SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 22, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Renwick, Mazzarelli, Andrias, Manzanet-Daniels, JJ.

4102N Law Offices of Russell I. Marnell, Index 157206/14
Plaintiff-Respondent,

-against-

Angela Sanabria,
Defendant-Appellant.

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Michael Ivanciu, Flushing, for appellant.

Rosenthal & Goldhaber, P.C., Hauppauge (Robert D. Goldhaber of counsel), for respondent.

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Order, Supreme Court, New York County (Donna M. Mills, J.), entered September 18, 2015, which granted plaintiff's motion to strike defendant's answer pursuant to CPLR 3126 for failure to comply with outstanding discovery, unanimously reversed, on the law and the facts and in the exercise of discretion, without costs, and the motion denied.

Upon the record before us, it does not appear that the pro se defendant's conduct was willful and contumacious and, thus, the drastic sanction of striking her answer is not warranted, given the lack of prejudice to plaintiff as a result of

defendant's delay in answering the interrogatories (*see Pezhman v Department of Educ. of The City of NY*, 95 AD3d 625 [1st Dept 2012]*; Cigna Prop. & Cas. Co. v Decoration & Design Bldg.* Partnership, 268 AD2d 223 [1st Dept 2000]; *Cianciolo v Trism Specialized Carriers*, 274 AD2d 369 [2d Dept 2000]).

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

ENTERED: JUNE 22, 2017

CLERK

Sweeny, J.P., Richter, Andrias, Kahn, JJ.

3970- Index 100820/12
3970A Keenan Britt,
Plaintiff-Respondent,

-against-

City of New York, et al.,
Defendants-Appellants.

_____

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

Glass Krakower LLP, New York (John Hogrogian of counsel), for respondent.

_____

Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered May 9, 2016, which, to the extent appealed from as limited by the briefs, upon reargument of defendants' motion to dismiss, denied dismissal of plaintiff's claims for prima facie tort and tortious interference with contract insofar as asserted against the individual defendants, unanimously reversed, on the law, without costs, and those claims dismissed. The Clerk is directed to enter judgment accordingly. Appeal from order, same court and Justice, entered August 12, 2013, unanimously dismissed, without costs, as taken from an order that has been superseded by the order entered May 9, 2016.

Plaintiff's claims for prima facie tort and tortious interference should have been dismissed for failure to state a

cause of action.[1] It is well settled that prima facie tort is not designed to "'provide a catch-all alternative for every cause of action which cannot stand on its legs'" (*Kickertz v New York Univ.*, 110 AD3d 268, 277 [1st Dept 2013], quoting *Bassim v Hassett*, 184 AD2d 908, 910 [3d Dept 1992]). Here, the gravamen of plaintiff's claims relate to his contention that he had a right to return to his permanent computer aide title; this claim was resolved in his favor in the article 78, and plaintiff was fully compensated for that wrong in that proceeding. In the complaint, plaintiff does not identify or itemize with any specificity the special damages he allegedly suffered that are encompassed within the prima facie tort claim (*see Phillips v New York Daily News*, 111 AD3d 420, 421 [1st Dept 2013]). Moreover, the complaint does not allege that disinterested malevolence was the sole motivation for the conduct of which he complains (*see AREP Fifty-Seventh, LLC v PMGP Assoc., L.P.*, 115 AD3d 402, 403 [1st Dept 2014]). Rather, he merely alleges that he was not told he was relinquishing his permanent title.

The tortious interference claim fails both because plaintiff was not a party to any contract with a third party (*see Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]; *Fiore v Town of*

[1] At oral argument, plaintiff essentially acknowledged that Nancy Grillo was the only viable remaining defendant.

Whitestown, 125 AD3d 1527, 1530 [4th Dept 2015], *lv denied* 25 NY3d 910 [2015]), and because, as noted above, he has not identified any damages apart from those for which he already has been compensated.

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

ENTERED: JUNE 22, 2017

CLERK

Tom, J.P., Sweeny, Richter, Kapnick, Webber, JJ.

4117 Tillage Commodities Fund, L.P., Index 654765/16
Plaintiff-Respondent,

-against-

SS&C Technologies, Inc.,
Defendant-Appellant.

_____

Davis Polk & Wardwell LLP, New York (Matthew A. Kelly of counsel), for appellant.

Arkin Solbakken LLP, New York (Lisa C. Solbakken of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered December 30, 2016, which, insofar as appealed from, denied defendant's motion to dismiss the breach of contract and breach of the implied covenant of good faith and fair dealing claims, unanimously modified, on the law, to grant the motion as to the breach of contract claim insofar as it is based on defendant's alleged failure to disclose its communications with the defrauding third party, and to grant the motion as to the breach of the implied covenant claim insofar as it is based on defendant's conduct prior to discovery of the fraud, and otherwise affirmed, without costs.

Plaintiff investment fund seeks damages from defendant, its fund administrator, in connection with defendant's processing of a series of wire transfer requests that were later discovered to

be fraudulent. Plaintiff claims that defendant breached the governing service agreement by disbursing funds without plaintiff's approval and by later refusing to turn over its communications with the defrauding third party. Plaintiff also claims that defendant breached the implied covenant of good faith and fair dealing by failing to take reasonable precautions to prevent the fraud and by frustrating plaintiff's recovery efforts.

The motion court correctly sustained the breach of contract claim insofar as it is based on defendant's disbursement of funds without plaintiff's instruction or approval. Under the terms of the service agreement, defendant can only be held liable to the extent it was at least grossly negligent. In the context of a contractual limitation of liability, "gross negligence" consists of "conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing" (*Colnaghi, U.S.A. v Jewelers Protection Servs.*, 81 NY2d 821, 823-824 [1993]; *accord Lubell v Samson Moving & Stor.*, 307 AD2d 215, 216 [1st Dept 2003]). Although the alleged unauthorized transfer of funds does not appear to have been intentional, plaintiff has sufficiently alleged that defendant's conduct "evince[d] a reckless disregard" for plaintiff's rights insofar as it failed to comply with basic cybersecurity precautions and actively disregarded its own

policies as well as obvious red flags (*id.*). This is especially true in light of defendant's awareness that the transfers, which were for substantial amounts of money, would result in near depletion of plaintiff's account (*see Internationale Nederlanden [U.S.] Capital Corp. v Bankers Trust Co.*, 261 AD2d 117, 122 [1st Dept 1999]).

The breach of contract claim must fail, however, to the extent it is based on defendant's refusal to turn over all of its communications with the fraudster. Even if plaintiff may be entitled to these communications, under the terms of the service agreement permitting access to "books, records and statements as may be reasonably necessary to document the transactions recorded" by defendant, plaintiff cannot demonstrate that it suffered any damages from defendant's failure to turn them over after the fraud had occurred.

The breach of the implied covenant of good faith and fair dealing claim must be dismissed as duplicative of the breach of contract claim, insofar as it is premised on defendant's conduct prior to discovery of the fraud, because the claims are "based on the same allegations and seek the same damages" (*Ullmann-Schneider v Lacher & Lovell-Taylor, P.C.*, 121 AD3d 415, 416 [1st Dept 2014]).

The breach of the implied covenant claim should be

sustained, however, as to defendant's post-discovery conduct. That conduct, which includes allegedly failing to immediately notify plaintiff of the fraud and filing a misleading report with Hong Kong police, is separate from the misconduct alleged in plaintiff's breach of contract claim. Defendant's attempt to dispute the veracity of these allegations is improper at the motion to dismiss stage (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]). Moreover, plaintiff has alleged damages resulting from this frustration of its recovery efforts, including a dramatically reduced likelihood of recovering funds from the latest transfer.

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

ENTERED: JUNE 22, 2017

CLERK

Sweeny, J.P., Mazzarelli, Moskowitz, Manzanet-Daniels, Kapnick, JJ.

4158 R.S., Index 350001/12
Plaintiff-Respondent,

-against-

B.L.,
Defendant-Appellant.

_____

Law Offices of Annette G. Hasapidis, White Plains (Annette G. Hasapidis of counsel), for appellant.

Cohen Clair Lans Greifer Thorpe & Rottenstreich LLP, New York (Robert Stephan Cohen of counsel), and Michele A. Katz PLLC, New York (Michele A. Katz of counsel), for respondent.

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Judgment of divorce, Supreme Court, New York County (Ellen Gesmer, J.), entered April 15, 2015, and bringing up for review an order, same court and Justice, entered on or about January 26, 2015, which, after a nonjury trial, resolved the parties' financial issues ancillary to the divorce, unanimously affirmed, without costs.

The parties were married in 1987, and there are two children of the marriage, born in 1994 and 1996, respectively. On or about January 4, 2012, the husband commenced this action for a divorce and ancillary relief. After a 21-day nonjury financial trial, the Supreme Court, inter alia, found that the parties' nonretirement assets had precipitously declined by approximately $1.6 million, largely due to the wife's lavish spending postcommencement and the parties' legal fees. The court, inter

alia, distributed the parties' nonretirement assets, including real property and the husband's partnership interest at his law firm, 35% to the wife and 65% to the husband. The parties' retirement assets, including a lifetime annuity payable upon the husband's retirement, were distributed equally. The wife was awarded declining maintenance for eight years, taking into account her imputed income, so as to provide her with $35,000 of taxable income per month. As for child support, the court applied a cap on combined parental income of $350,000, with the wife paying a pro rata share of 17% and the husband paying 83%, except for educational expenses, which were apportioned 35% to the wife and 65% to the husband.

Contrary to the wife's contention, the court properly imputed income to her based on the testimony and report of the husband's vocational expert. Although the Ivy-League educated wife left full-time work as a lawyer in 1999 to raise the parties' children, she nevertheless maintained her law license, continued to engage in professional activities, and did consulting work. Prior to commencement of the action, she was accepted to the Scheinman Institute on Conflict Resolution at Cornell University for an arbitration program and was appointed as an arbitrator for the United Federation of Teachers and New York City Department of Education § 3020-a Hearing Panel, where

she rendered a 90-page decision upheld by the Supreme Court. Moreover, the court properly precluded the wife, who suffered from three psychiatric hospitalizations in the year preceding the trial, from introducing testimony from a mental health evaluator about her ability to work. The wife waived such expert testimony pursuant to a so-ordered stipulation entered into by the parties (*see Alveranga-Duran v New Whitehall Apts., L.L.C.*, 40 AD3d 287 [1st Dept 2007]; *see generally Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 81 [2010]). Accordingly, there is no basis to disturb the court's award of maintenance to the wife.

Based on the foregoing, the court properly imputed income to the wife in determining her pro rata share of child support. As well, the court providently exercised its discretion in applying a combined income cap of $350,000 based on the children's actual needs, rather than the husband's income (*see Matter of Culhane v Holt*, 28 AD3d 251, 252 [1st Dept 2006]).

Turning to equitable distribution, the court providently exercised its discretion in distributing the parties' total nonretirement marital assets, including the values of the husband's partnership interest and the parties' real property, 35% to the wife and 65% to the husband, the net effect of which was to award the wife between 40 to 45% of the parties' liquid assets, as she would have only been entitled to a smaller

percentage of the husband's partnership interest if it were distributed separately (*see e.g. Sutaria v Sutaria*, 123 AD3d 909 [2d Dept 2014]; *Charap v Willett*, 84 AD3d 1000, 1002-1003 [2d Dept 2011]).

It was an appropriate exercise of discretion to allocate college costs in accordance with the equitable distribution division of nonretirement assets (35%), as opposed to the division of child support expenses (17%). "[E]ducational expenses are not necessarily prorated in the same percentage as each parent's income bears to the combined parental income" (*Castello v Castello*, 144 AD3d 723, 728 [2d Dept 2016] [internal quotation marks omitted]).

The court did not abuse its discretion in using a valuation date of September 30, 2013, the date the trial ended, under the circumstances of this case.[1] "[T]he appropriate date for measuring the value of marital property has been left to the sound discretion of the trial courts, which should make their determinations with due regard for all of the relevant facts and circumstances" (*McSparron v McSparron*, 87 NY2d 275, 287 [1995];

[1]It may be noted that although testimony concluded on August 23, 2013, the parties appeared on September 30, 2013 for arguments and the rendering of evidentiary rulings. We accordingly refer to the latter date as the "end of trial." There is nothing in the record in any event to show a material difference between values as of August 2013 and September 2013.

Blenk v Blenk, 6 AD3d 283, 285 [1st Dept 2004] [affirming end of trial valuation date for assets that had declined in value]).

The court properly equalized the parties' retirement assets to effect a 50%/50% split by transferring $402,380 from the husband's 401(k) to the wife, with the remaining retirement assets staying in the possession of the individual title holder. The court properly denied the wife's request for 50% of the husband's Capital C account. The account is not cash, as the wife suggests, but part of the approximately $313,844 annuity benefit. It should be noted that the husband must survive to age 65 to be entitled to the benefit. Finally, the court properly found that the property held by the insurance trust belongs to the trust, not the marital estate, and therefore is not subject to distribution (*see Markowitz v Markowitz*, 146 AD3d 872, 873-874 [2d Dept 2017]).

We have considered the remaining arguments and either find them unavailing or need not reach them in light of our decision.

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

ENTERED: JUNE 22, 2017

CLERK

Friedman, J.P., Gische, Kapnick, Kahn, JJ.

4219 Ripplewood Advisors, LLC, Index 653517/15
Plaintiff-Respondent,

-against-

Callidus Capital SIA, et al.,
Defendants-Appellants.

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Dentons US LLP, New York (Charles E. Dorkey III of counsel), for appellants.

Cravath, Swaine & Moore LLP, New York (Robert H. Baron of counsel), for respondent.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered February 28, 2017, which denied defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(8) and 327(a), unanimously reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

New York does not have personal jurisdiction over defendants pursuant to CPLR 302(a)(1), as they did not avail themselves "of the privilege of conducting activities within [this] State, thus invoking the benefits and protections of its laws" (*Fischbarg v Doucet*, 9 NY3d 375, 380 [2007] [internal quotation marks omitted]). The telephone and email communications between the Latvian defendants and plaintiff's office in New York, concerning a contemplated association in the acquisition of a Latvian bank (with no presence in New York) undergoing privatization, do not

suffice to constitute the transaction of business in New York. In so concluding, we find it persuasive that defendants never entered New York in connection with their dealings with plaintiff, that the parties' electronic communications also ran between defendants and plaintiff's London office, that plaintiff traveled to Latvia in connection with this matter, and that the parties' contemplated association (if the bank were acquired) would be centered in Latvia (*see e.g. SunLight Gen. Capital LLC v CJS Invs. Inc.*, 114 AD3d 521, 522 [1st Dept 2014]).

Plaintiff's argument that "the sharply conflicting affidavits submitted by the parties ... required a jurisdictional hearing" (*Shea v Hambro Am.*, 200 AD2d 371, 372 [1st Dept 1994]) is unpreserved. In any event, resolution in plaintiff's favor of the parties' factual disputes would not lead to a different result.

Even if personal jurisdiction existed over defendants, we would dismiss on the ground of forum non conveniens, in view of Latvia being the principal situs of the underlying transaction, the pendency in Latvia of an earlier-filed action between the same parties concerning this dispute, and the likely

applicability of Latvian law under a grouping-of-contacts analysis (*see Zurich Ins. Co. v Shearson Lehman Hutton*, 84 NY2d 309, 317 [1994]).

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

ENTERED: JUNE 22, 2017

CLERK

Sweeny, J.P., Mazzarelli, Andrias, Moskowitz, Gische, JJ.

4343 The People of the State of New York, Respondent, Ind. 1222/10

-against-

Bruce J. Adams, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered May 3, 2011, convicting defendant, after a jury trial, of two counts of criminal possession of a weapon in the second degree, and sentencing him to concurrent terms of eight years, unanimously affirmed.

Defendant's challenge to the admission of hearsay at trial is unpreserved, and we decline to review it in the interest of justice. In any event, given the overwhelming evidence of defendant's guilt, any error in admitting the hearsay statement was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

Defendant was not deprived of a fair trial by a summation comment by the prosecutor that invited the jury to speculate about matters not in evidence, because the court's extensive curative instructions, which were given at defendant's request,

and which the jury is presumed to have followed, were sufficient to prevent any prejudice. Moreover, given the overwhelming evidence, any error was harmless.

Defendant's request, made after the trial prosecutor had already made his sentencing recommendation, to have the prosecutor recused from sentencing for alleged personal bias, was untimely and without merit. In any event, the only remedy sought by defendant on appeal is a reduction of sentence in the interest of justice. However, we perceive no basis for reducing the sentence.

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

ENTERED: JUNE 22, 2017

CLERK

Sweeny, J.P., Mazzarelli, Andrias, Moskowitz, Gische, JJ.

4344 State ex rel. Jerome A., Index 100580/16
Petitioner-Appellant,

-against-

Joseph Ponte, Commissioner, etc.,
Respondent,

Anthony J. Annucci, etc.,
Respondent-Respondent.

_____

Marvin Bernstein, Mental Hygiene Legal Service, New York (Diane Goldstein Temkin of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Matthew W. Grieco of counsel), for respondent.

_____

Judgment and order (one paper), Supreme Court, New York County (Daniel P. Conviser, J.), entered June 8, 2016, which denied the petition for a writ of habeas corpus, and dismissed the proceeding, unanimously affirmed, without costs.

As we held on a prior appeal in a related proceeding, the State met its probable cause burden at the hearing held to determine that issue (*see* Mental Hygiene Law [MHL] § 10.06[g]), and relator's pretrial detention is not unconstitutional (*see Matter of State of New York v Jerome A.*, 137 AD3d 557 [1st Dept 2016] [*Jerome I*]). Petitioner's contention that the State's expert failed to adduce sufficient evidence of a predisposing mental disorder (*see* MHL § 10.03[i]) is meritless.

Petitioner's argument that, in reversing on the law in *Jerome I*, we left undisturbed the hearing court's finding that the State had also failed to meet its probable cause burden on the second prong of the "mental abnormality" showing (that relator's qualifying mental disorder causes him "serious difficulty" in controlling his sex offending conduct), is also without merit. Necessarily implicit in *Jerome I* was a finding that the State had met its probable cause burden on both prongs, and we in fact so held.

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

ENTERED: JUNE 22, 2017

CLERK

Sweeny, J.P., Mazzarelli, Andrias, Moskowitz, Gische, JJ.

4345 In re Leonardo Thomas B.,
Petitioner-Respondent,

-against-

Katherine F.,
Respondent-Appellant.

_____

Geoffrey P. Berman, Larchmont, for appellant.

_____

Order, Family Court, Bronx County (Lauren Norton Lerner, Referee), entered on or about May 21, 2015, which, upon a fact-finding determination that respondent committed assault in the second degree and aggravated harassment in the first degree, granted the petition and issued a two-year order of protection in favor of petitioner, unanimously reversed, on the law and the facts, without costs, the order of protection vacated, and the petition dismissed.

A fair preponderance of the evidence at the fact-finding hearing does not support the finding that respondent committed assault in the second degree. There is simply no evidence that petitioner sustained serious physical injury (*see* Penal Law §§ 120.05; 10.00[10]; *Matter of Chigusa Hosono D. v Jason George D.*, 137 AD3d 631, 632 [1st Dept 2016]).

The Referee also erred in determining that respondent's actions constituted aggravated harassment in the first degree,

since aggravated harassment in the first degree is not a designated family offense (*see* Family Court Act § 812[1]). To the extent the Referee meant to find that respondent committed acts constituting harassment in the first degree (Penal Law § 240.25), which is a designated family offense (*see* Family Court Act § 812[1]), a preponderance of the record evidence does not support a finding that respondent engaged in a course of conduct or repeatedly committed acts that placed petitioner in reasonable fear of physical injury (Penal Law § 240.25). Petitioner testified concerning only a single altercation, and an isolated incident is insufficient to support a finding of harassment in the first degree (*see Matter of Ebony J. v Clarence D.*, 46 AD3d 309 [1st Dept 2007]).

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

ENTERED: JUNE 22, 2017

CLERK

Sweeny, J.P., Mazzarelli, Andrias, Moskowitz, Gische, JJ.

4346 Verizon New York Inc., Index 161864/14
Plaintiff-Respondent,

-against-

New York State Electric & Gas Corporation,
Defendant-Appellant.

_____

The Wolford Law Firm LLP, Rochester (Laura A. Myers of counsel), for appellant.

Pillinger Miller Tarallo, LLP, Elmsford (Patrice Pulvers Coleman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered July 13, 2016, which denied defendant's motion for summary judgment dismissing the complaint, unanimously modified, on the law, to grant so much of the motion as sought dismissal of the second cause of action alleging trespass, and otherwise affirmed, without costs.

In this action alleging property damage due to defendant utility company's alleged negligence and/or trespass upon plaintiff's underground telecommunications cables during an excavation, defendant established its entitlement to judgment as a matter of law as to plaintiff's trespass cause of action. In opposition, plaintiff failed to raise a triable issue as to whether the actions by defendant in proceeding with excavation,

under the circumstances presented, rendered it a substantial certainty that the excavation would intrude upon plaintiff's underground equipment (*see Phillips v Sun Oil Company*, 307 NY 328 [1954]; *cf. Buckeye Pipeline Co. v Congel-Hazard, Inc.*, 41 AD2d 590 [4th Dept 1973]).

As to plaintiff's negligence cause of action, defendant's argument that article 36 of the General Business Law (GBL), along with attendant rules and regulations promulgated thereunder, were intended by the legislature to govern the rights and liabilities of excavators and underground equipment operators, as well as to supplant traditional common-law causes of action and other statutory rights, is not supported by the language of such statutory scheme. Where, as here, "common law gives a remedy, and another remedy is provided by statute, the latter is cumulative, unless made exclusive by statute" (*Assured Guaranty [UK], Ltd. v J.P. Morgan Inv. Mgt. Inc.*, 18 NY3d 341, 350-351 [2011] [internal quotation marks omitted]). The language of GBL 765 provides an operator a cumulative remedy in the form of reasonable repair costs for damages arising from an excavator's "violation" of a GBL article 36 provision (conditioned upon the operator not being in violation of a GBL article 36 provision).

Plaintiff's instant action seeks not the statutory remedy of reasonable repair costs for the damage to its equipment, but

rather, it alleges a common-law negligence claim, which GBL 765(2) expressly provides is not excluded by the GBL article 36 statutory scheme. As such, defendant's argument that it established prima facie entitlement to summary judgment on plaintiff's negligence claim based on evidence that plaintiff apparently failed to respond in a timely manner to defendant's one-call notification regarding its planned excavation date (*see* GBL 761, 763, 765; 16 NYCRR § 753-4.5[a]), is unavailing. Plaintiff's alleged violation of a regulation defining a timely response constituted only some evidence of negligence on its part (*see Conte v Large Scale Dev. Corp.*, 10 NY2d 20 [1961]; *Bjelicic v Lynned Realty Corp.*, 152 AD2d 151 [1st Dept 1989], *appeal dismissed* 75 NY2d 947 [1990]), and did not amount to a prime facie defense to plaintiff's action.

Furthermore, even assuming that the burden on the motion seeking dismissal of the negligence claim did shift to plaintiff, plaintiff's evidence that defendant, as excavator, failed to comply with the GBL article 36 statutory requirements that it first verify the location of underground facilities prior to excavating and confirm with the operator notified by its one-call notification that underground facilities were, in fact, not in the area of a proposed dig (*see* GBL 764[2], [3]), constitutes some evidence of negligence by defendant in the excavation to

warrant a denial of summary judgment as to liability on the negligence claim (*see Bjelicic* at 154). Contrary to defendant's argument, comparative negligence principles would apply, as they are not subsumed by the provisions of GBL article 36 (*see* GBL 765[2]).

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

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

ENTERED: JUNE 22, 2017

CLERK

Sweeny, J.P., Mazzarelli, Andrias, Moskowitz, Gische, JJ.

4347-
4348 Jason McCarthy, et al.,
Plaintiffs-Respondents,

-against-

New York Kitchen & Bathroom Corp.,
Defendant-Appellant.

- - - - -

[And a Third-Party Action]

Index 651959/11

_____

Law Offices of C. Jaye Berger, New York (C. Jaye Berger and Louis A. Badolato of counsel), for appellant.

Kishner & Miller, New York (Scott Himes of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Margaret A. Chan, J.), entered June 16, 2016, after a jury trial, awarding plaintiffs the total amount of $1,355,810.08, unanimously reversed, on the law, without costs, the judgment vacated, and the matter remanded for a new trial. Appeal from order, same court and Justice, entered on or about February 22, 2016, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

On May 6, 2010, plaintiffs entered into a contract with defendant New York Kitchen & Bathroom Corp. (NYKB) to renovate their Manhattan apartment. The contract set forth an estimated date for "[s]ubstantial completion" of October 30, 2010, subject

to various conditions, and expressly stated that the estimated completion date was not a "definite date which is of the essence." Third-party defendant Frank Catanzarite signed the contract as NYKB's chief operating officer, as did Perry Hiiman, the president of NYKB. Between May 6, 2010 and December 20, 2010, plaintiffs entered into additional contracts and amendments to the initial contract that expanded the original scope of renovation work. Three of these agreements were with NYKB, signed by Catanzarite and Hiiman, and five of the agreements were with "Frank Catanzarite Construction Co." (FCC) and signed only by Catanzarite, with no mention of NYKB. For the NYKB contracts, plaintiffs wrote checks made payable to "New York Kitchen and Bathroom," while the checks for the FCC contracts were made payable directly to Catanzarite.

By June 2011, approximately one year after the initial contract was executed, plaintiffs terminated their relationship with both NYKB and FCC, citing unreasonable delays on the project, and brought several claims against NYKB under all nine agreements, of which only plaintiffs' cause of action for breach of contract survived NYKB's motion to dismiss. A trial was held, and, at the close of testimony, prior to jury deliberations, the court determined that NYKB had not "substantial[ly] perform[ed]" under the NYKB contracts, and, thus, the issue would not be

submitted to the jury. Instead, the jury deliberated over only two questions presented on a verdict sheet before entering a verdict in favor of plaintiffs: (1) whether Catanzarite was an officer of NYKB, and (2) if so, whether Catanzarite, as an officer, bound NYKB to agreements he made with plaintiffs.

By directing verdict on the issue of breach of contract, the court committed reversible error. "A verdict may be directed only if the court finds that, upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party" (*Noor v City of New York*, 130 AD3d 536, 539 [1st Dept 2015] [internal quotation marks omitted], *lv dismissed* 27 NY3d 975 [2016]). Such was not the case here. Questions of fact, which should have been presented to the jury, existed as to whether plaintiffs prevented NYKB from performing under the contracts. These open issues, among others, would also affect the calculation of damages. Hiiman testified about numerous delays outside of NYKB's control, including a delay in getting the necessary work permit to begin construction, and submitted evidence that plaintiffs were still requesting additional work less than two weeks before termination of the contract.

In addition, the verdict sheet submitted to the jury obfuscated one of the critical issues in this case, which was the

extent of NYKB's liability for the FCC contracts plaintiffs entered into with Catanzarite. The verdict sheet confused the applicable law by failing to distinguish between Catanzarite's authority to bind NYKB to NYKB contracts, and his authority to bind NYKB to FCC contracts. Among other things, there were factual issues for the jury to decide whether Catazanite had apparent authority to bind NYKB to FCC contracts. Accordingly, reversal on this ground is also warranted (*see Aragon v A&L Refrig. Corp.*, 209 AD2d 268, 269 [1st Dept 1994]).

Given the foregoing determination, we have no need to address the parties' remaining arguments.

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

ENTERED: JUNE 22, 2017

CLERK

Sweeny, J.P., Mazzarelli, Andrias, Moskowitz, Gische, JJ.

4349 The People of the State of New York, Ind. 5911/09
Respondent,

-against-

Lamont Hesterbey also known as
Lamont Hersterbey,
Defendant-Appellant.

_____

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

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Judgment, Supreme Court, New York County (Jill Knoviser, J.), rendered April 24, 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 22, 2017

CLERK

Sweeny, J.P., Mazzarelli, Andrias, Moskowitz, Gische, JJ.

4350 In re Brandy V.,
Petitioner-Appellant,

-against-

Michael P.,
Respondent,

Ana S.,
Respondent-Respondent.

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Bruce A. Young, New York, for appellant.

Jo Ann Douglas Family Law, PLLC, New York (Jo Ann Douglas of counsel), for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Allison L. Mahoney of counsel), attorney for the child.

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Order, Family Court, New York County (Susan K. Knipps, J.), entered on or about March 14, 2016, which, after a hearing, dismissed the petition for modification of an order of visitation, unanimously affirmed, without costs.

Petitioner failed to establish that visitation would be in the best interests of the subject child (*see Matter of Mohamed Z.G. v Mairead P.M.*, 129 AD3d 516 [1st Dept 2015], *lv denied* 26 NY3d 906 [2015]). The record shows that the child would be at risk of serious emotional and psychological harm if visits with petitioner were resumed (*see Matter of Craig S. v Donna S.*, 101 AD3d 505 [1st Dept 2012], *lv denied* 20 NY3d 862 [2013]). The

child has lived for more than nine years, almost his entire life, with his paternal grandmother, and the grandmother is the only mother he has known. He has no specific recollection of petitioner's identity; he has not seen or had contact with petitioner for several years, by her choice. The last time he saw petitioner, he witnessed her physically push and hit his grandmother, and he feared that she would take him away from his grandmother. Moreover, the child has special needs that make him especially vulnerable. We note that petitioner's parental rights to two younger children have been terminated because of, among other things, her repeated refusal to participate in services and address the circumstances that resulted in the children's placement in foster care (*see Matter of Mia Veronica B. [Brandy Veronica R.]*, 145 AD3d 438 [1st Dept 2016]).

Contrary to petitioner's argument, her due process rights were not violated by the alleged delay in the adjudication of her request to visit the subject child. The record shows that, on at

least three occasions, her petitions were dismissed because of her failure to appear.

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

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

ENTERED: JUNE 22, 2017

CLERK

Sweeny, J.P., Mazzarelli, Andrias, Moskowitz, Gische, JJ.

4351 The People of the State of New York, Respondent, Ind. 5625/14

-against-

Eliniza Luna, Defendant-Appellant.

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Rubinstein & Corozzo, LLP, New York (Angela D. Lipsman of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered June 1, 2016, convicting defendant, upon her plea of guilty, of criminal possession of marijuana in the first degree, and sentencing her to a term of three years' probation, unanimously affirmed.

The court properly denied defendant's suppression motion. The suppression issue in this case turns on the credibility of an officer's testimony that he smelled a strong odor of marijuana as he approached the car he had stopped, notwithstanding that the 10 pounds of marijuana he recovered was vacuum sealed in plastic bags and thus, according to defendant, could not have given off any detectable odor. There is no basis for disturbing the court's credibility determination in this regard (*see generally People v Prochilo*, 41 NY2d 759, 761 [1977]). We note that no

evidence was introduced at the hearing to support defendant's assertion that it is impossible to detect odors given off by the contents of vacuum sealed bags.

The record also fails to support defendant's contention that the hearing court, which detected a pungent odor of marijuana from the exhibit produced in court, was misled by the prosecutor's statement that the marijuana was packaged in the same way at the time of the hearing as it had been at the time of the arrest. That statement was inaccurate, because in fact some or all of the marijuana had been removed from its vacuum sealed packages during testing by the police lab and then repackaged through a different process. Nevertheless, the hearing testimony made it clear to the court that the marijuana had been repackaged by the lab. Further, the court twice specifically stated that it had not been misled, rejecting the notion that it had adopted the premise that the packaging of the drugs was unchanged between the arrest and the hearing.

Finally, we find that the court providently exercised its discretion in denying defendant's belated request to conduct her own courtroom experiment on the effects of vacuum sealing.

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

ENTERED: JUNE 22, 2017

CLERK

Sweeny, J.P., Mazzarelli, Andrias, Moskowitz, Gische, JJ.

4352 Maria Barreras, Index 22207/14
Plaintiff-Appellant,

-against-

Francisco Martinez Vargas,
et al.,
Defendants-Respondents.

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Robert G. Goodman, P.C., New York (Robert G. Goodman of counsel), for appellant.

Marjorie E. Bornes, Brooklyn, for respondents.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered July 25, 2016, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the claim of serious injury (Insurance Law § 5102[d]) to the right shoulder, unanimously reversed, on the law, without costs, and the motion denied.

Defendants made a prima facie showing that plaintiff did not sustain a serious injury to her right shoulder by submitting the report of their radiologist, who opined that plaintiff's MRI showed longstanding degenerative tears and that there was no evidence to suggest that plaintiff sustained a traumatic injury (*see Kang v Almanzar*, 116 AD3d 540 [1st Dept 2014]). Defendants further demonstrated an absence of causation through the report of their orthopedist, who opined that plaintiff's post-accident

medical records, which showed no complaints of right shoulder pain, were inconsistent with any claim of traumatic injury to her right shoulder (*see Frias v Gonzalez-Vargas*, 147 AD3d 500, 501 [1st Dept 2017]). In addition, plaintiff did not seek treatment for her claimed right shoulder injuries until several months after the accident (*see Jones v MTA Bus Co.*, 123 AD3d 614, 615 [1st Dept 2014]; *see also Henchy v VAS Express Corp.*, 115 AD3d 478, 479 [1st Dept 2014]).

In opposition, plaintiff raised an issue of fact (*see Perl v Meher*, 18 NY3d 208, 217-218 [2011]). Contrary to defendants' contention, plaintiff's emergency room records reflect contemporaneous complaints of pain, since X rays of the right shoulder were ordered at the time. Plaintiff's treating physician noted that plaintiff had undergone physical therapy in the months following the accident, and found that she had limited range of motion in her right shoulder. Her orthopedic surgeon observed rotator cuff and superior labral tears during surgery, measured range-of-motion limitations two years after the surgery, and provided a sufficient opinion, based on his treatment of plaintiff, his review of the MRI report, and his observations during surgery, that, although there were degenerative conditions in plaintiff's shoulder consistent with her age, the tears were

causally related to the accident (*see Liz v Munoz*, 149 AD3d 646 [1st Dept 2017]; *Swift v New York Tr. Auth.*, 115 AD3d 507 [1st Dept 2014]).

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

ENTERED: JUNE 22, 2017

CLERK

Sweeny, J.P., Mazzarelli, Andrias, Moskowitz, Gische, JJ.

4353 The People of the State of New York, Respondent, Ind. 164/13

-against-

Keith Hall, Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Rosemary Herbert of counsel) and Weil, Gotshal & Manges, LLP, New York (Matthew S. Connors of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered February 19, 2014, convicting defendant, after a jury trial, of assault in the second degree and criminal possession of a weapon in the third degree, and sentencing him, as a persistent violent felony offender, to concurrent terms of 12 years to life, unanimously modified, on the law, to the extent of vacating the persistent violent felony offender adjudication only with respect to the weapon possession conviction, and remanding for resentencing on that conviction as a second felony offender, and otherwise affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations,

including its evaluation of the victim's explanation for initially giving false accounts of the incident.

The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]; *People v Walker*, 83 NY2d 455, 458-459 [1994]; *People v Pavao*, 59 NY2d 282, 292 [1983]). Defendant's theft-related convictions were highly relevant to his credibility. Defendant's *Sandoval* motion preserved a challenge to the court's substantive ruling, but failed to preserve defendant's present procedural arguments concerning the court's determination of the motion, and we decline to review them in the interest of justice. As an alternative holding, we find these procedural claims to be unsupported by a fair reading of the record, and unavailing.

The court providently exercised its discretion in denying defendant's CPL 210.40 motion to dismiss the charges in furtherance of justice. After considering the statutory factors in totality, we find no "compelling factor" (CPL 210.40[1]) that would warrant that "extraordinary remedy" (*People v Moye*, 302 AD2d 610, 611 [2d Dept 2003]), "which we have cautioned should be exercised sparingly" (*People v Keith R.*, 95 AD3d 65, 67 [1st Dept 2012], *lv denied* 19 NY3d 963 [2012] [internal quotation marks omitted]; *see also People v Marshall*, 106 AD3d 1, 11 [1st Dept 2013], *lv denied* 21 NY3d 1006 [2013]).

As the People concede, defendant's present conviction of criminal possession of a weapon in the third degree was under a subdivision (Penal Law § 265.02[1]) not constituting a violent felony (Penal Law § 70.02[1][c]). Accordingly, defendant could not be sentenced as a persistent violent felony offender on that conviction. The parties agree that the matter should be remanded for resentencing on that conviction.

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

ENTERED: JUNE 22, 2017

CLERK

Sweeny, J.P., Mazzarelli, Andrias, Moskowitz, Gische, JJ.

4354 The People of the State of New York, Ind. 2205/13
Respondent,

-against-

Frank Gillard also known as Frank Gilliard,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Jordan K. Hummel of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered December 12, 2014, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him, as a second felony offender, to a term of nine years, unanimously affirmed.

When, during a lengthy narrative of the events surrounding the robbery, the victim briefly mentioned evidence that had been suppressed, the court properly exercised its discretion (*see People v Ortiz*, 54 NY2d 288, 292 [1981]) in denying defendant's mistrial motion. The court sustained objections to this testimony, and defendant did not request a curative instruction or any relief short of a mistrial (*see People v Young*, 48 NY2d

995 [1980]). There is no indication that the prosecutor intentionally elicited the testimony, or acted in bad faith. Furthermore, the suppressed evidence was cumulative to closely related evidence that had not been suppressed.

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

ENTERED: JUNE 22, 2017

CLERK

Sweeny, J.P., Mazzarelli, Andrias, Moskowitz, Gische, JJ.

4355 Index 113859/11
590270/13

Martin Flynn,
Plaintiff-Respondent,

-against-

Turner Construction Company,
et al.,
Defendants-Appellants,

LVI Services, Inc.,
Defendant.

- - - - -

[And Another Action]

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Joan A. Madden, J.), entered on or about October 27, 2016,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated May 25, 2017,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: JUNE 22, 2017

CLERK

Sweeny, J.P., Mazzarelli, Andrias, Moskowitz, Gische, JJ.

4356 The People of the State of New York, Respondent, Ind. 2475/14

-against-

Kyle McBride, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Samuel Z. Goldfine of counsel), for respondent.

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Judgment, Supreme Court, New York County (Melissa C. Jackson, J.), rendered May 1, 2015, as amended June 9, 2015, convicting defendant, upon his plea of guilty, of attempted burglary in the second degree, aggravated family offense, and assault in the third degree, and sentencing him, as a second violent felony offender, to an aggregate term of five years, unanimously modified, on the law, to the extent of vacating the sentence for the aggravated family offense conviction and remanding to Supreme Court for resentencing on that conviction, and otherwise affirmed.

Defendant made a valid waiver of his right to appeal (*see People v Bryant*, 28 NY3d 1094 [2016]), which forecloses review of his claim that the court improperly denied his request for new

counsel (*see People v Doyle*, 82 AD3d 564 [1st Dept 2011], *lv denied* 17 NY3d 805 [2011]).

Regardless of whether defendant made a valid waiver of his right to appeal, we find that the court providently exercised its discretion in denying defendant's application for reassignment of counsel. At the plea proceeding, defendant failed to make specific factual allegations of genuinely serious complaints that would trigger the court's obligation to inquire further (*see People v Porto*, 16 NY3d 93, 100-101 [2010]). Furthermore, the court made reference to recent prior inquiries into defendant's complaints about the same attorney, and it declined to revisit the issue.

The parties agree that defendant should be resentenced on his aggravated family offense conviction because he was absent when, in order to correct an illegality, the court changed the minimum term from 1 year to 1½ years.

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

ENTERED: JUNE 22, 2017

CLERK

Sweeny, J.P., Mazzarelli, Andrias, Moskowitz, Gische, JJ.

4357N In re Midland Insurance Company Index 41294/86

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ASARCO LLC,
Claimant-Appellant,

-against-

The Superintendent of Financial Services of the State of New York, in her capacity as Liquidator of Midland Insurance Company,
Respondent-Respondent.

_____

McGuireWoods LLP, Austin, TX (J. Mark Lawless of the bar of the State of Texas, admitted pro hac vice, of counsel), for appellant.

DLA Piper LLP (US), New York (Aidan M. McCormack of counsel), for respondent.

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered December 12, 2016, which granted respondent's motion to confirm the decision of a referee, dated March 8, 2016, affirming the disallowance of claimant's claim, and denied claimant's cross motion to reject the referee's decision, unanimously affirmed, without costs.

Claimant, a mining, smelting, and refining company, seeks indemnification under four excess insurance policies issued to it by Midland Insurance Company of amounts paid pursuant to a settlement with the Environmental Protection Agency (EPA) and other government agencies in connection with the EPA's clean-up

of a residential area in Omaha, Nebraska, in which surface soils were contaminated by lead, in part, as a result of claimant's operations. The policies exclude coverage for "property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land" unless the "discharge, dispersal, release or escape is sudden and accidental." It is undisputed that these pollution exclusions bar any claim for indemnification of amounts paid to clean up soil contamination resulting from claimant's lead emissions. Claimant contends that it is entitled to indemnification of "the clean-up costs directly related to the contamination caused by the chipping and flaking of lead-based paint on . . . houses in the [subject area]."

Courts have held that damage resulting solely from lead paint is not excluded from coverage under similar pollution exclusions (*see Westview Assoc. v Guaranty Natl. Ins. Co.*, 95 NY2d 334, 340 [2000]; *Herald Sq. Loft Corp. v Merrimack Mut. Fire Ins. Co.*, 344 F Supp 2d 915, 920-921 [SD NY 2004]; *Sphere Drake Ins. Co., P.L.C. v Y.L. Realty Co.*, 990 F Supp 240, 242-245 [SD NY 1997]). However, in those cases, the courts did not address damage caused by lead paint in conjunction with an acknowledged

pollutant, and did not address the peculiarities of liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (*see* 42 USC § 9607), pursuant to which the EPA sought recovery from claimant in this case.

CERCLA permits the imposition of joint and several liability (*see United States v Alcan Aluminum Corp.*, 315 F3d 179, 184-187 [2d Cir 2003], *cert denied* 540 US 1103 [2004]). As a result, a party may be required to pay for the entirety of environmental damage for which it was only partially responsible. The fact that some of the damage was caused by someone other than the insured does not, in itself, affect the applicability of a coverage exclusion (*see Town of Harrison v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 89 NY2d 308, 316 [1996]; *Bituminous Cas. Corp. v Aaron Ferer & Sons Co.*, 2007 WL 2066452, *2, 2007 US Dist LEXIS 51427, *7-8 [D Neb July 16, 2007]).

In this case, not only did the damage result from different sources, i.e., lead emissions and lead paint, but, also, one source is excluded from coverage and the other is not. However, the damage resulting from either source is not readily divisible from the damage resulting from the other. The combined effect of the lead emissions and the lead paint was soil contamination - of the same soil. To the extent a particular area was contaminated solely by lead paint, it was not (and could not have been)

included in the EPA's remediation efforts (*see* 42 USC § 9604). Moreover, claimant would not have had to pay for any damage - including lead paint damage - if not for the accompanying pollution (*see* 42 USC § 9607). Thus, the entire claim is barred by the pollution exclusions.

In view of the foregoing, we do not reach the issue of the appropriate method for allocating losses among the various insurance policies.

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

ENTERED: JUNE 22, 2017

CLERK

Tom, J.P., Sweeny, Richter, Kapnick, Webber, JJ.

4118 In re Salena S.,
Petitioner-Appellant,

-against-

Ahmad G.,
Respondent-Respondent.

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Neal D. Futerfas, White Plains, for appellant.

Leslie S. Lowenstein, Woodmere, for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Rohan Grey of counsel), attorney for the child.

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Order, Family Court, Bronx County (Jennifer S. Burtt, Court Attorney-Referee), entered on or about June 7, 2016, affirmed, without costs.

Opinion by Kapnick, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
John W. Sweeny, Jr.
Rosalyn H. Richter
Barbara R. Kapnick
Troy K. Webber, JJ.

4118

_____x

In re Salena S.,
Petitioner-Appellant,

-against-

Ahmad G.,
Respondent-Respondent.
_____x

Petitioner mother appeals from the order of the Family Court, Bronx County (Jennifer S. Burtt, Court Attorney-Referee), entered on or about June 7, 2016, which denied her petition to relocate with the parties' child to Florida.

Neal D. Futerfas, White Plains, for appellant.

Leslie S. Lowenstein, Woodmere, for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Rohan Grey and Janet Neustaetter of counsel), attorney for the child.

KAPNICK, J.

This proceeding arises from the mother's petition to relocate with the parties' child to Florida, which Family Court denied after a hearing.

"It is well established that in reviewing relocation and other custody issues, deference is to be accorded to the determination rendered by the factfinder, unless it lacks a sound and substantial basis in the record" (*Matter of David J.B. v Monique H.*, 52 AD3d 414, 415 [1st Dept 2008] [internal quotation marks omitted]). Moreover, "it is the rights and needs of the children that must be accorded the greatest weight" (*Matter of Tropea v Tropea*, 87 NY2d 727, 739 [1996]). Here, Family Court's lengthy and thoughtful decision has a sound and substantial basis in the record and the rights and needs of the child were accorded their due weight.

The record shows that the mother's plan to relocate to Florida was less of a plan and more of an amorphous idea. As Family Court concluded, "the mother simply failed to establish an overall educational, economic or emotional benefit to the child sufficient to outweigh the detrimental impact on the quality of the child's relationship with his father and other extended family that would necessarily result from a move to Florida." Specifically, the mother was unable to say exactly which town in

Florida she would be moving to, but rather, testified during an inquest held on August 28, 2015, that she was considering Ft. Lauderdale, Kissimee, or Orlando[1], and that upon her last check of Section 8 apartment availability in Florida, there were apartments available in Ft. Lauderdale or Boca Raton[2]. She also acknowledged that she could obtain public assistance and Section 8 housing anywhere in the United States. At the time of the hearing, in February and March 2016, the mother was unemployed, having lost her previous job in a rehabilitation center and having had to resign from another job because she was unable to arrange for childcare to accommodate her work schedule. The mother testified that, despite trying, she had been unable to locate a job in New York with work hours from 9 a.m. to 5 p.m. She alleged that there were such jobs available in her field in Florida; however, she failed to provide any details or proof of such availability.

As far as childcare was concerned, the mother testified that her then boyfriend's mother, who lives in Ft. Lauderdale, would be available to help with the childcare. If the boyfriend's

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[1] Orlando and Kissimee are about 200 miles from Ft. Lauderdale.

[2] Boca Raton is approximately a half hour's drive from Ft. Lauderdale.

mother was not available, then the mother and her boyfriend would work at alternate times of day so that they could provide the necessary child care. As Family Court aptly noted, it was not clear why this proposed alternate work schedule could not be put into place in New York. Moreover, and as noted in the appeal brief submitted by the attorney for the child, since the time Family Court issued its determination, the mother and her boyfriend (who is not the father of the subject child) are no longer romantically involved. This certainly calls into question the former boyfriend's mother's availability to provide child care if the mother were to move to Ft. Lauderdale, as well as the mother's reason for continuing to want to move to Florida.

Regarding the father, the record shows that at the time of the hearing he was approximately $3000 in arrears with respect to his child support obligations to the mother. The record also shows that he was not actively involved in the child's education or school events and missed or had to reschedule certain of his visitation dates and times. However, the father testified that the child has a strong attachment to him and the child sees his paternal grandmother on alternate weekends when he stays over night with her while the father is working. Both relationships would be interrupted and suffer if the child moved to Florida, thus raising a question of the father's ability to maintain

"meaningful access" to the child (*see generally Matter of Tropea*, 87 NY2d at 739). Moreover, the record shows that the father consistently sought modifications to his visitation schedule when his work schedule changed so that the two could be synchronized.

In support of her petition to relocate, the mother contends that the father is capable of visiting the child in Florida. Indeed, the record shows that the father has another daughter who resides in Florida with her mother and that he previously took the subject child to Florida for a vacation with the child's half-sibling. According to the mother, he can combine his visits to Florida to see the subject child with seeing his other daughter. However, the record also shows that the half-sibling lives in Ft. Pierce, Florida, which is at least 100 miles from either Ft. Lauderdale or Orlando.

Additionally, the father testified that he works two jobs, one of which requires him to work nights on the weekends. Thus, it is not clear when and how the father would be able to take time off from work to travel to Florida. At some point, the mother offered to pay for travel between New York and Florida and to allow the child to stay with the father for extended periods of time during holidays and summer vacation. However, it is unclear from the record how the mother would be able to finance travel to and from New York and, as already noted, difficult to

comprehend how the father could care for the child for weeks at a time given his current work schedule. Indeed, the father's work schedule and demands likely preclude him from having any substantial flexibility so as to allow for frequent visits to Florida and/or extended visits by the child to New York.

Contrary to the mother's argument that her financial and economic situation would improve upon relocation to Florida, the record here shows that the mother did not establish that an overall economic benefit to the child would result from the move. Cases in which this Court has found an overall economic benefit to the child show that the parent petitioning for relocation presented more concrete details surrounding the relocation. For example, in *Matter of Kevin McK. v Elizabeth A.E.* (111 AD3d 124 [1st Dept 2013]), the mother had two job offers in Oxford, Mississippi, the town to which she wanted to relocate, and the mother's mother, as well as extended family, resided in Oxford, Mississippi.[3] In *Sonbuchner v Sonbuchner* (96 AD3d 566 [1st Dept 2012]), the mother, a post-graduate student in a medical clinical training program, had been matched with a residency program in North Carolina, the state to which she wanted to relocate. In contrast, here, the mother did not provide any evidence of job

[3] The decision also indicated that there was an "exceptional public school" in Oxford, Mississippi (111 AD3d at 127).

offers or even job prospects in any of the cities she was considering. Morever, the mother does not have any extended family in these various cities.

To the extent that the briefs of the mother and the attorney for the child point to the fact that the father is in arrears with his child support obligations, this fact, although troubling and requiring resolution, does not, in and of itself, warrant a conclusion that the mother's petition should have been granted. As the Court stated in *Matter of Nairen McI. v Cindy J.* (137 AD3d 694, 695 [1st Dept 2016]), the "father's failure to pay child support is *a* factor in support of relocation" (emphasis supplied), and a factor that can tip the balance in favor of relocation when other factors are present. In *Matter of Nairen M.I.*, those other factors were that the mother and child were already living in Tennessee, the mother had obtained employment in Tennessee, the child's academic performance had improved in her Tennessee school, and there was a general improvement in the family's quality of life (*id.*). No such factors are present in the case before us.

Lastly, the attorney for the child supports the mother's relocation to Florida. However, the arguments made by the attorney for the child are just as vague and amorphous as those of the mother and are predicated on such statements as "if the

mother's housing costs are reduced and she is able to obtain full-time employment" then her overall situation will improve. The attorney for the child cites *Yolanda R. v Eugene I.G.* (38 AD3d 288 [1st Dept 2007]) in support of the argument that Family Court should have attributed more weight to the position of the attorney for the child, whose client was only six years old at the time of the hearing before the Family Court. However, that case is distinguishable. There, the father waited 17 months after the mother and children had relocated to Atlanta before filing a formal complaint about their relocation, all the children had special needs and were enrolled in school in Atlanta and doing well, and the mother had her mother as well as extended family in Atlanta to help with the children. This Court also noted that the children all expressed to their law guardian a desire to move to Atlanta and that, according to the law guardian, the move was in the best interests of the children. Here, we are missing any information regarding a job, a town to live in, a home to reside in, or a school to attend, and, as already noted, the mother does not have any family or extended family in Florida.

Although the mother's desire to relocate with her child to a safer and better environment is admirable, Family Court was correct in its determination that there is simply not enough, on

this record, to establish that the child's best interests would be served if the mother and child relocate to Florida.

Accordingly, the order of the Family Court, Bronx County (Jennifer S. Burtt, Court Attorney-Referee), entered on or about June 7, 2016, which denied the mother's petition to relocate with the parties' child to Florida, should be affirmed, without costs.

All concur.

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

ENTERED: JUNE 22, 2017

CLERK