SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 30, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Renwick, Saxe, Freedman, Richter, JJ.

12462 Crush Boone, Index 101509/11
Plaintiff-Appellant,

-against-

Elizabeth Taxi, Inc., et al.,
Defendants-Respondents.

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Levine & Gilbert, New York (Harvey A. Levine of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Colin F. Morrissey of counsel), for respondents.

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Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered March 7, 2013, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff alleged in his bill of particulars that, as a result of an accident in which he was thrown from his bicycle after being hit by defendants' taxi, he suffered cervical spine injury, and that he complained of neck and bilateral wrist pain after the accident, but that X rays taken at the time "apparently

were negative." Plaintiff alleged, inter alia, injury under the permanent consequential limitations in use and 90/180-day categories of Insurance Law § 5102(d).

Defendants met their prima facie burden of demonstrating the absence of permanent consequential limitations in use injuries by submitting, inter alia, affirmed expert medical reports finding full range of motion in the cervical spine and wrists, negative test results and no objective evidence of permanent injury in plaintiff's cervical spine or wrists (*see Kone v Rodriguez*, 107 AD3d 537 [1st Dept 2013]). Defendants also submitted a report by their radiologist opining that plaintiff's claimed cervical spine injuries were chronic and degenerative, and not causally related to the subject accident (*see Nova v Fontanez*, 112 AD3d 435 [1st Dept 2013]).

In opposition, plaintiff failed to offer evidence of permanent consequential limitations in use of his cervical spine or wrists caused by the accident (*see Vasquez v Almanzar*, 107 AD3d 538, 539 [1st Dept 2013]). Instead, plaintiff raised for the first time a new serious injury claim under Insurance Law § 5102(d), namely, that he sustained a fracture in his left wrist. In support, he offered the affirmation of a radiologist, which, contrary to the motion court's determination, was in sufficient

compliance with the requirements of CPLR 2106 (*see e.g. Dennis v New York City Tr. Auth.*, 84 AD3d 579 [1st Dept 2001]). The radiologist had recently reviewed the post-accident left-wrist MRI and averred that it showed a nondisplaced fracture of the scaphoid. However, it was error for the court to consider this new serious injury claim, since plaintiff did not plead a fracture injury in the bill of particulars (*see Christopher V. v James A. Leasing, Inc.*, 115 AD3d 462 [1st Dept 2014]; *Marte v New York City Tr. Auth.*, 59 AD3d 398 [2d Dept 2009]).

Defendants also met their prima facie burden with respect to plaintiff's 90/180-day claim by submitting plaintiff's deposition testimony in which he claimed that he was only confined to his bed and home for a month after the subject accident (*see Komina v Gil*, 107 AD3d 596, 597 [1st Dept 2013]). In opposition, plaintiff failed to submit competent medical evidence contradicting this testimony and, furthermore, his submissions failed to address defendants' showing that his cervical spine injuries were degenerative and preexisting (*see Nova*, 112 AD3d at 436; *Bravo v Martinez*, 105 AD3d 458, 459 [1st Dept 2013]).

The Decision and Order of this Court entered herein on May 13, 2014 is hereby recalled and vacated (*see* M-3037 decided simultaneously herewith).

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

ENTERED: SEPTEMBER 30, 2014

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Manzanet-Daniels, Clark, JJ.

13044 The People of the State of New York, Ind. 1169/10
Respondent,

-against-

Joseph Smalls,
Defendant-Appellant.

_____

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

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

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Order, Supreme Court, New York County (Cassandra M. Mullen, J.), entered on or about April 2, 2012, which adjudicated defendant a level three sexually violent offender under the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly applied the presumptive override for a prior felony sex crime conviction, and properly exercised its discretion in denying a downward departure. The underlying offense is defendant's third felony sex crime conviction. Defendant committed the underlying crime after having already been adjudicated a level three sex offender (*see People v Carter*, 114 AD3d 592 [1st Dept 2014]). The mitigating factors cited by defendant were outweighed by his criminal record, which

demonstrates a dangerous propensity to commit sex crimes (*see e.g. People v Jamison*, 107 AD3d 531 [1st Dept 2013], *lv denied* 22 NY3d 852 [2013]; *People v Poole*, 105 AD3d 654 [1st Dept 2013], *lv denied* 21 NY3d 863 [2013]), and also by his failure to advance to the second level of the sex offender treatment program.

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

ENTERED: SEPTEMBER 30, 2014

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Manzanet-Daniels, Clark, JJ.

13045 In Re Reggie T.,

A Person Alleged to
be a Juvenile Delinquent,
Respondent.
- - - - -
Presentment Agency

_____

Zachary W. Carter, Corporation Counsel, New York (Deborah A. Brenner of counsel), for presentment agency.

Tamara A. Steckler, The Legal Aid Society, New York (Marcia Egger of counsel), for respondent.

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Order, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about March 12, 2013, which granted respondent's motion to suppress physical evidence, unanimously affirmed, without costs.

The court properly granted respondent's motion to suppress a weapon recovered from his person. The officer's credited testimony failed to establish that he had the requisite suspicion to justify pursuing respondent, ordering him to stop and handcuffing him. The police received an anonymous tip that lacked a detailed description of the alleged criminal activity or its participants (*see generally People v DeBour*, 40 NY2d 210 [1976]). Respondent and his companions did not even match the limited descriptions of four alleged participants in a fight, and

there was nothing to support an inference that they were likely to have been the same four persons described in the radio message, particularly since the events occurred on a busy street in the afternoon. Initially, there was nothing suspicious about the behavior of the four youths as the police arrived. Under all the circumstances, respondent's ensuing flight was insufficient to elevate the minimal level of preexisting suspicion to a level warranting pursuit (*see People v Holmes*, 81 NY2d 1056 [1993]). The manner in which respondent held his arms while fleeing was also equivocal.

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

ENTERED: SEPTEMBER 30, 2014

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Manzanet-Daniels, Clark, JJ.

13046 In re John J. Lynch, Index 103391/12
Petitioner-Appellant,

-against-

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

_____

Law Office of Stuart Salles, New York (Gail M. Blasie of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered January 18, 2013, granting respondents' cross motion to dismiss the petition to annul the determination that petitioner is not entitled to payment of $18,758 for unused annual leave at retirement, denying the petition, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously reversed on the law, without costs, the cross motion denied, the petition reinstated, and the matter remanded for further proceedings.

The motion court erred in finding that the petition was not filed within the four month statute of limitations applicable to article 78 proceedings (*see* CPLR 217[1]). There were two components to the "actual, concrete injury" (*see Matter of Best*

Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y., 5 NY3d 30, 34 [2005]) giving rise to petitioner's claim that respondents improperly determined that his unused annual leave had been miscalculated resulting in an overstatement of the amount he was to be paid upon his retirement in 2010. While the first determination, that petitioner was credited with approximately forty more days of annual leave than he was entitled to between 1992 and 1999, was definitively communicated to petitioner in June 2011, the second, that the "six-year rule," which would have limited recoupment to a period of six years preceding discovery of the error, did not apply to managers, such as petitioner, was not decided by respondents until March 2012.

Notably, in June 2011, the City's Human Resources Administration took the position that petitioner was covered by the six-year rule, and the issue remained unsettled for more than

ten months thereafter. Accordingly, the petition, filed on July 26, 2012, was timely, having been filed within four months of the March 27, 2012 determination that the six-year rule did not apply to petitioner.

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

ENTERED: SEPTEMBER 30, 2014

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Manzanet-Daniels, Clark, JJ.

13047 In re Jeremy A.,
Petitioner-Appellant,

-against-

Vianca G.,
Respondent-Respondent.

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Geoffrey P. Berman, Larchmont, for appellant.

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Order, Family Court, Bronx County (Jennifer S. Burtt, Referee), entered on or about September 25, 2013, which granted respondent mother's motion to dismiss petitioner father's visitation petition on forum non conveniens grounds to the extent of staying the father's petition until he either files a new petition for visitation in Florida or files a cross petition in the proceedings filed by the mother that are currently pending in Florida, unanimously reversed, on the law, without costs, the stay lifted, and the matter remanded for further proceedings consistent with this decision. Leave to appeal from the aforementioned order is granted nunc pro tunc.

The order staying the father's petition is not appealable as of right (*see* Family Ct Act § 1112[a]; *Matter of Holtzman v Holtzman*, 47 AD2d 620, 620-621 [1st Dept 1975]). However, we exercise our discretion and treat the father's appeal as an

application for leave to appeal, and grant the application nunc pro tunc (*see Matter of Brett M.D. v Elizabeth A.D.*, 110 AD3d 424 [1st Dept 2013]).

The court improvidently exercised its discretion, as the record indicates that the court failed to consider all relevant factors before making its determination (*see* Domestic Relations Law § 76-f[2]). In particular, there is no indication that the court considered the distance between New York and Florida, the relative financial conditions of the mother and father, any agreement between the parties on jurisdiction, or the nature and location of any evidence required to resolve the "pending litigation" concerning the father's visitation rights (§ 76-f[2][c], [d], [e], [f]). Accordingly, the matter is remanded so that the parties may present evidence and the court can consider all factors in determining whether New York is an

inconvenient forum and whether Florida is a more appropriate forum (*see* Domestic Relations Law § 76-f[1], [2]; *Matter of Wilson v Linn*, 79 AD3d 1767 [4th Dept 2010]; *Matter of Blerim M. v Racquel M.*, 41 AD3d 306, 310-311 [1st Dept 2007]).

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

ENTERED: SEPTEMBER 30, 2014

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Manzanet-Daniels, Clark, JJ.

13048 CPN Mechanical, Inc., et al.,
Plaintiffs-Appellants,

-against-

Madison Park Owner, LLC,
Defendant-Respondent,

G Buildings IV LLC, et al.,
Defendants.

- - - - -

[And Other Actions]

Index 601276/10
104923/10
652255/10
105485/11

Farrell Fritz, P.C., Uniondale (Aaron E. Zerykier of counsel), for appellants.

Zetlin & De Chiara LLP, New York (Jaimee L. Nardiello of counsel), for respondent.

Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered June 5, 2013, which granted defendant Madison Park Owner, LLC's (defendant) motion to dismiss the complaint as against it, unanimously affirmed, with costs.

Plaintiffs argue that since plaintiff CPN Mechanical, Inc.'s admitted theft of $100,000 from defendant by over-billing for the HVAC work on defendant's renovation project only amounted to 1.25% of its total subcontract price, the theft is not central to the claims brought in this lien foreclosure action (*see McConnell v Commonwealth Pictures Corp.*, 7 NY2d 465, 471 [1960]). This

argument is unpreserved and, in any event, without merit. CPN pleaded guilty to grand larceny in the second degree, and agreed to make restitution to defendant in an amount not to exceed $348,000 (later reduced to $100,000). Documents in the record show that CPN's principal admitted that CPN over-billed defendant "at the behest of" defendant's contract manager, whose own lien foreclosure action was dismissed because of its participation in "a complex kickback scheme involving the over-billing of project subcontractors" (*see G Bldrs. IV LLC v Madison Park Owner, LLC*, 101 AD3d 413, 414 [1st Dept 2012]). Moreover, CPN engaged in this over-billing practice during the two years in which it worked on the renovation project. CPN's illegality in the performance of its contract was not, as plaintiffs argue, a

"minor wrongdoing" but was "central to or a dominant part of [its] whole course of conduct in performance of the contract" (*McConnell*, 7 NY2d at 471).

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

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

ENTERED: SEPTEMBER 30, 2014

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Manzanet-Daniels, Clark, JJ.

13049 The People of the State of New York, Ind. 1711/12
Respondent,

-against-

Ervin Bowens,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered December 11, 2012, convicting defendant, after a jury trial, of attempted robbery in the second degree, and sentencing him, as a second violent felony offender, to a term of seven years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. Defendant's accessorial liability could be reasonably inferred from the entire course of conduct of defendant and his codefendant before, during and after the crime, along with defendant's damaging

admissions (*see generally Matter of Juan J.*, 81 NY2d 739 [1992]; *People v Allah*, 71 NY2d 830 [1988]).

The sentencing court properly adjudicated defendant a second violent felony offender. Not only was defendant's predicate felony (Penal Law § 110.00/265.02[4]) classified as a violent felony at the time of that conviction in 2003 (*see People v Walker*, 81 NY2d 661, 664-666 [1993]), the same crime remained a violent felony at the time of defendant's second violent felony offender adjudication, albeit as the result of a recodification (*see* Penal Law § 265.03[3]; William C. Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law § 265.00 at 413). Defendant's ex post facto argument is without merit.

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

ENTERED: SEPTEMBER 30, 2014

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Manzanet-Daniels, Clark, JJ.

13050 Robert V.C.,
Petitioner-Appellant,

-against-

Polly V.H.,
Respondent-Respondent.

_____

Carol L. Kahn, New York, for appellant.

Bruce A. Young, New York, for respondent.

_____

Order, Family Court, Bronx County (Ruben A. Martino, J.), entered on or about April 29, 2013, which, to the extent appealed from as limited by the briefs, denied petitioner father's objections to the Support Magistrate's approval of a Qualified Domestic Relations Order (QDRO), unanimously affirmed, without costs.

Petitioner father has been litigating this matter for 19 years. Pursuant to Family Court Act § 439(e), he made a specific objection regarding service of the QDRO (*see Matter of Renee XX. v John ZZ.*, 51 AD3d 1090, 1092 [3d Dept 2008]). However, his objection is unavailing. The Support Magistrate did not err in mailing the father's copy of the QDRO to the attorney who represented him on the support violation matter. The record indicates that the two matters were consolidated and that the

same attorney represented the father on both matters.

There is no basis for reassigning this case to a different judge or court (*cf. Matter of Tequan R.*, 43 AD3d 673, 679 [1st Dept 2007]).

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

ENTERED: SEPTEMBER 30, 2014

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Manzanet-Daniels, Clark, JJ.

13051 The People of the State of New York, Ind. 666/12
Respondent,

-against-

Ernest Gay,
Defendant-Appellant.

_____

Scott A. Rosenberg, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about November 29, 2012, as amended December 4, 2012, 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 [1st Dept 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.

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

ENTERED: SEPTEMBER 30, 2014

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Manzanet-Daniels, Clark, JJ.

13052 Midwest Goldbuyers, Inc., Index 653947/12
Plaintiff-Appellant,

-against-

Brink's Global Services USA, Inc., etc.,
Defendant-Respondent.

_____

Law Offices of Jordan T. Schiller, New York (Patrick Lucas of counsel), for appellant.

Messner Reeves LLP, New York (Jean-Claude Mazzola of counsel), for respondent.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered June 6, 2013, which, granted defendant's motion to dismiss the first two breach of contract claims, and the negligence claim, unanimously affirmed, without costs.

Plaintiff's claims arising from transactions that occurred more than one year before the filing of the instant suit in New York are time-barred under the one-year contractual limitations period. The IAS court correctly held that plaintiff's prior action in Illinois was not a "prior action" for purposes of the six-month toll in CPLR 205(a) (*Lehman Bros. v Hughes Hubbard & Reed*, 245 AD2d 203, 203 [1st Dept 1997], *affd* 92 NY2d 1014 [1998]). Further, the IAS court properly dismissed the claim for

negligence as to all transactions, as plaintiff failed to allege any breach of duty independent of the parties' contracts (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 551 [1992]).

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

ENTERED: SEPTEMBER 30, 2014

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Manzanet-Daniels, Clark, JJ.

13053 The People of the State of New York, Ind. 5456/10
Respondent,

-against-

Emiliano Carreon,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Edward J. McLaughlin, J.), entered on or about November 21, 2012, which adjudicated defendant a level two sex offender under the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion in declining to grant a downward departure (*see People v Cintron*, 12 NY3d 60, 70 [2009], *cert denied* 558 US 1011 [2009]; *People v Johnson*, 11 NY3d 416, 421 [2008]). Defendant did not demonstrate by a preponderance of the evidence any mitigating factors not already taken into account in the risk assessment instrument that would warrant a downward departure (*see People v Gillotti*, __NY3d__, 2014 NY Slip Op 04117, *11 [2014]). While working as a home

health care attendant for a disabled person, he committed sex offenses against that person's mentally-impaired teenaged sister. We do not find that this defendant's age requires a downward departure to level one, when viewed in light of all the circumstances (*see e.g. People v Harrison*, 74 AD3d 688 [1st Dept 2010], *lv denied* 15 NY3d 711 [2010]).

We have considered and reject defendant's remaining arguments.

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

ENTERED: SEPTEMBER 30, 2014

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Manzanet-Daniels, Clark, JJ.

13054- Index 103573/11
13055 Assos Construction Corp.,
Plaintiff-Respondent-Appellant,

-against-

1141 Realty LLC,
Defendant-Appellant-Respondent.

_____

Ronald Francis, New York, for appellant-respondent.

Kazlow & Kazlow, New York (Stuart L. Sanders of counsel), respondent-appellant.

_____

Judgment, Supreme Court, New York County (Marcy S. Friedman, J.), entered October 7, 2013, after a nonjury trial, awarding plaintiff $258,000 plus prejudgment interest from August 23, 2013, and costs and disbursements, unanimously modified, on the law, to reduce the award to $248,000, plus prejudgment interest calculated from March 28, 2011, and otherwise affirmed, without costs. Appeal from the order, same court and Justice, entered August 23, 2013, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Contrary to defendant project owner's contention, the documents detailing the scope of steel work to be performed by plaintiff subcontractor and setting a price for the work, are valid contracts that are binding on defendant. The documents

were signed by defendant's manager, and a mere misnomer in the name of the corporate entity will not free it from liability under the contract (*see Humble Oil & Ref. Co. v Jaybert Esso Serv. Sta.*, 30 AD2d 952 [1st Dept 1968]; *cf. Skyline Enters. of N.Y. Corp. v Amuram Realty Co.*, 288 AD2d 292 [2d Dept 2001] [misidentification of corporate plaintiff in contract does not preclude plaintiff from enforcing contract]). The contracts are sufficiently definite and evince an obligation on the part of defendant to pay the price stated for the work. This is not inconsistent with the contract between defendant and the general contractor which specifically permitted defendant to contract directly with other contractors.

Defendant's argument that it should be credited for payments it made to plaintiff with moneys from the general contractor's account is unavailing. The trial court's determination that defendant was not authorized by the general contractor to make such payments from the account is not incompatible with the evidence and should not be disturbed (*Horsford v Bacott*, 32 AD3d 310, 312 [1st Dept 2006], *affd* 8 NY3d 874 [2007]). However, plaintiff acknowledges that a $10,000 credit is owed to defendant for work that was not performed.

Plaintiff's argument on its cross appeal, that it is entitled to payment from defendant for change work orders signed by the former president of the general contractor, is unavailing. The trial court's rejection of the explanation offered by plaintiff's principal and the general contractor's former president, that the general contractor's former principal only signed the change work orders to signify that the work had been completed, is not incompatible with the evidence and should not be disturbed (*id.*). Plaintiff is entitled to prejudgment interest from the "earliest ascertainable date the cause of action existed" (CPLR 5001[b]), which, in this case, is the date the complaint was served, March 28, 2011.

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

ENTERED: SEPTEMBER 30, 2014

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Manzanet-Daniels, Clark, JJ.

13056 The People of the State of New York, Ind. 3185N/11
Respondent,

-against-

Morgan Soto,
Defendant-Appellant.

_____

Scott A. Rosenberg, The Legal Aid Society, New York (Bonnie B. Goldburg of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Michael Sonberg, J. at plea and sentencing), rendered on or about April 2, 2012, 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 [1st Dept 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.

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

ENTERED: SEPTEMBER 30, 2014

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Manzanet-Daniels, Clark, JJ.

13057 The People of the State of New York, Ind. 4007/10
Respondent,

-against-

Francisco Rodriguez,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Eric C. Washer of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Ralph Fabrizio, J.), rendered on or about March 21, 2012,

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: SEPTEMBER 30, 2014

CLERK

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

Mazzarelli, J.P., Andrias, Moskowitz, Manzanet-Daniels, Clark, JJ.

13058 Sea Trade Maritime Corporation, Index 602648/02
Plaintiff-Appellant,

-against-

Marsh USA, Inc., etc.,
Defendant-Respondent.

_____

Storch Amini & Munves PC, New York (Steven G. Storch of counsel), for appellant.

Seyfarth Shaw LLP, New York (Jonathan P. Wolfert of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered October 21, 2013, which granted defendant's motion to dismiss the complaint with prejudice, unanimously affirmed, with costs.

While in a port in Sri Lanka in May 1997, plaintiff's ship suffered damage as a result of an alleged terrorist bombing. Plaintiff's insurer paid millions of dollars less than the amount of plaintiff's loss, because plaintiff failed to give the insurer notice that its ship was entering an additional premium area (APA).

In this action, plaintiff claims that the terms of the insurance policy that defendant broker had procured for plaintiff were not those which plaintiff had requested and which defendant

had led plaintiff to believe had been obtained. This action — initially commenced against plaintiff's insurer, its former broker, and defendant — was stayed to permit plaintiff and the insurer to pursue contractually-mandated arbitration (*see Sea Trade Mar. Corp. v Hellenic Mut. War Risks Assn. [Bermuda]*, 7 AD3d 289, 290 [1st Dept 2004], *lv dismissed* 3 NY3d 766 [2004]). The arbitration panel ultimately found that plaintiff, through its agent, Trans-Ocean, was familiar with the insurer's rules, knew or should have known that it was required to declare voyages to APAs in advance or risk losing coverage, and had actual notice that Sri Lanka was an APA. The motion court recognized and enforced the award, and this Court affirmed the motion court's judgment (*see Sea Trade Mar. Corp. v Hellenic Mut. War Risks Assn. [Bermuda] Ltd.*, 79 AD3d 601 [1st Dept 2010], *lv dismissed in part, denied in part* 17 NY3d 783 [2011]).

The findings of the arbitration panel, supported by the written statement of Trans-Ocean's employee, were sufficient to rebut plaintiff's claims against defendant (*see Morgenthow & Latham v Bank of N.Y. Co.*, 305 AD2d 74, 78-80 [1st Dept 2003], *lv denied* 100 NY2d 512 [2003]; *see also Acevedo v Holton*, 239 AD2d 194, 195 [1st Dept 1997]). Indeed, plaintiff's claim that defendant negligently failed to procure the requested coverage

fails because the evidence established that plaintiff was aware of the policy's rules, that it "renewed the policy annually on five successive occasions" despite such knowledge (7 AD3d at 290), and that the loss was actually due to Trans-Ocean's inadvertent error in failing to give notice. Further, the motion court properly dismissed plaintiff's negligent misrepresentation cause of action, as the 1996 and 1997 Confirmations of Insurance, provided by defendant to Trans-Ocean, accurately described the insurance policy by expressly stating that notice "shall" be given prior to entering an APA (*see MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 840 [1st Dept 2011], *lv denied* 21 NY3d 853 [2013]).

Plaintiff has offered no evidentiary showing that would support a third amendment to the complaint (*see Lerner v Prince*, 119 AD3d 122, 126 n 1 [1st Dept 2014]).

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

ENTERED: SEPTEMBER 30, 2014

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Manzanet-Daniels, Clark, JJ.

13059 The People of the State of New York, Ind. 4443/11
Respondent,

-against-

Marcellus Johnson,
Defendant-Appellant.

_____

Cardozo Appeals Clinic, New York (Stanley Neustadter of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Patricia Nunez, J.), rendered March 22, 2012, as amended March 29, 2012, convicting defendant, after a jury trial, of robbery in the third degree (two counts), grand larceny in the fourth degree (three counts) and criminal possession of stolen property in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of 3½ to 7 years, unanimously affirmed.

We reject defendant's argument that his convictions on counts relating to his taking of the victim's wallet and phone were against the weight of the evidence with respect to the element of larcenous intent. The evidence supports the conclusion that, at the time of the taking, defendant intended to permanently deprive the victim of those items, even though

defendant then discarded those items, apparently to divert the victim as defendant escaped with the victim's debit card (*see e.g. People v Jacobs*, 52 AD3d 432 [1st Dept 2008], *lv denied* 11 NY3d 833 [2008]).

The court properly admitted portions of telephone calls made by defendant from Rikers Island that were routinely recorded by the Department of Correction. These calls were clearly admissible, notwithstanding that defendant's right to counsel had attached (*see Kuhlmann v Wilson*, 477 US 436, 459 [1986]; *Maine v Moulton*, 474 US 159, 176 [1985]; *see also People v Campney*, 94 NY2d 307 [1999]; *People v Harris*, 57 NY2d 335, 342 [1982], *cert denied* 460 US 1047 [1983]). We have considered and rejected defendant's remaining claims regarding the recorded calls.

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

ENTERED: SEPTEMBER 30, 2014

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Manzanet-Daniels, Clark, JJ.

13060 Terrence Mulligan, Index 301186/10
Plaintiff-Appellant,

-against-

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

_____

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

Zachary W. Carter, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for The City of New York, respondent.

Marjorie E. Bornes, Brooklyn, for American United Transportation, Inc. and Ramon A. Burgos, respondents.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered April 23, 2013, which, to the extent appealed from as limited by the briefs, granted defendants' motions for summary judgment dismissing the complaint based on plaintiff's failure to establish a "permanent consequential" or "significant" limitation of use of his cervical and lumbar spine and right knee within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, the motion denied to the extent plaintiff alleges permanent consequential and significant limitations of use of his cervical and lumbar spine, and otherwise affirmed, without costs.

Defendants made a prima facie showing that plaintiff did not sustain permanent consequential or significant limitations in the subject body parts by submitting the affirmed report of their medical expert, who found no limitations in range of motion upon examination (*see Thomas v City of New York*, 99 AD3d 580, 581 [1st Dept 2012], *lv denied* 22 NY3d 857 [2013]). Plaintiff's refusal to cooperate fully with the examination of his lower back does not undermine the expert's opinion that his back was asymptomatic. Defendants' expert, relying on plaintiff's MRI reports, also opined that the injuries were not causally related to the accident because the MRI report of the right knee revealed preexisting conditions that could cause a meniscal tear, and the MRI reports of the cervical and lumbar spine revealed bulging discs that may exist absent any trauma (*see Vasquez v Almanzar*, 107 AD3d 538, 539 [1st Dept 2013]).

Although plaintiff's orthopedic surgeon opined that the right knee injury was caused by the accident, plaintiff failed to present any evidence of quantified or qualitative limitations in use of his right knee, either before or after surgery to repair the meniscal tear. A tear of the meniscus, standing alone, without any evidence of limitations caused by the tear, is not

sufficient to raise a triable issue of fact (*see Valdez v Benjamin*, 101 AD3d 622, 623 [1st Dept 2012]).

Plaintiff, however, raised triable issues of fact with respect to the alleged injuries to his cervical and lumbar spine. Although plaintiff did not submit a copy of the MRI reports, defendants' expert relied on plaintiff's MRI reports in forming his opinion as to causation, and defendants did not present any evidence to dispute the findings of multiple bulging discs (*see Windham v New York City Tr. Auth.*, 115 AD3d 597, 598 [1st Dept 2014]). Further, the affidavit of plaintiff's chiropractor set forth range-of-motion limitations measured shortly after the accident, averred that limitations continued throughout the course of treatment, and measured limitations 2½ years later. Plaintiff's chiropractor and orthopedic surgeon both opined that the spinal injuries were causally related to the accident; their opinions are entitled to the same weight as defendants' expert's opinion and are sufficient to raise an issue of fact (*see Vaughan v Leon*, 94 AD3d 646, 648 [1st Dept 2012]). Defendants' argument that plaintiff had not explained a gap in his treatment is not properly before us, as it was raised for the first time in their reply affirmations in support of their motions (*see Rosa v Mejia*, 95 AD3d 402, 405 [1st Dept 2012]).

If plaintiff demonstrates that his spine injuries are serious injuries within the meaning of the Insurance Law, he can recover for all injuries proximately caused by the accident, including his knee injury (*Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549-550 [1st Dept 2010]).

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

ENTERED: SEPTEMBER 30, 2014

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Manzanet-Daniels, Clark, JJ.

13061 Fross, Zelnick, Lehrman & Zissu, P.C., Index 106044/11
Plaintiff-Appellant,

-against-

Louise Geer, as Trustee of the
Dille Family Trust,
Defendant-Respondent.

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Law Offices of Bernard D'Orazio & Associates, P.C., New York (Bernard D'Orazio of counsel), for appellant.

Law Office of Bonnie L. Mohr, New York (Bonnie L. Mohr of counsel), for respondent.

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Order, Supreme Court, New York County (Louis B. York, J.), entered May 21, 2013, which, in this action to recover legal fees, denied plaintiff's motion for summary judgment on its account stated claim and for summary judgment dismissing defendant's counterclaims, unanimously modified, on the law, to grant the motion for summary judgment on the account stated claim except as to the amount due under the August 25, 2009 invoice for the period ending July 31, 2009, and for summary judgment dismissing defendant's counterclaims, and otherwise affirmed, without costs.

The Dille Family Trust (the Trust), of which defendant is trustee, owned trademarks and copyrights for "Buck Rogers." Two

of the Dille family members are beneficiaries of the trust; their grandfather's syndicate had obtained the Buck Rogers trademark and copyrights. The syndicate had hired Philip Nowlan to create comic strips based on the character, and his heirs started cancellation proceedings to terminate the syndicate's trademark rights and obtain the rights for themselves. The beneficiaries of the Trust retained plaintiff law firm to handle intellectual property matters, including the cancellation action.

Contrary to the motion court's conclusion, there was a valid fee agreement between plaintiff and the Trust. The better practice would have been to send the engagement letter to the trustee, rather than only to the beneficiaries. However, the record, including email exchanges between the trustee and plaintiff, shows that the trustee was well aware of and approved of the beneficiaries' authority to act on the Trust's behalf with regard to plaintiff's retainer and representation (*see Granato v Granato*, 75 AD3d 434 [1st Dept 2010]). It is irrelevant that the original engagement letter was not signed by the client (*see* 22 NYCRR 1215.1[a]).

Defendant's timely written objection to plaintiff's invoice dated August 25, 2009, for the period ending July 31, 2009, creates triable issues of fact as to the amount due under that

invoice only. Defendant's oral and undocumented objections to the remaining bills do not suffice to create triable issues as to the remaining amount owed (*see Brill & Meisel v Brown*, 113 AD3d 435, 437 [1st Dept 2014]; *see also Darby & Darby v VSI Intl.*, 95 NY2d 308, 315 [2000]). Moreover, the Trust made partial payments to plaintiff throughout plaintiff's representation (*see Levisohn, Lerner, Berger & Langsam v Gottlieb*, 309 AD2d 668 [1st Dept 2003], *lv denied* 1 NY3d 509 [2004]).

Regarding the legal malpractice counterclaim, assuming that plaintiff's conduct, in failing to complete a chain-of-title report or failing to resolve the underlying intellectual property disputes before withdrawing, amounts to negligence, the Trust failed to demonstrate causation. The Trust failed to show how it would have successfully opposed the underlying trademark cancellation proceeding, or would otherwise have protected its intellectual property rights, but for plaintiff's omissions (*see AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428 [2007]; *Leder v Spiegel*, 31 AD3d 266 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied* 552 US 1257 [2008]).

In addition, the resulting inability to efficiently market the trademarks is too speculative to constitute the "actual ascertainable damages" required to support the malpractice

counterclaim (*see e.g. Pellegrino v File*, 291 AD2d 60, 63 [1st Dept 2002], *lv denied* 98 NY2d 606 [2002]).

Beneficiary Flint Dille's bare allegation that he and plaintiff had agreed to a $25,000 fee cap is unsupported in the engagement letter sent to Dille listing an hourly rate or by anything else in the record, and therefore cannot establish a legal malpractice counterclaim.

The breach of contract counterclaim is duplicative of the legal malpractice claim, since it is based on the same factual allegations that underlie the malpractice counterclaim (*see Voutsas v Hochberg*, 103 AD3d 445 [1st Dept 2013], *lv denied* 22 NY3d 853 [2013]).

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

ENTERED: SEPTEMBER 30, 2014

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Manzanet-Daniels, Clark, JJ.

13062 The People of the State of New York, Ind. 3346/99
Respondent,

-against-

Julio Perez,
Defendant-Appellant.

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

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

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Judgment of resentence, Supreme Court, New York County (Lewis Bart Stone, J.), rendered on or about May 5, 2012, resentencing defendant to an aggregate term of 25 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]).

We perceive no basis for reducing the term of postrelease supervision.

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

ENTERED: SEPTEMBER 30, 2014

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Manzanet-Daniels, Clark, JJ.

13063 In re Russell F.,
Petitioner-Appellant,

-against-

Brandon Jay F.,
Respondent-Respondent.

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Leslie S. Lowenstein, Woodmere, for appellant.

Newman & Denney P.C., New York (Briana Denney of counsel), for respondent.

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Order, Family Court, New York County (Jane Pearl, J.), entered on or about August 9, 2013, which, after a fact-finding hearing in a proceeding brought pursuant to article 8 of the Family Court Act, dismissed the petition for an order of protection, unanimously affirmed, without costs.

The Family Court properly dismissed the petition, since petitioner failed to establish by a fair preponderance of the evidence that respondent, his brother, had committed any acts warranting an order of protection in petitioner's favor (*see Matter of Everett C. v Oneida P.*, 61 AD3d 489 [1st Dept 2009]).

No basis exists to disturb the Family Court's findings that respondent and his wife were more credible witnesses than petitioner (*id.*).

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

ENTERED: SEPTEMBER 30, 2014

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Manzanet-Daniels, Clark, JJ.

13064 Robert A. Cole, Index 107396/09
Plaintiff-Respondent,

-against-

Sears, Roebuck & Company,
Defendant-Appellant.

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Jackson Lewis P.C., White Plains (Joseph A. Saccomanao, Jr. of counsel), for appellant.

Dupée & Monroe, P.C., Goshen (James E. Monroe of counsel), for respondent.

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Order, Supreme Court, New York County (Debra A. James, J.), entered July 3, 2013, which, insofar as appealed from, denied defendant's motion for summary judgment dismissing the causes of action for discrimination (hostile work environment) and retaliation under the New York State Human Rights Law, unanimously affirmed, with costs.

Viewed in the light most favorable to plaintiff (*see Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931 [2007]), the evidence shows that, from the very inception of his employment with defendant as an auto center manager, plaintiff was subjected to a constant bombardment of anti-gay remarks and other communications, which included insulting and offensive remarks about other Sears employees who were thought to be gay; crude

anti-gay humor and graphic sexual images disseminated by text and email; and anti-gay hate speech made repeatedly and openly by an operations manager in the presence of plaintiff and others. The anti-gay harassment worsened after plaintiff made his first formal complaint about it in March 2007. Among other things, the operations manager was promoted to acting general manager and continued to make offensive anti-gay remarks, and plaintiff received multiple offensive emails from an email address created for the apparent purpose of harassing him, which he testified were sent by a manager in another Sears store. Given this evidence, issues of fact exist whether plaintiff was subjected to harassment sufficiently severe and pervasive to alter the terms and conditions of his employment (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 310 [2004]).

Issues of fact also exist whether the harassment was directed toward plaintiff based on his membership in a category protected by the statute (Executive Law § 296[1][a]; *see Forrest*, 3 NY3d at 307). There is evidence that Sears management was aware of plaintiff's sexual orientation by February 2007; certainly by March 2007, when plaintiff made a formal written complaint about the anti-gay harassment, the managers responsible for addressing his complaints were aware of it.

The record further shows that there are issues of fact as to whether defendant's response to plaintiff's complaints of widespread anti-gay harassment was reasonable under the circumstances, and whether, through a lack of effective action, defendant condoned or acquiesced in the hostile work environment (*see Polidori v Societe Generale Groupe*, 39 AD3d 404 [1st Dept 2007]).

As defendant tacitly concedes, plaintiff established with respect to his retaliation claim that he engaged in protected activity (he complained about the hostile work environment), that defendant was aware of this activity, and that plaintiff suffered an adverse employment action (termination) based on his activity (*see* Executive Law § 296[7]; *Forrest*, 3 NY3d at 312-313). Contrary to defendant's contention, plaintiff raised an issue of fact as to the causal connection between the protected activity and the adverse action. Moreover, less than two months passed between plaintiff's last formal complaint on June 26 and his termination on August 23, 2007 (*see Cifra v General Elec. Co.*, 252 F3d 205, 217 [2d Cir 2001]).

Plaintiff also raised an issue of fact as to defendant's proffered legitimate, nondiscriminatory reason for the termination.

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

ENTERED: SEPTEMBER 30, 2014

CLERK

Tom, J.P., Renwick, Gische, Clark, JJ.

12722-
12723 Matthew Serino, et al.,
Plaintiffs,

-against-

Kenneth Lipper,
Defendant-Appellant,

PricewaterhouseCoopers LLP,
Defendant-Respondent,

Lipper & Company, Inc., et al.,
Defendants.

Index 604396/02

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Morvillo Abramowitz Grand Iason & Anello P.C., New York (Elkan Abramowitz of counsel), for appellant.

Orrick, Herrington & Sutcliffe LLP, New York (J. Peter Coll, Jr. of counsel), for respondent.

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Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 10, 2013, modified, on the law, to reinstate so much of defendant Lipper's cross claims for negligence/malpractice, breach of contract and breach of fiduciary duty as seek the recovery of gift taxes, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered April 25, 2013, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Opinion by Gische, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Dianne T. Renwick
Judith J. Gishe
Darcel D. Clark, JJ.

12722-12723
Index 604396/02

_____x

Matthew Serino, et al.,
Plaintiffs,

-against-

Kenneth Lipper,
Defendant-Appellant,

PricewaterhouseCoopers LLP,
Defendant-Respondent,

Lipper & Company, Inc., et al.,
Defendants.

_____x

Defendant Kenneth Lipper appeals from the judgment of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 10, 2013, insofar as appealed from, as limited by the briefs, dismissing all of his cross claims against defendant PricewaterhouseCoopers LLP (PwC), and from the order of the same court and Justice, entered April 25, 2013, which, insofar as appealed from as limited by the briefs, granted PwC's motion for summary judgment dismissing Lipper's cross claims, and denied Lipper's cross motion for partial summary judgment on his fraud claim against PwC.

Morvillo Abramowitz Grand Iason & Anello P.C., New York (Elkan Abramowitz, Benjamin S. Fischer and Dana M. Delger of counsel), for appellant.

Orrick, Herrington & Sutcliffe LLP, New York (J. Peter Coll, Jr., Steven J. Fink and Kristen R. Fournier of counsel), for respondent.

GISCHE, J.

In this complex, multi-party litigation, extending over a period of 12 years, the only issues awaiting final adjudication are defendant Kenneth Lipper's (Lipper) cross claims against codefendant PricewaterhouseCoopers LLP (PwC), sounding in fraud, negligence/malpractice, breach of contract, breach of fiduciary duty,[1] and negligent misrepresentation.[2] The motion court granted PwC's motion for summary judgment dismissing all of the cross claims and denied Lipper's cross motion for partial summary judgment on the fraud claim. We modify the judgment to reinstate the cross claims only to the extent indicated herein, and otherwise affirm the motion court's dismissal of the cross claims and denial of Lipper's motion for partial summary judgment on his cross claim for fraud.

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[1]PwC asserts that the claim for breach of fiduciary duty was dismissed by the court on the earlier motion to dismiss and that that determination was never appealed. The decision on that prior appeal however speaks to the reinstatement of all of Lipper non-contribution cross claims, which would include breach of fiduciary duty (*Serino v Lipper*, 47 AD3d 70, 79 [1st Dept 2007], *lv dismissed* 10 NY3d 930 [2008]).

[2]The cross claims also originally included a claim for contribution. The motion court dismissed all of Lipper's cross claims, which necessarily included the contribution claim. The parties do not address this cross claim on appeal. We find that the motion court's dismissal of the contribution cross claim is a final and binding adjudication against Lipper disposing of that cross claim.

The underlying case was originally commenced as a putative class action by former investors in the hedge funds operated by all defendants except PwC. Lipper & Company, Inc. (Lipper, Inc.),[3] an asset investment vehicle founded by Kenneth Lipper, formed hedge funds that invested in convertible securities. Lipper, through his various business entities, remained integrally involved in the operation and ownership of the funds, and his personal wealth was tied to them. Edward Strafaci, along with Abraham Biderman, was responsible for the day to day operation of the funds under Lipper's supervision. Strafaci, who was ultimately responsible for assigning values to the securities held by the funds, committed criminal securities fraud by grossly inflating their value (*see Serino v Lipper*, 47 AD3d 70, 73 n 2 [1st Dept 2007] *lv dismissed* 10 NY3d 930 [2008] [*Serino I*]). Strafaci's overvaluation of the underlying securities ultimately led to the funds' collapse.

In 1989 Lipper, on behalf of the funds, hired PwC to audit the annual financial statements, which included testing the value of the securities portfolios. Annual audits were conducted through 2000, in which 66.1% to 74% of the portfolio of

[3]The order appealed from dismissed all cross claims asserted both by Kenneth Lipper individually and Lipper, Inc. However, the brief is filed only on behalf of Lipper and expressly states that Lipper, Inc. is not perfecting its appeal.

convertible securities were valued by PwC.[4] Even though PwC's prices and Strafaci's prices for the securities differed up to 13.5% during the audit periods, each year PwC issued an unqualified audit opinion. Lipper, acting as part of the funds' management, represented to investors that the financial statements were fairly presented according to Generally Accepted Accounting Principles (GAAP). Lipper nonetheless claims that he did not know that PwC's findings of value were actually below that which Strafaci had stated. On January 14, 2002, Strafaci and Michael Visovsky (who was in charge of research for the funds), abruptly resigned their employment, triggering an internal investigation of the funds. The investigation revealed that Strafaci had failed to value the securities at market value, as he was required to do under the operative partnership agreement. Lipper claims that as a result of the investigation he learned for the first time that the funds' portfolio had been overvalued anywhere from $137 to $345 million. While the issue about when Lipper knew or should have known that the value of the funds had been overstated is disputed, that factual issue cannot be resolved on this motion (*see DDJ Mgt., LLC v Rhone Group LLC*, 15 NY3d 147, 155 [2010]). It is undisputed, however, that after

[4]The underlying action only concerns the audits beginning 1996 through 2000.

the internal investigation was completed, the securities were immediately marked down in value, leading many limited partners to withdraw their investments (see *Williamson v PricewaterhouseCoopers LLC*, 9 NY3d 1 [2007]). By March 2002, the Lipper entities and the funds announced that they would be dissolving.[5]

In addition to preparing audits for the funds, PwC also prepared Lipper's personal tax returns and balance sheets and provided him with personal financial advice. Lipper claims he personally paid PwC for the services it provided to him individually. He also claims that the personal documents prepared by PwC ascribe substantial values to his holdings, which were not true and known by PwC not to be true, because PwC had audited the value of the underlying securities. Lipper maintains that had he known that the values were overstated at an earlier point in time, he would have acted to stem the losses that ensued. He also claims he relied on these valuations in making personal financial decisions. In particular, under the terms of a divorce settlement with his ex-wife, Lipper had the option of

[5]Lipper commenced a liquidation proceeding in the New York County Supreme Court (Index No. 603653/2002). Richard Williamson was appointed as Successor Liquidating Trustee and that matter has been resolved, including the claims made by the funds directly against PwC.

gifting a certain portion of his holdings to his daughters. He claims that based upon PwC's implicit confirmation of the value of his personal holdings, he elected to make the gift, which required that he pay over $6 million in gift tax.

Lipper seeks three categories of damages in connection with his cross claims. He seeks the lost value of his share of the Lipper entities, lost earnings that he attributes to his damaged reputation in the financial investment community and $6 million reflecting the gift tax payment he made on the inflated value of his holdings.

A central issue in this appeal is whether all of Lipper's cross claims are barred, as a matter of law, because they are actually derivative claims, belonging only to the funds.

We reject at the outset Lipper's argument that footnote 8 in our prior decision in this case [*Serino I*] (47 AD3d at 77) binds us to deny summary judgment dismissing the crossclaims at this time. *Serino I* was an appeal from a motion to dismiss the complaint and the footnote addressed different issues from those now raised. On this appeal, we view Lipper's claims according to a summary judgment legal standard and on a more fully developed record. *Serino I* provides no impediment to our reaching the

merits of the issues presently before us *(see Friedman v Connecticut Gen. Life Ins. Co.*, 30 AD3d 349 [1st Dept 2006] *mod on other grounds* 9 NY3d 105 [2007]).

It is black letter law that a stockholder has no individual cause of action against a person or entity that has injured the corporation. This is true notwithstanding that the wrongful acts may have diminished the value of the shares of the corporation, or that the shareholder incurs personal liability in an effort to maintain the solvency of the corporation (*Citibank v Plapinger*, 66 NY2d 90, 93 n [1985]; *Niles v New York Cent. & Hudson Riv. R.R. Co.*, 176 NY 119 [1903]), or that the wrongdoer may ultimately share in the recovery in a derivative action if the wrongdoer owns shares in the corporation (*Glenn v Hoteltron Sys., Inc.*, 74 NY2d 386 [1989]). An exception exists, however, where the wrongdoer has breached a duty owed directly to the shareholder which is independent of any duty owing to the corporation (*Abrams v Donati*, 66 NY2d 951 [1985]; *General Rubber Co. v Benedict*, 215 NY 18 [1915]). This is a narrow exception, and Lipper's cross claim must be factually supportable by more than complaints that conflate his derivative and individual rights (*Abrams,* 66 NY2d at 953-954). In addition, Lipper may not obtain a recovery that

otherwise duplicates or belongs to the corporation (*Herbert H. Post & Co. v Sidney Bitterman, Inc.*, 219 AD2d 214, 225 [1st Dept 1996]).

Recognizing the difficulty in determining whether a claim is direct or derivative in the recent case of *Yudell v Gilbert* (99 AD3d 108 1st Dept [2012]), this court adopted the test developed by the Supreme Court of Delaware in *Tooley v Donaldson, Lufkin & Jenrette, Inc.* (845 A2d 1031, 1039 [Del 2004]) as a common sense approach to resolving such issues. We held that the Delaware test is consistent with existing New York State law. In order to distinguish a derivative claim from a direct one, the court considers "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders individually)" (*Yudell*, 99 AD3d at 114, quoting *Tooley*, 845 A2d at 1033). If there is any harm caused to the individual, as opposed to the corporation, then the individual may proceed with a direct action (*Gjuraj v Uplift Elev. Corp.*, 110 AD3d 540 [1st Dept 2013]). On the other hand, even where an individual harm is claimed, if it is confused with or embedded in the harm to the corporation, it cannot separately stand (*Abrams*, at 953-954 [conspiracy to terminate employment of corporation's president mixed with claim for diversion of corporate assets was

properly dismissed as a derivative action]; *Yudell*, at 115 [the plaintiff's direct claims, embedded in claims for partnership waste and mismanagement, were properly dismissed as derivative claims]; *Hahn v Stewart*, 5 AD3d 285 [1st Dept 2004] [claims that the corporation's damaged reputation diminished the value of former corporate shareholder's shares dismissed on the grounds that such allegations plead a wrong to the corporation only, for which a shareholder can only sue derivatively]).

Lipper paid for and obtained personal services from PwC, which he argues supports an independent duty owed to him by PwC. Lipper claims that PwC's services were deficient because PwC accepted values of his personal wealth, notwithstanding that PwC knew those values were incorrect because it had audited the underlying assets. Under *Yudell*, Lipper's factual predicate will not support an independent duty exception, unless the harm suffered and the relief sought belongs to him individually.

Applying the *Yudell* test, it is clear that Lipper's claim for damages based on the lost value of his holdings is derivative. The lost value of an investment in a corporation is quintessentially a derivative claim by a shareholder (*O'Neill v Warburg, Pincus & Company*, 39 AD3d 281 [1st Dept 2007]; *Hahn* at 285-286). In this respect, Lipper's damages are no different from losses suffered by any other investor in the funds and the

claims are supported by the same proof. The motion court correctly held that this aspect of relief sought by Lipper is not viable, as a matter of law.

We also hold that Lipper's claim for lost earning capacity is barred because it is inextricably embedded in the derivative claim. While certainly the funds would have no right to recover for injury to Lipper's reputation in the financial community, it is the scandal that befell the funds as a result of the overvaluation and perceived mismanagement that could have negatively impacted Lipper's reputation. Lipper's argument, that had PwC informed him about the overvaluation at an earlier time he could have stemmed the damage, demonstrates this point. Lipper's ability to have done damage control derives from his right to participate in management of the funds, not as a result of simply being an investor. In *Hahn v Stewart*, we held that the damage to the reputation of the corporate chairman and chief executive officer resulting from an insider trading scandal was likewise part of a derivative claim that should be dismissed (*id.* at 285-286). Lipper's claims based on the damage to his reputation in the financial industry are indistinguishable from the embedded claims in *Hahn*.

Lipper's claim regarding the gift taxes he paid, however, is an independent claim deriving from an independent duty, which

survives the *Yudell* test. Nor is this claim dismissible as an embedded claim. Based upon PwC's individual financial services and advice, Lipper maintains he took actions regarding his personal holdings that were adverse to him because the taxes he paid were based upon inflated and incorrect values. We disagree with the trial court's conclusion that Lipper's cross claim for gift taxes against PwC is per se barred because Lipper failed to seek a refund from the IRS. *United States v Dalm* (494 US 596 [1990]), relied upon by the motion court, pertains to taxpayer refund actions brought against the United States. It is not a limitation on damages in an action between private parties (*see e.g. Fielding v Kupferberg*, 65 AD3d 437 [1st Dept 2009]). We also disagree that the doctrine of in pari delicto, as a matter of law, bars Lipper's individual claims. It is well established that the court will not intercede to resolve a dispute between two wrongdoers, and that principles of agency law create a presumption that the wrongdoing of an agent can be imputed to the principal (*Kirschner v KPMG LLP*, 15 NY3d 446 [2010]). At bar, however, Strafaci was the agent of the funds. While an agency relationship may exist among Strafaci and some of the Lipper entities, it is less clear whether Strafaci was an agent for Kenneth Lipper, individually (*see Weinberg v Mendelow*, 113 AD3d 485 [1st Dept 2014]).

Nonetheless, we find that recoupment of taxes paid violates New York's out-of-pocket damages rule applicable to both the fraud and negligent misrepresentation cross claims Lipper has asserted (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413 (423 [1996]).[6] Pursuant to the New York rule, recovery is denied where it leaves the claimant in a better position than the claimant would have been in the absence of wrongdoing (*Gaslow v KPMG LLP*, 19 AD3d 264 [1st Dept 2005] *lv dismissed* 5 NY3d 849 [2005]). Lipper contends that he would not have made the gifts to his daughters if he had known the true value of his holdings. The payment of taxes was a consequence of making that gift. The relief he seeks would put him in a better financial position than had the claimed wrongdoing not occurred because it would, in effect, allow him to pass wealth on to his children without any tax impact.

Although the out-of-pocket damages rule bars the recovery of gift taxes paid in connection with Lipper's cross claims for fraud and negligent misrepresentation, it does not bar recovery

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[6]The out-of-pocket damages rule would also prohibit the recoupment of lost earning ability for fraud and negligent misrepresentation (*Rather v CBS Corp*, 68 AD3d 49 [1st Dept 2009] *lv denied* 13 NY3d 715 [2010]). Because we are holding that all cross claims for lost earning capacity are dismissed, we express this as an independent and separate basis for dismissing these cross claims.

of such damages in connection with his cross claims for negligence/malpractice, breach of contract or breach of fiduciary duty (*Fielding v Kupferman*, 65 AD3d 437 [1st Dept 2009]). In accordance with this decision, therefore, Lipper's cross claims against PwC are only reinstated to the extent that he can seek recovery of the gift taxes he paid on the cross claims sounding in negligence/malpractice, breach of contract and breach of fiduciary duty.

Having affirmed the motion court's dismissal of Lipper's fraud cross claim in total, we further affirm the motion court's denial of Lipper's cross motion for partial summary judgment on his fraud cross claim.

Because the issues decided by this Court fully dispose of the matter, we do not reach any of the other arguments raised by the parties.

Accordingly, the judgment of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 10, 2013, insofar as appealed from as limited by the briefs, dismissing all cross claims of defendant Kenneth Lipper against defendant PricewaterhouseCoopers LLP, should be modified, on the law, to reinstate so much of Lipper's cross claims for negligence/malpractice, breach of contract and breach of fiduciary duty the recovery of gift taxes paid as seek recovery

of gift taxes paid, and otherwise affirmed, without costs. The appeal from the order of the same court and Justice, entered April 25, 2013, which, insofar as appealed from as limited by the briefs, granted PwC's motion for summary judgment dismissing Kenneth Lipper's cross claims and denied his cross motion for partial summary judgment on his fraud claim against PwC, should be dismissed, without costs, as subsumed in the appeal from the judgment.

All concur.

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

ENTERED: SEPTEMBER 30, 2014

CLERK