SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 6, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Manzanet-Daniels, Mazzarelli, Gische, Kahn, JJ.

3780-
3781 The People of the State of New York, Ind. 2948/08
2922/11
Respondent,

-against-

Doran Allen,
Defendant-Appellant.

- - - - -

The People of the State of New York,
Respondent,

-against-

Bevon Burgan,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Susan H. Salomon of counsel), for Doran Allen, appellant.

Doran Allen, appellant pro se.

Andrea G. Hirsch, New York, for Bevon Burgan, appellant.

Darcel D. Clark, District Attorney, Bronx (Justin J. Braun of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Peter J. Benitez and Efrain Alvarado, JJ. at grand jury-related applications; Ralph Fabrizio, J. at jury trial and sentencing), rendered January 10, 2014, convicting defendant Allen of manslaughter in the first

degree, and sentencing him to a term of 25 years, reversed, on the law, and the matter remanded for a new trial. Judgment (same court and Justices), rendered January 17, 2014, convicting defendant Burgan of manslaughter in the first degree, and sentencing him to a term of 20 years, unanimously affirmed.

Both verdicts were supported by legally sufficient evidence, and were not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Initially, we find no basis for disturbing the jury's credibility determinations, and we find that the accomplice corroboration requirement set forth in CPL 60.22(1) was amply satisfied. The evidence, viewed in totality, supports the conclusion that both defendants intentionally aided the commission of the homicide and shared a community of purpose with the persons who actually shot the victim (*see generally* Penal Law § 20.00; *People v Scott*, 25 NY3d 1107 [2015]). In addition to evidence about events leading up to the incident, there was testimony that immediately before the homicide, there was a conversation among the participants in which one of the gunmen specifically referred to a plan to "hit" or "kill" the victim and other persons who might be accompanying him. The evidence also demonstrated that Burgan intentionally participated in the crime by remaining nearby with a drawn, loaded pistol, even though others did all the firing, and that

Allen intentionally participated by acting as a driver and by pointing out the victim.

The People re-presented, or commenced a re-presentation, of defendants' cases to the grand jury without first obtaining leave from the court, in violation of CPL 190.75(3) (*see People v Credle*, 17 NY3d 556 [2011]*; People v Wilkins*, 68 NY2d 269, 274-276 [1986]).

As to Burgan, the defect was cured when, although the re-presentation was in progress, the People sought and obtained leave, at a time when the safeguards of CPL 190.75(3) could still be implemented, and Burgan was not prejudiced (*see Wilkins* at 277).

The circumstances are different as to Allen, since the presence of the unlawful murder charge "loomed" over the trial and influenced the verdict (*see People v Mayo*, 48 NY2d 245, 251 [1979]). We accordingly reverse Allen's conviction and remand for a new trial on the manslaughter count.

The murder charge lacked jurisdictional legitimacy *(see People v McCoy*, 109 AD3d 708 [1st Dept 2013]), violating Allen's constitutional right to be tried for a felony only upon a valid indictment (*see People v Hansen*, 95 NY2d 227, 231 [2000]). While the trial for murder did not violate double jeopardy, it cannot be doubted that the presence of the charge "impugn[ed] the very

integrity of the criminal proceeding" (*Mayo*, 48 NY2d at 252). There is nothing to suggest that *Mayo* is limited to double jeopardy cases in the manner suggested by the dissent; indeed, the *Mayo* court recognized that errors of "constitutional magnitude . . . are so fundamental that their commission serves to invalidate the entire trial," and are not susceptible to a traditional spillover analysis, which has its "most convincing application in the area of trial errors concerning the admissibility of evidence" (*id*. at 252).

The dissent maintains that the right to an indictment by a grand jury is not a right "so basic to a fair trial that their infraction can never be treated as harmless error" (internal quotation marks omitted). However, the New York State constitution holds that no person shall be held to answer for an infamous crime unless upon indictment of the grand jury (NY Const, art 1, § 6), and the right to indictment by grand jury has been recognized "as not merely a personal privilege of the defendant but a public fundamental right which is the basis of jurisdiction to try and punish an individual" (*People v Boston*, 75 NY2d 585, 587 [1990] [internal quotation marks omitted]).

Although defendant Allen was ultimately acquitted of the murder charge, the charge's presence loomed over the trial, and in some way influenced the verdict. Rather than continuing to

deliberate concerning Allen's innocence – including evidence suggesting that he was surprised by the shooting, and may have intended that the victim receive no more than a "clipping" – the jury may have concluded that it had sufficiently grappled with the proof by acquitting him of the most serious charge.

In *Mayo*, the Court held that a retrial was necessary even though the unlawful charge had been dismissed prior to the jury retiring to deliberate. Allen's jury was allowed to deliberate on the illegal charge, increasing the likelihood that its presence influenced the verdict and "induced the jury to find him guilty of the less serious offense" (*id.* at 251).

The People's argument that Allen suffered no constitutional violation because he had previously been indicted by a grand jury for murder ignores the jurisdictional nature of the defect and is nothing more than an attempt to circumvent the *Credle* violation.

Even under the dissent's spillover analysis, it cannot be concluded beyond a reasonable doubt that Allen did not suffer prejudice as a result of the constitutionally infirm charge. Defense counsel's strategy was no doubt affected by the need to

present an effective defense to the more serious charge.

For the reasons stated in the dissent, we reject defendant Burgan's other arguments.

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

KAHN, J. (dissenting in part)

I believe that defendants Doran Allen and Bevan Burgan were properly convicted and sentenced for the reasons that follow. Therefore, I respectfully dissent in part.

For the reasons stated by the majority, I agree that both verdicts were supported by legally sufficient evidence, and were not against the weight of the evidence.

Although the People re-presented, or commenced a re-presentation, of defendants' cases to the grand jury without first obtaining leave from the court, and the circumstances of each of the original presentations made it necessary to obtain such leave (*see* CPL 190.75[3]; *People v Credle*, 17 NY3d 556 [2011]*; People v Wilkins*, 68 NY2d 269, 274-276 [1986]), I conclude that neither defendant is entitled to any remedy. I agree with the majority that as to Burgan, the defect was cured when, although the re-presentation was in progress, the People sought and obtained leave, at a time when the safeguards of CPL 190.75(3) could still be implemented, and Burgan was not prejudiced (*see Wilkens* at 277).

As to Allen, there was no prejudice because the only effect of the improper re-presentation was the addition by virtue of the second indictment of a count of second-degree murder, of which Allen was acquitted. The procedural posture of *People v Mayo* (48

NY2d 245 [1979]), cited by the majority for other purposes and discussed below, is distinguishable, as there, the counts of conviction were judicially-added lesser included counts of the subsequently dismissed sole count of the indictment and had never themselves been voted by a grand jury.

Although the People's failure to obtain court permission to re-present the murder charge to a second grand jury was a jurisdictional error, and the murder charge should have been dismissed (*see People v McCoy,* 109 AD3d 708 [1st Dept 2013]), there is no basis, without resort to speculation, for finding any spillover effect (*see People v Doshi*, 93 NY2d 499, 505 [1999]). In determining whether the error in submitting the murder count to the jury requires reversal of the count of conviction due to spillover effect, the paramount consideration "is whether there is a 'reasonable possibility' that the jury's decision to convict on the tainted counts influenced its guilty verdict on the remaining counts in a 'meaningful way'" (*id.*, quoting *People v Baghai-Kermani*, 84 NY2d 525, 532-533 [1994]). The evaluation must be made on a case by case basis, examining the nature of the error and its potential for prejudicial impact on the overall outcome of the case (*People v Morales,* 20 NY 3d 240, 250 [2012]). Our primary focus here must therefore be on the effect which the prosecution's failure to obtain court permission before

resubmitting the case to a second grand jury might have had on the trial jury's ability to deliberate fairly on the nontainted counts.

In this case, notably, the evidence introduced in support of the murder count pertained to the same criminal transaction and was otherwise entirely admissible in support of the manslaughter count, suggesting an absence of spillover prejudice (*see People v Williams*, 292 AD2d 474, 475 [2d Dept 2002]; *see also People v Bulgin*, 105 AD3d 551, 551 [1st Dept 2013], *lv denied* 21 NY3d 1002 [2013] [tainted count and other counts "stemmed from the same incident"; no spillover error]; *compare People v Morales*, 20 NY3d at 250 [introduction of numerous other alleged assaults, murders and other criminal acts over three year period by other gang members because of presence of tainted terrorism charge held to have prejudiced jury's deliberations]). Additionally, Allen was acquitted of the five remaining counts, regarding the attempted murders of the victims, as well as the three weapons charges, demonstrating that any claims of spillover prejudice are "belied by the fact that the jury actually voted to acquit on five of the remaining counts" (*People v Doshi*, 93 NY2d at 506).

I find no support for Allen's argument that this statutory, procedural violation, albeit one jurisdictional in nature and relating to the state constitutional right to indictment by a

grand jury, created a per se taint irrespective of any spillover effect. The position of Allen and the majority, in reliance upon *People v Mayo*, that the error here – a violation of Criminal Procedure Law § 190.75(3) and *Credle* – warrants preclusion of harmless error analysis and adoption of a finding of per se taint is unsupported in either law or fact. *Mayo* and *Price v Georgia* (398 US 323 [1970]), on which *Mayo* relied, involved violations of the double jeopardy clause, where the defendants were unconstitutionally subjected to a second trial, an "ordeal not to be viewed lightly" (*Price* at 331). Indeed, the Court of Appeals in *Mayo* expressly stated, "[W]e . . .base our holding on the fundamental principles inherent in the double jeopardy clause itself" (*Mayo,* 48 NY2d at 252), *and* explained that "[w]hen a defendant is brought to trial in violation of his rights under the double jeopardy clause of the Fifth Amendment, the very power of the court to try him is implicated" (*id.*), in contrast to violations of other procedural constitutional procedural guarantees (*id.*). The Court further observed that "a trial held in violation of the double jeopardy clause must be deemed to be a nullity having no legal effect ... [and] [a]ny less exacting standard would contravene the clear purpose of the double jeopardy clause. . . ." (*id.* at 252-253). There is no double jeopardy issue present in this case, as defendant concedes.

While observing that "there are some errors of constitutional magnitude that are so fundamental that their commission serves to invalidate the entire trial" (*Mayo*, 48 NY2d at 252), and are not susceptible to harmless error analysis, the *Mayo* Court made clear that not all constitutional errors were to be so treated. It characterized the qualifying errors to be those "constitutional infractions that impugn the very integrity of the criminal proceeding," citing its earlier ruling in *People v Felder* (47 NY2d 287 [1979]), involving the right to counsel, and applying its reasoning to double jeopardy violations. In *Felder*, the Court of Appeals identified such errors, in addition to the denial of the right to counsel, as the denial of the right to a public trial, prosecutorial misconduct, and judicial misconduct, finding them to be "so basic to a fair trial that their infraction can never be treated as harmless error" (*id.* at 296 [internal quotation marks omitted]).

Neither defendant nor the majority advances any authority for including the constitutional right to indictment by a grand jury among these rights. In any case, all of the charges presented to the jury here were included in indictments voted by grand juries. The error in this case was not a constitutional violation, but a statutory one, which did not impugn the integrity of the proceeding. There is, accordingly, no basis for

extending the reach of the per se taint rule of *Mayo* and *Felder* to the present circumstances.

Defendants' ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record, such as matters of strategy (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendants have not made CPL 440.10 motions, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, I find that each defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendants have not shown that their counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived the respective defendants of a fair trial or affected the outcome of the case.

Burgan's claims that the People violated their disclosure obligations under *Brady v Maryland* (373 US 83 [1963]), or presented allegedly false testimony, are based on factual assertions outside the record, and are thus unreviewable on direct appeal (*see e.g. People v Williams*, 43 AD3d 729 [1st Dept 2007], *lv denied* 9 NY3d 1010 [2007]).

The instances of alleged prosecutorial misconduct in the opening and closing statements, cited by Burgan, do not warrant reversal, and I reject Burgan's claim that his sentence was excessive.

Accordingly, I would affirm the judgments of conviction of defendants Allen and Burgan.

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

ENTERED: JULY 6, 2017

CLERK

Tom, J.P., Moskowitz, Gische, Kapnick, JJ.

3563 Jorge D. Santos, Jr., Index 100402/13
Plaintiff-Respondent,

-against-

Shona Traylor-Pagan,
Defendant-Appellant.

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Katz & Associates, Brooklyn (Stephen A. Saltzman of counsel), for appellant.

John C. Lévy, New York, for respondent.

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Order, Supreme Court, New York County (Leticia M. Ramirez, J.), entered February 4, 2016, which, to the extent appealed from as limited by the briefs, denied defendant's motion for summary judgment dismissing the complaint based on plaintiff's inability to demonstrate that he suffered a serious injury within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendant established her entitlement to judgment as a matter of law by submitting the affirmed report of an orthopedist who found normal ranges of motion in the affected body parts i.e., the right elbow and wrist (*see e.g. Torres v Triboro Servs., Inc.*, 83 AD3d 563, 563-564 [1st Dept 2011]). Defendant was not required to submit the report of an expert neurologist as

to plaintiff's claim of carpal tunnel syndrome in his right wrist, since it was not pleaded in the bill of particulars and was raised for the first time in opposition to the motion (*see Boone v Elizabeth Taxi, Inc.*, 120 AD3d 1143, 1144 [1st Dept 2014]). In any event, defendant's orthopedist found normal ranges of motion in plaintiff's right wrist and elbow, no atrophy in the muscles of the hand, and that Phalen's sign was negative (*see Jacobs v Slaght*, 47 AD3d 679 [2d Dept 2008]; *see also Kendig v Kendig*, 115 AD3d 438, 439 [1st Dept 2014]).

Plaintiff failed to raise a triable issue of fact as to whether his carpal tunnel syndrome was causally related to the accident (*Perl v Meher*, 18 NY3d 208, 217-218 [2011]). This Court, in *Rosa v Mejia* (95 AD3d 402, 404 [1st Dept 2012]), opined that the decision in *Perl* did not abrogate the need for at least a qualitative assessment of injuries soon after an accident. This Court then affirmed the dismissal of a plaintiff's case where the plaintiff had presented no admissible proof that she saw any medical provider for any evaluation until 5½ months after her accident (*id.*). Plaintiff here was treated on the date of the accident and released from the emergency room at Westchester Medical Center, where he was diagnosed with a right elbow laceration, which was treated with three sutures. He never had any further medical treatment until he first saw an orthopedist

13½ months after the accident, and then allegedly had a few months of physical therapy, although there are no details of any such therapy in the record. He did not see a neurologist about his carpal tunnel syndrome until almost four years after the accident (*see Camilo v Villa Livery Corp.*, 118 AD3d 586, 587 [1st Dept 2014] [plaintiff's orthopedic surgeon did not examine plaintiff until approximately 15 months after the accident, which was insufficient to raise an issue of fact as to causation]; *Henchy v VAS Express Corp.*, 115 AD3d 478, 479 [1st Dept 2014] [plaintiff did not receive treatment for her left knee until six months after the accident; this failure to provide contemporaneous objective evidence of injury to or limitations in the left knee was fatal to her claims]; *see also Stephanie N. v Davis*, 126 AD3d 502, 502-503 [1st Dept 2015]; *Linton v Gonzales*, 110 AD3d 534, 535 [1st Dept 2013]).

Plaintiff's remaining arguments are unavailing.

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

ENTERED: JULY 6, 2017

CLERK

Tom, J.P., Richter, Manzanet-Daniels, Mazzarelli, Gische, JJ.

4402 The People of the State of New York, Ind. 399/12
Respondent,

-against-

Stephen Bolt,
Defendant-Appellant.

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Rosemary Herbert, Office of the Appellate Defender, New York (Katherine M.A. Pecore of counsel), for appellant.

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

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Judgment, Supreme Court, Bronx County (Denis J. Boyle, J.), rendered February 9, 2015, convicting defendant, after a nonjury trial, of murder in the second degree, and sentencing him a term of 22 years to life, unanimously affirmed.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they generally involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]). Therefore, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. Alternatively, to the extent the record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). At

most, the alleged errors of counsel constitute inartfully phrased remarks that could not have affected the court's verdict or deprived defendant of a fair trial.

Defendant's challenges to testimony by the People's expert forensic psychologist are unpreserved, and we decline to review them in the interest of justice. Even if the People's expert exceeded the foundation necessary for his testimony, there was no reasonable possibility that the court, as the finder of fact, was usurped in its role of independently determining defendant's reliability or whether extreme emotional disturbance was proven (*see People v Pavone*, 26 NY3d 629 [2015]; *People v Diaz*, 15 NY3d 40 [2010]. In any event, we find that any error was harmless in light of the overwhelming evidence of guilt (*People v Crimmins*, 36 NY2d 230 [1975]), particularly since this was a nonjury trial.

We perceive no basis for reducing the sentence.

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

ENTERED: JULY 6, 2017

CLERK

Tom, J.P., Richter, Manzanet-Daniels, Mazzarelli, Gische, JJ.

4404 In re Elisha W-B.,
Petitioner-Respondent,

-against-

Aidan W.,
Respondent-Appellant,

Maeru W.,
Respondent.

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Leslie S. Lowenstein, Woodmere, for appellant.

Loeb & Loeb LLP, New York (P. Gregory Schwed of counsel), attorney for the child.

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Order, Family Court, New York County (Carol Goldstein, J.), entered on or about August 9, 2016, which, inter alia, after a hearing, awarded custody of the subject child to petitioner maternal cousin, unanimously affirmed, without costs.

The court properly found that respondent father's presumptive entitlement to the custody of his son was overcome by petitioner's showing of extraordinary circumstances based upon the facts that the father had never assumed a primary parental role in the child's life, had not obtained adequate housing even though the matter was pending for about one year and had failed to contribute support for his son, and the child was afraid of him (*see Matter of Jessica Marie C. [Anthony H.]*, 118 AD3d 601, 602 [1st Dept 2014]; *Matter of Cockrell v Burke*, 50 AD3d 895 [2d

Dept 2008]).

The court's determination that awarding custody to petitioner was in the child's best interest was supported by the requisite fair preponderance of the evidence. The record shows that she supported the child, gave structure to his life, took care of his medical and educational needs and provided him with a stable and loving home where he was thriving (*see Matter of Joseph S. v Michelle R.F.*, 3 AD3d 446, 447 [1st Dept 2004]).

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

ENTERED: JULY 6, 2017

CLERK

Tom, J.P., Richter, Manzanet-Daniels, Mazzarelli, Gische, JJ.

4405 Metropolitan Commercial Bank, Index 653436/15
Plaintiff-Appellant-Respondent,

-against-

Michael C. Levy, et al.,
Defendants-Respondents-Appellants,

John Does 1-5,
Defendants.

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Emery Celli Brinckerhoff & Abady LLP, New York (Daniel J. Kornstein of counsel), for appellant-respondent.

Kostelanetz & Fink LLP, New York (Claude M. Millman of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered December 23, 2016, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment on the breach of contract claim and to dismiss the counterclaims on the pleadings, and denied defendants' cross motion for partial summary judgment on the breach of contract counterclaim and dismissing the complaint as against defendant Michael C. Levy, unanimously modified, on the law, to grant defendants' cross motion to dismiss the complaint as against Michael C. Levy, and otherwise affirmed, without costs.

Defendant Law Office of Michael C. Levy, LLC (the LLC)

opened an IOLA account with plaintiff and deposited a purported client's cashier's check into the account. Shortly thereafter, the client, through the LLC, directed that the majority of the funds be wired to two international parties. Although plaintiff's business deposit accounts brochure says that a transfer of more than $5,000 out of a new account will be made only after nine business days, the money was wired out of the account before the ninth business day, after plaintiff's employees had verified by telephone with the clearinghouse bank that the check had "cleared." A few days later, it was discovered that the check was fraudulent.

The breach of contract claim should be dismissed as against defendant Michael C. Levy (Levy), because he is not the named customer on the bank account, and there is no basis for holding him liable in the various documents that comprise the application to open the account. The negligence cause of action should also be dismissed as against Levy. Limited Liability Company Law § 1205(a) cannot serve as the basis for individual liability because it makes a member of an LLC liable for negligence in the furnishing of services, i.e. malpractice. Here, however, neither Levy nor the LLC were providing personal services to the bank; they were acting as its customer. Additionally, there are no allegations otherwise supporting a personal claim against Levy

based on piercing the corporate veil (*see Teachers Ins. Annuity Assn. of Am. v Cohen's Fashion Opt. of 485 Lexington Ave., Inc*, 45 AD3d 317 [1st Dept 2007]).

Plaintiff failed to establish its entitlement to summary judgment on the breach of contract claim as against the LLC. *Greenberg, Trager & Herbst, LLP v HSBC Bank USA* (17 NY3d 565 [2011]) does not avail it, since that case involves a negligence claim, rather than a breach of contract claim, under the Uniform Commercial Code. We note that plaintiff has not appealed from the denial of its motion with respect to its negligence claim.

The record presents issues of fact precluding summary judgment on defendants' breach of contract counterclaim. Levy argues that the LLC did not agree to plaintiff's account terms and conditions, and questions of fact exist as to whether defendants waived the nine-day hold period when they directed plaintiff to wire the funds shortly after they were deposited.

Contrary to plaintiff's contention, defendants sufficiently pleaded damages to withstand the motion to dismiss the counterclaims.

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

ENTERED: JULY 6, 2017

CLERK

Tom, J.P., Richter, Manzanet-Daniels, Mazzarelli, Gische, JJ.

4406 CP JBAM Holdings, LLC, Index 651630/16
Plaintiff-Appellant,

-against-

Ira Shapiro, et al.,
Defendants-Respondents.

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Herrick Feinstein LLP, New York (Michael Berengarten and Jared D. Newman of counsel), for appellant.

Allen Miller LLP, New York (Yoram J. Miller of counsel), for respondents.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered February 9, 2017, which, insofar as appealed from as limited by the briefs, granted defendants' motion to dismiss the first cause of action as against defendant Irene Shapiro, and the second and fifth causes of action, unanimously reversed, on the law, and the motion denied.

The "clear and unequivocal meaning" of the contractual language requiring defendant Irene Shapiro to obtain approvals of certain plans is that Shapiro was required merely to seek those approvals (*see Mionis v Bank Julius Baer & Co.*, 301 AD2d 104, 110 [1st Dept 2002]). However, that reading would render meaningless or absurd the contractual terms regarding reduction of payment in

the face of a failure to obtain the approvals (*Ambac Assur. UK Ltd. v J.P. Morgan Inv. Mgt., Inc.*, 88 AD3d 1, 9 [1st Dept 2011]; *see also Mirvish v Mott*, 18 NY3d 510, 520 [2012]). The conflict between the two provisions renders the asset purchase agreement ambiguous, and the motion to dismiss should have been denied (*see Chen v Yan*, 109 AD3d 727 [1st Dept 2013]).

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

ENTERED: JULY 6, 2017

CLERK

Tom, J.P., Richter, Manzanet-Daniels, Mazzarelli, Gische, JJ.

4407 The People of the State of New York, Respondent, Ind. 556/06 6194C/05

-against-

Brian Tuitt, Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Dmitriy Povazhuk of counsel), for respondent.

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Order, Supreme Court, Bronx County (John S. Moore, J.), entered on or about March 13, 2015, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion in following the Board of Examiners of Sex Offenders' strong recommendation for an upward departure based on the seriousness and extent of defendant's repeated sex crimes against children, which were not

adequately accounted for in the risk assessment instrument, and which demonstrated a threat to public safety that outweighed the mitigating factors cited by defendant (*see generally People v Gillotti*, 23 NY3d 841, 861 [2014]).

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

ENTERED: JULY 6, 2017

CLERK

Tom, J.P., Richter, Manzanet-Daniels, Mazzarelli, Gische, JJ.

4408 In re New York State Division of Human Rights, Petitioner, Index 450543/13

-against-

Milan Maintenance, Inc., et al., Respondents.

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Caroline J. Downey, Bronx (Michael K. Swirsky of counsel), for petitioner.

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Determination of petitioner New York State Division of Human Rights (DHR), dated February 28, 2011, granting the complaint for employment discrimination and awarding the complainant $10,000 for mental anguish and humiliation (transferred to this Court by order of Supreme Court, New York County [Joan A. Madden, J.], entered on or about September 26, 2013), unanimously confirmed, without costs.

DHR's findings are supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176 [1978]). Respondents defaulted in this proceeding and thus failed to rebut a prima facie showing that they discriminated against complainant on account of his criminal conviction (*see Matter of State Div. of Human Rights v ARC XVI Inwood, Inc.*, 17 AD3d 239 [1st Dept 2005]).

The award of compensatory damages for mental anguish is

proper (*see* Executive Law § 297[4][c][iii]; *Matter of New York State Div. of Human Rights v Neighborhood Youth & Family Servs.*, 102 AD3d 491 [1st Dept 2013]; *Matter of City of New York v New York State Div. of Human Rights*, 250 AD2d 273, 278 [1st Dept 1998], *mod on other grounds* 93 NY2d 768 [1999]).

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

ENTERED: JULY 6, 2017

CLERK

Tom, J.P., Richter, Manzanet-Daniels, Mazzarelli, Gische, JJ.

4409-
4410 The People of the State of New York,
Respondent,

-against-

Marcus King,
Defendant-Appellant.

Ind. 1979/09

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

Darcel D. Clark, District Attorney, Bronx (Shannon Henderson of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Alvin Yearwood, J. at speedy trial motion; Judith Lieb, J. at jury trial and sentencing), rendered January 11, 2012, as amended October 29, 2015, convicting defendant of criminal possession of a weapon in the second degree (two counts) and assault in the second degree, and sentencing him to an aggregate term of 15 years, unanimously affirmed.

The court properly denied defendant's speedy trial motion. Defendant did not meet his burden of demonstrating that the People's unequivocal statement of readiness, which is "presumed truthful and accurate," was illusory (*People v Brown*, 28 NY3d 392, 405 [2016]; *see also People v Sibblies*, 22 NY3d 1174, 1180 [2014]). The record supports the reasonable inference that, even

if the People intended to strengthen their case by way of DNA evidence, but failed to make a timely motion for DNA testing, they had always been prepared to proceed to trial by relying solely on eyewitness testimony (*see People v Gnesin*, 127 AD3d 652 [1st Dept 2015], *lv denied* 29 NY3d 948 [2017]; *People v Wright*, 50 AD3d 429, 430 [1st Dept 2008], *lv denied* 10 NY3d 966 [2008]).

The trial court providently exercised its discretion in admitting into evidence a photograph of defendant taken about a month prior to the crime to corroborate the witnesses' identification of defendant as the assailant, in that it depicted him wearing his hair in braids (*see* e.*g. People v King*, 276 AD2d 319, 320 [1st Dept 2000], *lv denied* 96 NY2d 736 [2001]). There was nothing in the carefully redacted photograph that prejudiced defendant by suggesting that he had prior interactions with the law. The parties' stipulation satisfied any authentication requirement.

The court also providently exercised its discretion by admitting evidence about the unsuccessful attempts by police to locate defendant, after the shooting, at his place of residence and other areas he was known to frequent. This evidence could be interpreted as supporting a possible inference of consciousness of guilt, and any ambiguity as to whether the evidence warranted

such an inference presented a factual issue for the jury (*see* *People v Yazum*, 13 NY2d 302, 304 [1963]).

We perceive no basis for reducing the sentence.

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

ENTERED: JULY 6, 2017

CLERK

Tom, J.P., Richter, Manzanet-Daniels, Mazzarelli, Gische, JJ.

4411 Frances S. Campbell, Index 157639/12
Plaintiff-Appellant,

-against-

Gregory M. Wendt,
Defendant-Respondent.

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Willkie Farr & Gallagher LLP, New York (Roger D. Netzer of counsel), for appellant.

Adams & Kaplan, Yonkers (Joan A. Reyes of counsel), for respondent.

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Order, Supreme Court, New York County (Leticia M. Ramirez, J.), entered on or about May 18, 2016, which, to the extent appealed from, granted defendant's motion for summary judgment dismissing the complaint based on plaintiff's inability to establish a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendant met his prima facie burden of showing that plaintiff's claims of pain and headaches did not constitute a serious injury causally related to the 2009 motor vehicle accident. Plaintiff's treating physician's unaffirmed opinion that the accident exacerbated the chronic conditions was insufficient.

To the extent plaintiff's claimed new injury of occipital headaches could constitute a serious injury within the meaning of

Insurance Law § 5102(d), plaintiff failed to provide any evidence of such injuries. Nor did her physician compare plaintiff's measured range of motion in her cervical and lumbar spines to a preaccident standard, and thus any claimed deficits "could not be properly assessed to see whether they are significant" (*Mirdita v Ash Leasing Inc.*, 101 AD3d 480, 480 [1st Dept 2012]).

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

ENTERED: JULY 6, 2017

CLERK

Tom, J.P., Richter, Manzanet-Daniels, Mazzarelli, Gische, JJ.

4412 In re Michael Evan W.,
Petitioner-Respondent,

-against-

Pamela Lyn B.,
Respondent-Appellant.

_____

Elliott Scheinberg, New City, for appellant.

Law Office of Roland R. Acevedo, New York (Rolando R. Acevedo of counsel), for respondent.

Jo Ann Douglas Family Law, PLLC, New York (Jo Ann Douglas of counsel), attorney for the child.

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Order, Family Court, New York County (Monica Shulman, Referee), entered on or about December 3, 2015, which, to the extent appealed from as limited by the briefs, after a hearing, issued an order of protection against the mother in favor of the child, and denied the mother supervised visitation with the child, unanimously affirmed, without costs.

"The determination as to whether or not a court should award visitation to a noncustodial parent lies within the sound discretion of the trial court, and must be based upon the best interests of the child" (*see Matter of Ronald C. v Sherry B.*, 144 AD3d 545, 546 [1st Dept 2016], *lv dismissed* 29 NY3d 964 [2017]). "Generally, a child's best interest lies in being nurtured by both parents and a noncustodial parent should have reasonable

rights of visitation unless there is substantial evidence that visitation would be detrimental to the welfare of the child" (*id.* [internal citation omitted]). "Thus, there is a rebuttable presumption that visitation by a noncustodial parent is in the child's best interest and should be denied only in exceptional circumstances" (*id.*).

Here, the Family Court's determination that visitation would be detrimental to the child has a sound and substantial basis in the record (*see Matter of Marrero v Johnson*, 89 AD3d 596, 597 [1st Dept 2011]). The father presented substantial evidence at the hearing that the mother masterminded a plot to murder him in order to gain control of the proceeds of the father's $1,500,000 life insurance policy, for which she was named the irrevocable trustee. Surveillance photos revealed the mother and her cousin buying a sledgehammer at Home Depot the day before the cousin attacked the husband with the same sledgehammer. The father also presented phone records showing that the mother and her cousin were in communication on the day of the attack, and a hand-drawn map found with the cousin at his arrest, which depicted points of entry and egress in the father's building, was determined to be written in the mother's handwriting. In addition, the knife recovered from the scene came from the mother's apartment.

Beyond the evidence related to the attack on the father,

testimony demonstrated that the mother sought to alienate the child from the father, falsely claiming that the father was trying to put her in jail, and pressing the child for personal details about the father's life, which also supported the denial of visitation (*see Susan G.B v Yehiel B.H.*, 216 AD2d 58, 58-59 [1st Dept 1995]). Moreover, the mother invoked her Fifth Amendment right not to testify, and did not call any other witnesses, depriving the Family Court of any basis to grant her visitation. Thus, in view of the record, we find no reason to disturb the Family Court's determination (*see Marrero*, 89 AD3d at 597).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: JULY 6, 2017

CLERK

Tom, J.P., Richter, Manzanet-Daniels, Mazzarelli, Gische, JJ.

4415- Ind. 8116/98
4416 The People of the State of New York,
Appellant,

-against-

Curtis Munford,
Defendant-Respondent.

_____

Cyrus R. Vance, Jr., District Attorney, New York (Jessica Olive of counsel), for appellant.

Rosemary Herbert, Office of the Appellate Defender, New York (Matthew A. Wasserman of counsel), for respondent.

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Order, Supreme Court, New York County (Charles H. Solomon, J.), entered on or about November 24, 2015, which granted defendant's CPL 440.10 motion to vacate as April 13, 1999 judgment of conviction, unanimously reversed, on the law, the motion denied, and the conviction reinstated. Appeal from order, same court (Neil E. Ross, J.), entered on or about April 12, 2016, which, upon reargument, adhered to the November 24, 2015 determination, unanimously dismissed, as academic.

The court granted the motion on the ground that the automatic vacatur rule of *People v Catu* (4 NY3d 242 [2005]) applies retroactively. The Court of Appeals has subsequently rejected that proposition (*People v Smith*, 28 NY3d 191 [2016]).

Any allegations of prejudice raised by defendant in his pro se submission to the motion court were insufficient to warrant a hearing.

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

ENTERED: JULY 6, 2017

CLERK

Tom, J.P., Richter, Manzanet-Daniels, Mazzarelli, Gische, JJ.

4417 Willi F. Santos, et al., Index 301917/13
Plaintiffs,

Candida Garcia Mota,
Plaintiff-Respondent,

-against-

Benjamin A. Manga, et al.,
Defendants-Appellants.

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Marjorie E. Bornes, Brooklyn, for appellants.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered May 12, 2016, which, to the extent appealed from as limited by the brief, denied defendants' motion for summary judgment dismissing plaintiff Candida Garcia Mota's claims of serious injuries in the "permanent consequential" and "significant" limitation of use categories of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, the motion granted, and plaintiff Mota's claims dismissed in their entirety. The Clerk is directed to enter judgment accordingly.

Defendants made a prima facie showing that the 71-year-old plaintiff had preexisting degenerative conditions in her right shoulder, lumbar spine and cervical spine, which were reflected in her own MRI reports (*see Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043, 1044 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]). Since

plaintiff submitted no medical evidence to refute defendants' initial showing as to those body parts, defendants' motion to dismiss those claims should have been granted (*see Green v Domino's Pizza, LLC*, 140 AD3d 546 [1st Dept 2016]).

As to plaintiff's claimed right knee injury, defendants' radiologist opined that the MRI films showed preexisting degenerative joint disease, and their orthopedist found full range of motion and opined that the post-operative diagnoses noted by plaintiff's orthopedic surgeon in his operative report were all consistent with an arthritic knee, not trauma. In opposition, plaintiff submitted only the affirmed report of a doctor who examined her the day after the accident, which was insufficient to demonstrate "significant" or "permanent consequential" limitations in range of motion. Plaintiff also failed to submit admissible medical evidence to rebut the opinions of defendants' experts that she had an arthritic knee (*see Rickert v Diaz*, 112 AD3d 451 [1st Dept 2013]).

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

ENTERED: JULY 6, 2017

CLERK

Tom, J.P., Richter, Manzanet-Daniels, Mazzarelli, Gische, JJ.

4418 The People of the State of New York, Ind. 2039/14
Respondent,

-against-

Anonymous,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (James J. Wen of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Steven L. Barrett, J.), rendered June 11, 2015,

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

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

ENTERED: JULY 6, 2017

CLERK

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

CORRECTED ORDER - AUGUST 1, 2017

Tom, J.P., Richter, Manzanet-Daniels, Mazzarelli, Gische, JJ.

4419-
4420-
4421N Index 653732/16

Delos Megacore Ltd.,
Plaintiff-Appellant,

-against-

Omega Investments Ltd.,
Defendant-Respondent.

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Reitler Kailas & Rosenblatt LLC, New York (Leo G. Kailas of counsel), for appellant.

Brown Gavalas & Fromm LLP, New York (Peter Skoufalos of counsel), for respondent.

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Orders, Supreme Court, New York County (Charles E. Ramos, J.), entered February 10, 2017 and February 13, 2017, which granted defendant's motion to dismiss or stay this action in favor of arbitration pending in London, and order, same court and Justice, entered March 15, 2017, which, to the extent appealable, denied **plaintiff's** motion to modify or, alternatively, for leave to renew, unanimously affirmed, without costs.

The motion court properly stayed this action in favor of pending arbitration, since the decision in the arbitration proceeding could dispose of the issues in this action (*see* CPLR 2201; *Doronin v Amanat*, 133 AD3d 524 [1st Dept 2015]; *JP Foodservice Distribs. v PricewaterhouseCoopers*, 291 AD2d 323 [1st Dept 2002]). In this action, plaintiff seeks to recover on a

promissory note; at issue in the earlier commenced arbitration proceeding is the propriety of a subsequent agreement between the parties that includes a provision releasing defendant from its obligations under the note.

Contrary to **plaintiff's** arguments, issues of arbitrability were properly resolved by the London arbitration tribunal pursuant to the law governing the tribunal; the parties' subsequent agreement provided that English law would apply to any disputes arising under the agreement and would be addressed in arbitration in London in accordance with the rules of the London Maritime Arbitrators' Association.

The purportedly "new" evidence that **plaintiff** submitted in its renewal motion was already before the court and, in any event, would not change the original determination (*see* CPLR 2221[e]).

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

ENTERED: JULY 6, 2017

CLERK

Tom, J.P., Richter, Manzanet-Daniels, Mazzarelli, Gische, JJ.

4422N Maria-Leticia Ossa Daza, Index 302586/15
Plaintiff-Respondent,

-against-

Juan Carlos Torres Leclerc,
Defendant-Appellant.

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Laurence P. Greenberg, New York, for appellant.

Brady Klein Weissman, LLP, New York (Margaret M. Brady of counsel), for respondent.

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Order, Supreme Court, New York County (Matthew F. Cooper, J.), entered January 26, 2017, which, to the extent appealed from, granted defendant's application for pendente lite relief only to the extent of awarding him temporary spousal maintenance of $10,100 per month and child support of $1,405.62 per month and directing plaintiff to bear 70% of the child's add-on expenses, unanimously affirmed, without costs.

Defendant failed to show either that the motion court failed properly to apply the formulas or to consider the factors set forth in the version of Domestic Relations Law § 236(B)(5-a) applicable to this case, which was commenced in March 2015, or that there are exigent circumstances warranting reversal of the temporary maintenance award (*see Aron v Aron*, 216 AD2d 98 [1st Dept 1995]). Defendant contends that the amounts are

insufficient to meet his reasonable living expenses at a level consistent with the parties' pre-separation standard of living, but he offered no documentation of those expenses, did not identify any expenses that he had not been, or would not be, able to pay, and offered no rebuttal to plaintiff's claim that some of his expenses appear to have been inflated for litigation purposes (*see Hearst v Hearst*, 29 AD3d 395 [1st Dept 2006]). To the extent this temporary award is inadequate, the proper remedy is a speedy trial (*Turret v Turret*, 147 AD3d 467 [1st Dept 2017]).

Similarly, we decline to disturb the award of temporary child support. Defendant, failed to identify any child-related expense that he had not been, or would not be, able to pay as a result of the award (*see Matter of Vladena B. v Mathias G.*, 52 AD3d 431 [1st Dept 2008]; Domestic Relations Law § 240[1-b]).

The court properly pro-rated the child's add-on expenses. Again, defendant failed to identify any expenses that he had not been, or would not be, able to pay. Moreover, the court properly took into account the temporary maintenance awarded (*see Lundgren v Lundgren*, 127 AD3d 938 [2d Dept 2015]). Given the temporary nature of the award, defendant's obligations are not, as he claims, "open-ended" (*cf. Kosovsky v Zahl*, 272 AD2d 59 [1st Dept 2000] [limiting an obligation for all potential add-on expenses in an award that was not by definition temporary]).

The court properly declined to require plaintiff to guaranty a renewal lease on the three-bedroom marital residence, where defendant continues to reside, in light of her willingness to guaranty a lease on another apartment for up to $5,000 in monthly rent.

We decline to disturb the court's deferral of defendant's application for interim counsel fees until such time as defendant retains substitute counsel.

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

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

ENTERED: JULY 6, 2017

CLERK