SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 9, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Renwick, Moskowitz, Manzanet-Daniels, JJ.

9863 The People of the State of New York, Respondent, Ind. 1430/03

-against-

George Lucas,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Thomas M. Nosewicz of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered on or about February 1, 2011, unanimously affirmed.

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

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting

such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

We have considered the contentions raised in defendant's pro se supplemental brief and find them to be without merit.

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

ENTERED: JANUARY 9, 2014

CLERK

Gonzalez, P.J., Tom, Manzanet-Daniels, Feinman, JJ.

11448 The People of the State of New York, Dkt. 47028C/10
Respondent,

-against-

Roberto Duran,
Defendant-Appellant.

_____

The Bronx Defenders, Bronx (V. Marika Meis of counsel), and Goodwin Procter LLP, New York (Philip Desgranges of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Ravi Kantha of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Raymond L. Bruce, J.), rendered July 29, 2011, convicting defendant, upon his plea of guilty, of operating a motor vehicle while under the influence of alcohol, and sentencing him to a conditional discharge for a period of one year and a $500 fine, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are accorded great deference (*see People v Prochilo*, 41 NY2d 759, 761 [1977]).

The suppression court's restrictions on defendant's introduction of evidence were proper exercises of discretion, particularly in light of the fact that a suppression hearing is

not a proceeding to determine whether a defendant is guilty or not guilty (*see People v DeJohn*, 239 AD2d 184, 185 [1st Dept 1997], *lv denied* 90 NY2d 904 [1997]; *see also People v Chipp*, 75 NY2d 327, 336-338 [1990], *cert denied* 498 US 833 [1990]). Defendant was permitted to establish that nowhere in any paperwork prepared by, or through an interview of, the arresting officer was there any mention of the officer's claim that defendant made an illegal U-turn. The officer also testified that he had no recollection of giving this information to the complaint room prosecutor. The omission having been amply demonstrated, further evidence on this subject would have been cumulative. As an alternative holding, we find any error in this regard was harmless.

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

ENTERED: JANUARY 9, 2014

CLERK

Gonzalez, P.J., Tom, Friedman, Manzanet-Daniels, JJ.

11449 Anna Pezhman, Index 402354/09
Plaintiff-Appellant,

-against-

Department of Education of
the City of New York, et al.,
Defendants-Respondents.

_____

Anna Pezhman, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Julian L. Kalkstein of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Louis B. York, J.), entered September 25, 2013, dismissing with prejudice plaintiff's action alleging defamation, unanimously affirmed, without costs.

The decision to grant a continuance is "within the sound discretion of the trial court and should not be disturbed absent a clear abuse of that discretion" (CPLR 4402; *Mayorga v Jocarl & Ron Co.*, 41 AD3d 132, 134 [1st Dept 2007], *appeal dismissed* 9 NY3d 996 [2007] [internal citations omitted]; *Balogh v H.R.B. Caterers*, 88 AD2d 136, 143 [2d Dept 1982]). The court providently exercised its discretion in denying plaintiff's request for a continuance to retain an attorney to represent her. The record shows that plaintiff chose to proceed pro se despite

advice from two judges, including the trial court judge, apparently believing that she could represent herself adequately without an attorney. Further, litigation has been ongoing for nine years, and granting plaintiff time to find an attorney, and time for that attorney to prepare for trial, would result in further delay, prejudicing defendants. As the evidence submitted by plaintiff thus far does not establish a defamation claim, dismissal was proper.

We have reviewed plaintiff's remaining contentions, including her request for sanctions, and find them unavailing.

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

ENTERED: JANUARY 9, 2014

CLERK

Gonzalez, P.J., Tom, Renwick, Manzanet-Daniels, Feinman, JJ.

11450 Miguel Angel Cabrera Martinez, Index 309585/10
Plaintiff-Respondent,

-against-

OEL Realty Corp.,
Defendant/Third-Party
Plaintiff-Respondent,

-against-

Tower Insurance Company of New York,
Third-Party Defendant-Appellant.

_____

Law Office of Steven G. Fauth, LLC, Tarrytown (Suma S. Thomas of counsel), for appellant.

Finz & Finz, P.C., Mineola (Joshua B. Sandberg of counsel), for Miguel Angel Cabrera Martinez, respondent.

Law Office of William E. Grigo, P.C., Southampton (William E. Grigo of counsel), for Oel Realty Corp., respondent.

_____

Order, Supreme Court, Bronx County (Julia Rodriguez, J.), entered October 11, 2012, which denied third-party defendant Tower Insurance Co.'s motion for summary judgment declaring that it has no duty to defend or indemnify defendant OEL Realty Corp. in an underlying personal injury action, unanimously reversed, on the law, with costs, the motion granted, and it is declared that third-party defendant has no such duty.

Because the complaint's negligence allegations could not

survive except for the assault, those claims are deemed to have arisen from the assault and are thus subject to the assault and battery exclusion (*see Mount Vernon Fire Ins. Co. v Creative Hous.*, 88 NY2d 347, 353 [1996]). The declaration pages of the policy clearly state that the policy was issued with a Commercial General Liability Part and an endorsement called the "Assault and Battery Exclusion." The fact that the policy was issued without a Liquor Liability Coverage Part creates no ambiguity or confusion in the form itself, which still expressly states it applies to the Commercial Liability Coverage Part.

There is no issue relating to the applicability of the Assault and Battery Exclusion because of a blank insurance company signature line at the foot of the endorsement. Where "the policy has been duly countersigned, an endorsement or rider which was a part of the policy when it was issued is valid even though not signed or countersigned by the insurer or its authorized representative" (*Metalios v Tower Ins. Co. of N.Y.*, 77 AD3d 471, 472 [1st Dept 2010]). The certified renewal policy was also sufficient "to establish the existence of the policy and to invoke the presumptions that the terms of the renewal policy are identical to the terms of the policy being renewed" (*Estee Lauder Inc. v OneBeacon Ins. Group, LLC*, 62 AD3d 33, 39 [1st Dept

2009]).

OEL's affidavit, claiming that "OEL Realty Corp. was neither provided nor made aware of the assault and battery form" was insufficient to rebut this evidence (*Employers' Liab. Assur. Corp. v Gotham Hotels*, 38 AD2d 810, 810 [1st Dept 1972]). Issues concerning policy mailing are factual and cannot be considered for the first time on appeal (*see Lindgren v New York City Hous. Auth.*, 269 AD2d 299, 303 [1st Dept 2000]).

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

ENTERED: JANUARY 9, 2014

CLERK

Gonzalez, P.J., Tom, Renwick, Manzanet-Daniels, Feinman, JJ.

11452- Index 105411/08
11453-
11454-
11455 Aaron Elkin,
Plaintiff-Appellant,

-against-

Andrea Labis,
Defendant-Respondent.

_____

Aaron Elkin, appellant pro se.

Char & Herzberg, LLP, New York (Edward M. Char of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Ellen Gesmer, J.), entered April 25, 2011, which, inter alia, awarded defendant sole legal custody of the child, and ordered that plaintiff spend time with the child in accordance with a schedule that included therapeutic visitation, unanimously affirmed, without costs. Order, same court and Justice, entered January 20, 2012, which, inter alia, denied plaintiff's motion to reopen the forensic examination of the child and to stay the financial trial and financial discovery, unanimously affirmed, without costs.

The court properly awarded custody to defendant, with a phased visitation plan including therapeutic visitation for plaintiff, after carefully assessing the testimony of the parties

and the court-appointed forensic expert (*see Eschbach v Eschbach*, 56 NY2d 167 [1982]). The record supports the court's finding that the parties' acrimonious relationship precludes joint custody *see Lubit v Lubit*, 65 AD3d 954 [1st Dept 2009], *lv denied* 13 NY3d 716 [2010], *cert denied* __ US __, 130 S Ct 3362 [2010]). It supports the court's finding that defendant is better able than plaintiff to meet the emotional and intellectual needs of the child, including the need for a positive relationship with plaintiff. Plaintiff's focus on his conflict with defendant has caused him to cease visitation with the child.

The record shows that the court fully explored the issue of defendant's mental health. The court noted defendant's past difficulties and found that defendant had appropriately addressed them. Further, there is no evidence that defendant's past mental health issues have affected her parenting abilities (*see Sendor v Sendor*, 93 AD3d 586 [1st Dept 2012]).

The requirement of therapeutic visitation between plaintiff and the child is the court's well-considered response to the fact that the transitions between the parties have caused the child serious anxiety and the fact that plaintiff has not been visiting the child in a consistent or stable manner.

There is no basis to reopen the forensic examination.

Plaintiff failed to demonstrate any changed circumstances in the short time between the issuance of the custody decision and his motion. Further, there is no evidence to support plaintiff's claim that the child is not healthy or thriving or that she is in danger because of defendant's past mental health issues.

The court properly denied plaintiff's request for a stay of the financial proceedings since any further delay in the child support proceedings could harm the child. Further, plaintiff's filing for bankruptcy protection does not operate as a stay of this proceeding (*see* 11 USC § 362[b][2][A][ii]).

Plaintiff's challenges to the court's rulings on counsel fee awards, visitation with the child's paternal grandparents, and the sufficiency of defendant's discovery responses are not properly before us, since his appeals from the judgment entered January 22, 2010 and the order entered April 25, 2011 in which those rulings were made were dismissed by order of this Court dated April 18, 2012 (M-1844). Plaintiff's purported appeals from the unsigned orders to show cause dated May 23, 2012 were also dismissed, by order dated January 3, 2013 (M-5189), since

they were taken from nonappealable papers (*see Naval v American Aribration Assn.*, 83 AD3d 423 [1st Dept 2011]; CPLR 5701[a][2]).

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

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

ENTERED: JANUARY 9, 2014

CLERK

Gonzalez, P.J., Tom, Renwick, Manzanet-Daniels, Feinman, JJ.

11456 The People of the State of New York, Ind. 1360/11
Respondent,

-against-

Chris Simmons,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Rahul Sharma of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Karinna M. Rossi of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J. at suppression hearing; Michael R. Sonberg, J. at plea and sentencing), rendered February 1, 2012, as amended February 2, 2012, convicting defendant of criminal possession of a controlled substance in the fourth degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to a term of 6 years, unanimously affirmed.

"Defendant's written waiver, taken together with the oral colloquy in which defendant confirmed he understood he was giving up his right to appeal, established that the waiver was knowing, intelligent and voluntary" (*People v Caviness*, 95 AD3d 622 [1st Dept 2012], *lv denied* 19 NY3d 995 [2012]; *see also People v Johnson*, 14 NY3d 483, 486 [2010]; *compare People v Bradshaw*, 18

NY3d 257 [2011]). In the oral colloquy, defendant unequivocally stated that he understood the written waiver.

Defendant's waiver forecloses review of his challenge to the denial of his suppression motion and his claim that his sentence is excessive. As alternative holdings, we find that the suppression motion was properly denied, and we perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 9, 2014

CLERK

Gonzalez, P.J., Tom, Renwick, Manzanet-Daniels, Feinman, JJ.

11457 Kelvin Diaz, Index 310392/10
Plaintiff-Appellant,

-against-

Federico Perez, D.D.S., et al.,
Defendants-Respondents.

_____

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

_____

Order, Supreme Court, Bronx County (Stanley Green, J.), entered February 25, 2013, which, in an action alleging dental malpractice, denied plaintiff's motion for a default judgment, and sua sponte dismissed the complaint, unanimously affirmed, without costs.

Personal jurisdiction was never obtained over the individual defendant Federico Perez, as Perez was never personally served with the summons and complaint, as required by CPLR 306-b. Therefore, there was no basis upon which to enter a default judgment against Perez, and there exists no reason to disturb the dismissal of the complaint as against him. Plaintiff's argument that Perez, a dentist, should be estopped from arguing nondiligent efforts to effect service upon him since he failed to amend information regarding his resident address, as required by

the professional licensing statute (Education Law § 6502[5]), is unpreserved (*see Moreira-Brown v City of New York*, 109 AD3d 761 [1st Dept 2013]). In any event, the estoppel argument fails since plaintiff offers no details regarding any efforts to effect service upon Perez other than a single attempt.

The record further demonstrates that while defendant dental practice was properly served with a copy of the pleadings via the Secretary of State, more than one year transpired from the dental practice's default in appearing. Accordingly, the complaint is deemed abandoned "unless sufficient cause is shown why the complaint should not be dismissed" (CPLR 3215[c]; *see Utak v Commerce Bank Inc.*, 88 AD3d 522 [1st Dept 2011]; *Pack v Saldana*, 178 AD2d 123 [1st Dept 1991]). Although plaintiff demonstrated potential merit to a dental malpractice claim based on an affirmation from an expert, plaintiff failed to provide a reasonable excuse for waiting almost a year after the one-year

limitation period had expired before moving for a default judgment (*see Utak* at 523; *cf. LaValle v Astoria Const. & Paving Corp.*, 266 AD2d 28 [1st Dept 1999]).

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

ENTERED: JANUARY 9, 2014

CLERK

Gonzalez, P.J., Tom, Renwick, Manzanet-Daniels, Feinman, JJ.

11458 Colette Malouf, Index 107152/09
Plaintiff-Respondent, 590888/10

-against-

Equinox Holdings, Inc.,
Defendant-Appellant.

- - - - -

Equinox Holdings, Inc.,
Third-Party Plaintiff-Appellant,

-against-

Life Fitness, Inc.,
Third-Party Defendant-Respondent,

Rebecca Krauss, et al.,
Third-Party Defendants.

_____

Larocca Hornik Rosen Greenberg & Blaha LLP, New York (David N. Kittredge of counsel), for appellant.

Law Office of Robert Evan Trop, PLLC, Garden City (Robert E. Trop of counsel), for Colette Malouf, respondent.

K & L Gates LLP, New York (David Short of the bar of the State of Illinois, admitted pro hac vice, of counsel), for Life Fitness, Inc., respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered October 26, 2012, which, insofar as appealed from, granted plaintiff's motion for spoliation sanctions to the extent of precluding defendant from arguing at trial that the treadmill plaintiff was using at the time of her accident was operating

properly or was free from defects, and granted the motion of third-party defendant Life Fitness, Inc., to strike the third-party complaint against it, unanimously affirmed, without costs.

In this action for personal injuries allegedly sustained by plaintiff on September 17, 2008, when she fell off a treadmill at defendant's Soho location, defendant was unable to provide the treadmill for inspection or to provide any information as to how or when the treadmill was removed, other than an affidavit from a manager at the Soho location who believed that it was replaced as part of an equipment upgrade that would have occurred some time prior to September 2010. All paperwork concerning the treadmill was also missing. Plaintiff and third-party defendant established that defendant's failure to take affirmative steps to preserve the treadmill constituted spoliation of evidence by demonstrating that defendant was on notice that the treadmill might be needed for future litigation (*see Strong v City of New York*, __ AD3d __, 973 NYS 2d 152 [1st Dept 2013]). Although the instant action was not commenced until May 20, 2009, the evidence shows that plaintiff immediately reported the accident and a claims defense form was prepared by defendant's employee and forwarded to its legal department (*see id.; see also Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 173-175 [1st Dept

1997]). Accordingly, the motion court did not abuse its broad discretion in remedying defendant's discovery failures by barring it from arguing at trial that the subject treadmill was operating properly or was free from defects.

The motion court's invocation of the harsh penalty of striking defendant's third-party complaint seeking contribution and indemnification based on the design, manufacture, sale, maintenance, and servicing of the treadmill was warranted since the treadmill was a key piece of evidence that is not available for inspection (*see Kirkland*, 236 AD2d at 176; *Standard Fire Ins. Co. v Fed. Pac. Elec. Co.*, 14 AD3d 213, 219 [1st Dept 2004]).

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

ENTERED: JANUARY 9, 2014

CLERK

Gonzalez, P.J., Tom, Renwick, Manzanet-Daniels, Feinman, JJ.

11461 In re Allen Dubose, Index 402798/11
Petitioner-Appellant,

-against-

New York City Housing Authority,
Respondent-Respondent.

_____

Steven Banks, The Legal Aid Society, New York (Douglass J. Seidman of counsel), for appellant.

Kelly D. MacNeal, New York (Byron S. Menegakis of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Arlene P. Bluth, J.), entered October 16, 2012, denying the petition seeking to vacate respondent's determination, which terminated petitioner's tenancy, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Supreme Court properly determined that transfer of the proceeding pursuant to CPLR 7804(g) was not required since the issues raised in the petition concerned the penalty imposed rather than the charges of nondesirability (*see e.g. Matter of Kerney v Hernandez*, 60 AD3d 544 [1st Dept 2009]). Even were we to conduct a de novo review, petitioner's guilty plea to the criminal charge involving illegal drug activity in his apartment

established the nondesirability charges (*see Grayes v DiStasio*, 166 AD2d 261, 262-263 [1st Dept 1990]).

Despite the existence of mitigating factors, the penalty of termination does not shock one's sense of fairness, particularly in view of the danger to others posed by petitioner's illegal drug activity (*see Matter of Chandler v Rhea*, 103 AD3d 427 [1st Dept 2013]). The Hearing Officer was entitled to reject the testimony of petitioner's expert as to his low risk of recidivism, even in the absence of a contrary expert opinion (*see Felt v Olson*, 51 NY2d 977, 979 [1980]).

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

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

ENTERED: JANUARY 9, 2014

CLERK

Gonzalez, P.J., Tom, Renwick, Manzanet-Daniels, Feinman, JJ.

11462 The People of the State of New York, Ind. 4001/11
Respondent,

-against-

Omar A. Williams,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered December 13, 2011, convicting defendant, upon his plea of guilty, of attempted robbery in the third degree, and sentencing him, as a second felony offender, to a term of 1½ years, unanimously affirmed.

Defendant's challenge to the imposition of the mandatory surcharge should be raised in the sentencing court by way of a motion for resentencing at the end of a defendant's incarceration (*People v Bradley*, 249 AD2d 103 [1st Dept 1998], *lv denied* 92

NY2d 923 [1998]). Consequently, defendant's arguments to this Court are premature.

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

ENTERED: JANUARY 9, 2014

CLERK

Gonzalez, P.J., Tom, Renwick, Manzanet-Daniels, Feinman, JJ.

11463 Lavigny Holdings Limited, et al., Index 651818/12
Plaintiffs-Appellants,

-against-

Coller International Partners V-A, LP, et al.,
Defendants-Respondents.

_____

McKool Smith, P.C., New York (Gayle R. Klein of counsel), for appellants.

O'Melveny & Myers LLP, New York (Abby F. Rudzin of counsel), for respondents.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered December 21, 2012, which, upon converting defendants' motion to dismiss the complaint into a summary judgment motion, granted defendants' motion and denied plaintiffs' cross motion for summary judgment, unanimously affirmed, with costs.

In this action for breach of contract, the motion court correctly found that defendants were entitled to summary judgment dismissing the complaint. When plaintiffs failed to pay the purchase price for defendants' patent portfolios by a certain date, the unambiguous agreements were terminated and became null

and void, without penalty to any party (*see e.g. Karan v Sutton E. Assoc.-#88*, 256 AD2d 29 [1st Dept 1998], *lv denied* 93 NY2d 811 [1999]). Accordingly, defendants did not breach the agreements by selling the portfolios to a third party after that date. Nothing in the record shows that defendants acted in bad faith, failed to discharge their obligations under the agreements or impeded plaintiffs' performance during the term of the agreements. In any event, as the motion court properly determined, plaintiffs have no cognizable damages since the agreements provide that plaintiffs could not recover consequential damages arising under the agreements, including loss of profits, which is what plaintiffs seek in this action.

Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing is duplicative of the breach of

contract claims (*see e.g. Banc of Am. Sec. LLC v Solow Bldg. Co. II, L.L.C.*, 47 AD3d 239, 243-244 [1st Dept 2007], *appeal withdrawn* 16 NY3d 796 [2011]).

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

ENTERED: JANUARY 9, 2014

CLERK

Gonzalez, P.J., Tom, Renwick, Manzanet-Daniels, Feinman, JJ.

11465 The People of the State of New York, Ind. 5116/10
Respondent,

-against-

Kashawn Watson,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Naomi C. Reed 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 (Edward J. McLaughlin, J.), rendered on or about February 22, 2011,

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

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

ENTERED: JANUARY 9, 2014

CLERK

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

Gonzalez, P.J., Tom, Renwick, Manzanet-Daniels, Feinman, JJ.

11466N Confesora Martinez, Index 110659/08
Plaintiff-Respondent,

-against-

Government Employees Ins. Co.,
Defendant-Appellant.

_____

McDonnell & Adels, P.L.L.C., Garden City (Jannine A. Gordineer of counsel), for appellant.

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph, III of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered July 11, 2012, which granted plaintiff's motion to vacate an order of dismissal entered upon her default, unanimously reversed, on the facts, without costs, and the motion denied.

Plaintiff failed to take any action to seek relief from the dismissal order until a year after it was issued (*see Forbes v New York City Tr. Auth.*, 88 AD3d 546 [1st Dept 2011]). While a court retains discretionary power to vacate a default judgment in the interest of justice, even when the motion is made more than a year after service of notice of entry, "that discretion should not be exercised where, as here, the moving party has

demonstrated a lack of good faith, or been dilatory in asserting its rights" (*Greenwich Sav. Bank v JAJ Carpet Mart*, 126 AD2d 451, 452 [1st Dept 1987]).

In any case, plaintiff failed to demonstrate a reasonable excuse and the legal merit of her asserted claim (*see Benson Park Assoc., LLC v Herman*, 73 AD3d 464 [1st Dept 2010]). Counsel's explanation that an unnamed attorney had appeared on the return date of the motion to request an adjournment and also appeared at a status conference scheduled in the courtroom was denied in a sworn statement by defendant's counsel. The complaint verified by counsel and the affirmation submitted by counsel in support of another motion are not made by a person with personal knowledge and, moreover, fail to provide specifics of the fraud and other claims (*see Paez v 1610 Saint Nicholas Ave. L.P.*, 103 AD3d 553, 554 [1st Dept 2013]; *Peacock v Kalikow*, 239 AD2d 188, 190 [1st Dept 1997]).

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

ENTERED: JANUARY 9, 2014

CLERK

Tom, J.P., Mazzarelli, Freedman, Richter, Feinman, JJ.

11074 Annabel Delgado, Index 402239/12
Plaintiff-Appellant,

-against-

Martinez Family Auto, et al.,
Defendants-Respondents.

_____

Subin Associates LLP, New York (Robert J. Eisen of counsel), for appellant.

Cruser, Mitchell & Novitz, LLP, Farmingdale (Magda DeMoya Coyle of counsel), for Martinez Family Auto and Simon Delacruz, respondents.

Steve S. Efron, New York, for New York City Transit Authority and Vincente Pagan, Jr., respondents.

_____

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered February 8, 2013, which denied plaintiff's motion for partial summary judgment on the issue of liability, reversed, on the law, without costs, and the motion granted.

Plaintiff was a passenger in the back seat of a taxi owned by defendant Martinez Family Auto and operated by defendant Simon Delacruz (collectively Delacruz) when it was involved in an accident with a New York City Transit Authority bus operated by Vincente Pagan, Jr. (collectively NYCTA). According to plaintiff, the accident occurred when the NYCTA bus, which was in the lane immediately to the right of the Delacruz vehicle,

attempted to make a left-hand turn across the lane of traffic in which the Delacruz vehicle was traveling.

Plaintiff established her entitlement to summary judgment on the issue of liability as against Delacruz based on his violation of Vehicle and Traffic Law (VTL) § 1180(a), which provides that "[n]o person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing." Plaintiff's affidavit stated that following the accident, Delacruz apologized to her for partly causing the impact by traveling 50 mph in a 30 mph zone. Delacruz's statement is admissible as a party admission (*see Bruenn v Pawlowski*, 292 AD2d 856, 857 [4th Dept 2002]; *Ferrara v Poranski*, 88 AD2d 904 [2d Dept 1982]), and is sufficient to establish a violation of VTL § 1180(a).[1]

A violation of traffic law, absent an excuse, constitutes negligence, and therefore plaintiff established a prima facie case of negligence *(see Vasquez v Christian Herald Assn.*, 186 AD2d 467, 468 [1st Dept 1992], *lv dismissed* 81 NY2d 783 [1993]; *Stanisz v Tsimis*, 96 AD2d 838 [2d Dept 1983]). The burden then

[1] Although submitted by NYCTA, we note the record also contains plaintiff's testimony given at the General Municipal Law § 50-h hearing.

shifted to Delacruz to produce evidentiary proof in admissible form that there are material questions of fact sufficient to require a trial. Delacruz neither offered an explanation or excuse for the accident nor did he deny making the statement to plaintiff (*McGraw v Ranieri*, 202 AD2d 725, 727 [3d Dept 1994] [defendant failed to raise a question of fact as he offered no explanation for his guilty plea to a vehicle violation]). Rather, he relied solely on his counsel's affirmation, which also made no reference to defendant's admission (*see Gruppo v London*, 25 AD3d 486, 487 [1st Dept 2006] [affirmation of counsel who lacks personal knowledge of the facts is insufficient to raise a triable issue of fact]; *see also Jean v Zong Hai Xu*, 288 AD2d 62 [1st Dept 2001]). Therefore, Delacruz failed to raise a question of fact regarding the circumstances of the accident.

The contention, made by the dissent, that plaintiff's motion should be denied merely because defendants have not been deposed is unconvincing as Delacruz, who possesses personal knowledge of the relevant facts, did not provide an affidavit (*see Rainford v Sung S. Han*, 18 AD3d 638, 639-640 [2d Dept 2005]; *Johnson v Phillips*, 261 AD2d 269, 270, 272 [1st Dept 1999]). Because it is Delacruz who was driving the cab and who made the statement, he does not need discovery to know when and where the statement was

made or to deny that it was made at all.

Kramer v Oil Servs., Inc. (56 AD3d 730 [2d Dept 2008]), cited by the dissent for the proposition that Delacruz's statement to plaintiff cannot be dispositive of a summary judgment motion, is readily distinguishable. In *Kramer*, the plaintiff moved for summary judgment on the issue of liability, basing her motion, in part, on an out-of-court statement made to her by the defendant's employee (id. at 730). In contrast to Delacruz's statement, the employee's statement may not have been an admission (*see Dank v Sears Holding Mgt. Corp.*, 93 AD3d 627, 628 [2d Dept 2012] [an employee's statement is admissible against an employer only if the "statement was made within the scope of the employee's authority to speak for the employer"]). We also do not know whether the employee in *Kramer* denied making the statement or sought to explain it.

Plaintiff also established entitlement to summary judgment as against NYCTA based on its violation of VTL 1128(a), which provides that "[a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety" (*see Stanisz*, 96 AD2d at 838). In opposition, NYCTA failed to raise a triable issue of fact.

NYCTA's argument that further discovery is needed is unavailing. There is no indication that further discovery would lead to relevant evidence on the issue of NYCTA's liability and like defendant Delacruz, the bus driver is in the best position to know whether he violated the VTL. Although NYCTA wants discovery as to plaintiff's conduct, "it is well settled that the right of an innocent passenger to summary judgment is not in any way restricted by potential issues of comparative negligence as between the drivers of the two vehicles" (*Garcia v Tri-County Ambulette Serv.*, 282 AD2d 206, 207 [1st Dept 2001]).

Furthermore, while plaintiff may not have been wearing a seatbelt at the time of the accident, such is not a defense to liability, but instead is "limited to the jury's determination of plaintiff's damages and in mitigation thereof" (*id.*). Defendants are entitled to such discovery before a damages trial is held.

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

FREEDMAN, J. (dissenting in part)

I agree with the majority that plaintiff's motion for summary judgment on the issue of liability should be granted as against defendants NYCTA and Vincente Pagan, Jr. But I would affirm the denial of plaintiff's motion as against defendants Martinez Family Auto and Simon Delacruz.

In support of the motion, plaintiff submitted only her one-paragraph affidavit stating that, while she was a passenger in a taxicab owned by Martinez Family Auto and driven by Delacruz, a NYCTA bus operated by Pagan turned across the cab's lane of travel without signaling. "After the impact," plaintiff further states, "[Delacruz] apologized for partly causing the accident because . . . he was [traveling] 50 mph in a 30 mph zone." Plaintiff's testimony that she observed the bus turning suffices to establish NYCTA's and Pagan's liability for violating Vehicle and Traffic Law § 1128(a), and the attorney's affirmation that defendants submitted in opposition fails to raise an issue of fact that would preclude summary judgment.

However, at this stage in the proceedings, plaintiff's statement that Delacruz told her he was driving too fast, without more, is insufficient "to warrant the court as a matter of law" to direct judgment in her favor (CPLR 3212[b]). While

plaintiff's report of Delacruz's out-of-court statement might be admissible at trial as a party admission, it cannot be dispositive of a summary judgment motion, given that this case is in the early stages of discovery and neither plaintiff nor Delacruz has been deposed (*see Kramer v Oil Servs. Inc.*, 56 AD3d 730 [2d Dept 2008] [the plaintiff's affidavit that the defendant's technician told her that his actions caused an oil spill failed to satisfy the plaintiff's burden on summary judgment motion on issue of liability]). At the least, defendants are entitled to question plaintiff and Delacruz about the accuracy of the out-of-court statement plaintiff reports.

Accordingly, I would modify the motion court's order to the extent of granting plaintiff's motion as against NYCTA and Pagan and otherwise affirm the order.

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

ENTERED: JANUARY 9, 2014

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Acosta, J.P., Andrias, Moskowitz, Richter, JJ.

11227- Index 304990/09
11227A-
11227B- Anthony Mejia,
Plaintiff-Appellant,

Karen Santos,
Plaintiff,

-against-

Rafael Ramos, et al.,
Defendants-Respondents,

Phyllis G. Taylor,
Defendant.

_____

Wingate, Russotti & Shapiro, LLP, New York (Joseph P. Stoduto of counsel), for appellant.

O'Connor, McGuinness, Conte, Doyle, Oleson, Watson & Loftus, LLP, White Plains (Montgomery L. Effinger of counsel), for Rafael Ramos, respondent.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Marjorie E. Bornes of counsel), for Maddy Mbaye and O.C. Service, respondents.

_____

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered March 25, 2013, to the extent it denied plaintiff Mejia's motion to vacate an order, same court and Justice, entered June 22, 2012, granting, upon his default, defendants' motions for summary judgment dismissing his claims, unanimously reversed, on the law, without costs, the motion to vacate granted, and the

matter remanded for further proceedings consistent with this order. Appeal from so much of the March 25, 2013 order as denied the motion to renew and/or to reargue, unanimously dismissed, without costs, as academic and as taken from a nonappealable disposition, respectively. Appeal from order, same court and Justice, entered June 22, 2012, which granted, on default, defendants' motions for summary judgment, unanimously dismissed, without costs, as taken from a nonappealable order. Order, same court and Justice, entered June 22, 2012, which denied plaintiffs' motion for summary judgment as untimely, unanimously affirmed, without costs.

To successfully vacate a default, a party must demonstrate a justifiable excuse for his default and a meritorious claim (*Northern Source, LLC v Kousouros*, 106 AD3d 571 [1st Dept 2013]). In determining if there is a reasonable excuse for a party's default, several relevant factors should be taken into consideration, including the length of the delay, prejudice to the opposing party and the strong public policy in this State favoring the resolution of matters on the merits (*Chevalier v 368 E. 148th St. Assoc., LLC*, 80 AD3d 411, 413-414 [1st Dept 2011]; *see also New Media Holding Co.*, 97 AD3d at 465; *Dokmecian v ABN AMRO N. Am.*, 304 AD2d 445 [1st Dept 2003]).

Here, plaintiffs' counsel claims that the delay in acquiring medical reports necessary to oppose defendants' motions was the reason for the default. Further, the belief of plaintiffs' counsel that he thought an adjournment had been granted, although not the strongest argument, amounts to a law office failure, "which is a recognized excuse for vacatur of a default" (*Matter of Lancer Ins. Co. v Rovira*, 45 AD3d 417, 418 [1st Dept 2007]; *see Theatre Row Phase II Assoc. v H&I, Inc.*, 27 AD3d 216, 217 [1st Dept 2006] [incorrect assumption that a requested adjournment had been granted was "inadvertent and excusable"]).

In addition, plaintiff moved to vacate shortly after he defaulted and this delay did not cause defendants to suffer undue prejudice (*see American Intl. Ins. Co. v MJM Quality Constr., Inc.*, 69 AD3d 520 [1st Dept 2010]). On remand, defendants will have ample opportunity to argue their motion on the merits. As to the merits of the case, plaintiff presented a meritorious claim by submitting medical reports indicating that plaintiff underwent numerous treatments following the accident. Taken together, these factors warrant giving plaintiff the opportunity to respond to defendants' motions for summary judgment to dismiss the complaint.

The motion court properly denied plaintiffs' motion for partial summary judgment as untimely (CPLR 3212[a]; *see Brill v City of New York*, 2 NY3d 648, 652 [2004]). Plaintiffs failed to offer a reasonable explanation to the motion court as to why the motion was filed 181 days after the filing of the note of issue.

Because we are granting plaintiff's motion to vacate his default, plaintiff's appeal from the denial of the motion to renew is moot (*see Matter of Castell v City of Saratoga Springs*, 3 AD3d 774, 776 [3rd Dept 2004]).

Finally, no appeal lies from the denial of a motion for reargument (*see Belok v New York City Dept. of Hous. Preserv. & Dev.*, 89 AD3d 579 [1st Dept 2011]) or from the order of default itself (CPLR 5511; *see Armin A. Meizlik Co. Inc. v L&K Jewelry Inc.*, 68 AD3d 530, 531 [1st Dept 2009]).

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

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

ENTERED: JANUARY 9, 2014

CLERK

Tom, J.P., Friedman, Renwick, Feinman, Clark, JJ.

11244 & M-5964 Index 401119/12

In re Billy Barnes,
Petitioner-Appellant,

-against-

Beth Israel Medical Center,
Respondent-Respondent,

New York State Division of Human Rights,
Respondent.

_____

Billy Barnes, appellant pro se.

Edwards Wildman Palmer LLP, New York (David R. Marshall of counsel), for respondent.

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Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered on or about November 5, 2012, granting the cross motion of respondent Beth Israel Medical Center (Beth Israel) to dismiss the petition to annul the determination of respondent New York State Division of Human Rights (DHR), dated April 20, 2012, that there was no probable cause to believe that Beth Israel had engaged in an unlawful discriminatory employment practice, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

DHR's determination had a rational basis in the record and

was not arbitrary and capricious (*see generally Flacke v Onondaga Landfill Sys.*, 69 NY2d 355, 363 [1987]). Petitioner failed to show that the nondiscriminatory reason offered by Beth Israel for terminating his employment, namely, his commission of "gross misconduct" by placing his hands on a coworker's neck and threatening her, was a pretext for discrimination based upon his race, sex or national origin.

Petitioner was not prevented from showing pretext by DHR's failure to make additional attempts to contact witnesses. The information supplied by the parties was sufficient for DHR to make its determination (*see Matter of Pascual v New York State Div. of Human Rights*, 37 AD3d 215 [1st Dept 2007]). Moreover, the record shows that the investigation conducted by DHR was sufficient and not one-sided, and that petitioner had a full and fair opportunity to present his own case (*see id.; Matter of McFarland v New York State Div. of Human Rights*, 241 AD2d 108, 112 [1st Dept 1998]).

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

M-5964 - ***In re Billy Barnes v Beth Israel Medical Center***

Motion seeking leave for oral argument denied.

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

ENTERED: JANUARY 9, 2014

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Freedman, Clark, JJ.

11404N Tricham Housing Associates, L.P., Index 106909/09
Plaintiff-Respondent,

-against-

Allan Klein, et al.,
Defendants-Appellants,

Emanuel Panitz,
Defendant.

_____

Kagen Law Firm, New York (Stuart Kagen of counsel), for appellants.

Pepper Hamilton LLP, New York (Hope A. Comisky of counsel), for respondent.

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Order, Supreme Court, New York County (Debra A. James, J.), entered July 16, 2013, which denied defendants Allan Klein, Lobby Design Group, and Steeltech SA LLC's motion for an order sanctioning plaintiff for a violation of 22 NYCRR § 130-1.1 and Rule of Professional Conduct 3.4(b), unanimously modified, on the law, the Memorandum of Understanding between plaintiff and defendant-respondent vacated, and otherwise affirmed, without costs.

In an attempt to settle the claims and counterclaims between them, plaintiff and defendant Emanuel Panitz entered into a Memorandum of Understanding (MOU) pursuant to which Panitz's

legal fees would be paid, provided that the claims of defendants Allan Klein, Lobby Design Group, and Steeltech SA (the LDG defendants, collectively) failed. In exchange for this, Panitz assigned plaintiff his remaining cross claims against the LDG defendants. This agreement is void and unenforceable as against public policy. Although his claims against plaintiff have been settled, Panitz is still a witness in this action. Permitting the MOU to stand as it is, with the payment of Panitz's legal fees conditioned on the failure of his former co-defendants' claims, creates an incentive for Panitz to falsify his testimony, an incentive that has long been disfavored (*see e.g. Caldwell v Cablevision Sys. Corp.*, 20 NY3d 365, 371 [2013], citing *Bergoff Detective Serv. v Walters*, 239 App Div 439, 442-443 [1st Dept 1933]).

We perceive no basis for sanctioning plaintiff or its counsel.

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

ENTERED: JANUARY 9, 2014

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