SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 15, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Mazzarelli, Manzanet-Daniels, Webber, JJ.

3872 Jianfeng Jiang, Index 805172/13
Plaintiff-Appellant,

Quinyang Chen,
Plaintiff,

-against-

Xue Chao Wei,
Defendant,

New York City Health and Hospitals Corporation,
Defendant-Respondent.

_____

Morelli Law Firm, PLLC, New York (Sara A. Strickland of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Benjamin Welikson of counsel), for respondent.

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Order, Supreme Court, New York County (George J. Silver, J.), entered on or about January 29, 2016, which granted defendant New York City Health and Hospitals Corporation's (HHC) motion to dismiss all claims against it based on conduct prior to May 8, 2012, unanimously affirmed, without costs.

In this medical malpractice action, plaintiff alleges that defendants were negligent in failing to timely diagnose a

cancerous wound on his left leg. The motion court properly granted HHC's motion to dismiss the claims based on conduct occurring prior to May 8, 2012, since plaintiff failed to file a timely notice of claim, in violation of General Municipal Law § 50-e(1)(a).

Plaintiff was discharged from an HHC hospital in November 2010 and did not return to an HHC hospital for treatment to his leg until May 8, 2012. During that stay, he received the cancer diagnosis. The notice of claim was filed shortly after plaintiff's discharge from the hospital in October 2012, more than 90 days after the claim's accrual in November 2010 (*see Allende v New York City Health & Hosps. Corp.*, 90 NY2d 333, 337 [1997]).

We reject plaintiff's contention that both the November and May visits were part of a continuous course of treatment such that the statutory period for filing a notice of claim was tolled (*see* CPLR 214-a; *Allende*, 90 NY2d at 337-338). Although it is clear that HHC anticipated further treatment by HHC at the time of discharge in 2010, it is likewise clear that plaintiff did not (*see Young v New York City Health & Hosps. Corp.*, 91 NY2d 291, 296, 297 [1998]; *Zelig v Urken*, 28 AD3d 318, 318 [1st Dept 2006], *lv denied* 7 NY3d 708 [2006]), given his failure to show up for follow-up appointments (*see Batiste v Brooklyn Hosp. Ctr.*, 255

AD2d 474, 475 [2d Dept 1998]; *Bellmund v Beth Israel Hosp.*, 131 AD2d 796, 797-798 [2d Dept 1987]) and his exclusive reliance on codefendant Xue Chao Wei (an acupuncturist who plaintiff believed to be a licensed physician) for treatment during the interim period (*see Sposato v Di Giacinto*, 247 AD2d 267, 267 [1st Dept 1998]; *Alverio v New York Eye & Ear Infirmary*, 123 AD2d 568, 569-570 [1st Dept 1986]). *Devadas v Niksarli*, 120 AD3d 1000, 1007 [1st Dept 2014]). Plaintiff's actions indicated an intention to discontinue his relationship with HHC; his return visit must therefore be deemed a "renewal, rather than a continuation, of the physician-patient relationship" (*O'Donnell v Siegel*, 49 AD3d 415, 417 [1st Dept 2008] [internal quotation marks omitted]).

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

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

ENTERED: JUNE 15, 2017

CLERK

Acosta, P.J., Richter, Feinman, Webber, Kahn, JJ.

4287 The People of the State of New York, Respondent, Ind. 491/15

-against-

Daquan Anderson, Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Samuel L. Yellen of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Eugene Oliver, Jr., J.), rendered February 29, 2016, convicting defendant, upon his plea of guilty, of robbery in the third degree, and sentencing him to a term of six months, concurrent with five years' probation, unanimously affirmed.

Defendant made a valid waiver of his right to appeal (*see People v Bryant*, 28 NY3d 1094 [2016]), which forecloses review of his suppression claims. The court's oral explanation of the appeal waiver "was sufficient because the right to appeal was adequately described without lumping it into the panoply of rights normally forfeited upon a guilty plea" (*People v Sanders*, 25 NY3d 337, 341 [2015]). Even if there was any ambiguity in the colloquy, defendant executed a detailed written waiver that he discussed with counsel, and which explained that the right to

appeal was separate and distinct from the rights forfeited by pleading guilty. Furthermore, although defendant also pleaded guilty to an unrelated misdemeanor, the court clearly stated that the appeal waiver applied to the felony conviction at issue.

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

ENTERED: JUNE 15, 2017

CLERK

Acosta, P.J., Richter, Webber, Kahn, JJ.

4288 Scott A. Safier, Index 24120/14E
Plaintiff-Respondent,

-against-

Saggio Restaurant Inc., et al.,
Defendants-Respondents,

Tri-State Biodiesel, LLC,
Defendant-Appellant,

First Food Service LLC, etc., et al.,
Defendants.

_____

Lewis Johs Avallone Aviles, LLP, Islandia (Robert A. Lifson of counsel), for appellant.

Gersowitz Libo & Korek, P.C., New York (Avinoam Laby of counsel), for Scott A. Safier, respondent.

Law Offices of Michael E. Pressman, New York (Robert S. Bonelli of counsel), for Saggio Restaurant Inc., respondent.

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for Unity Fuels LLC, respondent.

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Order, Supreme Court, Bronx County (Donna M. Mills, J.), entered December 13, 2016, which denied defendant Tri-State Biodiesel, LLC's motion for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendant Tri-State Biodiesel, which collects used cooking oil from restaurants, established prima facie that it did not

cause the large slick of cooking oil and/or grease to be on the road where plaintiff slipped and fell riding his bicycle. Tri-State submitted an affidavit by its general manager saying that he had searched its records and that the records indicated that the company had not collected oil from its codefendants, restaurant operators and the owners of the building in which the restaurants are located, since January 25, 2013, about 16 months before the accident happened on the road adjacent to the building (*see Piccinich v New York Stock Exch.*, 257 AD2d 438, 439 [1st Dept 1999]). Tri-State also submitted deposition testimony by its codefendants admitting either that they had never been serviced by it or that they had had no dealing with it for more than a year before the accident happened (*see Tower Ins. Co. of N.Y. v Khan*, 93 AD3d 618, 619 [1st Dept 2012]). These unsigned transcripts were properly before the motion court, because the deponents were served with notices to execute more than 60 days before Tri-State moved for summary judgment, every transcript was certified by a reporter, and neither plaintiff nor co-defendants challenged the accuracy of the testimony (*see* CPLR 3116[a]; *Franco v Rolling Frito-Lay Sales, Ltd.*, 103 AD3d 543 [1st Dept 2013]).

In opposition, plaintiff and codefendants neither submitted an affidavit demonstrating the existence of an issue of fact nor

made any attempt to show that facts essential to justify their opposition to the motion existed that could not be stated absent a deposition of Tri-State (*see* CPLR 3212[f]; *Guaman v Ansley & Co., LLC*, 135 AD3d 492, 492 [1st Dept 2016]). They failed to show that the proof they claim they need is within the exclusive knowledge or control of Tri-State and that their opposition to Tri-State's motion is supported by something other than mere hope or conjecture (*see Voluto Ventures, LLC v Jenkens & Gilchrist Parker Chapin LLP*, 44 AD3d 557 [1st Dept 2007]).

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

ENTERED: JUNE 15, 2017

CLERK

Acosta, P.J., Richter, Feinman, Webber, Kahn, JJ.

4289-
4290 In re Doris F.,
Petitioner-Respondent,

-against-

Ari T.,
Respondent-Appellant.

- - - - -

In re Ari T.,
Petitioner-Appellant,

-against-

Doris F.,
Respondent-Respondent.

_____

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

Andrew J. Baer, New York, for respondent.

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Order, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about November 17, 2015, which, upon a fact-finding determination that respondent Ari T. committed harassment in the second degree, issued a two-year order of protection against him in favor of petitioner Doris F., unanimously reversed, on the law and the facts, without costs, the order of protection vacated, and the petition dismissed. Order, same court and Judge, entered on or about November 17, 2015, upon a fact-finding determination that respondent Doris F. did not commit a family offense, dismissed Ari T.'s petition, unanimously

affirmed, without costs.

A fair preponderance of the evidence does not support a finding of harassment in the second degree against Ari (*see* Family Ct Act § 832). Doris's petition was based solely on one letter Ari sent to Doris on or about November 17, 2014, a month after a previous order of protection against Ari and in favor of Doris had expired. This letter sought to apologize for Ari's behavior during and after the parties' relationship, which he attributed to his health and medical problems. Included with the letter was a recent article from the New York Post about Ari's lawsuit against a physician for misdiagnosis and treatment of Ari's condition that left him, in Ari's words, a "drugged-out mess." Although Family Court inferred that Ari intended to harass, annoy or alarm Doris by sending the letter, such finding does not have a sound and substantial basis in the record (*see Matter of Melind M. v Joseph P.*, 95 AD3d 553, 555 [1st Dept 2012]). While Ari testified at the fact-finding hearing that he suspected Doris was conspiring with others to stalk and defame him, the letter itself made no mention of these allegations, contained no threats, and was written in an objectively apologetic and loving tone. Moreover, the fact that Ari sent the letter days after the New York Post article came out further supports a finding that he did not intend to harass, annoy, or

alarm Doris (*see* Penal Law § 240.26). While it is understandable that Doris may have been scared by Ari's renewed contact via the letter, "her reaction is immaterial in establishing [Ari]'s intent" (*Matter of Shephard v Ray*, 137 AD3d 1715, 1716 [4th Dept 2016] [internal quotation marks omitted]).

A fair preponderance of the evidence also failed to establish that Doris had committed the family offense of harassment in the second degree. Ari's petition alleged, among other things, that Doris chased after and grabbed Ari, and also repeatedly jumped on Ari's back while he was lying face down in the bed, making it difficult to breathe. At the fact-finding hearing, Doris testified that in March 2012 she chased after Ari and attempted to restrain him because she believed he was suicidal. By Ari's own account, Doris jumped on his back in a playful manner because she wanted him to show her a press release for a conference they were organizing together. Neither of these actions support a finding that Doris committed the family offense

of harassment in the second degree, as the evidence does not support an inference that Doris intended to harass, annoy, or alarm Ari (*see* Penal Law § 240.26; *see also People v Bartkow*, 96 NY2d 770, 772 [2001]).

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

ENTERED: JUNE 15, 2017

CLERK

Acosta, P.J., Richter, Feinman, Webber, Kahn, JJ.

4291 San-Dar Associates, et al., Index 150850/12
Plaintiffs-Appellants-Respondents,

-against-

Jacqueline Fried, et al.,
Defendants-Respondents-Appellants.

_____

Kaufman Friedman Plotnicki & Grun, LLP, New York (Howard Grun of counsel), for appellants-respondents.

Schwartz Sladkus Reich Greenberg Atlas LLP, New York (Jared E. Paioff of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Donna M. Mills, J.), entered on or about May 19, 2016, which denied plaintiffs' motion for summary judgment on the complaint and dismissing the affirmative defenses and the counterclaim for slander of title, and denied defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, to grant plaintiffs' motion as to the counterclaim, and otherwise affirmed, without costs.

While the record establishes that defendants' building now uses more floor area than was reported in previous filings with the Department of Buildings (DOB), it presents questions of fact as to when the increase occurred and whether the building had a basement that was part of the floor-space calculation.

The motion court was free not to dismiss the "affirmative

defense" of failure to state a claim, because failure to state may be asserted at any time even if not pleaded (CPLR 3211[e]) and is therefore "mere surplusage" as an affirmative defense (*Bernstein v Freudman*, 136 AD2d 490, 492–493 [1st Dept 1988], citing *Rodman v Todman & Co.*, 56 AD2d 350 [1st Dept 1977]). Plaintiff has not established any legal basis to dismiss the other affirmative defenses at this juncture.

The counterclaim for slander to title is based on statements made in and pertinent to this litigation, which are absolutely privileged (*see Hinckley v Resciniti*, 159 AD2d 276 [1st Dept 1990]).

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

ENTERED: JUNE 15, 2017

CLERK

Acosta, P.J., Richter, Feinman, Webber, Kahn, JJ.

4292 Rama Realty Associates LLC, et al., Index 654365/15
Plaintiffs-Appellants,

-against-

Nautilus Capital, LLC,
Defendant-Respondent,

Banco Popular North America,
Defendant.

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Levi Lubarsky Feigenbaum & Weiss LLP, New York (Howard B. Levi of counsel), for appellants.

Einig & Bush, LLP, New York (Dan M. Rice of counsel), for respondent.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered June 14, 2016, which, to the extent appealed from as limited by the briefs, granted the motion of defendant Nautilus Capital, LLC, for partial summary judgment seeking dismissal of plaintiffs' claims against it, unanimously affirmed, with costs.

The default interest provision at issue is not so vague as to be unenforceable. It clearly reflects that the parties intended to cap interest at the highest rate allowable under New York's usury laws (*see Emery v Fishmarket Inn of Granite Springs*, 173 AD2d 765, 767 [2d Dept 1991]). The court also properly determined that the loan matured on March 31, 2014, since

plaintiffs failed to comply with conditions required for a proposed extension of the maturity date.

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: JUNE 15, 2017

CLERK

Acosta, P.J., Richter, Feinman, Webber, Kahn, JJ.

4293 The People of the State of New York, Ind. 1446/15
Respondent,

-against-

Curtis White,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Rafael Curbelo 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 (Miriam Best, J.), rendered January 21, 2016,

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

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

ENTERED: JUNE 15, 2017

CLERK

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

Acosta, P.J., Richter, Feinman, Webber, Kahn, JJ.

4294 Deadco Petroleum, Index 651305/15
Plaintiff-Appellant,

-against-

Trafigura AG, et al.,
Defendants-Respondents.

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Spencer T. Malysiak Law Corp., Roseville, CA (Spencer T. Malysiak of the bar of the State of California, admitted pro hac vice, of counsel), for appellant.

McGuireWoods LLP, New York (Michael L. Simes of counsel), for respondents.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered August 30, 2016, which, to the extent appealed from, granted defendants' motion to dismiss the amended complaint, unanimously affirmed, with costs.

Plaintiff, a distributor of petroleum products, entered into a business relationship in early 2008 with defendant petroleum suppliers. Plaintiff alleges that the parties operated under an oral "partnership/strategic partnership" for some months and then documented certain aspects of the relationship in a May 2008 Product Services Agreement (PSA). After the PSA was executed, and through December 2009, defendants allegedly charged staggering interest and profit sharing fees never previously negotiated, to compensate for the undisclosed loss of their

competitive market advantage vis-a-vis Asian oil, which plaintiff did not learn about until February 2012. The interest and fees allegedly worsened plaintiff's position with its lender, prevented it from finding alternative financing, and left it with no choice but to sell its company as soon as possible, to a buyer who paid $21 million less than its value.

In May 2012, plaintiff commenced an action against defendants in California federal court. The action was dismissed based on the PSA's forum selection clause designating New York courts as the exclusive forum, and the dismissal was affirmed by the circuit court of appeals on March 23, 2015. Plaintiff commenced this action on April 20, 2015.

The breach of partnership/strategic partnership, breach of implied covenant of good faith and fair dealing, breach of fiduciary duty, and fraud claims, which arose under the PSA, are time-barred pursuant to the PSA's two-year limitations provision. These claims accrued, at the latest, in February 2012, when plaintiff alleges that it discovered them. While the California action was timely commenced, the tolling provision of CPLR 205(a) does not avail plaintiff, because an out-of-state action is not a "prior action" within the meaning of that provision (*Guzy v New York City*, 129 AD3d 614 [1st Dept 2015]; *Midwest Goldbuyers, Inc. v Brink's Global Servs. USA, Inc.*, 120 AD3d 1150 [1st Dept 2014],

lv dismissed 26 NY3d 1078 [2015]; *Baker v Commercial Travelers Mut. Acc. Assn. of Am.*, 3 AD2d 265, 266 [4th Dept 1957], *appeal dismissed* 4 NY2d 828 [1958]).

The intentional interference with prospective economic advantage claim, which did not arise under the PSA, is also time-barred, because it accrued, at the latest, in December 2009, and plaintiff did not commence this action until well beyond the expiration of the applicable three-year limitations period (*see* CPLR 214[4]; *Susman v Commerzbank Capital Mkts. Corp.*, 95 AD3d 589, 590 [1st Dept 2012], *lv denied* 19 NY3d 810 [2012]).

The breach of partnership/strategic partnership and breach of fiduciary duty claims fail to state a cause of action and are belied by documentary evidence. Both claims are premised on the existence of a partnership. However, the PSA expressly disclaimed a partnership relationship between the parties. As to the breach of fiduciary duty claim, plaintiff alleges an arm's-length transaction and no special circumstances that might give rise to a fiduciary relationship between the parties (*see V. Ponte & Sons v American Fibers Intl.*, 222 AD2d 271 [1st Dept 1995]). The breach of implied covenant of good faith and fair dealing claim is duplicative of the breach of partnership claim (*see Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 [1st Dept 2010], *lv denied* 15 NY3d 704 [2010]).

The fraud claim fails because it is based on the allegation that defendants did not intend to perform as promised (*see Goldstein v CIBC World Mkts. Corp.*, 6 AD3d 295, 296 [1st Dept 2004]; *DePinto v Ashley Scott, Inc.*, 222 AD2d 288 [1st Dept 1995]). The intentional interference with prospective economic relations claim fails to allege that defendants' actions were motivated solely by malice (*see Matter of Entertainment Partners Group v Davis*, 198 AD2d 63 [1st Dept 1993]).

Given the clear, expansive terms of the PSA's integration clause, plaintiff's efforts to avoid the contract's two-year limitations provision or other terms on the basis of a pre-PSA oral partnership/strategic partnership are unavailing. To the extent any such relationship existed, it was expressly superseded by the PSA.

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

ENTERED: JUNE 15, 2017

CLERK

Acosta, P.J., Richter, Feinman, Webber, Kahn, JJ.

4295- Ind. 593/09
4296 The People of the State of New York
Respondent,

-against-

Gaetano D'Attore,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

Gaetano D'Attore, appellant pro se.

Darcel D. Clark, District Attorney, Bronx (Ryan P. Mansell of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Cassandra M. Mullen, J.), rendered July 1, 2010, as amended February 28 and November 16, 2011, convicting defendant, after a nonjury trial, of criminal possession of a weapon in the second degree (three counts), criminal possession of a weapon in the third degree (two counts), unlawful possession of pistol ammunition (seven counts), unlawful possession of rifle ammunition (two counts), unlawful possession of handcuffs, criminal possession of stolen property in the fifth degree and endangering the welfare of a child (two counts), and sentencing him, as a second felony offender, to an aggregate term of 14 years, unanimously affirmed.

The court providently exercised its discretion in declining

to impose any sanction for the inadvertent destruction by the police of three pistols recovered from defendant's house. Due to a clerical error, the weapons were mischaracterized as unconnected with any pending case and thus subject to being destroyed. Despite proper disclosure by the People, long before the pistols were destroyed, defendant never availed himself of the opportunity to examine or test the firearms, and it was not until the destruction was discovered during trial that defendant moved to dismiss the charges or expressed an interest in performing independent tests. Under such circumstances, "defendant forfeited whatever right he had to demand production of the [pistols] and, consequently, he cannot complain about the People's failure to preserve [them]" (*People v Allgood*, 70 NY2d 812, 813 [1987]; *see also People v Aponte*, 240 AD2d 317 [1st Dept 1997], *lv denied* 91 NY2d 868 [1997]). In any event, even if the court should have expressly "charged" itself that, like a jury, "it *may* draw an inference in defendant's favor" (*People v Handy*, 20 NY3d 663, 669 [2013]), we find any error to be harmless, particularly in the context of a nonjury trial.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations regarding the circumstances of defendant's wife's consent to searches of the house in which she jointly resided

with defendant. The evidence established that defendant's wife had both actual and apparent authority to consent to the search of the entire house, and there was no indication that defendant had exclusive access to the unlocked attic and basement areas (*see People v Williams*, 278 AD2d 150 [1st Dept 2000], *lv denied* 96 NY2d 764 [2001]).

We reject defendant's challenges to the sufficiency or weight of the evidence supporting his convictions for possessing the three pistols found during the final search of his house, conducted after defendant was already in custody on the other charges in this case (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations in this regard. The evidence supports the conclusion that defendant carefully concealed these weapons in his house, as a result of which they were not discovered during the first two searches. Defendant's far-fetched theory that an estranged relative planted the weapons in defendant's house in his absence in order to worsen his legal troubles is unsupported by the evidence.

Although there was evidence that, while in custody, defendant contacted a relative and asked her to abandon a certain bag at a police station, anonymously, and without looking in it or giving the police any information, we conclude that the

exemption for voluntary surrender of weapons (Penal Law § 265.20[a][1][f]) did not apply, and the court was not required to "charge itself" on this exemption. There was no reasonable view of the evidence that defendant's conduct satisfied the requirements of this exemption. In particular, the exemption requires that the surrender be in accordance with terms and conditions established by the police (such as an amnesty program).

The court providently exercised its discretion in denying counsel's request for a third CPL article 730 examination, where, notwithstanding his mental illness, defendant had already been found competent twice, there was no indication of a change in his condition, and the court's interactions with defendant showed that he understood the proceedings (*see People v Morgan*, 87 NY2d 878 [1995]).

We perceive no basis for reducing the sentence.

Defendant's pro se claims are without merit.

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

ENTERED: JUNE 15, 2017

CLERK

Acosta, P.J., Richter, Feinman, Webber, Kahn, JJ.

4297 In re New York City Asbestos Litigation — Index 190281/14

- - - - -

Theresa Warren, etc.,
Plaintiff-Respondent,

-against-

Amchem Products, Inc., et al.,
Defendants,

J-M Manufacturing Company, Inc.,
Defendant-Appellant.

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Segal McCambridge Singer & Mahoney, Ltd., New York (Madina Axelrod of counsel), for appellant.

Weitz & Luxenberg, P.C., New York (Gennaro Savastano of counsel), for respondent.

_____

Order, Supreme Court, New York County (Peter H. Moulton, J.), entered July 20, 2016, which denied defendant J-M Manufacturing Company, Inc.'s (J-M) motion to vacate the special master's recommendations finding that J-M had waived attorney-client privilege as to a redacted and unredacted document, and to seal all briefing and exhibits relating to the motion, unanimously modified, on the law and the facts, to grant the motion to the extent of vacating the recommendation's finding that J-M had waived the attorney-client privilege as to the unredacted document, and otherwise affirmed, without costs.

The documents at issue are two versions of a memorandum

created by in-house counsel for J-M in the 1980's. In 2003, J-M's litigation counsel discovered the inadvertent disclosure of the unredacted version of the memorandum. In response to correspondence demanding its return, plaintiff's counsel forwarded the document and advised that it had not been disseminated to anyone outside of their firm. Nevertheless, that memorandum, as well as a redacted version of that memorandum, continued to appear in various litigation throughout the country. Plaintiff argued, and the special master and motion court agreed, that, in light of various concessions and actions on the part of J-M over the years, J-M had waived any privilege it once had in either the redacted, or the unredacted, version of the memo.

New York law applies here (*see JP Morgan Chase & Co. v Indian Harbor Ins. Co.*, 98 AD3d 18, 25 [1st Dept 2012], *lv denied* 20 NY3d 858 [2013]). Thus, J-M has the burden to show that it had not waived the privilege (*see New York Times Newspaper Div. of N.Y. Times Co. v Lehrer McGovern Bovis*, 300 AD2d 169, 172 [1st Dept 2002]). Although J-M argues that its multiple concessions that the redacted memorandum had been voluntarily disclosed resulted solely from misrepresentations by counsel for the plaintiff in a prior action, its evidence in this regard is insufficient to meet its burden.

J-M, however, showed that it had not waived the privilege as

to the unredacted memo. J-M continually objected to the use of the unredacted version. The public availability of the document and J-M's lack of success in obtaining a protective order does not warrant a finding that J-M waived the privilege (*see John Blair Communications v Reliance Capital Group*, 182 AD2d 578, 579 [1st Dept 1992]).

There is no basis to seal the appellate record and briefs, as the unredacted document is not included in the record or briefs (*see* 22 NYCRR 216.1).

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

ENTERED: JUNE 15, 2017

CLERK

Acosta, P.J., Richter, Feinman, Webber, Kahn, JJ.

4299 The People of the State of New York, Respondent, Ind. 3037/13

-against-

Carlos Fernandez, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered June 25, 2014, convicting defendant, upon his guilty plea, of assault in the second degree, and sentencing him to a term of one year, unanimously affirmed.

Defendant failed to preserve his claim that the court gave him untimely and insufficient advice about the deportation consequences of his plea, and the narrow exception to the preservation requirement does not apply (*see People v Peque*, 22 NY3d 168, 182-183 [2013]; *People v Tiburcio*, 136 AD3d 584 [1st Dept 2016], *lv denied* 27 NY3d 1140 [2016]; *People v Diakite*, 135 AD3d 533 [1st Dept 2016], *lv denied* 27 NY3d 1131 [2016]). We

decline to review this unpreserved claim in the interest of justice.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 15, 2017

CLERK

Acosta, P.J., Richter, Feinman, Webber, Kahn, JJ.

4300 Delight Bvunzawabaya, Index 400434/14
Plaintiff-Appellant,

-against-

JP Morgan Chase & Co., et al.,
Defendants-Respondents.

_____

Delight Bvunzawabaya, appellant pro se.

Stagg, Terenzi, Confusione & Wabnik, LLP, Garden City (Andrew Kazin of counsel), for respondents.

_____

Order, Supreme Court, New York County (Lucy Billings, J.), entered January 22, 2015, which granted defendants' motion to dismiss the complaint for lack of standing and for failure to state a cause of action, unanimously affirmed, without costs.

Plaintiff asserts that he and a friend went together to Chase Bank, his friend's bank, because he wanted to cash a check from his employer, and he had no identification due to his immigration status. The two signed their names in front of the teller, before sliding it under the teller window, with a deposit slip that instructed to clear the funds into the friend's account. Chase, however, rejected the deposit, closed the friend's account, and did not issue a replacement check until several months later.

When plaintiff endorsed and delivered the check to his

friend, the friend became the holder of the check (NY UCC 3-202[1]). Thus, only the friend was entitled to negotiate the check or to "enforce payment in [her] own name" (NY UCC 3-301[1]). Plaintiff's arguments in support of his contention that he, as payee of the check, is entitled to enforce its return or payment are unavailing. Plaintiff lacks standing to sue the bank for the return or proceeds of the check, because he is no longer the holder of the check (*see Gallery Garage Mgt. Corp. v Chemical Bank*, 226 AD2d 305, 305 [1st Dept 1996]).

Plaintiff has abandoned his claims against the individual defendants (*see Derico v City of New York*, 66 AD2d 740, 740 [1st Dept 1978]).

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

ENTERED: JUNE 15, 2017

CLERK

Acosta, P.J., Richter, Feinman, Webber, Kahn, JJ.

4301 The People of the State of New York, Respondent, Ind. 2994/13

-against-

Bruce Washburn, Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

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Judgment, Supreme Court, Bronx County (Seth L. Marvin, J.), rendered October 25, 2013, as amended May 27, 2014, unanimously affirmed.

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

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

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

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

ENTERED: JUNE 15, 2017

CLERK

Acosta, P.J., Richter, Feinman, Webber, Kahn, JJ.

4302 The People of the State of New York, Respondent, Ind. 1899/12

-against-

Kevin Rodriguez, Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Nicole Neckles of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Robert E. Torres, J.), rendered June 18, 2015, convicting defendant, upon his plea of guilty, of attempted murder in the second degree (two counts), and sentencing him to concurrent terms of 20 years, unanimously affirmed.

The court properly denied defendant's motion to withdraw his plea. Defendant, citing information about the effects of solitary confinement in general, argues that his plea was involuntary as a result of physical and mental distress caused by a lengthy period of solitary confinement. However, he failed to show a causal connection between his alleged physical or mental condition and his decision to plead guilty, made after careful discussions with his family and counsel (*see People v Jacks*, 48 AD3d 241 [1st Dept 2008], *lv denied* 10 NY3d 960 [2008]).

Moreover, the court observed that defendant appeared lucid during the thorough plea colloquy, and neither defendant nor his counsel contemporaneously expressed any concern about the effect of defendant's physical or mental condition on his understanding of that proceeding. The court properly ruled on the motion without holding an evidentiary hearing after considering counsel's detailed affirmation in support of the motion and defendant's extended statement on the matter in court (*see People v Fiumefreddo*, 82 NY2d 536, 543-44 [1993]).

Although the People concede that defendant's waiver of the right to appeal was invalid (*see People v Santiago*, 119 AD3d 484 [1st Dept 2014], *lv denied* 24 NY3d 964 [2014]), we perceive no basis for reducing the sentence.

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

ENTERED: JUNE 15, 2017

CLERK

Acosta, P.J., Richter, Feinman, Webber, Kahn, JJ.

4303- Index 850044/11
4304-
4305N Orchard Hotel, LLC,
Plaintiff-Respondent,

-against-

Flintlock Construction Service LLC,
Defendant-Appellant,

D.A.B. Group, LLC, et al.,
Defendants,

Brooklyn Federal Savings Bank, et al.,
Defendants-Respondents.

_____

Hollander Law Group, Great Neck (Anthony P. DeCapua of counsel), for appellant.

Morrison Cohen LLP, New York (Brett D. Dockwell of counsel), for Orchard Hotel LLC, respondent.

O'Reilly, Marsh & Corteselli P.C., Mineola (James G. Marsh of counsel), for Brooklyn Federal Savings Bank and State Bank of Texas, respondents.

_____

Orders, Supreme Court, New York County (Charles E. Ramos, J.), entered May 19, 2014, which denied as moot plaintiff's and defendants Brooklyn Federal Savings Bank and State Bank of Texas's motions to dismiss defendant Flintlock Construction Service LLC's amended answer, unanimously reversed, on the facts, without costs, and the matter remitted for a determination of the motions on the merits. Order, same court and Justice, entered December 27, 2016, which denied Flintlock's motion to lift the

stay of the action, unanimously modified, on the facts, to lift the stay so as to allow Flintlock to prosecute those claims asserted in the amended answer filed August 28, 2013 that remain pending and for a determination on its motion for an order of attachment, and otherwise affirmed, without costs.

In the December 2016 order, the court acknowledged that its May 2014 orders denying as moot the motions to dismiss the relevant claims in Flintlock's 2013 amended answer were in error because the court failed to consider the sufficiency of those claims, mistakenly considering the allegations in a 2012 proposed amended answer. The court also found that as a result of those erroneous orders, pending a determination of this appeal, Flintlock did not possess valid causes of action allowing for the lifting of the stay and consideration of its motion for an order of attachment, and the court noted that Flintlock's sole remedy might lie in application for relief to this Court.

In light of the above, we reverse the May 2014 orders, lift the stay, and remit the matter to the court for a substantive

determination on the merits of the motions to dismiss the 2013 amended answer and Flintlock's motion for an order of attachment (see *e.g. Bucci v Village of Port Chester*, 22 NY2d 195, 204 [1968]).

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

ENTERED: JUNE 15, 2017

CLERK

Acosta, P.J., Richter, Feinman, Webber, Kahn, JJ.

4306 In re Hilary A. Best, Ind. 103/17
[M-2149] Petitioner, OP 103/17
[M-2436]

-against-

Hon. Alison Y. Tuitt, et al.,
Respondents.

_____

Hilary A. Best, petitioner pro se.

John W. McConnell, New York (Lisa Evans of counsel), for Alison Y. Tuitt, respondent.

Eric T. Schneiderman, Attorney General, New York (Angel M. Guardiola II of counsel), for Harold Adler and Bronx County Criminal Court, respondents.

Darcel D. Clark, District Attorney, Bronx (Paul A. Andersen of counsel), for Bronx County District Attorney, respondent.

_____

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

And respondents Hon. Harold Adler and the Criminal Court of the City of New York, Bronx County, having cross-moved to dismiss the petition,

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

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

ENTERED: JUNE 15, 2017

CLERK

Richter, J.P., Andrias, Moskowitz, Feinman, Kapnick, JJ.

3921 The People of the State of New York, Dkt. 30619C/09
Respondent,

-against-

Yolanda Sumter,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Cynthia A. Carlson of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Leonard Livote, J.), rendered June 4, 2012, convicting defendant, after a jury trial, of resisting arrest and obstructing governmental administration in the second degree, and sentencing her to a conditional discharge, reversed, on the law, and the misdemeanor complaint dismissed.

Defendant was charged with obstructing governmental administration and resisting arrest arising from an incident in which she allegedly interfered with the arrest of her brother, and then resisted her own arrest. On appeal, defendant maintains that the misdemeanor complaint is insufficient on its face. To be facially sufficient, a misdemeanor complaint and any accompanying depositions must set forth allegations providing "reasonable cause to believe that the defendant committed the

offense charged," and nonhearsay factual allegations that "establish, if true, every element of the offense charged and the defendant's commission thereof" (CPL 100.40[1]; *see People v Alejandro*, 70 NY2d 133, 135-136 [1987]). An information that is facially insufficient is jurisdictionally defective and must be dismissed (*People v Jones*, 9 NY3d 259, 263 [2007]).

As relevant here, "[a] person is guilty of obstructing governmental administration [in the second degree] when he [or she] intentionally . . . prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference" (Penal Law § 195.05). "[A] defendant may not be convicted of obstructing governmental administration or interfering with an officer in the performance of an official function unless it is established that the police were engaged in authorized conduct" (*People v Lupinacci*, 191 AD2d 589, 590 [2d Dept 1993]; *see People v Greene*, 221 AD2d 559, 560 [2d Dept 1995]; CJI2d [NY] Penal Law § 195.05 ["the official function the defendant is charged with having prevented or attempted to prevent a public servant from performing must have been authorized"]).

Where, as here, the official function performed by the officer is an arrest, an information is jurisdictionally defective if it fails to allege facts showing that the arrest was

authorized (*see e.g. Matter of Anthony B.*, 201 AD2d 725, 726 [2d Dept 1994]; *Matter of Verna C.*, 143 AD2d 94, 95 [2d Dept 1988]; *see also* William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, Penal Law § 195.05 ["An 'official function' in the context of an arrest requires that the arrest be lawful"]).[1] In *Verna C.*, "[t]he supporting affidavit, executed by the arresting officer, simply stated that 'Deponent observed the Respondent with intent to prevent me from performing my lawful duty, to wit: placing her under arrest, respondent did attempt to cause physical injury to me by kicking me in the groin and did struggle and physically resist being placed in handcuffs'" (143 AD2d at 94). The court dismissed the petition as jurisdictionally defective because it did not include facts establishing that the officer's arrest was legally authorized, and thus failed to allege facts sufficient to establish all the essential elements of obstructing governmental administration (*id.* at 95; *accord Matter of Anthony B.*, 201 AD2d at 726; *cf. Matter of Jeremy B.*, 151 AD2d 314, 316 [1st Dept 1989] [upholding charge of obstructing governmental administration because the supporting

[1] Although *Anthony B.* and *Verna C.* are Family Court proceedings, the requirements for a sufficient Family Court petition and a sufficient Criminal Court information are essentially the same (*see* CPL 100.40, Family Court Act § 311.2; *see also Matter of Jeremy B.*, 151 AD2d at 316 n2).

deposition contained factual allegations that the underlying arrest was authorized by law]).

Guided by these principles, we conclude that the misdemeanor complaint here is jurisdictionally defective. The factual part of the complaint merely states that the officer was "attempting to effectuate the arrest of [defendant's brother]." However, the complaint contains no factual allegations that would establish, if true, that the underlying arrest of defendant's brother was authorized. Thus, the complaint fails to allege facts sufficient to establish all the essential elements of the crime of obstructing governmental administration in the second degree. Because the information fails to allege sufficient facts supporting the underlying obstructing governmental administration charge, it is also insufficient to allege that defendant's arrest on that charge was "authorized," as required by Penal Law § 205.30. Therefore, defendant is also entitled to dismissal of the resisting arrest charge (*see People v Jones*, 9 NY3d 259, 263 [2007]; *People v Matthews*, 115 AD3d 625, 625 [1st Dept 2014], *lv denied* 23 NY3d 1022 [2014]).

The dissent acknowledges that an element of the crime of obstructing governmental administration is that the underlying arrest was authorized, but nevertheless concludes that this essential element need not be alleged in the factual part of an

information. This position, however, cannot be reconciled with the statutory requirement that an information contain "nonhearsay allegations [that] establish, if true, every element of the offense charged" (CPL 100.40[1][c]). It also contravenes the Court of Appeals's decision in *People v Alejandro* (70 NY2d at 138), which emphasizes that "an information must, for jurisdictional purposes, contain nonhearsay factual allegations sufficient to establish a prima facie case."

People v Casey (95 NY2d 354 [2000]), a case cited by the dissent, states that the factual allegations of an information "should be given a fair and not overly restrictive or technical reading" "[s]o long as [they] give an accused notice sufficient to prepare a defense" (*id.* at 360). Here, the allegations do not give any notice whatsoever that would allow defendant to mount a defense that her brother's arrest was not authorized. The complaint does not identify the crime for which defendant's brother was arrested, or the circumstances that led to the arrest. We disagree with the dissent's view that the complaint's deficiency is remedied by a brief reference to the arrest number of defendant's brother. As noted, the statute and case law require that facts establishing all of the elements of an offense charged be contained in the complaint and any supporting depositions. Merely referencing an arrest number does not cure

the deficiency and does not provide defendant with the requisite "notice sufficient" to defend against the charges (*id.*).[2]

In finding the misdemeanor complaint sufficient, the dissent relies on a number of cases from the Appellate Term of the Second Department. Those cases, however, are contrary to the express language of CPL 100.40(1)(c), the Court of Appeals' decision in *Alejandro*, and the Second Department's decisions in *Anthony B.* and *Verna C.*, and we are not obligated to follow them.[3]

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

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[2] We also note that no arrest report or other documents pertaining to the brother's arrest were annexed to the complaint.

[3] *Matter of Carlos G.* (215 AD2d 165 [1st Dept 1995]), cited by the dissent, does not change the result. The brief decision in that case does not quote all of the language contained in the petition and supporting deposition. Thus, it is unknown if those documents provided the requisite factual allegations about the underlying arrest. It is likewise unknown if that appeal raised the precise appellate question presented here.

ANDRIAS, J. (dissenting)

I disagree with the majority's holding that the misdemeanor complaint was jurisdictionally defective, with respect to both the obstructing governmental administration in the second degree and resisting arrest charges, because it did not contain sufficient factual allegations showing that the underlying arrest of defendant's brother, Richard Sumter, was authorized.[1] The information charged defendant with preventing an officer from effectuating an authorized arrest, and expressly identified her brother by name and provided his arrest number. Defendant's own offending acts were described in great detail. She "approached and attempted to pull deponent's partners away from separately apprehended RICHARD SUMTER, and swung fists at officers involved in the arrest of separately apprehended RICHARD SUMTER preventing them from timely effectuating his arrest." No additional evidentiary details were required for the People's pleading to provide "adequate notice to enable defendant to prepare a defense and invoke [her] protection against double jeopardy" (*People v Kasse*, 22 NY3d 1142, 1143 [2014]). Therefore, I dissent.

"A valid and sufficient accusatory instrument is a

[1]Richard Sumter was tried jointly with defendant and convicted of resisting arrest and obstructing governmental administration.

nonwaivable jurisdictional prerequisite to a criminal prosecution" (*People v Dreyden*, 15 NY3d 100, 103 [2010]). Under CPL § 100.15, every accusatory instrument must contain an accusatory portion designating the offense charged and a factual portion containing evidentiary facts which support or tend to support the charges stated in the accusatory portion.

A misdemeanor information is facially sufficient if the non-hearsay allegations provide reasonable cause to believe that the People can prove every element of the crime charged and defendant's commission of the crime (CPL 100.40(1)(a)-(c); *see People v Alejandro*, 70 NY2d 133, 136-137 [1987]). Conversely, "[u]nder *Alejandro* . . ., an information is facially deficient if it *entirely* fails to address an element of the offense charged" (*People v Konieczny*, 2 NY3d 569, 576 [2004] [emphasis added]).

A court reviewing for facial insufficiency must assume that the factual allegations contained in the information are true and must consider all reasonable inferences that may be drawn from them (CPL 100.40, 100.15; *see People v Jackson*, 18 NY3d 738, 741-742 [2012]). Significantly, the facts need only establish the existence of a prima facie case, even if those facts would not be legally sufficient to prove guilt beyond a reasonable doubt (*see*

People v Jennings, 69 NY2d 103, 115 [1986]).[2] Furthermore, a valid information need not disprove every potential defense (*People v Cox*, 44 Misc 3d 134[A] [App Term, 2d Dept 2014], *lv denied* 24 NY3d 1001 [2014]). "So long as the factual allegations of an information give an accused notice sufficient to prepare a defense and are adequately detailed to prevent a defendant from being tried twice for the same offense, they should be given a fair and not overly restrictive or technical reading" (*People v Casey*, 95 NY2d 354, 360 [2000]). These core principles are satisfied in this case and the information charging defendant with obstructing governmental administration in the second degree and resisting arrest is facially sufficient (*see People v Kalin*, 12 NY3d 225, 230 [2009]).

"A person is guilty of obstructing governmental administration [in the second degree] when he [or she] intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference" (Penal Law

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[2]"To the extent that *People v Alejandro* . . . may have tended to equate a prima facie case for an information or a juvenile delinquency petition with legally sufficient evidence under CPL 70.10 (1), those portions of the writings were dicta and . . . incompatible with the governing statutes" (*People v Suber*, 19 NY3d 247, 254 [2012]).

§ 195.05; *see People v Dumay*, 23 NY3d 518, 524 [2014]). The accusatory instrument charges "that on or about May 8, 2009 at approximately 11:55 PM at Front of 1360 Lyman Place," defendant committed the offenses of resisting arrest and obstructing governmental administration in the second degree in that she

> "did intentionally prevent or attempt to prevent a . . . police officer from effecting an authorized arrest of himself [sic] or another person and intentionally obstruct, impair or pervert the administration of law or other governmental function or prevented or attempted to prevent a public servant from performing an official function, by means of intimidation, physical force or interfernce [sic], or by means of an independently unlawful act, ..."

The factual part of the information states that

> "deponent was attempting to effectuate the arrest of separately apprehended RICHARD SUMTER (Arrest #BO9638199) and defendant approached and attempted to pull deponent's partners away from separately apprehended RICHARD SUMPTER, and swung fists at officers involved in the arrest of separately apprehended RICHARD SUMPTER preventing them from timely effectuating his arrest. Deponent further states that when he observed officers attempt to arrest defendant for her aforementioned actions, defendant flailed her arms and kicked her legs in attempt to prevent from being handcuffed."

When read in conjunction with the description of the charges, these allegations sufficed to inform defendant of the official function being performed by the police, namely the authorized arrest of the separately apprehended Richard Sumter, and the acts she undertook to obstruct that official function

(*see Matter of Carlos G.*, 215 AD2d 165 [1st Dept 1995] ["The allegations that respondent punched an officer and yelled obscenities while other officers were attempting to arrest his mother sufficiently demonstrated that he specifically intended to interfere with the officer's function of maintaining order"]; *Matter of Daniel M.*, 37 AD3d 1101, 1103 [4th Dept 2007] ["With respect to the crime of obstructing governmental administration, we conclude that the testimony that respondent grabbed the flashlight from the officer and raised it as if to strike the officer while the police were attempting to arrest his father is legally sufficient to establish that respondent was attempting to interfere with the arrest of his father"]; *People v Cox*, 44 Misc 3d 134[A], *supra* [information charging the defendant with obstructing governmental administration and resisting arrest facially sufficient where it alleged, among other things, that the "defendant yelled, screamed, cursed, engaged in a verbal dispute with, and swung his arms at, a police officer in an effort to prevent the officer from arresting a third party"]).

The majority states that the allegations in the information "do not give any notice whatsoever that would allow defendant to mount a defense that her brother's arrest was not authorized." However, while the People must establish at trial beyond a reasonable doubt that the underlying arrest was authorized,

"whether or not the arrest, which constitutes the 'official function' alleged to have been obstructed, was authorized need not be made part of the pleadings" (*People v Cacsere*, 185 Misc 2d 92, 93 [App Term, 2d Dept 2000]; *see also People v Aitkens*, 45 Misc 3d 50, 52-53 [App Term, 2d Dept 2014] ["an information directly charging obstructing governmental administration in the second degree, where an arrest is the official function alleged to have been obstructed, need not allege that the arrest was authorized"]; *People v Stewart*, 32 Misc 3d 133[A] [App Term, 2d Dept 2011] [allegations that official function was authorized not required for pleading], *lv denied* 18 NY3d 861 [2011]; *People v Ballard*, 28 Misc 3d 129[A] [App Term, 2d Dept 2010] ["The information sufficed to allege the offense of obstructing governmental administration in the second degree even though . . . there was no allegation indicating that the official function was authorized"]). "[T]o require more for pleading purposes would be an unacceptable hypertechnical interpretation of the pleading requirements" (*id.; see also People v Casey*, 95 NY2d at 360).

Matter of Verna, C. (143 AD2d 94 [2d Dept 1988]), on which the majority relies, does not mandate a different result. In *Verna C.*, a juvenile delinquency proceeding, the supporting affidavit stated that "Deponent observed the Respondent with

intent to prevent me from performing my lawful duty, to wit: placing her under arrest, respondent did attempt to cause physical injury to me by kicking me in the groin and did struggle and physically resist being placed in handcuffs" (*id.*). However, the petition did not state the basis for the respondent's own arrest. Here, the information, in setting forth the basis for the charges, states that respondent interfered with the authorized arrest of herself or a third person, and identifies that third person as the separately apprehended Richard Sumter, whose arrest number was given. As explained above, this identified the official function being performed and gave defendant sufficient notice to prepare a defense and invoke her protection against double jeopardy. To require more would unduly obligate the People to allege facts in the information that establish the essential elements of the crimes charged against a third party, in addition to the crimes charged against the defendant herself.

"A person is guilty of resisting arrest when he intentionally prevents or attempts to prevent a police officer . . . from effecting an authorized arrest of himself or another person" (Penal Law § 205.30). After establishing the existence of a prima facie case of obstructing governmental administration in the second degree, the information stated that when the

officers attempted to arrest defendant for her unlawful actions, she "flailed her arms and kicked her legs in an attempt to prevent from being handcuffed." This sufficed to establish prima facie that defendant attempted to prevent officers from effectuating her own authorized arrest for that offense (*Matter of Thomas L.*, 4 AD3d 295, 295 [1st Dept 2004]["Since appellant's arrest for obstructing governmental administration was authorized, his struggle to avoid being handcuffed and placed in a police car constituted resisting arrest"]).

Viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620 [1983]), I find it was legally sufficient to prove the defendant's guilt of the crimes of resisting arrest and obstructing governmental administration in the second degree, and that the verdict was not against the weight of the evidence (*see People v Danielson*, 9

NY3d 342, 348 [2007]). Defendant's remaining arguments are unavailing.

Accordingly, I would affirm the judgment.

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

ENTERED: JUNE 15, 2017

CLERK

Friedman, J.P., Moskowitz, Manzanet-Daniels, Kapnick, Webber, JJ.

3999-
3999A Index 25400/14E

Juan Carlos Rodriguez De La Cruz,
Plaintiff-Respondent,

-against-

Eugene K. Dalmida, et al.,
Defendants-Appellants.

_____

McAndrew, Conboy & Prisco, LLP, Melville (Michael J. Prisco of counsel), for appellants.

Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered November 2, 2015, which granted plaintiff's motion to compel certain discovery to the extent of directing defendants to produce the documents for an in camera review, and denied defendants' motion to dismiss plaintiff's negligent entrustment claim, and order, same court and Justice, entered February 24, 2016, which granted plaintiff's motion seeking sanctions for failure to exchange discovery, unanimously reversed, on the law, without costs, defendants' motion to dismiss the negligent entrustment claim granted, plaintiffs' related discovery request denied, and the sanction order vacated.

Defendant Eugene K. Dalmida, an employee of Verizon, was using its van with permission and within the scope of his

employment when the accident occurred. Verizon's vicarious liability in light of those admitted facts renders plaintiff's cause of action for negligent entrustment academic, and subject to dismissal (*see Karoon v New York City Tr. Auth.*, 241 AD2d 323 [1st Dept 1997]). Plaintiff's claim that this case is an exception to the general rule, since punitive damages are sought, is without merit given that plaintiff has neither made a claim for punitive damages, nor pled facts sufficient to support such a claim (*compare Cristallina v Christie, Manson & Woods Intl.*, 117 AD2d 284, 295 [1st Dept 1986]). With regard to the discovery issue, upon this appeal, plaintiff does not contest that he is not entitled to production of the subject material if the negligent entrustment cause of action is dismissed. While we are troubled by defendant's neglect of its discovery obligations, since we are dismissing the negligent entrustment cause of action, the related discovery request is denied.

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

ENTERED: JUNE 15, 2017

CLERK

Friedman, J.P., Richter, Moskowitz, Gische, Kapnick, JJ.

4039 Nelson Sanchez, Index 304528/11
Plaintiff-Appellant,

-against-

New York City Transit Authority,
Defendant-Respondent.

_____

Burns & Harris, New York (Blake G. Goldfarb of counsel), for appellant.

Lawrence Heisler, Brooklyn (Timothy J. O'Shaughnessy of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered May 4, 2016, which granted defendant's motion to set aside the jury's verdict as against the weight of the evidence and direct that a new trial be held on the issue of liability, unanimously reversed, on the facts, without costs, and the motion denied.

In this action for personal injuries, plaintiff alleges that he fell while descending a covered and unlit exterior subway staircase owned by defendant. The jury found that defendant was negligent in its maintenance of the lighting on the staircase, that defendant's negligence was a substantial factor in causing plaintiff's injuries', and that plaintiff was not negligent.

The trial court erred in setting aside as against the weight of the evidence the jury's finding that plaintiff was not

negligent (*see Jones v New York Presby. Hosp.*, ___ AD3d ___, 2017 NY Slip Op 03595 [1st Dept 2017]; *Soler v Jersey Boring & Drilling Co., Inc.*, 143 AD3d 421 [1st Dept 2016]; *see also* CPLR 4404[a]). Although plaintiff conceded that he descended an unlighted staircase, the jury could reasonably have concluded that his decision to do so was not negligent, as plaintiff testified that he used the same staircase every night while coming home from work, and had in fact done so without incident on previous evenings when the lights were inoperative.

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

ENTERED: JUNE 15, 2017

CLERK

Tom, J.P., Renwick, Manzanet-Daniels, Kapnick, JJ.

4270 Susan Sermoneta, Index 111617/11
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant.

_____

Lawrence Heisler, Brooklyn (Timothy J. O'Shaughnessy of counsel), for appellant.

Alexander J. Wulwick, New York, for respondent.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered July 18, 2016, upon a jury verdict, awarding plaintiff $700,000 for past pain and suffering and $2 million for future pain and suffering over 15 years, unanimously modified, on the facts, to vacate the award for future pain and suffering, and the matter remanded for a new trial solely on the issue of those damages, unless plaintiff stipulates, within 20 days of service of a copy of this order with notice of entry, to reduce the award for future pain and suffering to $1 million and to entry of an amended judgment in accordance therewith, and otherwise affirmed, without costs.

Plaintiff sustained injuries when nonparty David Cloud slipped on slime oozing from a trash can on a subway platform and fell, knocking plaintiff over. The jury could fairly and

rationally have concluded that Cloud was not negligent based on the evidence presented at trial, including Cloud's testimony that he was not in a rush and that he had never seen slime in that location before (*see Lolik v Big V Supermarkets*, 86 NY2d 744 [1995]; *Cohen v Hallmark Cards*, 45 NY2d 493 [1978]). Contrary to defendant's contention that, as a matter of law, the slime was an open and obvious condition that was not inherently dangerous, the jury could reasonably have found that the slimy condition was inherently dangerous or that the condition on the floor of a crowded, rush-hour subway station constituted a trap for the unwary (*see Mauriello v Port Auth. of N.Y. & N.J.*, 8 AD3d 200 [1st Dept 2004]).

The award of $700,000 for five years of past pain and suffering, although high, is not excessive (CPLR 5501[c]; *see Diaz v City of New York*, 80 AD3d 425 [1st Dept 2011]; *Clotter v New York City Tr. Auth.*, 68 AD3d 518, 519 [1st Dept 2009], *lv denied* 14 NY3d 713 [2010]). Plaintiff continues to experience pain and difficulty bending her knee as a result of traumatic arthritis caused by the accident. In addition, she presented voluminous evidence of mental anguish and loss of enjoyment of life, including testimony by her treating psychiatrist and a forensic psychiatrist, which defendant did not rebut with expert testimony.

The award of $2 million for 15 years of future pain and suffering is, however, excessive, as compared to other cases involving similar injuries, including cases where, as here, the plaintiff is expected eventually to need a total knee replacement (*see e.g. Reyes v New York City Tr. Auth.*, 126 AD3d 612 [1st Dept 2015]; *Diaz*, 80 AD3d 425; *Clotter*, 68 AD3d 518; *Calzado v New York City Tr. Auth.*, 304 AD2d 385 [1st Dept 2003]; *Gonzalez v New York City Tr. Auth.*, 87 AD3d 675 [2d Dept 2011]). However, none of those cases cites evidence of mental anguish and loss of enjoyment of life akin to the substantial trial evidence in this case. The reduction here is appropriate in light of plaintiff's age and the fact that her ability to travel and take photographs, while being adversely affected, has not been totally curtailed.

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

ENTERED: JUNE 15, 2017

CLERK

Tom, J.P., Renwick, Manzanet-Daniels, Kapnick, JJ.

4271 In re Michael A.,

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

_____

Tamara A. Steckler, The Legal Aid Society, New York (Gary Solomon of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Melanie T. West of counsel), for presentment agency.

_____

Order of disposition, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about April 25, 2016, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of grand larceny in the fourth degree, and placed him with the Administration for Children's Services' Close to Home program for a period of 18 months, minus 7 days spent in predispositional detention, unanimously affirmed, without costs.

Appellant was required to preserve his contention that the court violated Family Court Act § 353.3(5) by not providing a sufficient record for its denial of full credit for the time he spent in detention (*see generally Matter of Markim Q.*, 7 NY3d 405 [2006]), and we decline to review this unpreserved claim in the interest of justice. Appellant's claim is analogous to an adult

defendant's claim that a substantively lawful sentence was imposed by way of a defective procedure, and such claims require preservation (*People v Samms*, 95 NY2d 52, 58 [2000]). As an alternative holding, we find that, at the dispositional hearing, the court provided a sufficient basis for the denial of credit, and it properly supplemented its oral determination through a subsequent written order.

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

ENTERED: JUNE 15, 2017

CLERK

Tom, J.P., Renwick, Manzanet-Daniels, Kapnick, JJ.

4272 Laura Moore-Brown, Index 300015/11
Plaintiff-Appellant,

-against-

Sofi Hacking Corp., et al.,
Defendants-Respondents,

The Hebrew Home for the Aged at Riverdale, et al.,
Defendants.

_____

Mitchell Dranow, Sea Cliff, for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Robert D. Grace of counsel), for respondents.

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Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered November 24, 2015, which, to the extent appealed from as limited by the briefs, granted the motion of defendants Sofi Hacking Corp. and Mohammed Sakaria for summary judgment dismissing the complaint based on plaintiff's inability to demonstrate a serious injury to her cervical spine within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants made a prima facie showing that plaintiff did not sustain a serious injury to her cervical spine by submitting the expert report of an orthopedist, who found full range of motion and opined that plaintiff's alleged injuries had resolved (*see*

Birch v 31 N. Blvd., Inc., 139 AD3d 580 [1st Dept 2016]). Those findings were consistent with the conclusion of defendants' neurologist who found no neurological deficits and a limitation in one plane of range of motion, which did not undermine his conclusion that plaintiff suffered no permanent injury as a result of the accident (*see Paduani v Rodriguez*, 101 AD3d 470 [1st Dept 2012]; *Sone v Qamar*, 68 AD3d 566 [1st Dept 2009]). Defendants' neurologist also relied on plaintiff's MRI report, which showed preexisting degenerative disc disease in her cervical spine, in concluding that she suffered no traumatic injury causally related to the accident (*see Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]; *Colon v Vincent Plumbing & Mech. Co.*, 85 AD3d 541 [1st Dept 2011]). Defendants further demonstrated an absence of causation through the report of an expert in emergency room medicine, who opined that plaintiff's post-accident medical records showing no complaints of neck pain and a normal cervical exam, were inconsistent with any claim of traumatic injury to her cervical spine (*see Frias v Gonzalez-Vargas*, 147 AD3d 500, 501 [1st Dept 2017]). Furthermore, plaintiff testified that she did not seek treatment for her claimed cervical spine injuries from a neurologist until some eight months after the accident, which is "too remote in time to establish a causal relationship" between

her claimed injuries and the accident (*Jones v MTA Bus Co.*, 123 AD3d 614, 615 [1st Dept 2014]; *see Henchy v VAS Express Corp.*, 115 AD3d 478, 479 [1st Dept 2014]).

In opposition, plaintiff failed to raise a triable issue of fact as to whether she sustained a serious injury to her cervical spine causally related to the accident (*see Mayo v Kim*, 135 AD3d 624, 625 [1st Dept 2016]).

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

ENTERED: JUNE 15, 2017

CLERK

Tom, J.P., Renwick, Manzanet-Daniels, Kapnick, JJ.

4273 Noel Willis, Index 8549/07
Plaintiff-Respondent, 83920/08

-against-

Plaza Construction Corp., et al.,
Defendants-Appellants.
- - - - -
[And a Third-Party Action]

_____

London Fischer LLP, New York (Deborah J. Denenberg of counsel), for appellants.

The Rosato Firm, PC, New York (Paul A. Marber of counsel), for respondent.

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Order, Supreme Court, Bronx County (Donna M. Mills, J.), entered May 6, 2016, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the Labor Law §§ 200 and 241(6) and common-law negligence claims, unanimously modified, on the law, to grant the motion for summary judgment dismissing plaintiff's Labor Law § 200 claim, common-law negligence claim, and Labor Law § 241(6) claim predicated on Industrial Code (12 NYCRR) §§ 23-1.10(b)(2) and 23-4.2(k), and otherwise affirmed, without costs.

The motion court erred in denying defendants' motion as to the Labor Law § 200 and common-law negligence claims, because the construction accident — that is, the bursting of a hose pouring liquid cement — arose out of the means and methods of plaintiff's

work, and there was no evidence that defendants actually controlled or exercised supervisory authority over how plaintiff performed that work (*see Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 449 [1st Dept 2013]). At most, defendants had general authority over work site safety, which is insufficient to hold them liable for plaintiff's injuries (*see id.*; *see also Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]).

12 NYCRR 23-4.2(k) is insufficiently specific to support a Labor Law § 241(6) claim (*Sparendam v Lehr Constr. Corp.*, 24 AD3d 388, 389 [1st Dept 2005], *lv denied* 7 NY3d 703 [2006]), and 12 NYCRR 23-1.10(b)(2), involving the use of hand tools, is inapplicable to the facts of this case.

Nevertheless, the motion court correctly sustained the Labor Law § 241(6) claim predicated on 12 NYCRR 23-1.8(a) and (c)(4), because plaintiff's evidence, including his deposition testimony, raises a question of fact as to whether plaintiff was provided with and used proper eye protection (*cf. Beshay v Eberhart L.P.*

#1, 69 AD3d 779, 781 [2d Dept 2010] [the plaintiffs' counsel's admission that the plaintiff worker removed the protective eye gear before being struck by flying debris absolved the defendant of liability]).

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

ENTERED: JUNE 15, 2017

CLERK

Tom, J.P., Renwick, Manzanet-Daniels, Kapnick, JJ.

4274-
4274A The People of the State of New York, Respondent,

Ind. 3350N/13
67N/14

-against-

Walter Walker,
Defendant-Appellant.

_____

Galluzzo & Arnone LLP, New York (Matthew J. Galluzzo of counsel), for appellant.

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

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Judgments, Supreme Court, New York County (Michael J. Obus, J. at pleas; Bonnie G. Wittner, J. at sentencing), rendered May 21, 2015, convicting defendant of criminal sale of a firearm in the first degree (two counts), criminal possession of a weapon in the first degree and conspiracy in the fourth degree, and sentencing him to an aggregate term of 20 years, unanimously affirmed.

Defendant's challenges to his plea are unpreserved (*see People v Conceicao*, 26 NY3d 375, 382 [2015]), and we decline to review them in the interest of justice. As an alternative holding, we find that the record as a whole demonstrates that defendant's plea was knowing, intelligent, and voluntary, notwithstanding any deficiencies in the plea colloquy, including

the lack of an express waiver of the right to remain silent (*see People v Tyrell*, 22 NY3d 359, 365 [2013]; *People v Velez*, 138 AD3d 418 [1st Dept 2016], *lv denied* 27 NY3d 1140 [2016]).

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 15, 2017

CLERK

Tom, J.P., Renwick, Manzanet-Daniels, Kapnick, JJ.

4275-
4276 Index 350006/11

Debra Todres,
Plaintiff-Respondent,

-against-

Andrew Freifeld,
Defendant-Appellant.

- - - -

Bruce A. Yerman,
Nonparty Appellant.

_____

Andrew Freifeld, New York, appellant pro se.

Bruce A. Yerman, New York, appellant pro se.

Schwartz, Levine & Kaplan PLLC, New York (Jeffrey A. Kaplan of counsel), for respondent.

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Judgment of divorce, Supreme Court, New York County (Phyllis Sambuco, Special Referee), entered September 1, 2015, which to the extent appealed from as limited by the briefs, distributed the marital estate, awarded plaintiff child support, awarded plaintiff $164,124 in attorneys' fees, and imposed $25,500 in sanctions on defendant, unanimously affirmed, without costs. Order, same court (Lori S. Sattler, J.), entered August 26, 2015, which, to the extent appealed from as limited by the briefs, denied defendant's motion for attorneys' fees, unanimously affirmed, without costs.

Regarding distribution of the marital residence, the

Special Referee correctly credited each spouse for their separate property contributions to the purchase before determining how to distribute its remaining value (*see Fields v Fields*, 15 NY3d 158, 166-167 [2010]). Plaintiff sufficiently proved her contributions to the purchase price from her separate property through her testimony, her father's testimony, and documentary evidence. In determining the value of the marital residence, the Special Referee providently exercised her discretion in relying on the May 2013 joint appraisal, which fell after the January 26, 2011 commencement date of the proceeding, but before the November 19, 2013 commencement date of trial (*McKnight v McKnight*, 18 AD3d 288, 289 [1st Dept 2005]; *see also Mesholam v Mesholam*, 11 NY3d 24, 28 [2008]; *see* Domestic Relations Law [DRL] § 236[B][1][c]). In addition, defendant unduly prolonged the trial by his conduct, and is not entitled to benefit from further appreciation in value of the property over the prolonged trial (*Dabo v Sibblies*, 142 AD3d 459, 461 [1st Dept 2016]). The Special Referee considered the relevant statutory factors, and did not abuse her discretion in allocating 90% of the increased value of the marital residence to plaintiff (DRL § 236 [B][5][d]; *Fields* at 168, 170; *Holterman v Holterman*, 3 NY3d 1, 7-8 [2004], particularly in light of her findings regarding the parties' relative contributions as parent and homemaker, and financial provider. The Special Referee's

determination to credit plaintiff's rather than defendant's testimony on this and other issues is entitled to substantial deference (*Havell v Islam*, 301 AD2d 339, 347 [1st Dept 2002], *lv denied* 100 NY2d 505 [2003]).

Next, the Special Referee providently exercised her discretion in awarding plaintiff 80% of her two employment-related retirement accounts, but awarding her 50% of defendant's employment-related retirement account after considering both parties' economic contributions during the marriage, and noting the significant difference in investments the parties made in those accounts during the marriage. In contrast to defendant, plaintiff continued to contribute to her retirement accounts during the marriage.

In calculating child support, both parties are attorneys, and the Special Referee properly calculated plaintiff's income, and properly imputed future income of $140,000, beginning in July 2015, based on her testimony that although she was not employed at the time of trial, her health was improving, and she hoped to return to work in the near future (Family Ct Act §§ 413[1][b][5][i],[v]; *Matter of Childress v Samuel*, 27 AD3d 295 [1st Dept 2006]). Regarding defendant's income, the Special Referee providently exercised her discretion in imputing 20% more income than stated on his 2011, 2012, and 2013 tax returns, after

deeming his testimony not credible, and providently exercised her discretion in averaging his imputed 2011 and 2013 income to conclude his 2014 income would be $190,778, and properly ignored his 2012 income, for which he gave limited testimony, after invoking and, on the last day of trial, withdrawing his privilege against self-incrimination regarding his 2012 tax return (*Matter of Mongelluzzo v Sondgeroth*, 95 AD3d 1332 [2d Dept 2012], *lv denied* 20 NY3d 854 [2012]).

Regarding add-on expenses, the same court (Lori S. Sattler, J.), in orders dated December 13, 2016, and December 22, 2016, ordered a further hearing on plaintiff's claims for unreimbursed medical expenses beginning in November 2014, and on defendant's pro rata share of medical expenses from 2011 to 2013. As that hearing will render moot many of defendant's challenges to the orders directing defendant to pay plaintiff such add-ons in the judgment of divorce, we decline to modify that portion of the judgment at this time.

Next, a review of the record demonstrates that the sanctions of $25,500, imposed on defendant for six instances of frivolous conduct, were appropriate. Contrary to defendant's assertions, the Special Referee's grounds for imposition of sanctions were adequately set forth in a written decision, after giving defendant a reasonable opportunity to be heard (*see* 22 NYCRR §§

130-1.1, 130-1.2; *Gordon Group Invs., LLC v Kugler*, 127 AD3d 592 [1st Dept 2015]).

Regarding the Special Referee's award of $164,124 in attorneys' fees to plaintiff in the judgment of divorce, pursuant to her determination rendered in a decision and judgment entered June 9, 2015, she later vacated that award upon defendant's motion. In an order entered May 3, 2016, the Special Referee acknowledged that, while she had authority to hear and report on attorneys' fees based on the Supreme Court's reference order dated October 5, 2012, she lacked authority to hear and determine the issue because a later so-ordered stipulation, dated September 4, 2013, conferred authority only to hear and determine child support and equitable distribution (*see* CPLR 4311, 4317[a]; *see also Batista v Delbaum, Inc.*, 234 AD2d 45, 46 [1st Dept 1996]). She then converted her determination to a recommendation, which was confirmed in part by the Supreme Court, subject to a hearing on the reasonableness of the fees billed. Defendant and nonparty appellant did not appeal from those later orders. Accordingly, any challenge to her authority to hear and determine is moot.

In any event, the Special Referee maintained authority to hear and report on attorneys' fees. The reference order expressly acknowledged that the parties could enter a stipulation to allow the Special Referee to determine equitable distribution,

child support, or attorneys' fees. The fact that the parties stipulated to allow the Special Referee to hear and determine only equitable distribution and child support does not otherwise modify the reference order conferring authority to hear and report on attorneys' fees.

The Special Referee properly considered the financial circumstances of both parties, together with all of the circumstances of the case (DRL § 237; *DeCabrera v Cabrera-Rosete*, 70 NY2d 879 [1987]), and properly considered defendant's "obstructionist" conduct during the trial, which unduly prolonged the trial, and increased the legal fees incurred (*Johnson v Chapin*, 49 AD3d 348, 361 [1st Dept 2008], *mod* 12 NY3d 461 [2009]). Nor was plaintiff, who was unemployed by the time of trial, always the monied spouse. In fact, the Special Referee calculated plaintiff's earning capacity to be $140,000 and defendant's $190,000.

Regarding the appeal from the order entered August 26, 2015, defendant was not deprived of his right to seek attorneys' fees during the financial trial or afterwards. The discrepancy between the reference order and the stipulation regarding attorneys' fees might have created confusion over the Special Referee's authority to determine that issue at the financial trial. Nevertheless, the Special Referee directed the parties to

submit their legal bills in order to make a record in case the stipulation was expanded to confer authority to determine the issue of attorneys' fees. Thus, both sides had an opportunity to present evidence on the issue of attorneys' fees before she reported on the issues. Defendant chose not to seek such fees in his posttrial submissions, and to make his motion for attorneys' fees well after the financial trial. Defendant later moved to vacate the August 2015 order denying his motion, which relief was denied in an order dated December 13, 2016, and he thus had an adequate opportunity to litigate and pursue his claim. To the extent he disagrees with the December 13, 2016 order, it is not before this Court, since he apparently did not appeal from that order.

In any case, his motion was properly denied. Plaintiff was not, as defendant asserts, the monied spouse, and his own conduct

unduly delayed the trial, thereby increasing his own legal fees.

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

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

ENTERED: JUNE 15, 2017

CLERK

Tom, J.P., Renwick, Manzanet-Daniels, Kapnick, JJ.

4277 Thomas Zakrzewski, Index 650994/15
Plaintiff-Appellant,

-against-

Luxoft USA, Inc.,
Defendant-Respondent.

_____

Moritt, Hock & Hamroff, LLP, New York (David A. Schrader of counsel), for appellant.

Sherman Wells Sylvester & Stamelman LLP, New York (Jordan D. Weinreich of counsel), for respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered on or about August 18, 2016, which, to the extent appealed from as limited by the briefs, granted defendant's motion to dismiss the breach of contract, breach of the covenant of good faith and fair dealing, promissory estoppel, and negligent misrepresentation claims, unanimously modified, on the law, to deny the motion as to the breach of contract claim with respect to severance pay and the breach of implied covenant and fair dealing claim, and otherwise affirmed, without costs.

Plaintiff alleges that he was hired by defendant in January 2013 pursuant to terms set forth in a written offer of employment and other written agreements, which specified that his employment would be at-will and subject to three months' notice of termination and that his compensation would include an annual

bonus of at least $50,000 and the opportunity to earn up to $250,000 of stock in defendant's holding company if defendant acquired plaintiff's former employer and plaintiff met performance goals to be set by defendant. Plaintiff's employment was terminated in July 2014, without prior notice.

The allegations of breach of contract with respect to a 2014 bonus are based on promises by defendant that are "too indefinite to permit enforcement" (*see De Madariaga v Union Bancaire Privee*, 103 AD3d 591, 591 [1st Dept 2013], *lv denied* 21 NY3d 854 [2013], quoting *Glanzer v Keilin & Bloom*, 281 AD2d 371, 372 [1st Dept 2001]). Plaintiff's entitlement to the bonus was "based on execution of relevant [key performance indicators] determined annually in accordance with the current Company policies," and the complaint does not allege that those goals were determined and "execut[ed]."

The allegations of breach of contract with respect to severance pay state a cause of action and are not conclusively refuted by the documentary evidence. The complaint alleges that defendant's CEO, acting with authority, offered plaintiff three months' notice prior to termination, that plaintiff accepted that term, and that he was then terminated without proper notice. The complaint properly seeks three months' salary as severance pay or damages for the failure to comply with a notice of termination

provision (*see De Graffenreidt v Neighborhood Health Ctr. of Provident Clinical Socy.*, 42 AD2d 773 [2d Dept 1973]; *David Birnbaum LLC/Rare 1 v Park*, 2013 NY Slip Op 33372[U], *17-18 [Sup Ct, NY County Jan. 24, 2013]).

The complaint states a cause of action for breach of the implied covenant of good faith and fair dealing (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]). It alleges that defendant's representative, acting with authority, sent plaintiff a letter offering him employment, with an email saying that plaintiff would have the ability to earn up to $250,000 worth of defendant's restricted stock, pending defendant's acquisition of plaintiff's former employer and provided that plaintiff met certain goals; it further alleges that defendant failed to set goals. Based upon the language of the email, a reasonable person in plaintiff's position would be justified in understanding that defendant was obligated to set goals for plaintiff to enable him to receive the "fruits" of the offer (*see 511 W. 232nd Owners Corp.*, 98 NY2d at 153 [internal quotation marks omitted]). Defendant's alleged failure to set goals "ha[d] the effect of destroying or injuring [plaintiff's] right" to earn the stock (*see id.* [internal quotation marks omitted]; *see e.g. Pleiades Publ., Inc. V Springer Science + Bus. Media LLC*, 117 AD3d 636 [1st Dept 2014]; *Merzon v Lefkowitz*, 289

AD2d 142 [1st Dept 2001]).

The promissory estoppel and negligent misrepresentation claims were correctly dismissed since plaintiff does not allege a duty independent of the employment agreement (*see Vista Food Exch., Inc. v BenefitMall*, 138 AD3d 535, 537 [1st Dept 2016] [negligent misrepresentation], *lv denied* 28 NY3d 902 [2016]).

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

ENTERED: JUNE 15, 2017

CLERK

Tom, J.P., Renwick, Manzanet-Daniels, Kapnick, JJ.

4278 The People of the State of New York, Respondent, Ind. 4114/13

-against-

Westley Poirier, Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered October 7, 2014, unanimously affirmed.

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

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

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

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

ENTERED: JUNE 15, 2017

CLERK

Tom, J.P., Renwick, Manzanet-Daniels, Kapnick, JJ.

4282 The People of the State of New York, Ind. 4766/15
Appellant,

-against-

Stephen Lewins,
Defendant-Respondent.

_____

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

Law Office of Zachary Margulis-Ohnuma, New York (Zachary Margulis-Ohnuma of counsel), for respondent.

_____

Order, Supreme Court, New York County (Michael J. Obus, J.), entered on or about March 16, 2016, which granted defendant's CPL 30.30 motion to dismiss the indictment, unanimously reversed, on the law and the facts, the indictment reinstated, and the matter remanded for further proceedings.

The period between January 24 and March 17, 2015, which is dispositive of defendant's speedy trial motion, should not have been charged to the People. Contrary to the court's conclusion, defense counsel clearly expressed consent to the exclusion of the relevant period in emails to the prosecutor on March 16 and 17, 2015.

Defendant was charged with one count of second-degree unlawful surveillance by a felony complaint dated January 24, 2015, and was arraigned on the complaint the same day. Soon

afterward, one of defendant's attorneys contacted the prosecutor to express defendant's interest in negotiating a plea.

On March 16, 2015, the prosecutor emailed defendant's principal counsel and associate counsel to let them know that she was "considering making a non-felony offer in [defendant's] case if there are no additional crimes revealed on [defendant's] electronic devices." To facilitate plea negotiations, the prosecutor offered defendant an opportunity to participate in a proffer session and requested that defendant grant the People "permission to search" several electronic devices that had been seized from defendant to verify that he had not committed any additional crimes.

The prosecutor stated that "consideration of any offer by the People must be accompanied by [defendant's] written waiver of all 30.30 time," and that, if defendant was "not interested in an offer" or "not willing to waive 30.30 time," the case would be "presented to the current Grand Jury." That same day, defense counsel responded with an email indicating that he had "spoken to [defendant]," who "consents to a search of his devices that were seized and . . . waives 30.30 in order to facilitate plea negotiations."

On the next day, March 17, 2015, the prosecutor sent a second email to defense counsel, in which she explained how a

proffer session would work, provided defense counsel with a sample proffer agreement, and offered to draft the consent form for the search of defendant's electronic devices. The prosecutor then asked: "Are you waiving 30.30 from the arraignment date of Jan 24, 2015?" Defense counsel promptly responded, stating, "I'd be inclined to waive from today, but if you insist on 1/24 that's acceptable."

Under CPL 30.30(4)(b) a defendant may consent to the exclusion of time that would otherwise be chargeable to the People. If the People rely on consent under subsection 4(b) they must establish that such consent was "clearly expressed by defendant or defense counsel" (*People v Liotta*, 79 NY2d 841, 843 [1992]; *see also People v Dickinson*, 18 NY3d 835 [2011]). In addition to the exceptions enumerated in CPL 30.30(4), CPL 30.30 time may be excluded where "defendant's counsel explicitly waived speedy trial rights in order to complete ongoing plea negotiations" (*People v Waldron*, 6 NY3d 463, 467 [2006]).

In its decision on defendant's speedy trial motion, the court, relying on the phrase "if you insist," found that defense counsel's March 17 response did not constitute a clear agreement to waive time going back to January 24. The court noted that "[t]he prosecutor did not 'insist' or otherwise respond" to defense counsel's last email, indicating that without such

"insistence" no consent to exclusion of the relevant period was achieved. Rather, in the court's view, "the discussion of the commencement of defendant's consent appears to have been abandoned midstream."

We disagree with this analysis. In assessing whether time is properly excluded, a court should look to the totality of the record (*see People v Hernandez*, 248 AD2d 149, 149 [1st Dept 1998], *lv denied* 91 NY2d 1008 [1998]). Here, based on a fair reading of the whole record, we conclude that defense counsel expressly waived inclusion of the 52-day period. Central to the court's reasoning was that the prosecutor "did not 'insist' or otherwise respond" after defense counsel wrote "I'd be inclined to waive from today, but if you insist on 1/24 that's acceptable." However, in this exchange, "insistence" was not an eventuality that had to be confirmed by further action of the prosecutor, but an already clearly stated position. The prosecutor had already, in her March 16 email, insisted on a waiver of "all 30.30 time," extending back to the arraignment – requiring such a total waiver as a condition of negotiations. She had explained that if defendant were not willing to waive all 30.30 time, the case would be presented to the current grand jury.

The March 17 email repeated, even more explicitly, the

prerequisite – to which defendant had already agreed – that defendant waive speedy trial time going back to January 24. There was no need for the People to again insist on this because they had unequivocally insisted on it from the beginning of the conversation. As a realistic matter, the question whether the People insisted on this was not an open one, and defense counsel did not treat it as unresolved. He "accept[ed]" the waiver running back to the time of arraignment and promised to call the prosecutor the following week to make arrangements for a "presentation to you."

In *Waldron*, the defendant's attorney, as here, pursued a strategy that involved waiving speedy trial time "in order to reserve the possibility of negotiating a better sentence for his client" (6 NY3d at 465). In a July 11, 2000 letter to the district attorney, he requested "that we schedule a dispositional hearing date on or before September 15, 2000" and stated that "the defendant does hereby waive any speedy trial or other rights that he may have by your concurring with this request" (*id.* at 466). Ultimately, the parties remained in negotiations through November. The Court rejected the defendant's claim that "at most, the People established the excludable period requested in the letter ended September 15, the date [the attorney] requested a dispositional hearing" (*id.* at 468). While it found that

"[t]he July letter could have been clearer, and prosecutors would be well advised to obtain unambiguous written waivers in situations like these," the Court ruled that "the letter, read in light of the negotiations that preceded and followed it, as described in [defense counsel's] testimony, was a waiver of the delay between July 11 and November 30 because that was the time used by the defendant to negotiate with the District Attorney" (*id.*).

Although the period in controversy in this case is one that preceded the parties' engagement in negotiations, the principle is the same. Like the letter in *Waldron*, the email exchange between the parties "could have been clearer," in that any debate would have been eliminated if the prosecutor had responded to defense counsel's March 17 email by saying, "I insist." But the absence of that declaration did not make the preceding negotiations ambiguous. Contrary to the analysis of the court below, the prosecutor clearly demanded exclusion of all speedy trial time beginning with the arraignment, and defense counsel, while using the rhetorical phrase "if you insist," clearly acceded to that demand. Furthermore, the People and the Court both noted the defense waiver of that period during subsequent adjournments and ongoing negotiations, without defense objection.

Thus, the 52-day period should not have been charged to the People, and, as indicated, defendant's speedy trial motion fails without the inclusion of that period.

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

ENTERED: JUNE 15, 2017

CLERK

Tom, J.P., Renwick, Manzanet-Daniels, Kapnick, JJ.

4283-
4283A In re Alonzo R.,

A Child Under the Age of Eighteen Years, etc.,

Stephanie R.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Law Office Of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Seymour W. James, Jr. of counsel), attorney for the child.

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Order of disposition, Family Court, Bronx County (Sarah P. Cooper, J.), entered on or about April 8, 2016, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about April 8, 2016, which found that respondent mother had neglected the subject child, unanimously affirmed, without costs. Appeal from the fact-finding order unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

A preponderance of the evidence shows that the mother neglected the child by permitting the child to live in the home

of a person she had never met and whose full name and address were unknown to her; failing to provide that person with documentation necessary for the child to receive dental treatment; failing to provide the child with financial support; and failing to act after learning that the child was homeless for several months (*see* Family Ct Act §§ 1012[f][i][A], [B]; 1046[b][i]; *Matter of Kimberly F. [Maria F.]*, 146 AD3d 562 [1st Dept 2017], *lv denied* __ NY3d __, 2017 NY Slip Op 68601 [2017]; *Matter of Joelle T. [Laconia W.]*, 140 AD3d 513, 513-514 [1st Dept 2016]). The mother's conduct and the testimony of the caseworkers demonstrated her clear intention to abdicate her parental responsibilities, despite her claims of illness and poverty (*see Kimberly F.*, 146 AD3d at 563; *Joelle T.*, 140 AD3d at 514).

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

ENTERED: JUNE 15, 2017

CLERK

Tom, J.P., Renwick, Manzanet-Daniels, Kapnick, JJ.

4284 The People of the State of New York, Respondent, Ind. 1406/13

-against-

Sean Terrell, Defendant-Appellant.

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Rosemary Herbert, Office of the Appellate Defender, New York (Sharmeen Mazumder of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered July 3, 2014, convicting defendant, upon his plea of guilty, of attempted murder in the second degree and conspiracy in the second degree, and sentencing him to concurrent terms of 16 years and 5 to 15 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence on the attempted murder conviction to 10 years, and otherwise affirmed.

We do not find that defendant made a valid waiver of his right to appeal, and we find the sentence excessive to the extent indicated.

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

ENTERED: JUNE 15, 2017

CLERK

Tom, J.P., Renwick, Manzanet-Daniels, Kapnick, JJ.

4285 The People of the State of New York, Respondent, Ind. 9378/98

-against-

William Green, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Jeffrey A. Wojcik of counsel), for respondent.

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Order, Supreme Court, New York County (Juan M. Merchan, J.), entered March 25, 2016,, which denied defendant's petition to modify his sex offender classification, unanimously affirmed, without costs.

Defendant failed to meet his burden under Correction Law § 168-o of presenting clear and convincing evidence that a downward modification to level two is warranted. Defendant has a long history of sex crimes, and even while residing in a nursing home and confined to a wheelchair he sexually abused incapacitated fellow residents. In his current situation, defendant is able to move around, by wheelchair and without supervision, in his nursing home, which houses a population of potential victims. Defendant has not established that his medical condition has

deteriorated to the point that he no longer poses a serious risk of reoffense, or that his recent good behavior warrants a modification (*see e.g. People v Wragg*, 41 AD3d 1273, 1274 [4th Dept 2007], *lv denied* 9 NY3d 809 [2007]).

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

ENTERED: JUNE 15, 2017

CLERK

Tom, J.P., Renwick, Manzanet-Daniels, Kapnick, JJ.

4286N Armen Behljulhevic, Index 161437/13
Plaintiff-Respondent,

-against-

The City of New York,
Defendant,

Consolidated Edison Company of
New York, Inc.,
Defendant-Appellant.

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The Law Office of Douglas J. McKay, New York (Stephen T. Brewi of counsel), for appellant.

Wingate, Russotti, Shapiro & Halperin, LLP, New York (Andrea Borden of counsel), for respondent.

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Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered April 12, 2016, which, in this action for personal injuries, denied the motion of defendant Consolidated Edison Company of New York, Inc. (Con Ed) to vacate the note of issue and strike the matter from the trial calendar, unanimously affirmed, without costs.

In this discovery dispute, the court properly exercised its discretion in denying the motion to vacate. By stipulating at the October 20, 2015 compliance conference that all discovery was complete, Con Ed lost its entitlement to the information plaintiff stated in his April 6, 2015 response that he would

provide under separate cover (*see Stolowski v 234 E. 178th St. LLC*, 104 AD3d 569, 570 [1st Dept 2013]; *Chichilnisky v Trustees of Columbia Univ. in City of N.Y.*, 52 AD3d 206 [2008]).

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

ENTERED: JUNE 15, 2017

CLERK

Tom, J.P., Mazzarelli, Andrias, Manzanet-Daniels, Webber, JJ.

3844 Sarah Adams, etc., et al., Index 310425/11
Plaintiffs-Respondents,

-against-

Juan J. Pilarte, M.D., et al.,
Defendants,

Montefiore Medical Center,
Defendant-Appellant.

_____

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Judy C. Selmeci of counsel), for appellant.

Rheingold Giuffra Ruffo & Plotkin LLP, New York (Sherri L. Plotkin of counsel), for respondents.

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Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered August 19, 2016, modified, on the law, to dismiss the second cause of action alleging lack of informed consent as against Montefiore, and otherwise affirmed, without costs.

Opinion by Manzanet-Daniels, J. All concur except Tom, J.P. and Andrias, J. who dissent in part in an Opinion by Andrias J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Angela M. Mazzarelli
Richard T. Andrias
Sallie Manzanet-Daniels
Troy K. Webber, JJ.

3844
Index 310425/11

_____x

Sarah Adams, etc., et al.,
Plaintiffs-Respondents,

-against-

Juan J. Pilarte, M.D., et al.,
Defendants,

Montefiore Medical Center,
Defendant-Appellant.

_____x

Defendant Montefiore Medical Center appeals from the order of the Supreme Court, Bronx County (Douglas E. McKeon, J.), entered August 19, 2016, which, to the extent appealed from as limited by the briefs, denied its motion for summary judgment dismissing the complaint as against it.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Judy C. Selmeci of counsel), for appellant.

Rheingold Giuffra Ruffo & Plotkin LLP, New York (Sherri L. Plotkin and Thomas P. Giuffra of counsel), for respondents.

MANZANET-DANIELS, J.

The 17-year-old plaintiff received contraceptive counseling from a nurse practitioner at a school clinic operated by defendant Montefiore Medical Center (Montefiore). Plaintiff was noted as having a family history of heart disease and a chronic heart murmur.[1] In April 2010, plaintiff was dispensed a contraceptive device known as a NuvaRing, a hormonal method associated with an increased risk of developing blood clots. The device is inserted internally by the patient every month. The nurse practitioner testified that it was her custom and practice to review the information contained on the NuvaRing fact sheet/consent form with the patient prior to dispensing the device. The Montefiore school clinic records for plaintiff do not include a copy of the form, either signed or unsigned; however, plaintiff's mother admitted that she was aware of the risk of blood clots and had discussed same with her daughter.

On June 1, 2010, plaintiff presented at the school clinic complaining of shortness of breath and chest pain. The nurse practitioner's notes indicated "hx [history] of heart problem."

[1]Plaintiff was under the care of a pediatric cardiologist because of the family history of heart disease. Plaintiff's mother and uncle both suffered from ventricular dysplasia. Plaintiff's pediatric cardiologist found no evidence of ventricular dysplasia in plaintiff at a March 2009 visit.

She did not document an examination or evaluation of plaintiff's heart and lungs. The nurse practitioner did not consider the NuvaRing as a precipitating factor of the patient's symptoms, and assessed plaintiff as being dehydrated.

Plaintiff saw her pediatrician later that same day. He diagnosed her with asthma, though plaintiff had no prior history of asthma and did not have any wheezing upon examination.

On June 2, 2010, plaintiff presented to the emergency room at Bronx Lebanon Hospital complaining of chest pain and intermittent palpitations. The triage notes clearly noted that plaintiff was using the NuvaRing device. An EKG was performed and found to be normal with a prolonged QT interval. Plaintiff was discharged without being assessed for possible thromboembolism.

On June 3, 2010, plaintiff returned to the pediatrician's office continuing to complain of chest pain. The pain was persistent without relation to exertion. The pediatrician noted that her chest pain might be related to costochondral pain. He instructed her to return in 48 to 72 hours if her symptoms did not improve.

On June 4, 2010, a Friday, a doctor from Bronx Lebanon called plaintiff's mother to report "abnormalities" she had seen on the EKGs taken during plaintiff's emergency room visit, and

recommended that she make an appointment with plaintiff's pediatric cardiologist. Plaintiff's mother called the pediatric cardiologist's office, but was informed that the office needed to see the hospital records before scheduling an appointment. The hospital promised to fax the records first thing on Monday morning, June 7, 2010. An appointment was scheduled for plaintiff to see the pediatric cardiologist on June 10, 2010.

On June 8, 2010, plaintiff complained of chest pain and collapsed at home. Plaintiff's mother began CPR and called EMS. EMTs shocked plaintiff three times and administered epinephrine and vasopressin. The total cardiac arrest time was noted to be eight minutes.

Upon arrival at the hospital, plaintiff was nonresponsive and had no pupillary reflex. Her score on the Glasgow coma score was three, the lowest possible score. While in the emergency room, plaintiff showed evidence of seizure activity. She was placed on a ventilator and transferred to the pediatric intensive care unit at Columbia Presbyterian Hospital. Upon arrival, an echocardiogram showed severely diminished right ventricular function and a dilated main pulmonary artery. A CT scan was positive for bilateral pulmonary emboli. An MRI of the brain showed bilateral infarcts and subacute ischemic changes in the hippocampal region. Plaintiff remained hospitalized for a month,

and was thereafter transferred to the NYU Rusk Institute for rehabilitation. As a consequence of the arrest, she has suffered significant and permanent brain damage with marked cognitive and fine motor skills deficits, and requires constant, around-the-clock care.

Defendant Montefiore moved for summary judgment, asserting that it did not depart from accepted standards of medical care and that any such departure in failing to properly assess and respond to the patient's forming pulmonary embolism was not the proximate cause of her injuries (*see Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24 [1st Dept 2009]). Montefiore relied on the expert affidavit of Dr. Lisa Bardack, a board-certified internist. Dr. Bardack opined, based on her review of the medical records, that there was no indication to work up plaintiff for thrombophelia. She opined that plaintiff's family history of heart disease did not contraindicate prescribing NuvaRing, and that the NuvaRing fact sheet clearly discussed the warning signs and serious health problems associated with the contraceptive method, allowing users to make an informed choice. She opined that no reasonable or additional follow-up medical care could have been recommended by the nurse practitioner that was not provided by the higher level of care providers to which plaintiff subsequently presented, and that no care rendered by the clinic's nurse practitioner affected

plaintiff's outcome.

In opposition, plaintiff relied on the affirmation of Dr. Melanie Gold, a physician board-certified in pediatrics and adolescent medicine who had experience working in school medical clinics. Dr. Gold identified the following as departures from accepted medical practice: the failure to have plaintiff patient sign the consent form and the failure to retain a copy; the failure to document that plaintiff was counseled regarding the serious side effects associated with the use of the NuvaRing and the importance of immediately removing the device in the event she experienced such symptoms; and the failure to properly evaluate plaintiff or to immediately remove the device when plaintiff presented to the clinic complaining of chest pain and shortness of breath. Dr. Gold opined that if the nurse practitioner had properly assessed plaintiff, removed the NuvaRing, and referred plaintiff for further assessment, all of the subsequent injuries and complications suffered by plaintiff would have been avoided.

In reply, Montefiore relied on a second affidavit from Dr. Bardack. Dr. Bardack took issue with Dr. Gold's opinion that removal of the NuvaRing on June 1, 2010 would have affected the outcome. She opined that "[t]he gradual decrease of clot risk from removal . . . would have no impact . . . as [plaintiff's]

pulmonary embolism occurred on June 8, 2010, some 7 days after being seen at [the clinic]," relying on FDA prescribing information guidelines which recommended that the NuvaRing be discontinued four weeks prior to any surgery.

The court denied Montefiore's motion for summary judgment, finding sufficient questions of fact based on the expert opinions.

On appeal, Montefiore argues that any departures from accepted practice were not a proximate cause of patient's injuries because they did not - and, indeed, could not - have affected the outcome.

Montefiore made a prima facie case through its expert, Dr. Bardack, that it was not the proximate cause of plaintiff's injuries (*see Frye*, 70 AD3d at 24). In opposition, plaintiff's expert raised an issue of fact concerning causation. We disagree with the dissent that the affidavit of Dr. Gold was speculative and conclusory. Dr. Gold specifically opined that if the nurse practitioner had properly assessed plaintiff, instructed her to remove the NuvaRing, and referred her for further assessment, plaintiff's subsequent injuries and complications would have been avoided. Had the nurse properly assessed plaintiff as suffering from the symptoms of a blood clot, she could have instructed plaintiff to remove the ring immediately, thereby at least

beginning to correct any clotting imbalance. As Montefiore's expert acknowledges, "clot risk is gradually decreased after the ring is removed." Thus, while the nurse was not in a position to treat clots, she certainly was in a position to make the diagnosis and to direct the plaintiff to remove the likely source of her symptoms, lessening the risk of an adverse outcome.

Montefiore asserts that even if the NuvaRing had been removed on June 1, thromboembolism was nonetheless likely to ensue, relying on FDA guidelines concerning presurgical protocols;[2] Dr. Gold, however, opined that the risk of blood clotting would have subsided had the ring been removed. At this stage, plaintiff's expert's affidavit suffices to raise a factual issue as to the element of causation.

It may well be that the medical professionals who subsequently treated plaintiff are also at fault for failing to work her up for thromboembolism and failing to remove or direct her to remove the NuvaRing. Issues of relative culpability await resolution at trial. Plaintiff's submissions raise an issue of fact as to the liability of the nurse practitioner sufficient to defeat summary judgment.

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[2]Dr. Bardack's opinions concerning the import of the FDA guidelines are contained in her reply affidavit, to which plaintiff had no opportunity to respond.

However, Montefiore is entitled to dismissal of plaintiffs' informed consent claim. This claim was raised before the motion court, and therefore the matter is properly before us. The record shows that the nurse practitioner disclosed and discussed the potential risks of the NuvaRing with the patient, including the risk of blood clots. In fact, plaintiff's mother testified at her deposition that she received an information sheet about the device, which she discussed with her daughter, as well as signed the consent form at the bottom of the sheet. There is accordingly no evidence in the record sufficient to raise a triable issue of fact as to whether the doctor failed to disclose a reasonably foreseeable risk (*Orphan v Pilnik*, 66 AD3d 543, 544 [1st Dept 2009], *affd* 15 NY3d 907 [2010]), nor do plaintiffs raise any substantive arguments in support of their informed consent claim.

Accordingly, the order of the Supreme Court, Bronx County (Douglas E. McKeon, J.), entered August 19, 2016, which, to the extent appealed from as limited by the briefs, denied Montefiore's motion for summary judgment dismissing the complaint

as against it, should be modified, on the law, to dismiss the second cause of action alleging lack of informed consent as against Montefiore, and otherwise affirmed, without costs.

All concur except Tom, J.P. and Andrias, J. who dissent in part in an Opinion by Andrias, J.

ANDRIAS J. (dissenting in part)

On June 8, 2010, plaintiff, Sarah Adams, suffered a bilateral pulmonary embolism, allegedly caused by the use of the NuvaRing, a hormonal contraceptive device that carries an increased risk of developing blood clots. Plaintiff alleges that defendant Montefiore Medical Center failed to obtain her informed consent when it dispensed the NuvaRing and that it committed malpractice when it failed to properly diagnose and treat complications associated with its use at a June 1, 2010 visit, which was a proximate cause of her injuries.

Supreme Court denied Montefiore's motion for summary judgment dismissing the complaint as against it. The majority modifies to dismiss the cause of action for lack of informed consent, and otherwise affirms, finding that, in opposition to Montefiore's prima facie showing, plaintiff's expert raised an issue of fact as to whether Montefiore's alleged departures were a proximate cause of plaintiff's injuries. Because I believe that plaintiff's expert offered only conclusory assertions and speculation that the injuries plaintiff suffered would have been avoided had Montefiore referred her for further assessment or removed the NuvaRing at the June 1, 2010 visit, I dissent in part.

On April 12, 2010, the clinic at her high school, operated

by Montefiore, dispensed the NuvaRing to plaintiff, then age 17. On May 10, plaintiff returned to the clinic for a follow up visit. The records for that visit are silent as to whether plaintiff had inserted the NuvaRing or had removed it according to the instructions or whether she was experiencing side effects.

On May 17, complaining of a rash for five days and headaches, plaintiff saw defendant Dr. Pilarte, her pediatrician, whose diagnosis was Pityriasis Rosea.

On June 1, 2010, plaintiff went to the Montefiore clinic, complaining of shortness of breath and chest pain. The nurse practitioner who assessed plaintiff noted that plaintiff complained of feeling tired and had told the nurse that she had been active over the weekend, but had not drunk water. She also noted that plaintiff complained of a dry mouth and had a "hx [history] of heart problem." Plaintiff's vital signs were temperature of 97.9 degrees, heart rate of 76, respiration rate of 16 and blood pressure of 90/60. Her oxygen saturation was 99%. The nurse practitioner diagnosed plaintiff with dehydration and did not consider the NuvaRing as a precipitating factor of her symptoms.

Later that day, plaintiff returned to Dr. Pilarte with the same complaints. Dr. Pilarte diagnosed her with unspecified asthma, possible exercise induced asthma, and prescribed an

inhaler, despite plaintiff not having a prior history of asthma.

On June 2, 2010, plaintiff went to the emergency room at defendant Bronx Lebanon Hospital Center, complaining of chest pain, shortness of breath and heart palpitation. The hospital's notes indicate that plaintiff was using the NuvaRing. Her EKG and vital signs were found to be normal and she was discharged without assessment for possible thromboembolism.

On June 3, 2010, plaintiff returned to Dr. Pilarte and again complained of chest pain, shortness of breath and heart palpitation. Her respiratory rate was elevated. Dr. Pilarte noted that her chest pain might be related to costochondral pain and told plaintiff to return in 48 to 72 hours if there was no improvement. Plaintiff's mother, Yanixa Rosado, testified that she asked for a written referral to the pediatric cardiologist at Colombia Presbyterian but Dr. Pilarte refused. Dr. Pilarte testified that he gave a verbal recommendation that plaintiff see a cardiologist at Lincoln Hospital because she could be seen faster there.

On June 4, 2010, Dr. Kulkarny of Bronx Lebanon advised plaintiff's mother of abnormalities on the June 2 EKGs and urged her to make an appointment with plaintiff's pediatric cardiologist as soon as possible. The mother called the cardiologist's office and was told that they needed the medical

records before scheduling an appointment. While an appointment was subsequently scheduled for June 10, plaintiff collapsed at home on June 8. Plaintiff was in cardiac arrest for eight minutes and sent to Bronx Lebanon, where she arrived unresponsive with nonreactive pupils and no response to painful stimuli. She was transferred to Colombia Presbyterian Pediatric Intensive Care Unit where a CT scan was positive for bilateral pulmonary emboli and an MRI of the brain showed bilateral thalamic infarcts.

In moving for summary judgment dismissing a complaint alleging medical malpractice, a defendant must establish, prima facie, either that there was no departure from good and accepted medical practice or that any departure was not a proximate cause of the plaintiff's injuries (*see Scalisi v Oberlander*, 96 AD3d 106, 120 [1st Dept 2012]). If the defendant meets its burden, the plaintiff, to avoid summary judgment, must rebut the defendant's prima facie showing via medical evidence attesting that the defendant departed from accepted medical practice and that such departure was a proximate cause of the injuries alleged (*see Agosto v Nercessian*, 124 AD3d 562, 564 [1st Dept 2015]).

As the majority finds, Montefiore, through its expert, made a prima facie showing that any departure from the accepted standard of medical care in failing to properly assess and respond to plaintiff's forming pulmonary embolism was not a

proximate cause of her injuries. Montefiore's expert opined to a reasonable degree of medical certainty that plaintiff was properly evaluated and that there was no indication to work plaintiff up for thrombophelia on June 1, and that there would have been no change in plaintiff's outcome, had the clinic worked plaintiff up for thrombophelia that day. The expert explained that any failure to refer plaintiff for a higher level intervention was inconsequential, as in the days immediately following her visit to the clinic, plaintiff saw her pediatrician twice, as well as emergency room doctors, who observed her symptoms and were aware that she was using the NuvaRing. The expert stated that this amounted to complete followup care and that there was no reasonable or additional followup care which the clinic could have recommended.

In opposition, plaintiff's expert stated, among other things, that

> "it is my opinion to a reasonable degree of medical certainty that if [the nurse practitioner at the Montefiore clinic] had not departed from the good and accepted standards of medical care and practice by properly assessing the situation and removing the NuvaRing and referring Sarah for further assessment at the June 1, 2010 visit, all of the subsequent injuries and complications suffered by Sarah would have been avoided."

The majority believes that this suffices to raise an issue of fact as to causation and that while other medical

professionals who subsequently treated plaintiff may also be at fault, issues of relative culpability should await resolution at trial. Under the particular circumstances of this case, I disagree.

Generally, "the opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants" (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002] [internal quotation marks omitted]). However, a plaintiff's expert's opinion "must demonstrate the requisite nexus between the malpractice allegedly committed and the harm suffered" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 307 [1st Dept 2007] [internal quotation marks omitted]). If "the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz*, 99 NY2d at 544; *Giampa v Marvin L. Shelton, M.D., P.C.*, 67 AD3d 439 [1st Dept 2009]). Further, the plaintiff's expert must address the specific assertions of the defendant's expert with respect to negligence and causation (*see Foster-Sturrup v Long*, 95 AD3d 726, 728-729 [1st Dept 2012]).

Here, plaintiffs' expert's assertion that the failure to remove the NuvaRing on June 1, 2010 "may have led to this

devastating outcome," is both conclusory and speculative (*see Bullard v St. Barnabas Hosp.*, 27 AD3d 206 [1st Dept 2006] [defendants were entitled to summary judgment where plaintiff's opposition to their prima facie showing of entitlement to summary judgment offered only conclusory assertions and speculation that an earlier diagnosis and treatment of the heel decubitus would have avoided the eventual bilateral amputation]). The expert failed to show that even if an imbalance in clotting existed on June 1, it would have resolved itself before June 8 if the NuvaRing had been removed that day, and failed to establish how the removal of the NuvaRing that day would have prevented plaintiff's pulmonary embolism (*see Matter of Joseph v City of New York*, 74 AD3d 440 [1st Dept 2010]).

The majority disagrees, stating that "[h]ad the nurse properly assessed plaintiff as suffering from the symptoms of a blood clot, she could have instructed plaintiff to remove the ring immediately, thereby at least beginning to correct any clotting imbalance." While the majority posits that this may have lessened the risk of an adverse outcome, it has not been established that plaintiff's blood clots had in fact formed by the time of her last visit to the clinic on June 1. In any event Montefiore's expert opined that, given the timing between that visit and her cardiac arrest on June 8, 2010, removal of the

NuvaRing on June 1 would not have prevented her subsequent injuries because not enough time would have elapsed to allow for the clotting risk to decrease. In support, Montefiore's expert explained that the prescribing information from the Federal Drug Administration for NuvaRing, addressing discontinuance of the medication for surgical patients, states that the medication/ device is to be discontinued four weeks prior to a surgical procedure and the patient is to remain off NuvaRing for two weeks thereafter for clot risk reduction, which suggests that "NuvaRing would have to be discontinued for weeks to allow the risk of clot to diminish." The expert also noted that the "prescribing information for NuvaRing states clot risk is gradually decreased after the ring is removed."

As Montefiore's expert observed, plaintiff's expert's "statement calling for immediate removal of NuvaRing and an effect on the outcome does not consider the FDA's prescribing information and literature concerning the product," and is speculative. Moreover, the opinion had multiple qualifiers, with plaintiff's expert stating that it was "likely" that a clot was forming on June 1, given plaintiff's symptoms, and that the failure to remove the NuvaRing "may" have led to the outcome here. Plaintiff's expert similarly speculated that "if" a pulmonary embolism was forming and plaintiff referred to a

"higher level of assessment" "in a more timely manner," then "many, if not all" of the "most severe" events "would have been avoided." However, plaintiff's vitals were normal on June 1 and she only complained of shortness of breath on exertion. The theory that plaintiff was already suffering from a blood clot when she visited the clinic that day is based on supposition and hindsight, and is therefore insufficient to raise a material issue of fact (*see Manuel H. v Landsberger*, 138 AD3d 490 [1st Dept 2016], *lv denied* 28 NY3d 909 [2016]; *Foster-Sturrup*, 95 AD3d at 728).

Furthermore, even if the clinic had made a different diagnosis, it could only have referred plaintiff elsewhere. It could not treat her for clots. Plaintiff's expert did not refute Montefiore's showing that, even had a referral been given, the result would have been the same because plaintiff was nevertheless seen by numerous health care providers, including her regular pediatrician, who were advised of her complaints and the fact that she was using the NuvaRing. Disregarding these subsequent examinations, the first of which occurred on the very same day as plaintiff's last visit to the clinic, plaintiff's expert merely speculated that Montefiore's failure to properly refer her for a "higher level" of intervention and assessment was a proximate cause of her injuries. This did not suffice to

establish the requisite nexus between the alleged departure and plaintiff's injuries, and Montefiore is entitled to dismissal of plaintiff's medical malpractice claims because a rational jury could not infer that there was a substantial possibility that plaintiff was denied a chance of the better outcome as a result of Montefiore's alleged deviation from the standard of care (*see Moore v New York Med. Group, P.C.*, 44 AD3d 393 [1st Dept 2007], *lv dismissed* 10 NY3d 740 [2008]; *DeCintio v Lawrence Hosp.*, 25 AD3d 320 [1st Dept 2006]).

Accordingly, the order denying Montefiore's motion for summary judgment dismissing the complaint as against it should be reversed and Montefiore's motion for summary judgment granted in its entirety.

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

ENTERED: JUNE 15, 2017

CLERK