Acosta, P.J., Renwick, Richter, González, JJ.

11467 The People of the State of New York, Respondent, Ind. 1585/13

-against-

Brian Johnson, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

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Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered October 2, 2015, convicting defendant, after a jury trial, of four counts of criminal possession of a forged instrument in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 3½ to 7 years, unanimously reversed, on the law, and the indictment dismissed.

Defendant's protestation at trial that the People had not proven "all the essential elements of the charges" was sufficient to preserve the issue on appeal. Even if not preserved, we would review it in the interest of justice. The evidence was not legally sufficient to establish defendant's guilt beyond a reasonable doubt (*see People v Delamota*, 18 NY3d 107, 113 [2011]). The People failed to prove that defendant knew that the four New York Rangers tickets at issue were counterfeit (*see* Penal Law § 170.25; *People v Johnson*, 65 NY2d 556, 561 [1985]).

Defendant approached Rangers fans outside of Madison Square

Garden before a game, and at one point said "tickets, tickets." He was on a cell phone call for a few seconds with an unspecified caller, the substance of which was not overheard. Defendant then met an unapprehended man, who gave defendant an envelope, which he immediately passed to a codefendant. The envelope, which the police recovered from the codefendant, contained a birthday card and the four forged Rangers tickets.

The evidence suggested that defendant sought to buy or sell tickets, but it did not show that he knew the tickets in question were forged. Even if the evidence established that defendant knowingly acted in concert with one or more other persons to sell tickets, in the circumstances presented this failed to support an inference that he knew he was selling *forged* tickets. His momentary possession of the envelope as he took it from one man and handed it to another, without looking inside or otherwise seeing the tickets, and the lack of any evidence of the codefendant's conduct, besides his walking with defendant and receiving the tickets, does not suffice to establish that defendant knew the tickets were forged, either personally or while acting in concert with the codefendant.

Defendant's flight from a plainclothes officer, whom defendant may have recognized, was too equivocal to prove that he knew the tickets inside the envelope were forged. There are other reasonable explanations for defendant's flight, such as his potential awareness that it is unlawful to sell tickets, even if

genuine, in the vicinity of the Garden (*see* Arts and Cultural Affairs Law §§ 25.11[1], 25.35[4]; *People v Lewis*, 50 AD3d 595 [2008], *lv denied* 11 NY3d 790 [2008]).

In light of this determination, we do not reach defendant's claim that the evidence was legally insufficient in other respects, or any other issues.

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

ENTERED: MAY 7, 2020

CLERK

Acosta, P.J., Renwick, Richter, González, JJ.

11468-
11468A Index 651977/18

Michael C. Trimarco,
Plaintiff-Appellant,

-against-

Charles Edwards, also known as
Charles E. (Chase) Ergen III,
also known as M. Charles E. (Chase)
Ergen,
Defendant-Respondent,

John Does 1-10,
Defendants.

_____

Wachtel Missry LLP, New York (Jason L. Libou of counsel), for appellant.

Willkie Farr & Gallagher LLP, New York (Tariq Mundiya of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered December 10, 2018, which granted defendant's motion to dismiss the action for lack of personal jurisdiction, unanimously affirmed, without costs. Order, same court (Marcy Friedman, J.), entered July 12, 2019, which denied plaintiff's motion to renew, unanimously affirmed, without costs.

The IAS court properly found that the forum selection clause in the parties' 2010 "Co-adventurers Resolutions" agreement did not apply to the 2012 loan agreement sued upon here (*Phillips v Audio Active Ltd.*, 494 F3d 378, 389 [2d Cir 2007]).

The court also properly found no jurisdiction under CPLR 302(a)(1). The alleged New York contacts were not substantially related to the loan agreement and dispute over payment at issue

here to support the exercise of personal jurisdiction (*Coast to Coast Energy, Inc. v Gasarch*, 149 AD3d 485, 486 [1st Dept 2017]).

Even if the court had personal jurisdiction over the plaintiff, the court did not abuse its discretion in finding that the case should be dismissed under CPLR 327 (forum non conveniens). While this is a relatively simple action, that would not unduly burden the courts of this State, there is minimal connection between the action and this State, both the defendant and the sole non-party witness reside in Switzerland, and there is no indication of any relevant events having taken place in New York (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], *cert denied* 469 US 1108 [1985]).

The IAS court did not abuse its discretion in refusing to consider the plaintiff's post-briefing submission of a supposedly newly-discovered agreement, over defendant's timely objection (*cf. Addison v New York Presbyt. Hosp./Columbia Univ. Med. Ctr.*, 52 AD3d 269, 270 [1st Dept 2008]).

Nor did the IAS court abuse its discretion in denying renewal. Plaintiff never based any request for an extension of briefing on the need to review further documents. Such an excuse would have been belied in any event, given that plaintiff had filed an identical action in Colorado, eight months earlier, where personal jurisdiction had also been challenged (*Abu Dhabi Commercial Bank, P.J.S.C. v Credit Suisse Sec. [USA] LLC*, 114 AD3d 432, 432–433 [1st Dept 2014]). Nor was plaintiff entitled

to renewal in the interest of justice, given his seemingly tactical decision to file an identical action in New York while the Colorado action was pending. Notably, plaintiff will not lose his opportunity to litigate the merits, albeit he will do so in a Swiss forum.

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

ENTERED: MAY 7, 2020

CLERK

Acosta, P.J., Renwick, Richter, González, JJ.

11469 In re Charles A., and Others,

Children Under Eighteen Years of Age, etc.,

April W.A.,
Respondent-Appellant,

Norman A.,
Respondent,

Administration for Children's Services,
Petitioner-Respondent.

Dkt. NA42059-61/12
B-09945-47/14

_____

Schpoont & Cavallo, LLP, New York (Carrie Anne Cavallo of counsel), for appellant.

James E. Johnson, Corporation Counsel, New York (Janet L. Zaleon of counsel), for respondent.

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

_____

Appeal from order, Family Court, New York County (Emily M. Olshansky, J.), entered on or about December 19, 2018, to the extent it denied respondent mother's motion for modification of the temporary orders of visitation, unanimously dismissed, without costs, as academic.

This appeal has been rendered moot by the termination of respondent's parental rights following a finding of permanent

neglect (*see Matter of D'Elyn Delilah W. [Liza Carmen T.]*, 135 AD3d 417, 417 [1st Dept 2016]).

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

ENTERED: MAY 7, 2020

CLERK

Acosta, P.J., Renwick, Richter, González, JJ.

11470-
11471 In re CUCS Housing Development Fund Corporation IV, et al., Petitioners-Respondents,

-against-

Clifford S. Aymes, Respondent-Appellant.

Index 159303/18

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Clifford S. Aymes, appellant pro se.

Tuttle Yick LLP, New York (Gregory O. Tuttle of counsel), Henry H. Korn, PLLC, New York (Henry H. Korn of counsel) and Klein Slowik PLLC, New York (Christopher M. Slowik of counsel), for respondents.

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Order, Supreme Court, New York County (Melissa A. Crane, J.), entered on or about February 27, 2019, which, insofar as appealed from, denied respondent's motion for a default judgment or summary judgment on his counterclaim to enjoin construction on petitioners' property, unanimously affirmed, without costs. Order, same court and Justice, entered August 26, 2019, which denied respondent's motion to vacate an order, same court and Justice, entered July 23, 2019, directing him to allow petitioners access to his property to install overhead protection, and denied his cross motions to dismiss the petition and for summary judgment on his counterclaim to enjoin construction, unanimously affirmed, without costs.

Petitioners commenced this special proceeding pursuant to RPAPL 881 seeking a license to access and protect respondent's property from damage during construction on petitioners'

adjoining property. In this instance, where the Department of Buildings rejected respondent's challenge to petitioners' plan and no Article 78 proceeding was filed, we take no position on the merits.

"[A]n action for injunctive relief is the appropriate remedy of an aggrieved property owner who seeks to bar the erection of a structure on adjoining or nearby premises in violation of express zoning regulations" (*Lesron Junior v Feinberg*, 13 AD2d 90, 95 [1st Dept 1961]; *accord Matter of Sun-Brite Car Wash v Board of Zoning & Appeals of Town of N. Hempstead*, 69 NY2d 406, 412 [1987]). Viewed in this light, respondent was not entitled to dismissal of the petition or summary judgment on his counterclaim to enjoin construction. Respondent's motions and arguments were repetitive of his previous summary judgment motions (*Brown Harris Stevens Westhampton LLC v Gerber*, 107 AD3d 526, 527 [1st Dept 2013]).

Additionally, Supreme Court providently exercised its discretion in denying respondent's motion for a default judgment. He waived any objection to the timeliness of petitioners' reply by failing to object thereto within 15 days (CPLR 2101[f]; *Ligotti v Wilson*, 287 AD2d 550, 551 [2d Dept 2001]). Moreover, petitioners demonstrated a justifiable excuse for default in that it was not necessarily clear that respondent's pro se "addendum" to his answer with counterclaims constituted a counterclaim, as well as a potentially meritorious defense (*New Media Holding Co.*

LLC v Kagalovsky, 97 AD3d 463, 465-466 [1st Dept 2012]).

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

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

ENTERED: MAY 7, 2020

CLERK

Acosta, P.J., Renwick, Richter, González, JJ.

11472 The People of the State of New York, Ind. 4206/16
Respondent,

-against-

Vladimir Jean,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Laura A. Ward, J. at suppression hearing; Daniel P. Conviser, J. at jury trial and sentencing), rendered September 26, 2017, convicting defendant of criminal possession of a weapon in the second degree and driving while intoxicated, and sentencing him to an aggregate term of six years, unanimously affirmed.

The hearing court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, including its finding that an officer testified credibly about his observation, after an undisputedly lawful stop of defendant's car, of a firearm in plain view. There was no basis to suppress defendant's statement, even though it was made while defendant was in custody and had not yet received *Miranda* warnings. Defendant's inquiry about why the police were arresting his passenger was "immediately met by a brief and relatively innocuous answer by the police officer," not

constituting interrogation or its functional equivalent (*People v Rivers*, 56 NY2d 476, 480 [1982]; *compare People v Lanahan*, 55 NY2d 711 [1981] [detailed recital of evidence held equivalent to interrogation]).

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 7, 2020

CLERK

Acosta, P.J., Renwick, Richter, González, JJ.

11473 Jones Lang LaSalle Brokerage, Inc., Index 650917/18
Plaintiff-Respondent,

-against-

Epix Entertainment LLC formerly known as Studio 3 Partners LLC, et al.,
Defendants-Appellants.

_____

Jenner & Block LLP, New York (Andrew H. Bart of counsel), for appellants.

Cozen O'Connor, New York (Jesse Ryan Loffler of counsel), for respondent.

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Order, Supreme Court, New York County (Alan C. Marin, J.), entered on or about September 10, 2019, which denied defendants' motion for summary judgment dismissing the complaint and granted plaintiff's motion for summary judgment declaring, upon the first cause of action, that the intended date of the broker's services agreement is May 1, 2017 and the intended term May 1, 2017 through May 1, 2018, and on the cause of action for reformation of the contract, unanimously modified, on the law, to deny plaintiff's motion and grant defendants' motion as to the causes of action for a declaration and reformation of the contract, and to declare that the effective date of the one-year broker's agreement is May 1, 2016, as written, and otherwise affirmed, without costs.

Plaintiff failed to demonstrate by clear and convincing evidence that the commencement date of the brokerage services agreement was the product either of a mutual mistake or of a

unilateral mistake induced by fraud (*see Warberg Opportunistic Trading Fund L.P. v GeoResources, Inc.*, 151 AD3d 465, 470 [1st Dept 2017]). The record shows that the agreement underwent multiple revisions by both parties, including revisions that plaintiff made to the language in the lead paragraph, which contained the inserted May 1, 2016 effective date, without disturbing the date. In addition, an uncontradicted internal email exchanged between defendants' senior representatives on May 24, 2017, well before the date of the execution of the agreement, explicitly states that defendants intentionally back-dated the proposed agreement to May 1, 2016.

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

ENTERED: MAY 7, 2020

CLERK

Acosta, P.J., Renwick, Richter, González, JJ.

11475 The People of the State of New York, Ind. 2190/13
Respondent,

-against-

Devonte Kelley,
Defendant-Appellant.

_____

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

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

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Order, Supreme Court, New York County (Ellen N. Biben, J.), entered on or about May 8, 2017, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-c), unanimously affirmed, without costs.

Clear and convincing evidence supported the court's assessment of 20 points under the risk factor for the relationship (strangers) between defendant and a victim (*see People v Postelli*, 136 AD3d 514 [1st Dept 2016], *lv denied* 27 NY3d 907 [2016]). The evidence presented to the hearing court, including defendant's own exhibits, supported a finding that defendant was a stranger to at least one of his victims according to the guidelines. Among other things, the victims' knowledge of defendant as a neighborhood person who should be avoided because of his bad reputation was not an acquaintanceship for purposes of this risk factor.

In light of this determination, defendant's point score would make him a level three offender regardless of whether points should have assessed under the risk factor for defendant's age (20 years or less) at the time of his first sex crime. In any event, because of defendant's undisputed age and the plain language of the risk factor, the court was required to assess those points, with any overassessment to be addressed by way of a downward departure (*see People v Johnson*, 11 NY3d 416, 420 [2008]; *People v Ferrer*, 69 AD3d 513, 514 [1st Dept 2010], *lv denied* 14 NY3d 709 [2010]). However, based on the totality of the record before the hearing court, we find that the court providently exercised its discretion in declining to grant a downward departure (*see generally People v Gillotti*, 23 NY3d 841, 861 [2014]).

The court was required to designate defendant a sexually violent offender because he was convicted of an enumerated offense, as an adult offender under New York law, and his arguments to the contrary, including his constitutional claims, are unavailing (*see People v Cisneros*, 165 AD3d 499, 499 [1st

Dept 2018]; *People v Delacruz*, 161 AD3d 519, 519 [1st Dept 2018] *lv denied* 32 NY3d 1037 [2018]).

Defendant did not preserve his challenge to the sufficiency of the court's findings. In any event, we find that a remand for further proceedings is unnecessary.

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

ENTERED: MAY 7, 2020

CLERK

Acosta, P.J., Renwick, Richter, González, JJ.

11476 Jaime Kowal, et al., Index 156412/15
Plaintiffs-Appellants,

-against-

JackFromBrooklyn Incorporated, etc.,
Defendant,

Erech Swanston also known as Jackie Summers, etc.,
Defendant-Respondent.

_____

The Law Office of Justine T. Rousseau, Brooklyn (Justine T. Rousseau of counsel), for appellant.

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Order, Supreme Court, New York County (Gerald Lebovits, J.), entered on or about December 14, 2018, which granted the motion of defendant Erech Swanston to vacate the default judgment previously entered against him, unanimously reversed, on the law and the facts, with costs, and the motion denied.

The motion court thought that Swanston's excuses might not be valid but that they were "plausible." However, plausibility is not the standard; rather, on a CPLR 5015(a)(1) motion, the movant must show a *reasonable* excuse for his default (*see e.g. Galaxy Gen. Contr. Corp. v 2201 7th Ave. Realty LLC,* 95 AD3d 789, 790 [1st Dept 2012]). Swanston's one-sided understanding that plaintiffs would refrain from prosecuting their lawsuit while defendant JackFromBrooklyn Inc. (JFB) negotiated to sell itself did not constitute a reasonable excuse for failing to answer (*see e.g. Sunrise Capital Partners Mgt. LLC v Glattstein,* 115 AD3d 602 [1st Dept 2014]).

Given the absence of a reasonable excuse, we "need not determine whether a meritorious defense exists" (*id.*). In any event, Swanston failed to show that he did not "exercise[] complete domination and control over" JFB (*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 16 NY3d 775, 776 [2011]) – in fact, he did not deny this – or that he did not "abuse[] the privilege of doing business in the corporate form to perpetrate a wrong or injustice" (*id.* [internal quotation marks omitted]). Swanston justified only the use of JFB's corporate credit cards for restaurant tabs; he did not address the use of the corporation's funds for other personal expenses such as payments to his girlfriend, pet supplies, groceries, clothes, video on demand, and sound therapy.

The IAS court did not grant the branch of Swanston's motion that was pursuant to CPLR 5015(a)(3). In any event, Swanston failed to show that plaintiffs obtained the default judgment through fraud, misrepresentation, or other misconduct (*see generally Greenwich Sav. Bank v JAJ Carpet Mart*, 126 AD2d 451, 453 [1st Dept 1987]).

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

ENTERED: MAY 7, 2020

CLERK

Acosta, P.J., Renwick, Richter, González, JJ.

11477 In re Xzandria B., and Another, Dkt. NA-42105-8/16
V-22937-8/17

Children Under the Age of
Eighteen Years, etc.,

Nasheen B.,
Respondent-Appellant,

Laira R.,
Respondent,

Administration for Children's
Services,
Petitioner-Respondent.

_____

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

Michele Cortese, Center for Family Representation, Inc., New York (Emily S. Wall of counsel), for Laira R., respondent.

James E. Johnson, Corporation Counsel, New York (Ashley R. Garman of counsel), for Administration for Children's Services, respondent.

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

_____

Order of fact-finding and disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about October 3, 2018, which, after a hearing, determined that respondent father derivatively abused the subject children, awarded sole custody of the children to their mother, and placed restrictions on respondent's contact with the children, unanimously affirmed, without costs.

A preponderance of the evidence supports the court's finding of derivative abuse (*see Matter of Alexis W. [Efrain V.]*, 159

AD3d 547, 549 [1st Dept 2018]). Although there was evidence that respondent had provided daily care for the subject children, the finding that respondent sexually abused his stepdaughter, the children's half-sibling, demonstrated a fundamental defect in his understanding of the responsibilities of parenthood, and placed his biological children at imminent risk of abuse (*see id.*; *Matter of Kylani R. [Kyreem B.]*, 93 AD3d 556 [1st Dept 2012]). The circumstances of the commission of such acts, as well as evidence of long-standing, extensive sexual abuse and excessive punishment of respondent's stepdaughter, demand that a derivative finding be entered.

The court properly placed restrictions on respondent's contact with the children. It was in the best interests of the children that their mother would be able to monitor communications with respondent to ensure that he was complying with the court's order not to discuss his court cases with the children (*see e.g. Matter of Velasquez v Kattau*, 167 AD3d 912, 913 [2d Dept 2018]).

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

ENTERED: MAY 7, 2020

CLERK

Acosta, P.J., Renwick, Richter, González, JJ.

11478 The People of the State of New York, Ind. 3892/15
Respondent,

-against-

Edward Ruiz,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael J. Obus, J.), rendered September 7, 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: MAY 7, 2020

CLERK

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

Acosta, P.J., Renwick, Richter, González, JJ.

11480 East Hampton Capital LLC, Index 152264/19
Plaintiff-Appellant,

-against-

Claire Fergusson,
Defendant-Respondent.

_____

Law Offices of David E. Mollon, Great Neck (David E. Mollon of counsel), for appellant.

Don B. Panush, New York, for respondent.

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Order, Supreme Court, New York County (Gerald Lebovits, J.), entered August 1, 2019, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff is the owner of the subject apartment. Defendant is the present and long-time occupant. Plaintiff seeks a declaration that defendant has no right to occupy the apartment.

This action is barred by res judicata in view of the prior decision in an action involving defendant and a prior owner of the subject apartment (NLI/Lutz, LLC [NLI/Lutz]). "[U]nder res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties," or those in privity with them, on any "claims arising out of the same transaction or series of transactions . . . , even if based upon different theories or if seeking a different remedy" (*Landau, P.C. v LaRossa, Mitchell & Ross*, 11 NY3d 8, 12 [2008]; *Green v Santa Fe Indus.*, 70 NY2d 244, 253 [1987]). As a successor to the same property interest, plaintiff is in privity with NLI/Lutz (*see Matter of Juan C. v*

Cortines, 89 NY2d 659, 667 [1997]; *Watts v Swiss Bank Corp.*, 27 NY2d 270, 277 [1970]; *Arnold v 4-6 Bleecker St. LLC*, 165 AD3d 493, 494 [1st Dept 2018]; *see also Stasyszyn v Sutton E. Assoc.*, 161 AD2d 269, 272 [1990]).

The fact that the prior decision was rendered shortly after NLI/Lutz sold the property does not change this analysis. Unlike in the case relied upon by plaintiff, the prior action at issue here was commenced and litigated while NLI/Lutz still owned the apartment; it was only the decision that did not come down until after the sale (*see Postal Tel. Cable Co. v City of Newport, Ky.*, 247 US 464, 474-476 [1918]). Contrary to plaintiff's claim, there was nothing preventing the new owner from appealing (*see* CPLR 1018; *B&H Florida Notes LLC v Ashkenazi*, 149 AD3d 401, 401 [1st Dept 2017]).

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

ENTERED: MAY 7, 2020

CLERK

Acosta, P.J., Renwick, Richter, González, JJ.

11481 Edward Williams, Index 151083/14
Plaintiff-Appellant,

-against-

New York Property Insurance Underwriting Association,
Defendant-Respondent,

Lloyd Dunkley, individually, and doing business as A L Dunkley Insurance,
Defendant.

_____

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

Mound Cotton Wollan & Greengrass LLP, New York (Constantino P. Suriano of counsel), for respondent.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered May 23, 2019, which granted the motion of defendant New York Property Insurance Underwriting Association (NYPIUA) for summary judgment dismissing the complaint, unanimously affirmed, without costs.

NYPIUA, created by statute, is required to adhere to its plan of operation (Insurance Law § 5402[d]). The plan of operation specifically states that, "[a]ny person who, after reasonable notice, has not provided access to the insured property for inspection," is not eligible for coverage.

NYPIUA's submissions on summary judgment, which included, inter alia, the plan of operation, the deposition testimony of NYPIUA's underwriting supervisor, her affidavit, and the affidavit of an investigator assigned to inspect plaintiff's

premises, were sufficient to justify finding in its favor, as a matter of law. The evidence showed that notice of cancellation was made after two failed attempts to inspect the insured premises.

Plaintiff's bare denial of receipt of the cancellation notice, standing alone, did not overcome the presumption of proper mailing (*Matter of Hernandez v New York City Hous. Auth.*, 129 AD3d 446, 446 [1st Dept 2015]), particularly in light of an email forwarded to NYPIUA soon after the notice of cancellation was sent, which indicated that the cancellation notice had been received by the plaintiff's producer.

Thus, we find that Supreme Court correctly determined that NYPIUA was entitled to judgment as a matter of law (*see Tapscott Food Corp. v Lincoln Ins. Co.*, 161 AD2d 451 [1st Dept 1990]).

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

ENTERED: MAY 7, 2020

CLERK

Acosta, P.J., Renwick, Richter, González, JJ.

11482 Diana Pyle, et al., Index 190360/16
Plaintiffs-Respondents,

-against-

Pfizer Inc., individual and as Successor in Interest to Coty Inc., et al.,
Defendants-Appellants.

_____

Dechert LLP, New York (Sheila L. Birnbaum of counsel), for appellants.

Phillips & Paolicelli, LLP, New York (Shaina A. Weissman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered September 6, 2018, which, inter alia, denied defendants' motion to dismiss the action on the grounds of forum non conveniens, unanimously affirmed, without costs.

The movant seeking dismissal on the grounds of forum non conveniens has a "heavy burden" of establishing that New York is an inconvenient forum, and that a substantial nexus between New York and the action is lacking (*Kuwaiti Eng'g Group v Consortium of Intl. Consultants*, LLC, 50 AD3d 599, 600 [1st Dept 2008]). Here, defendants failed to establish that the balance of the forum non conveniens factors points "strongly in their favor" (*Bacon v Nygard*, 160 AD3d 565, 565 [1st Dept 2018] [internal quotation marks and brackets omitted]; *see generally Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-479 [1984], *cert denied* 469 US 1108 [1985]), or that the action lacks a substantial nexus to New York.

We have considered defendants' remaining contentions, including that the action should be dismissed based on principles of international comity, and find them unavailing.

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

ENTERED: MAY 7, 2020

CLERK

Acosta, P.J., Renwick, Richter, González, JJ.

11483 Hui-Lin Wu, Index 161402/14
Plaintiff-Appellant,

-against-

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

_____

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

James E. Johnson, Corporation Counsel, New York (Susan Paulson of counsel), for respondents.

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Judgment, Supreme Court, New York County (Paul A. Goetz, J.), entered April 25, 2019, upon a jury verdict in favor of defendant, unanimously affirmed, without costs.

Plaintiff seeks damages for personal injuries she allegedly sustained during a protest in New York City's Chinatown. The trial court should not have dismissed her battery claim as duplicative of her wrongful arrest claim before submitting the case to the jury for a finding as to the lawfulness of her arrest (*see Budgar v State of New York*, 98 Misc 2d 588, 592 [Ct Cl 1979]). However, the error is academic, since the jury found that the arrest was lawful.

The jury's finding that plaintiff was arrested lawfully is supported by the evidence. Video footage of the incident shows the police repeatedly requesting, verbally and with body gestures, that plaintiff stay back from protesters in front of her business. For 30 minutes, the officers continually

instructed plaintiff, her boyfriend, and her boyfriend's sister to stop trying to interfere with the protest, and yet the group refused to stop. In light of plaintiff's placing her hand on one of the officers in an attempt to reach her boyfriend, who was being arrested, it was objectively reasonable for the police to take custody of her (*see Ostrander v State of New York*, 289 AD2d 463, 464 [2d Dept 2001]).

The police also used a reasonable amount of force. Indeed, viewed in the light most favorable to plaintiff, including every reasonable inference in her favor, the evidence is insufficient as a matter of law to permit a finding of excessive force (*see Pacheco v City of New York*, 104 AD3d 548 [1st Dept 2013], citing *Koeiman v City of New York*, 36 AD3d 451 [1st Dept 2007], *lv denied* 8 NY3d 814 [2007]). The officer used an arm bar hold for less than 30 seconds before plaintiff ceased resisting. Thus, while the trial court should not have held the excessive force claim in abeyance of the jury's determination on the wrongful arrest claim, the error is academic.

The trial court properly denied plaintiff's motion to strike defendants' pleadings or preclude defendants from calling witnesses on the ground of their alleged failure to provide discovery, since, by filing a note of issue, plaintiff waived her entitlement to any further discovery (*see* 22 NYCRR 202.21; *Escourse v City of New York*, 27 AD3d 319 [1st Dept 2006]; *Abbott v Memorial Sloan-Kettering Cancer Ctr.*, 295 AD2d 136 [1st Dept

2002]). The court properly rejected plaintiff's attempt to authenticate her medical records through the testimony of someone who merely became the records' physical custodian after the sale of the surgical center at which they were created (*see Irizarry v Lindor*, 110 AD3d 846 [2d Dept 2013]). The court correctly declined to admit the officers' disciplinary files, since plaintiff had never requested the requisite in camera review (*see* Civil Rights Law § 50-a[2], [3]; *see also People v Gissendanner*, 48 NY2d 543, 551 [1979]; *Telesford v Patterson*, 27 AD3d 328 [1st Dept 2006]). Nor could plaintiff show that the records were relevant, particularly since the City admitted that the officers were acting in the scope of their employment during the incident (*see Cheng Feng Fong v New York City Tr. Auth.*, 83 AD3d 642 [2d Dept 2011]; *Weinberg v Guttman Breast & Diagnostic Inst.*, 254 AD2d 213 [1st Dept 1998]). There is no indication in the record that plaintiff requested and was denied interested witness charges. The court properly determined that any explanation as to missing witnesses was better addressed by counsel in their summations than by a jury charge.

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

ENTERED: MAY 7, 2020

CLERK

Acosta, P.J., Renwick, Richter, González, JJ.

11484N Aldrea Frazier, Index 28099/17E
Plaintiff-Respondent,

-against-

811 E. 178th St. Realty Corp.,
Defendant-Appellant.

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

Michelstein & Ashman, PLLC, New York (Gil J. Winokur of counsel), for respondent.

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered July 3, 2019, which denied defendant's motion to vacate the default judgment entered against it, unanimously affirmed, without costs.

Supreme Court providently exercised its discretion in determining that under the circumstances, defendant's failure to maintain an accurate address with the Secretary of State for six years did not constitute a reasonable excuse for its default (*NYCTL 1998-2 Trust v Alanis Realty LLC*, 176 AD3d 486, 486-487 [1st Dept 2019]; *NYCTL 2015-A Trust v Diffo Props. Corp.*, 171 AD3d 538, 539 [1st Dept 2019]; *see* CPLR 5015[a][1]; *Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 142-143 [1986]).

Defendant was not entitled to relief under CPLR 317 because it failed to rebut plaintiff's proof showing that it received actual notice of the action in time to defend, since the summons

and complaint, with the motion for a default judgment, were sent to defendant's president. The order granting a default and directing an inquest was also sent to the president at the same address. The affidavit of defendant's president claiming not to have received the complaint or default order was conclusory, as he did not discuss the address where those mailings were sent, and did not address the fact that the default judgment, which he admitted having received, was sent to the same address (*see Reliable Abstract Co., LLC v 45 John Lofts, LLC*, 152 AD3d 429, 430 [1st Dept 2017], *lv dismissed* 30 NY3d 1056 [2018]).

Plaintiff submitted an affidavit of merit setting forth the elements of a viable negligence claim based on personal knowledge (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 [2003]). Even assuming that her affidavit of merit did not satisfy CPLR 3215(f), that defect would not provide a basis to vacate the default judgment where defendant moved to vacate the judgment under CPLR 5015(a)(1), but failed to demonstrate a reasonable excuse for its default (*Manhattan Telecom. Corp. v H & A Locksmith, Inc.*, 21 NY3d 200, 203-204 [2013]).

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

ENTERED: MAY 7, 2020

CLERK

Acosta, P.J., Renwick, Richter, González, JJ.

11485N MTGLQ Investors, LP, Index 380310/14
Plaintiff-Respondent,

-against-

Graciela A. Collado,
Defendant-Appellant,

Department of Housing Preservation
and Development, et al.,
Defendants.

_____

Steven Zalewski & Associates P.C., Kew Gardens (Matthew J. Routh of counsel), for appellant.

Druckman Law Group PLLC, Westbury (Maria Sideris of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered on or about January 30, 2019, which, to the extent appealed from as limited by the briefs, granted plaintiff MTGLQ Investors, LP's (MTGLQ) motion for summary judgment on its mortgage foreclosure claim, unanimously affirmed, without costs.

MTGLQ established its entitlement to judgment as a matter of law by showing that it was the holder of the note. At the time this foreclosure action was commenced by MTGLQ's predecessor-in-interest, the note and the written assignment of the note were annexed to the verified summons and complaint. MTGLQ showed that it now holds the note and the mortgage. "A plaintiff proves that it has standing to commence a mortgage foreclosure action by showing that it was both the holder or assignee of the mortgage and the note when the action was commenced" (*U.S. Bank N.A. v*

Richards, 155 AD3d 522, 523 [1st Dept 2017]). Further, a "written assignment of the note or physical delivery of the note is sufficient to establish standing" (*id.*).

As for defendant Collado's procedural arguments, the motion court providently exercised its discretion in reviewing the successive motion for summary judgment because MTGLQ set forth "sufficient justification" to move again after the mortgage was assigned to it (*see Jones v 636 Holding Corp.*, 73 AD3d 409 [1st Dept 2010]). Even if the proper procedure was to move for leave to reargue or renew, the motion court did not improvidently exercise its discretion in reviewing the successive motion for summary judgment "where that motion clearly enhanced judicial efficiency" (*Landmark Capital Invs., Inc. v Li-Shan Wang*, 94 AD3d 418, 419 [1st Dept 2012]; *see also Coccia v Liotti*, 70 AD3d 747, 752 [2d Dept 2010], *lv dismissed* 15 NY3d 767 [2010]). Collado's reliance on plaintiff's failure to respond to her notice to admit is insufficient because that discovery device is not properly used "for the purpose of compelling admission of fundamental and

material issues or ultimate facts . . .” (*Meadowbrook-Richman, Inc. v Cicchiello*, 273 AD2d 6, 6 [1st Dept 2000]; *see also 32nd Ave, LLC v Angelo Holding Corp.*, 134 AD3d 696, 698 [1st Dept 2015]). We have reviewed defendant’s additional arguments and find them unavailing.

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

ENTERED: MAY 7, 2020

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Gesmer, Moulton, JJ.

11446 The People of the State of New York, Ind. 2403/17
Respondent,

-against-

Joel Rivera,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, Bronx County (George Villegas, J.), rendered February 14, 2018, as amended February 15, 2018, convicting defendant, upon his plea of guilty, of rape in the first degree, and sentencing him to a term of 10 years, unanimously modified, on the law, to the extent of vacating the DNA databank fee, the sex offender registration fee and the supplemental sex offender fee, and reducing the mandatory surcharge and crime victim assistance fees to $200 and $10, respectively, and amending the sentence and commitment sheet to reflect the correct statute of conviction, Penal Law § 130.35(1), and otherwise affirmed.

We perceive no basis for reducing the sentence. However, as the People concede, the fees should be reduced or vacated as indicated, in accordance with the sentencing laws in effect in 2002 when the crime was committed. In addition, the parties agree that the commitment sheet should be amended to the extent indicated to correct a clerical error.

THIS CONSTITUTES THE DECISION AND ORDER

OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 7, 2020

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Gesmer, Moulton, JJ.

11447 Suzanne Curl, Index 160139/17
Plaintiff-Respondent,

-against-

Michael H. Schiffman, et al.,
Defendants-Appellants.

_____

White & McSpedon, P.C., New York (Irwen C. Abrams of counsel), for appellants.

Nguyen Leftt, P.C., New York (Stephen D. Chakwin, Jr. of counsel), for respondent.

_____

Order, Supreme Court, New York County (Adam Silvera, J.), entered February 14, 2019, which granted plaintiff's motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

Plaintiff established prima facie entitlement to summary judgment on the issue of liability by submitting evidence showing that she was crossing an intersection within the crosswalk, with the light in her favor, when defendants' vehicle struck her while making a left turn (*see Rozon v Rosario*, 144 AD3d 597 [1st Dept 2016]; *Beamud v Gray*, 45 AD3d 257 [1st Dept 2007]).

In opposition, defendants failed to raise a triable issue of fact. Defendant Michael Schiffman's affidavit was inconsistent with the police report and with the report of motor vehicle accident that he had filled out six days after the accident. Due to these inconsistencies, Schiffman's affidavit raises feigned issues of fact, and is insufficient to defeat the motion for

summary judgment (*see e.g. Estate of Mirjani v DeVito*, 135 AD3d 616, 617 [1st Dept 2016]; *Batashvili v Veliz-Palacios*, 170 AD3d 791, 792 [2d Dept 2019]). Furthermore, his affidavit fails to raise a triable issue as to whether there was a nonnegligent explanation for the accident, as he does not indicate that plaintiff was outside of the crosswalk or that she did not have the light in her favor when the accident occurred (*cf. Villaverde v Santiago-Aponte*, 84 AD3d 506 [1st Dept 2011]).

Contrary to defendants' contentions, plaintiff's affidavit is based on her personal knowledge of the accident, as she was lucid and able to communicate with defendant and police officers immediately after being struck by the vehicle. Although she alleged injuries including cognitive difficulties and memory issues, there is no evidence that plaintiff had been unable to recall the general details contained in her affidavit.

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

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

ENTERED: MAY 7, 2020

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Gesmer, Moulton, JJ.

11451 The People of the State of New York, Ind. 445/14
Respondent,

-against-

Kalief Jackson,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Eric Del Pozo of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Eduardo Padro, J.), rendered July 9, 2015,

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

It is unanimously ordered that the 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: MAY 7, 2020

CLERK

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

Manzanet-Daniels, J.P., Mazzarelli, Gesmer, Moulton, JJ.

11452-
11452A In re Cannon Point Preservation Corporation, et al., Petitioners-Appellants,

-against-

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

Index 152692/19

Gibson, Dunn & Crutcher LLP, New York (Jennifer H. Rearden and Randy M. Mastro of counsel), for appellants.

James E. Johnson, Corporation Counsel, New York (Anna W. Gottlieb of counsel), for municipal respondents.

Letitia James, Attorney General, New York (Ari J. Savitzky of counsel), for State Department of Transportation, respondent.

Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered October 10, 2019, dismissing the action, and bringing up for review an order, same court and Justice, entered on or about September 17, 2019, which denied the petition to annul determinations by various agencies, under, among other laws, the New York State Environmental Quality Review Act that the "East Midtown Esplanade Project" would have no significant adverse environmental impact, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The court correctly found that petitioners' claims pursuant to the New York State Environmental Quality Review Act (SEQRA) (Environmental Conservation Law § 8-0101 *et seq.*) are time-barred, since the four-month statute of limitations began to run

upon the end of the public comment period following the issuance of the final SEQRA review, years before this proceeding was brought (*see Stop-The-Barge v Cahill*, 1 NY3d 218 [2003]). It does not avail petitioners to argue that the statute of limitations did not begin to run until the New York City Public Design Commission preliminarily approved the project following its review of design issues (*see Matter of Metropolitan Museum Historic Dist. Coalition v De Montebello*, 20 AD3d 28, 35-36 [1st Dept 2005]).

The court correctly found that the public trust doctrine is inapplicable, since the site at issue was not impliedly designated parkland. Petitioners point to some evidence that the site was treated as parkland, such as communications by respondent New York City Department of Parks and Recreation referring to the site as a "park," but they failed to meet their burden of showing acts and declarations "unmistakable in their purpose and decisive in their character to have the effect of a dedication" of parkland (*Matter of Glick v Harvey*, 25 NY3d 1175, 1180 [2015] [internal quotation marks omitted]; *see e.g. Matter of Bronx Council for Envtl. Quality v City of New York*, 177 AD3d 416 [1st Dept 2019]). Even if the site were designated parkland, legislative approval would not be required, since any parkland would not be alienated by the proposed placement of a pedestrian and bicycle bridge terminating in the site at issue (*see e.g. Matter of Friends of Petrosino Sq. v Sadik-Khan*, 126 AD3d 470

[1st Dept 2015]). Petitioners' disagreement with respondents' exercise of their broad discretion as to the best alternative use of the site does not establish such alienation (*see Union Sq. Park Community Coalition, Inc. v New York City Dept. of Parks & Recreation*, 22 NY3d 648, 655 [2014]).

In light of the foregoing, we need not reach the remaining arguments raised on appeal.

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

ENTERED: MAY 7, 2020

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Gesmer, Moulton, JJ.

11454 The People of the State of New York, Ind. 4005/11
Respondent,

-against-

Daniel Everett,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Svetlana M. Kornfeind of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered May 14, 2012, convicting defendant, after a jury trial, of murder in the second degree, two counts of assault in the first degree, and two counts of criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 32 years to life, unanimously affirmed.

The court properly granted the People's reverse-*Batson* application (*see People v Kern*, 75 NY2d 638 [1990], *cert denied* 498 US 824 [1990]). Initially, we note that the People made a strong prima facie case of discrimination, which is relevant to the issue of pretext (*see People v Hecker*, 15 NY3d 625, 660 [2010]), and that defense counsel generally gave unpersuasive explanations for her challenges to other panelists not at issue on appeal. The record supports the court's finding that the race-neutral reasons provided by defense counsel for the peremptory challenge at issue were pretextual. Because findings

of pretext are based primarily on the court's assessment of counsel's credibility, they are entitled to great deference (*see Snyder v Louisiana*, 552 US 472, 477 [2008]; *People v Hernandez*, 75 NY2d 350, 356 [1990], *affd* 500 US 352 [1991]). To the extent defense counsel's objection to the juror in question was based on his youth, it was unpersuasive, because unchallenged panelists were equally young. To the extent it was based on his alleged hesitation in answering a question about willingness to acquit, the trial court was in the best position to evaluate whether the prospective juror in fact hesitated and the significance of any such hesitation (*see e.g. People v Martinez*, 284 AD2d 157 [1st Dept 2001]). Because counsel failed to specifically claim that the court improperly applied the standard for determining for-cause challenges, that claim is unpreserved (*see People v Richardson*, 100 NY2d 847, 853 [2003]; *People v Smocum*, 99 NY2d 418, 423-424 [2003]), and we decline to review it in the interest of justice. As an alternate holding, we reject it on the merits. When viewed in the context of the colloquy, the court's description of the panelist at issue as "unequivocal" was a rejection of the defense claim that the panelist was hesitant.

Defendant's argument that the convictions of depraved indifference murder and assault were against the weight of the evidence is unavailing (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant fired numerous gunshots into a crowd, killing a 13-year-old boy and wounding two others. Firing into a

crowd is a "[q]uintessential example[]" of depraved indifference (*People v Suarez*, 6 NY3d 202, 214 [2005]), and the totality of the evidence supports the inference that defendant did not merely act recklessly. Although defendant casts his arguments primarily in terms of weight of the evidence, to the extent he is also claiming the evidence was legally insufficient to establish guilt beyond a reasonable doubt, that claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

Defendant, who objected only on a ground not pursued on appeal, failed to preserve his claim that the probative value of phone calls in which defendant solicited someone to intimidate witnesses was outweighed by the potential for prejudice, or his claim that the court erred in failing to give a limiting instruction. We decline to review these claims in the interest of justice. As an alternative holding, we find no basis for reversal. The evidence at issue was highly probative of defendant's consciousness of guilt, was not cumulative to other evidence, and was not so prejudicial as to warrant its exclusion.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be

addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 7, 2020

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Gesmer, Moulton, JJ.

11455-
11455A Index 157267/14

Scott Cackett,
Plaintiff,

-against-

Gladden Properties, LLC, et al.,
Defendants-Appellants-Respondents,

Forest Electric Corp.,
Defendant,

Interstate Drywall Corp.,
Defendant-Respondent,

KD Electric, Inc.,
Defendant-Respondent-Appellant.

- - - - -

Gladden Properties, LLC, et al.,
Third-Party Plaintiffs-Appellants-Respondents,

-against-

Port Morris Tile & Marble
Corporation, et al.,
Third-Party Defendants-Respondents,

Weinstein & Holtzman,
Defendant.

- - - - -

Gladden Properties, LLC, et al.,
Second Third-Party Plaintiffs-Appellants-
Respondents,

-against-

KD Electric, Inc.,
Second Third-Party Defendant-Respondent-Appellant.

_____

Barry McTiernan & Moore LLC, New York (Laurel A. Wedinger of counsel), for appellants-respondents.

Farber Brocks & Zane LLP, Garden City (Charles T. Ruhl of counsel), for respondent-appellant.

Hannum Feretic Prendergast & Merlino, LLC, New York (Jessica M. Erickson of counsel), for Interstate Drywall Corp., respondent.

Pillinger Miller Tarallo, LLP, Elmsford (Michael Neri of counsel), for Port Morris Tile & Marble Corporation, respondent.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered January 8, 2019, which, to the extent appealed from as limited by the briefs, denied defendants Gladden Properties, LLC, Boston Properties, Inc., Structure Tone, Inc., and Kaye Scholer, LLP's (collectively, the Structure Tone defendants) motion for summary judgment dismissing the Labor Law § 200 and common-law negligence claims as against them and on their contractual indemnification claims against defendant Interstate Drywall Corp. (Interstate), defendant KD Electric, Inc. (KD), and third-party defendant Port Morris Tile & Marble Corporation (Port Morris), granted Port Morris's motion for summary judgment dismissing the third party complaint as against it, and granted KD's motion for summary judgment dismissing the Structure Tone defendants' cross claims against it, unanimously modified, on the law, to deny KD's motion and Port Morris's motion as to the contractual indemnification claim against it, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered April 17, 2019, which, upon renewal and reargument, adhered to the original determination, unanimously dismissed, without costs, as academic.

Plaintiff was allegedly injured when a heavy metal door that had been stored in an inadequately lit room fell over on him. Except as to defendant Port Morris, plaintiff's employer, and

contrary to the appealing parties' contentions, the record is replete with issues of fact and credibility precluding summary judgment on the Labor Law § 200 and common-law negligence claims as against the Structure Tone defendants, the owners, occupant and general contractor, and on the common-law indemnification, contractual indemnification, and contribution cross claims and third-party claims, particularly because "there can be more than one proximate cause of an accident" (*Sussman v MK LCP Rye LLC*, 164 AD3d 1139, 1140 [1st Dept 2018]).

Issues of fact exist as to whether the accident was caused by a dangerous premises condition or a subcontractor's means and methods, or some combination of those factors, and as to the Structure Tone defendants' liability under the applicable standard (*see Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 51-52 [2d Dept 2011]; *Cook v Orchard Park Estates, Inc.*, 73 AD3d 1263, 1265 [3d Dept 2010]; *see also* PJI 2:216, Comment, Caveat 1 ["The distinction between accidents arising from premises conditions and those arising from the manner in which the work was performed . . . may be nuanced"]).

The claims against defendant KD for common-law negligence and contribution should not be dismissed. As a subcontractor and therefore the statutory agent of the owner and general contractor, KD stands in the shoes of the owner and general contractor, and may be held liable if it "actually created the dangerous condition or had actual or constructive notice of it"

(*DeMaria v RBNB 20 Owner, LLC*, 129 AD3d 623, 625 [1st Dept 2015]; *see Sledge v S.M.S. Gen. Contrs., Inc.*, 151 AD3d 782, 783 [2d Dept 2017]). Issues of fact exist as to whether KD, which was responsible for lighting the premises, caused or created the purportedly inadequate lighting of the room in which the metal door was stored or had actual or constructive notice of the inadequate lighting.

As to defendant Interstate, there is evidence that its employee negligently stored the door in the inadequately lit room, where it remained until it fell and struck plaintiff. Contrary to the motion court's finding, the employee's placement of the door was not so remote in time as to sever the causal connection between the alleged negligence and plaintiff's accident (*see Williams v State of New York*, 18 NY3d 981, 984 [2012]; *Hoggard v Otis El. Co.*, 52 Misc 2d 704, 707-708 [Sup Ct, NY County 1966], *affd* 28 AD2d 1207 [1st Dept 1967], *lv denied* 21 NY2d 641 [1968]; *see also* 79 NY Jur 2d, Negligence § 65). Nor is Interstate absolved from liability by whatever mitigation may have resulted from the employee informing the Structure Tone defendants of his actions. The trier of fact must determine whether Interstate's actions or inaction were a proximate cause of plaintiff's accident (*see generally Espinal v Melville Snow Contrs.*, 98 NY2d 136, 142-143 [2002]). To the extent the court's observation that Structure Tone's cross claims against Interstate for common-law indemnification and contribution "will not stand"

may be read as dismissing those claims, we clarify that the claims should not be dismissed.

As for the Structure Tone defendants' contractual indemnification claim against Port Morris, Port Morris agreed to indemnify Structure Tone for claims arising from acts or omissions "in connection with the performance of any work by or for [it]." Thus, while there is no evidence that any negligence on Port Morris's part contributed to plaintiff's accident, its duty to indemnify under the agreement was triggered by the fact that the accident "arose from [plaintiff's] performance of his work as an employee of Port Morris" (*Ramirez v Almah, LLC*, 169 AD3d 508, 509 [1st Dept 2019]). A contractual indemnification clause may shift liability from an owner or contractor to an employer even where the employer was not negligent (*see Lamela v Verticon, Ltd.*, 162 AD3d 1268, 1271 [3d Dept 2018]; General Obligations Law § 5-322.1[1]; *Adagio v New York State Urban Dev. Corp.*, 168 AD3d 602, 603 [1st Dept 2019]; *Guzman v 170 W. End Ave. Assoc.*, 115 AD3d 462, 463-464 [1st Dept 2014]).

However, "[t]he extent of the indemnification will depend on the extent to which [the Structure Tone defendants'] negligence is found to have proximately caused the accident" (*Ramirez*, 169 AD3d at 509). On that issue, the parties to this appeal dispute whether the Structure Tone defendants' motion for summary judgment on its contractual indemnification claims should be denied as premature or granted conditionally, subject to an

apportionment of fault (*compare e.g. Auliano v 145 E. 15th St. Tenants Corp.*, 129 AD3d 469 [1st Dept 2015] [property owners entitled to conditional summary judgment on contractual indemnification claim against contractor given broad indemnification agreement and issues of fact as to property owners' negligence], *with e.g. Arias v Recife Realty Co., N.V.*, 172 AD3d 631 [1st Dept 2019] [issues of fact as to general contractor's negligence precluded summary judgment in its favor on contractual indemnification claim against subcontractor]; *see* 23 NY Jur 2d, Contribution, Etc. § 135). Because an agreement by a subcontractor to indemnify an owner or general contractor for the latter's own negligence is "against public policy and void, and unenforceable" (General Obligations Law § 5-322.1[1]), we hold that it is inappropriate to grant conditional summary judgment on an owner or general contractor's contractual indemnification claim against a subcontractor where an issue of fact exists as to whether the owner or general contractor's negligence was the sole proximate cause of the underlying claim (*see Callan v Structure Tone, Inc.*, 52 AD3d 334, 335-336 [1st Dept 2008]; *see also Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 612, 616 [2d Dept 2011], quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]). Since such an issue of fact exists in this case, the court correctly denied the Structure Tone defendants' motion for summary judgment on their contractual indemnification claims as premature.

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

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

ENTERED: MAY 7, 2020

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Gesmer, Moulton, JJ.

11456 In re Jeanine H., Dkt. V-21579/15
Petitioner-Respondent, V-21579-15/16A
V-22037/15
-against- V-22037-15/16A

Mamadou O.,
Respondent-Appellant.

_____

Bruce A. Young, New York, for appellant.

Kenneth M. Tuccillo, Hastings on Hudson, for respondent.

Andrew J. Baer, New York, attorney for the child.

_____

Order, Family Court, Bronx County (Annette L. Guarino, Referee), entered on or about January 12, 2018, which, after a hearing, awarded respondent father sole legal and physical custody of the subject child and provided that the mother's parental access to the child be supervised by the father, unanimously modified, without costs, the mother is awarded interim unsupervised visitation no less than from 12 to 2 pm every Saturday, and the matter is remanded to Family Court for further proceedings to set an appropriate schedule and other appropriate terms for her visitation, and otherwise affirmed, without costs.

The determination that the child's best interests would be served by awarding sole legal and primary physical custody to the father is supported by a sound and substantial basis and is entitled to deference (*see Eschbach v Eschbach*, 56 NY2d 167 [1982]; *Elkin v Labis* 113 AD3d 419 [1st Dept 2014], *lv dismissed*

22 NY3d 1193 [2014]).

However, the determination that the mother be limited to two hours of visitation every Saturday supervised by the father at a location agreed upon by the parties did not have a sound and substantial basis in the record. Because "supervision can interfere with the parent-child relationship," it is only appropriate where there is a showing that the child's physical safety or emotional well-being is at risk without supervision (*Frank M. v Donna W.*, 44 AD3d 495, 496 [1st Dept 2007]).

The record shows the following facts relevant to our decision. The parties lived together with the subject child, Z, from her birth until December 2014 or January 2015. The father testified that he never had any concerns about the mother's ability to care for her during the time they lived together.

From the time of the parties' separation until August 2015, the mother had sole care of Z. Since then, the father has had sole physical custody of Z.

On August 17, 2015, the mother filed a petition seeking custody of Z. On August 20, 2015, the father filed a cross-petition seeking custody of Z. His petition does not seek an order limiting the mother to supervised visitation, and he has never amended it to seek such a provision.

At a temporary custody hearing on December 3, 2015, the father testified that the child loves her mother and has a good relationship with her, and that he would not be opposed to the

mother having parenting time every day if she wished. The court thereafter ordered that the mother have unsupervised visitation. The Family Court ordered that the mother have unsupervised visitation with the child for all but approximately 10 weeks over a two-year period during the pendency of this matter, frequently with the father's consent, both before and after the brief period of supervision. There was no evidence that the mother acted improperly during any of the visits. Indeed, after the father advised the court that the visits he had observed were "fine," the court again directed that the mother have unsupervised visits.

In its decision and order after trial dated January 12, 2018, Family Court found that the child is "loving as to both . . . parents and refus[es] to express a preference to live with either parent.

Under these circumstances, there was no basis for directing that the mother be limited to supervised visits. Moreover, even if supervision were necessary, it would not be appropriate for the father to supervise, since the Family Court found that the parties did not communicate with each other.

However, given the passage of time since Family Court's order, we remand to Family Court for further proceedings to determine the appropriate parenting time schedule and other logistics, such as the time and location for pick-ups and drop-offs, as necessary.

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

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

ENTERED: MAY 7, 2020

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Gesmer, Moulton, JJ.

11457-
11457A

The People of the State of New York,
Respondent,

Ind. 867/06
3547/16

-against-

Andre Pinnock,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Kyle R. Silverstein of counsel), for respondent.

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Appeal from judgment, Supreme Court, Bronx County (Ethan Greenberg, J.), rendered May 2, 2017, convicting defendant, upon his plea of guilty, of criminal possession of a firearm, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, held in abeyance, and the matter remanded for further proceedings in accordance herewith. Judgment of resentence, same date, court and Justice, convicting defendant, upon his plea of guilty, of violation of probation, revoking his sentence of probation and resentencing him to a concurrent term of 1 to 3 years, unanimously reversed, as a matter of discretion in the interest of justice, and the matter remanded for further proceedings on the violation of probation.

When defendant, a noncitizen, pleaded guilty to criminal possession of a firearm, the court did not advise him that if he was not a citizen, he could be deported as a consequence of his plea. Even though he did not move to withdraw his guilty plea, there is no evidence that defendant knew about the possibility of

deportation during the plea and sentencing proceedings. As such, the claim falls within the "narrow exception" to the preservation doctrine (*People v Peque*, 22 NY3d 168, 183 [2013], *cert denied* 574 US 850 [2014]). Therefore, defendant should be afforded the opportunity to move to vacate his plea upon a showing that there is a "reasonable probability" that he would not have pleaded guilty had the court advised him of the possibility of deportation (*id.* at 198). Accordingly, we remit for the remedy set forth in Peque (*id.* at 200-201), and we hold the appeal in abeyance for that purpose.

Furthermore, defendant's guilty plea to violation of probation was defective because there was no allocution about whether defendant understood that he was giving up his right to a hearing on the violation. While there is no mandatory catechism, Supreme Court failed to "advise defendant of his rights or the consequences regarding an admission to violating probation, including that he understood that he was entitled to a hearing on the issue and that he was waiving that right" (*People v Aubain*, 152 AD3d 868, 870 [3d Dept 2017][citations omitted]; *see generally Aleman*, 43 AD3d at 757). Although defendant never

moved to withdraw this plea and his claim is unpreserved, we review it in the interest of justice.

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

ENTERED: MAY 7, 2020

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Gesmer, Moulton, JJ.

11458 David Gallen, Index 310701/11
Plaintiff-Appellant-Respondent,

-against-

Nancy Gallen,
Defendant-Respondent-Appellant.

_____

Amy Saltzman, P.C., New York (Amy Saltzman of counsel), for appellant-respondent.

Chemtob Moss Forman & Beyda, LLP, New York (Susan M. Moss of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Laura E. Drager, J.), entered August 29, 2018, which, to the extent appealed from as limited by the briefs, awarded defendant 25% of the "marital" portion of plaintiff's premarital Vanguard account ending in -4264, awarded defendant 50% of the value of plaintiff's Chase account ending at -8909 at commencement without crediting plaintiff for $20,000 in post-commencement transfers, terminated defendant's maintenance as of December 31, 2018, and awarded defendant $70,000 in counsel fees, unanimously affirmed, without costs.

The trial court properly found that the increase in value in the Vanguard account in the plaintiff's name was due in part to active trading by plaintiff and to deposits of funds not traced to separate property. Accordingly, the trial court properly exercised its discretion in awarding defendant $494,626 from that account.

The court acted within its discretion in declining to award plaintiff a $20,000 credit for post-commencement transfers to defendant before his Chase account ending in -8909 was distributed (*see generally Coburn v Coburn*, 300 AD2d 212, 213 [1st Dept 2002]). Despite his failure to provide a reason for these transfers at trial, plaintiff claims that the sum was, de facto, an advance to defendant on her equitable distribution. However, there is no evidence that the parties entered into such an agreement.

The court providently exercised its discretion in terminating defendant's non-taxable maintenance as of December 31, 2018, after considering her employment prospects, the parties' modest marital lifestyle, and the equitable distribution of assets (*Cohen v Cohen*, 120 AD3d 1060, 1064 [1st Dept 2014], *lv denied* 24 NY3d 909 [2014]). Notably, defendant had received pendente lite support since the commencement of the action in 2011, a duration longer than the parties' six-year marriage. Under the circumstances, she is not entitled to a longer duration of maintenance.

Contrary to defendant's contention, we perceive no reason to disturb the referee's finding that both parties prolonged the litigation, and therefore decline to award defendant additional counsel fees on that ground.

We have considered and rejected the parties' remaining contentions.

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

ENTERED: MAY 7, 2020

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Gesmer, Moulton, JJ.

11460 In re Rosetta Cochran, Index 101116/17
Petitioner,

-against-

Shola Olatoye, etc., et al.,
Respondents.

_____

Brooklyn Defender Services, Brooklyn (Ancra Grigore of counsel), for petitioner.

Kelly D. MacNeal, New York (Andrew M. Lupin of counsel), for respondents.

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Determination of respondent, dated April 11, 2017, which, after a hearing, terminated petitioner's public housing tenancy, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Carmen Victoria St. George, J.], entered on or about September 5, 2018) dismissed, without costs.

At the administrative hearing, the police detective testified that, when he executed the search warrant at petitioner's home on November 4, 2015, petitioner was not home. The detective further testified that, during the search, he discovered a glass pipe and metal rod with cocaine residue in the possession of petitioner's brother. However, the hearing officer did not sustain charge 6 which alleged that petitioner's brother was an unauthorized occupant. Thus, based on the record, there is no substantial evidence to support charge 2, alleging

nondesirability based on petitioner's possession of the items recovered (*see Matter of Rasnick v New York City Hous. Auth.*, 128 AD3d 598, 598 [1st Dept 2015]).

Charges 1 and 3-5, alleging nondesirability, and charge 7, alleging a violation of rules, however, are supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). As to charge 7, petitioner admits that her brother was arrested while a guest in her apartment and pleaded guilty to criminal possession of a controlled substance, both in November 2015 and on a prior occasion in 2012. As to charge 1, the detective testified that at some time prior to securing the warrant targeting petitioner, he observed a confidential informant purchase drugs at her apartment and that the informant identified petitioner as the seller from a photo array. The hearing officer allowed the detective to withhold the date of this controlled buy to protect the identity of the confidential informant.

As to charges 3-5, arising from a separate criminal investigation, a different detective who arrested petitioner in January 2014 testified that he took part in a long-term narcotics investigation at petitioner's building, during which he was in contact with an undercover police officer's 'ghost' at the time of a controlled buy of crack cocaine. At that time, the undercover officer gave him the purchased bags directly, and identified petitioner as the seller from a photo array the

detective had compiled. Although the criminal charges against petitioner were dismissed after this testimony, but before additional hearing dates, "[t]he sealing of a criminal case will not immunize a defendant against all future consequences of the charges, and an administrative tribunal is permitted to consider evidence of the facts leading to those charges when they are independent of the sealed records" (*Matter of Rosa v New York City Hous. Auth., Straus Houses*, 160 AD3d 499, 499 [1st Dept 2018]; *see* CPL 160.50, 160.60). Contrary to petitioner's contention, this detective's testimony was not entirely based upon sealed records. We also find no reason to overturn the hearing officer's credibility determinations (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443 [1987]).

Even with the dismissal of the second charge, we do not find, under the circumstances, that the penalty is shocking to one's sense of fairness (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974]; 24 CFR 966.4[l][5][i][B], [vii][B]). "Since the termination of petitioner's tenancy was based upon her own conduct, and not just that of her [brother], respondent was not obliged to offer her probation, even though" the hearing officer found insufficient evidence that her brother lived in the unit (*Matter of Satterwhite v Hernandez*, 16 AD3d 131, 132 [1st Dept 2005]).

THIS CONSTITUTES THE DECISION AND ORDER

OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 7, 2020

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Gesmer, Moulton, JJ.

11461 In re Louis Golder, etc., Index 652371/16
Petitioner-Respondent,

29 West 27th Street Associates, LLC,
Respondent-Appellant,

Tauber Family Irrevocable Trust dated December 10, 2012, et al.,
Respondents.

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Sperber Denenberg & Kahan, P.C., New York (Jacqueline Handel-Harbour of counsel), for appellant.

Stephen I. Feder, P.C., Forest Hills (Stephen I. Feder of counsel), for respondents.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered June 13, 2018, which confirmed the special referee's report and granted the petition for dissolution of respondent 29 West 27th Street Associates, LLC (the LLC), unanimously affirmed, with costs.

The motion court correctly confirmed the special referee's report and adopted his determination that the partnership agreement's termination date applied to the later formed LLC (*see Flanagan & Cooke v RC 27th Ave. Realty Corp.*, 305 AD2d 135 [1st Dept 2003]). Contrary to the LLC's contention, the partnership agreement did not automatically terminate upon the formation of the LLC (*see Matter of Hochberg v Manhattan Pediatric Dental Group, P.C.*, 41 AD3d 202 [1st Dept 2007]). The record before the referee showed that only the Taubers, representing a 40% interest in the LLC, had signed the operating agreement, and the referee

acted within the scope of the reference in rejecting evidence that he deemed irrelevant (*see generally Charap v Willett*, 84 AD3d 1000, 1001 [2d Dept 2011]).

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

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

ENTERED: MAY 7, 2020

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Gesmer, Moulton, JJ.

11462-
11462A Martin Trepel, DO,
Plaintiff-Appellant,

-against-

Gregg Hodgins, et al.,
Defendants-Respondents.

Index 650541/18

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Kreindler & Kreindler LLP, New York (Andrew J. Maloney, III of counsel), for appellant.

Hinshaw & Culbertson LLP, New York (Edward K. Lenci of counsel), for Gregg Hodgins and Arizona Board of Regents, respondents.

Valerie Cross Dorn, Ithaca (Valerie Cross Dorn of counsel), for Sturt Manning and Cornell University Board of Trustees, respondents.

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Orders, Supreme Court, New York County (Charles E. Ramos, J.), entered October 15, 2018, which granted defendants' motions to dismiss the complaint as against them, unanimously affirmed, without costs.

The court lacks subject matter jurisdiction over defendants Arizona Board of Regents, an agency of the State of Arizona, and Hodgins, an employee of the agency (*Franchise Tax Bd. of California v Hyatt*, __ US __, 139 S Ct 1485 [2019]). Contrary to plaintiff's apparent contention, Ariz Rev Stat Ann § 12-820.05(A), which governs tort actions against public entities or employees, is not relevant to the breach of contract claim. As to the tort claims, plaintiff failed to show that Arizona's rules of tort immunity as developed at common law and as established under its statutes and constitution are different from the rules

enunciated in *Hyatt*.

The complaint fails to state a cause of action against defendants Manning and Cornell University Board of Trustees (the New York defendants). The tortious interference with contract claim does not allege an intentional procurement of a breach (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]). The fraud claim does not allege that plaintiff relied on allegedly false statements in Manning's analysis (*see Unique Goals Intl., Ltd. v Finskiy*, 178 AD3d 626, 627 [1st Dept 2019]). The trade libel claim, which plaintiff acknowledges is a claim for "product disparagement," does not allege actual malice (*see Charles Atlas, Ltd. v Time-Life Books, Inc.*, 570 F Supp 150, 154 [SD NY 1983]). The tortious interference with prospective business relations claim does not allege that the New York defendants acted solely out of malice or employed wrongful means or that a contract would have been entered into with any third party "but for" their conduct, and it does not identify any such third party (*see American Preferred Prescription v Health Mgt.*, 252 AD2d 414, 418 [1st Dept 1998]; *Carvel Corp. v Noonan*, 3 NY3d 182, 192 [2004]).

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: MAY 7, 2020

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Gesmer, Moulton, JJ.

11463 The People of the State of New York, Ind. 4745N/15
Respondent, 4853N/15

-against-

Stephen Edey,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (John L. Palmer of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Neil E. Ross, J.), rendered September 20, 2017, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree and conspiracy in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of three years, unanimously affirmed.

Defendant made a valid waiver of his right to appeal (*People v Thomas*, 2019 NY Slip Op 08545 [2019]). Even had we found that he had waived his right to appeal, we would have found that the court properly denied his suppression motion. There was probable cause for defendant's arrest and the search of the vehicle in which he was a passenger. According to an informant who was feigning participation in the crime while actually communicating with the police, a convoy of three cars had gathered in a parking lot and were on their way to commit a robbery involving a shipment of narcotics. Based on the totality of the hearing

evidence, the inference was inescapable that the car at issue was part of the convoy and was not merely traveling behind the other two cars. The inference was equally strong that defendant was in the car for the purpose of participating in the robbery, and not for some innocent reason. Given the circumstances, it is reasonable to "conclude that only trusted members of the operation would be permitted to enter [the car]" (*People v Bundy*, 90 NY2d 918, 920 [1997]). Even if there was "an innocent explanation for this highly suspicious sequence of events," there was still "probable cause for defendant's arrest, because probable cause does not require proof beyond a reasonable doubt" (*People v Ginyard*, 16 AD3d 239, 240 [1st Dept 2005], *lv denied* 5 NY3d 789 [2005]).

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

ENTERED: MAY 7, 2020

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Gesmer, Moulton, JJ.

11464 Katarzyna Zabawa, Index 162795/14
Plaintiff-Respondent,

-against-

Sky Management Corp., et al.,
Defendants-Appellants.

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

Law Office of Rosemarie Arnold, New York (Maria R. Luppino of counsel), for respondent.

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Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered August 14, 2019, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants failed to establish prima facie entitlement to judgment as a matter of law in this action where plaintiff, while exiting the shower in her boyfriend's apartment, lost consciousness and fell against an uninsulated steam pipe, resulting in third-degree burns to her thigh. Defendants failed to show that Administrative Code of City of NY § 27-809, which requires certain heating pipes to be insulated, did not apply to the building, and that no exception to the grandfathering provision was applicable. The conclusory affidavit of defendants' property manager averring that the building was governed by the 1938 Building Code because in "no 12 month period

since that time have defendants or anyone acting on their behalf expended as much as 30% of the value of the building in alterations and/or renovations" (*see* Administrative Code § 27-117), did not conclusively show that alterations in excess of 30% of the value of the property were not made to the building in any 12-month period (*see White v New York City Hous. Auth.*, 139 AD3d 579 [1st Dept 2016]). The affidavit also fails to show that the costs of the 2011 alterations defendants acknowledged making to the subject apartment were not between 30% and 60% of the value of the building (*see* Administrative Code § 27-116).

Furthermore, defendants' expert affidavit of their professional engineer stating that the building's steam heating system conformed to the requirements of the Building and Energy Codes of the City of New York failed to satisfy defendants' initial burden. The expert never inspected the building's heating system, the records of that system or the accident location (*see Pastabar Café Corp. v 343 E. 8th St. Assoc., LLC*, 147 AD3d 583, 585 [1st Dept 2017]; *V.W. v Middle Country Cent. Sch. Dist. at Centereach*, 175 AD3d 638, 639 [2d Dept 2019]). For these reasons defendants are not entitled to summary judgment on plaintiff's claim that defendant's negligence in keeping the bathroom's steam pipe in a reasonably safe condition proximately caused the accident (*see Mora v Cammeby's Realty Corp.*, 106 AD3d 704, 705 [2d Dept 2013]).

In view of defendants' failure to establish their prima

facie entitlement to judgment as a matter of law, there is no need to consider the sufficiency of the opposition papers (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

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

ENTERED: MAY 7, 2020

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Gesmer, Moulton, JJ.

11465-
11465A Ashley Bradford,
Plaintiff-Respondent,

-against-

Shah Chowdhury, et al.,
Defendants-Appellants.

Index 150906/13

Marjorie E. Bornes, Brooklyn, for appellants.

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

Judgment, Supreme Court, New York County (Verna L. Saunders, J.), entered July 30, 2019, which, upon a jury verdict, awarded plaintiff damages on her personal injury claim against defendants, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about June 18, 2019, which denied defendants' motion to amend their answer to assert a set-off defense, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff commenced this action, arising from a motor vehicle accident, against defendants, who owned and operated the taxi in which she was a passenger, and two other individuals, who owned and operated the second vehicle involved in the accident. Plaintiff settled with the other individuals, and proceeded to trial against defendants four years later. Although defendants were informed of the settlement and received copies of the settlement documents, they did not seek to amend their answer to

assert the affirmative defense of a setoff under General Obligations Law § 15-108(a), until after the jury returned a verdict in plaintiff's favor. If the setoff defense applied, plaintiff would have recovered no damages from defendants.

The court providently denied defendants' motion based on their unexcused delay in making their motion, which prejudiced plaintiff by causing her to expend significant time and expense in preparing for trial under the belief that defendants would not seek an offset. Such preparation, as well as plaintiff's approach to settlement discussions with defendants, may have been altered if plaintiff was aware of defendants' intent to assert an off-set defense (*see Oakes v Patel*, 20 NY3d 633, 646-647 [2013];*Inwood Tower v Summit Waterproofing & Restoration Corp.*, 290 AD2d 252, 252-253 [1st Dept 2002]; *Hanford v Plaza Packaging Corp.*, 284 AD2d 179, 180 [1st Dept 2001]).

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

ENTERED: MAY 7, 2020

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Gesmer, Moulton, JJ.

11466N In re Apex Fund Services (US), Inc.,
Petitioner-Respondent,

-against-

Stephen Maffei, et al.,
Respondents-Appellants.

Index 151244/19

_____

Lowenstein Sandler LLP, New York (Frank T. M. Catalina of counsel), for appellants.

Brach Eichler L.L.C., New York (Autumn M. McCourt of counsel), for respondent.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered on or about April 25, 2019, which granted the petition of Apex Fund Services (US), Inc. (Apex) to quash an out-of-state subpoena served on the United States Securities Exchange Commission (SEC) pursuant to CPLR 3119(e), unanimously affirmed, without costs.

The court providently exercised its discretion in granting Apex's application to quash the subpoena. The information sought is irrelevant to the New Jersey action, as it relates to the SEC's investigation of Apex's handling of investment funds that are not at issue in the New Jersey action (*see Matter of Kapon v Koch*, 23 NY3d 32, 34 [2014]). Further, quashing the subpoena is justified by the fact that the requested information is subject to some expectation of confidentiality (*see* 17 CFR 203.5 ["Unless otherwise ordered by the Commission, all formal investigative proceedings shall be non-public"]; *compare Technology Multi*

Sources, S.A. v Stack Global Holdings, Inc, 44 AD3d 931 [2d Dept 2007]).

We note that the SEC had previously denied a FOIA request for the same documents on confidentiality grounds. Furthermore, following the grant of this petition, the New Jersey court denied respondents' motion to compel, finding the requested information irrelevant and subject to confidentiality.

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

ENTERED: MAY 7, 2020

CLERK

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

9824-
9825-
9826 Gary Ganzi, et al., Index 653074/12
Plaintiffs-Respondents,

-against-

Walter Ganzi, Jr., et al.,
Defendants-Appellants.
- - - - -
Just One More Restaurant
Corporation, etc., et al.,
Nominal Defendants.

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Kasowitz Benson Torres LLP, New York (Marc E. Kasowitz of counsel), for appellants.

Hoguet Newman Regal & Kenney, LLP, New York (Fredric S. Newman of counsel), and Dunning Rievman & Davies LLP, New York (Joshua D. Rievman of counsel), for respondents.

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Judgment, Supreme Court, New York County (Andrea Masley, J.), entered February 11, 2019, in favor of plaintiffs, on behalf of the nominal defendants, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered November 15, 2018, after a nonjury trial, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The trial court correctly rejected defendants' statute of limitations defense to the derivative claims. Defendants contend that the claims that they breached their fiduciary duty to the shareholders of nominal defendant Just One More Restaurant Corporation (JOMR), which owns the Palm Restaurants, by executing various licensing agreements after 2006 that paid JOMR a $6,000 annual license fee for the use of its intellectual property are

time-barred by virtue of the fact that the corporation had previously executed license agreements that included the same fee provision. Defendants argue that the execution of the 2007 and 2011 licenses merely renewed, updated, and reaffirmed preexisting allegedly tortious licensing arrangements, and did not constitute new, discrete acts causing new injury that restarted the applicable six-year statute of limitations.

Breach of fiduciary duty is a tort claim that accrues when all the elements of the tort can be truthfully alleged in a complaint (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 140 [2009]). Where there is one tortious act complained of, the cause of action accrues at the time that the wrongful act first injured the plaintiff; the "continuous wrong" doctrine tolls the running of the statute of limitations where there is a series of independent, distinct wrongs rather than a single wrong that has continuing effects (*see Henry v Bank of Am.*, 147 AD3d 599, 601 [1st Dept 2017]).

Here, defendants argue that pursuant to a stipulation between the parties, the valid and enforceable 2007 and 2011 licenses merely papered or re-papered existing license agreements from 2004 and earlier, repeating identical terms, including the $6,000 annual fee, which would have continued regardless of whether the written licenses had been prepared, such that any damages sustained after 2006 were merely continuing consequential damages from preexisting breaches that occurred when each new

Palm opened with established licensing terms and cannot be used to toll the statute of limitations.

However, the trial court properly found that plaintiffs timely asserted their claims of breach of fiduciary duty in connection with the $6,000 annual fee in the 2007 and 2011 licenses for the new Palms, even if defendants had earlier agreements to pay those restaurants the same fees prior to 2006. Unlike the facts in *Madison Squ. Garden, L.P. v National Hockey League* (2008 WL 4547518, 2008 US Dist LEXIS 80475 [SD NY 2008]), the 2007 and 2011 licenses, even if they stated the same terms, were not mere "renewals" of prior, written agreements. Rather, they were new and fully enforceable contracts entered into between JOMR and defendants' wholly-owned restaurants within the limitations period, as they included a recital providing that "Licensor and Licensee have previously entered into a certain License Agreement and desire to enter into a new License Agreement under the terms and conditions as herein set forth," as well as a merger clause providing that "this Agreement contains all of the terms and conditions agreed upon by the parties hereto and no promises or representations have been made other than as herein set shall be valid unless made in writing executed by an authorized officer of the Licensee or Licensor." These are formal, complete agreements that have legal effect, and any associated breach of fiduciary duty occurred upon the execution of those agreements, regardless of identical breaches that

occurred in connection with prior license agreements that were in place for unspecified terms and that were superseded by the new agreements. While defendants argue that the old licenses, including the $6,000 fee term, would have remained in place indefinitely even if the agreements had not been re-papered in 2007 and 2011, such that there was no injury in 2007 and 2011, the formalizing of the licenses in 2007 and 2011 was a new, overt act that constituted an injurious breach of fiduciary duty.

The claims based on license agreements with third parties are similarly not time-barred.

The court correctly rejected defendants' other affirmative defenses. The trial evidence does not establish that plaintiffs' predecessors in interest had sufficient knowledge of the licensing fee terms of the prior agreements to permit a finding that they acquiesced in or ratified those agreements and terms so as to preclude any later claims of breach of fiduciary duty based on defendants' execution of subsequent agreements containing the same terms (*see e.g. Tierno v Puglisi*, 279 AD2d 836, 839 [3d Dept 2001]). Nor does the evidence establish that any acquiescence to or ratification of agreement terms by predecessor shareholders on behalf of the nominal corporations was unanimous (*see e.g. Winter v Bernstein*, 177 AD2d 452, 453 [1st Dept 1991]). The trial evidence does not support defendants' affirmative defense of laches based on an unreasonable delay in bringing the breach of fiduciary duty claims. In any event, as the court observed, the

defense of laches is not available to a fiduciary unless the fiduciary openly repudiates the relationship (*see Matter of Barabash*, 31 NY2d 76, 82 [1972]; *Knobel v Shaw*, 90 AD3d 493, 496 [1st Dept 2011]), and the trial evidence does not establish that defendants' self-dealing use of the intellectual property was done in a manner that openly repudiated their fiduciary duties.

With respect to the damages award, the court correctly credited the expert testimony of plaintiffs' expert, Pamela O'Neill, as to the appropriate royalty rate that should have been set after 2006 for the use of the intellectual property, and declined to credit the testimony of defendants' experts. Defendants failed to show that O'Neill's analysis was flawed and should not have been followed. Nor did defendants establish that the court otherwise erred in awarding damages and remedies to plaintiffs.

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

ENTERED: MAY 7, 2020

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Sallie Manzanet-Daniels, J.P.
Angela M. Mazzarelli
Ellen Gesmer
Peter H. Moulton, JJ.

11459
Ind. 1049/17
Index 260263/18

_____x

The People of the State of New York,
Plaintiff-Respondent,

-against-

Curtis Nichols,
Defendant,

In re Malisha Blyden,
Bailor/Depositor-Appellant.
_____x

Bailor/Depositor appeals from an order of the Supreme Court, Bronx County (Robert E. Torres, J.), entered December 13, 2018, which denied nonparty appellant surety's application for remission of a bail forfeiture in the amount of $15,000.

Kasowitz Benson Torres LLP, New York (Megan M. Reilly and Sabrina Baig of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Clara H. Salzberg and Beth R. Kublin of counsel), for respondent.

GESMER, J.

The court abused its discretion in denying the application by appellant surety Malisha Blyden seeking the remission of forfeited bail. Appellant supplied sufficient documentation to show that defendant had a valid medical excuse which prevented his appearance in court on the required date, that there were exceptional circumstances warranting the relief sought, and that the People were not prejudiced by the delay (*see People v Peerless Ins. Co.*, 21 AD2d 609 [1st Dept 1964]*; Matter of Nationwide Bail Bonds/Intl. Fid. Ins. Co. v People*, 244 AD2d 556 [2d Dept 1997]).

On May 19, 2017, defendant Curtis Nichols was indicted for second- and third-degree burglary, second-, third- and fourth-degree criminal mischief and second-degree criminal trespass. On June 2, 2017, he was arraigned in Bronx Supreme Court and bail was set in the amount of $30,000 bond over $15,000 cash. On September 12, 2017, appellant posted cash bail in the amount of $15,000, and defendant was released. On November 29, 2017, when defendant failed to appear for his scheduled court appearance, the court issued a bench warrant and ordered the bail forfeited.

On April 6, 2018, defendant returned to court involuntarily, after having been arrested for a new offense. On August 27,

2018, he pled guilty to one count of fourth-degree criminal mischief, a class A misdemeanor, and was sentenced to a prison term of one year.

On October 19, 2018, appellant moved pro se for remission of the forfeited bail. In support of her motion, appellant submitted an affidavit, using a form supplied to her by the court. The form included one space for appellant to state the reasons that the court should grant her motion, preceded by five lines of small type, written in complex language, suggesting some facts that she might list. The form did not include a space or a prompt for her to describe her relationship to defendant, the circumstances leading to her deposit of the bail, or the hardship, if any, that she would suffer if her motion were not granted.

In the affidavit, appellant stated that she appeared in court on November 29, 2017 and advised the court that defendant had suffered the loss of his younger brother, which caused him to suffer from a "deep depression." She further advised that court that, as a result of his depression, defendant failed to take his mental health medication and missed his court date.

In further support of her motion, appellant also submitted an affidavit from defendant to explain why he missed his court date. He explained that the death of his younger brother caused

him to go into a deep depression. That, in turn, caused him to start abusing drugs and alcohol and to stop taking his mental health medications. As a result of these events, he lost his memory and his appetite, became paranoid, and ran away from home. Lacking the support of his family, he then missed his court date. He described this confluence of events as a "mental breakdown." He further advised the court that he had begun to turn his life around by ceasing to use drugs, resuming his mental health medication, and participating in mental health therapy.

Finally, appellant asked the court to consider an "After Care Letter," dated October 3, 2018 and signed by Dr. Arkadiy Chemyak, a senior psychiatrist at Manhattan Detention Complex. Dr. Chemyak stated that defendant "has been under our care for the following conditions . . . post-traumatic stress disorder, alcohol use disorder, severe cocaine use disorder, moderate cannabis use disorder [and] severe intermittent explosive disorder." Dr. Chemyak specified that defendant should be treated with two forms of mental health medication and supportive psychotherapy and strongly recommended that he be enrolled in the Mentally Ill Chemical Abuse Treatment Program (MICA), either as an inpatient or outpatient.

In opposition, the People submitted a brief affirmation by an Assistant District Attorney who did not claim to have personal

knowledge of any of the facts alleged in her affirmation. In addition, the affirmation did not state that the People had been prejudiced in any way by defendant's failure to appear.

In an order dated December 13, 2018, the court denied appellant's application for remission of the forfeited bail. The court refused to give any weight to appellant's affidavit, stating that it was "hearsay," and that she had failed to state the basis for her familiarity with defendant's mental health condition. The court also declined to rely on both defendant's affidavit and the medical letter because they "fail[ed] to specify dates of treatment, initial diagnosis, severity of condition, treating medical professionals, medication and treatment, mental health care givers and/or prior hospitalizations." The court concluded that, since the right to remission of forfeited bail is "purely statutory," it must strictly construe the statutory requirements. Finding that the application did not satisfy the statutory requirements, the court denied the application.

A court may forfeit a bail bond "[i]f, without sufficient excuse, a principal does not appear when required or does not render himself amenable to the orders and processes of the criminal court wherein bail has been posted" (CPL 540.10[1]). When this occurs, the surety may make an application for

remission of the forfeited bail, which the court may grant "upon such terms as are just" (CPL 540.30[2]). "[S]uch an application should be granted only under exceptional circumstances and to promote the ends of justice. In making the application, a defendant or surety has the burden of proving that the defendant's failure to appear was not deliberate and willful, and that the failure did not prejudice the People or deprive them of any rights" (*Matter of Indemnity Ins. Co. of N. Am. v People*, 133 AD2d 345, 346 [2d Dept 1987], *lv denied* 70 NY2d 613 [1987]; *see also People v Gonzalez*, 280 AD2d 274, 274 [1st Dept 2001]). We find that appellant met all of these requirements.

Initially, we note that, since appellant was representing herself, we must treat her with leniency, and read her papers with a broad and liberal interpretation *(Matter of Zelodius C. v Danny L.*, 39 AD3d 320 [1st Dept 2007]*; Pezhman v City of New York*, 29 AD3d 164, 168 [1st Dept 2006]*; Du-Art Film Labs. v Wharton Intl. Films*, 91 AD2d 572, 573 [1st Dept 1982].

Turning to the substantive factors, we find that the surety met her burden to show that defendant's failure to appear was not willful by proving that his absence was caused by a disabling illness. To satisfy this burden,

> "the defendant's affidavit must be detailed and explicit, showing that the illness was a disabling one or made appearance hazardous. A medical certificate

> for a serious disabling illness may suffice, but for anything less a detailed explanatory medical affidavit should be required. And then, the failure at the appointed time or immediately thereafter to advise the court by attorney or other person of the nonappearance should be explained by plausible and sufficient affidavit of one with knowledge of the facts"

(People v Peerless Ins. Co., 21 AD2d at 617).

Here, appellant submitted defendant's detailed affidavit in which he specifically stated that he missed his court date due to the onset of his depression, paranoia, memory loss, and drug use which were triggered and/or exacerbated by the death of his brother. Moreover, his statements were corroborated by appellant's statements in her own affidavit. However, as discussed above, the court also refused to rely on appellant's affidavit, holding that it was "hearsay" and because she did not state the source of her knowledge of defendant's mental health. In so doing, the court overlooks that this is the unusual case where the bond was posted not by a bonding company but by an individual. We can infer that appellant would not have posted such a substantial amount of cash bail unless she had a significant relationship of some kind with defendant, which would have given her an opportunity to observe his mental state. Accordingly, the statements made by the surety in her pro se affidavit appear to be based on her personal observations and thus are not hearsay, and were improperly disregarded by the

motion court.

The motion court also refused to rely on the letter from defendant's psychiatrist, submitted with the motion. The motion court found that the letter was not adequately specific and did not address the time period of defendant's nonappearance. We disagree. In the statement submitted by appellant, defendant's treating psychiatrist wrote that defendant was diagnosed with post-traumatic stress disorder, severe cocaine use disorder, and severe intermittent explosive disorder. Looking at the pleadings liberally as we must, this is certainly sufficient to show that defendant suffered from a "disabling" mental illness (*People v Peerless Ins. Co.*, 21 AD2d at 617).

We also reject, for three reasons, the People's argument that we should not consider the doctor's letter because it does not state that defendant was suffering from mental illness on the date he failed to appear. First, the doctor's statement that defendant "has been" under our care indicates that defendant was being treated for some period prior to the date of the letter. Second, the conditions with which the doctor diagnosed defendant are not conditions with a sudden onset. Third, the affidavits of defendant and appellant contain a lay description of defendant's condition at the time he failed to appear that closely mirrors the doctor's description of him a year later. That supports a

finding that he had been suffering from those conditions at the time he failed to appear. For all of these reasons, we find that defendant did not miss his court date willfully or deliberately but because of his disabling mental illness.

As stated above, where remission is sought based on the defendant's illness at the time of the missed court date, the applicant must also explain "the failure at the appointed time or immediately thereafter to advise the court by attorney or other person of the nonappearance should be explained by plausible and sufficient affidavit of one with knowledge of the facts" (*People v Peerless Ins. Co.*, 21 AD2d at 617). Here, there was no such failure. Rather, as appellant stated in her affidavit, she went to court on November 29, 2017, and told the judge that the reason defendant did not appear that day was because of his deep depression resulting from his brother's death. The People did not dispute that appellant so advised the court on that date.

We also find that appellant met her relatively light burden of showing that defendant's non-appearance did not prejudice the People (*People v Peerless Ins. Co.*, 21 AD2d at 615-616). In their opposition papers to the motion, the People made no showing that they had suffered any prejudice, and they concede in their brief to this Court that this factor is not at issue.

Finally, we find that appellant met her burden of showing

exceptional circumstances. First, defendant's bail was posted not by a bonding company but by an individual. In the usual case, the surety "insured for profit against a calculated peril and suffered a loss" and therefore is required to "pa[y] according to its recognizance" (*People v Continental Cas. Co.*, 301 NY 79, 86 [1950]). Here, however, the bail was posted not by a company doing business for profit, but by an individual.

Second, the fact that appellant brought this motion pro se strongly suggests, as discussed further below, that she could not afford a lawyer and that the denial of remission of the $15,000 at issue will cause her hardship, a further reason for the granting of her motion (*see People v Stuyvesant Ins. Co.*, 24 AD2d 990, 991 [2d Dept 1965][bail remission granted in part because the "indemnitor may suffer severe hardship"]). Indeed, she has a stronger reason for remission than that recognized by this Court in *Peerless,* where we stated that, where the amount of bail is significant, "forfeiture might work too severe a penalty on the defendant, assuming that he, his family, or his friends are responsible to the surety" (*People v Peerless Ins. Co.*, 21 AD2d at 620-621). In this case, we know that the penalty will fall on appellant, which is too severe a penalty, especially in light of defendant's ultimate disposition of a misdemeanor conviction in his criminal proceeding.

Third, although appellant represented herself on the motion, she has pro bono counsel on this appeal who represented in the brief to this Court that appellant is a single woman who posted bail for defendant because of the coercive and abusive relationship that she endured with defendant. These factual circumstances, taken together, constitute exceptional circumstances.

Therefore, appellant's pro se application, which was supported by her affidavit, defendant's affidavit, and a medical letter from a psychiatrist who had treated defendant, sufficiently demonstrated that defendant's failure to appear at his scheduled court appearance was nonwillful and that there were exceptional circumstances warranting the granting of her application for remission of the bail forfeiture. We thus reverse the judgment and grant her motion to accomplish a just result, as the statute requires.

Accordingly, the order of the Supreme Court, Bronx County (Robert E. Torres, J.), entered December 13, 2018, which denied nonparty appellant surety's application for remission of a bail forfeiture in the amount of $15,000, should be reversed, without

costs, and the motion for remission of the bail forfeiture on the law, granted in full.

All concur.

Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered December 13, 2018, reversed, without costs, and the motion for remission of the bail forfeiture on the law, granted in full.

Opinion by Gesmer, J. All concur.

Manzanet-Daniels, J.P., Mazzarelli, Gesmer, Moulton, JJ.

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

ENTERED: MAY 7, 2020

CLERK