SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 2, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Richter, Mazzarelli, Gische, JJ.

3696-
3697-
3698 Index 650646/14

Philippe Maestracci,
Plaintiff-Respondent-Appellant,

-against-

Helly Nahmad Gallery, Inc., et al.,
Defendants-Appellants-Respondents,

John Doe #1-10, etc., et al.,
Defendants.

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Aaron Richard Golub, Esquire, P.C., New York (Nehemiah S. Glanc of counsel), for appellants-respondents.

McCarthy Fingar LLP, White Plains (Phillip C. Landrigan of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered on or about January 14, 2016, which, insofar as appealed from as limited by the briefs, granted defendants' motion insofar as it sought to strike certain matter from the record, and denied the motion insofar as it sought sanctions, unanimously affirmed, without costs. Orders, same court and Justice, entered on or about September 24, 2015, which, insofar as appealed from as limited by the briefs, granted defendants' motion to dismiss the

complaint on the ground of lack of personal jurisdiction as to defendants International Art Center, S.A. and David Nahmad, granted defendants' motion to dismiss the complaint on the ground that plaintiff Maestracci lacked standing, granted plaintiff Maestracci's motion for leave to add George W. Gowen as a coplaintiff, and ordered Gowen to serve a supplemental summons and amended complaint, unanimously modified, on the law, to deny defendants' motion to dismiss the complaint on the ground that plaintiff Maestracci lacked standing, and otherwise affirmed, without costs.

Plaintiff Philippe Maestracci, a resident and citizen of France, is the grandson and sole heir to Oscar Stettiner, who, Maestracci alleges, was the rightful owner of a painting by Amedeo Modigliani entitled "Seated Man with a Cane" (hereinafter, the painting). Stettiner resided in Paris until 1939, when he fled the Nazi occupation. According to Maestracci's extensive research, the painting was confiscated by the Nazis shortly before the Allied liberation of Paris, and sold in July 1944 without Stettiner's consent. In 1946, after the war's end, Stettiner brought a proceeding in Paris against both the official appointed by the Nazi-controlled government to sell Stettiner's painting, and the buyer of the painting, pursuant to French legislation voiding sales of property looted by the Nazis during

the war. Stettiner was awarded an emergency summons invalidating the sale and directing that the painting be returned to him. However, French court records dated March 29, 1947, indicate that the buyer alleged he had entrusted the painting to another man who declared that he had sold it in 1944 to an unknown American officer. Stettiner died in 1948.

In 1996, the painting was put up for auction in London, by Christie's, on behalf of sellers who were reputedly the descendants of the buyer of the painting in 1944. The auction catalogue's description of the painting's provenance indicated that it had been sold between 1940-1945 to "Anon." According to Christie's records, defendant International Art Center, S.A. (IAC) bought the painting. The painting was exhibited in New York City in 2005, at defendant Helly Nahmad Gallery, Inc. (HNGallery). It was also shown at the Helly Nahmad Gallery London in 1998; at the Musée d'Art Moderne in Paris in 1999; and the Royal Academy of Arts in London in 2006.

In November 2008, the painting was included in an auction conducted by Sotheby's New York. The auction catalog described the owner as "Private Collection," and indicated that the painting had "possibly" been owned by Stettiner as of 1930. The painting was not sold at the 2008 auction. In April 2010, Maestracci's representative first contacted Sotheby's Restitution

Department to ask for the name of the consignor and that Sotheby's inform the consignor of the claim by Stettiner's heirs. In early 2011, plaintiff's attorney twice contacted HNGallery and demanded return of the painting. HNGallery did not respond. Maestracci states that, as of August 2011, he believed that the HNGallery was refusing to return the painting and was not aware of defendants' contention that IAC was the sole buyer and owner of the painting.

In 2012, Maestracci filed suit against HNGallery in the United States District Court for the Southern District of New York. That suit was discontinued without prejudice within the same year. Thereafter, Maestracci learned of defendants' claim of IAC's ownership, as well as IAC's contention that Maestracci himself had no standing to bring the action, because, under EPTL 13-3.5, he had not established, as a foreigner, that he was a duly appointed representative of the nondomiciliary Stettiner estate. Maestracci then petitioned the Surrogate's Court, New York County, to issue letters of administration to George W. Gowen, Esq., a New York attorney, on behalf of the estate, for the limited purpose of recovering the painting. Limited ancillary letters of administration were granted to Gowen in June 2013.

In February 2014, Maestracci commenced this suit, solely in

his name, by filing a summons with notice against all defendants. Because of several stipulated adjournments, the complaint was not filed and served until February 2015, in the name of both Maestracci and Gowen. In the interim, several precomplaint motions were decided or withdrawn. Before us are the appeals from the orders rendered on three motions.

We turn first to defendants' motion to strike certain allegedly offensive material from the record and for sanctions. The motion court properly struck the allegedly offensive material (*see Matter of Reynolds*, 23 AD2d 623, 624 [4th Dept 1965]; *Baylis v Wood*, 246 App Div 779 [2d Dept 1935]; *Griffin v Griffin*, 231 App Div 819 [1st Dept 1930]; *Scholing v O'Conner*, 209 App Div 839 [3d Dept 1924]). Plaintiff's references to defendants' and their counsel's Jewish faith and to unfounded accusations of tax fraud by defendants are plainly improper (*see* Rules of Chief Admin of Cts [22 NYCRR] § 100.3[B][5]; *see also Minichiello v Supper Club*, 296 AD2d 350, 352 [1st Dept 2002]). Further, plaintiff's attempt to explain the relevance of Helly Nahmad's criminal conviction for gambling is unpersuasive. The motion court, however, providently exercised its discretion in declining to sanction plaintiff (*see* 22 NYCRR 130-1.1), as this was essentially a first-time offense and the court strongly admonished plaintiff's counsel regarding this conduct.

The motion court correctly granted defendants' motion to dismiss the complaint as against defendants IAC and David Nahmad, on the ground of lack of personal jurisdiction, as plaintiff does not dispute on appeal that they were improperly served. However, the motion court erred when it determined that Maestracci lacked standing to bring this action. Although defendants correctly state that merely asserting that one is a beneficiary of a foreign decedent does not confer standing to bring suit on behalf of the estate, this Court has construed EPTL 13-3.5 to permit certain representatives of estates in foreign countries to bring suit in New York without first obtaining New York letters of administration by the alternative procedure of filing an affidavit and supporting documents establishing their right to pursue claims on behalf of the estate under the foreign law (*see Schoeps v Andrew Lloyd Webber Art Found.*, 66 AD3d 137, 143-144 [1st Dept 2009]). Here, Maestracci relies on precisely the forms of proof we endorsed in *Schoeps* — namely, "an affidavit from an expert in the law of the foreign jurisdiction concerning inheritance rights" and "the foreign jurisdiction's equivalent of an 'acte de notariete' formally certifying the party's right to pursue claims on behalf of the estate" (*id.* at 144). Further, lack of compliance with the requirements set forth in EPTL 13-3.5(a)(1) and (2) merely operates to stay the action pending such

compliance (EPTL 13-3.5[a][3]).

The motion court properly granted Maestracci leave to add Gowen as a coplaintiff (*see* CPLR 1003). Although Maestracci sought leave only after serving a complaint naming Gowen as a coplaintiff, CPLR 1003 gives a court "wide latitude and [is] to be liberally construed" (*Micucci v Franklin Gen. Hosp.*, 136 AD2d 528, 529 [2d Dept 1988]). Moreover, due to the enactment of the Holocaust Expropriated Art Recovery Act of 2016 (HEAR) (Pub L 114-308, 130 US Stat 1524, amending 22 USC § 1621 *et seq.*), there is no prejudice to defendants in allowing Gowen to join the action (*see Kelley v Schneck*, 106 AD3d 1175, 1177-1178 [3d Dept 2013], *lv dismissed* 21 NY3d 1069 [2013]). HEAR supplants the statute of limitations provisions otherwise applicable to civil claims such as these (*see* Pub L 114-308, § 5[a]). Under HEAR, the applicable statute of limitations is six years from the date of "actual discovery" of "the identity and location of the artwork" and "a possessory interest of the claimant in the artwork" (*id.*). We reject defendants' argument that HEAR can be displaced by a choice-of-law analysis.

Under section 5(c) of HEAR, for purposes of starting the running of the six-year statute of limitations provided by section 5(a), a preexisting claim covered by HEAR is "deemed to have been actually discovered on the date of enactment of

[HEAR]." However, section 5(c) is made subject to the exception provided in section 5(e), which, as here relevant, provides that HEAR does not save a preexisting claim that was "barred on the day before the date of enactment of [HEAR] by a Federal or State statute of limitations" where "not less than 6 years have passed from the date [the] claimant . . . acquired such knowledge and during which time the civil claim or cause of action was not barred by a Federal or State statute of limitations." Accordingly, to establish that HEAR does not save the subject claim, defendants were required to show that Maestracci discovered the claim on or before December 15, 2010 (six years before the day before the date of HEAR's enactment). This they have failed to do. Indeed, defendants have failed to establish that Maestracci had actual knowledge of the identity and location of the artwork before December 22, 2011, when as part of motion papers related to a previous federal action commenced by Maestracci, HNGallery disclosed to Maestracci that IAC has owned

the painting since purchasing it from Christie's London in 1996. Defendants therefore have not established that this claim is barred by the statute of limitations.

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

ENTERED: NOVEMBER 2, 2017

CLERK

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

4414- Index 601425/03
4414A Joseph Korff,
Plaintiff-Appellant-Respondent,

-against-

Richard A. Corbett, et al.,
Defendants-Respondents-Appellants.

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Oberdier Ressmeyer LLP, New York (Carl W. Oberdier of counsel), for appellant-respondent.

Golenbock Eiseman Assor Bell & Peskoe LLP, New York (David J. Eiseman of counsel), for respondents-appellants.

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Orders, Supreme Court, New York County (Eileen Bransten, J.), entered June 17, 2016, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment declaring that nonparty CSAT, L.P. is not defendants' affiliate and that its gross revenue does not come within the scope of paragraph 3 of the letter agreement on which plaintiff sues, and dismissing part of the contract claim on statute of limitations grounds, denied defendants' motion as to the remainder of the contract claim, and granted plaintiff's motion for summary judgment dismissing the ninth affirmative defense (based on General Obligations Law § 5-1105), unanimously modified, on the law, to deny plaintiff's motion, and grant defendants' motion as to the entire contract claim, and otherwise

affirmed, without costs.

This appeal revolves around a one-page letter agreement between plaintiff, an attorney and real estate consultant, on the one hand, and defendant Corbett and "all entities in which he has an interest," on the other. In its entirety, the agreement, which was signed by plaintiff and countersigned by Corbett and International Plaza in or about July 1990, the entity under which Corbett did business, stated as follows:

> "Dear Dick,
>
> "At least one of us had in mind a 50-50 partnership several years ago. To avoid unproductive controversy:
>
> "1. All my firm's legal bills and interest thereon ... will be cleared up out of the first available financing sources. You will pay $25,000 per month against such bills until that time.
>
> "2. The equivalent of $500,000 plus interest at 15% per annum from September 5, 1985 will be paid to me from the first decent term financing source (for example: sale, lease, joint venture, or more than 3 years overall financing).
>
> "3. You will pay upon receipt by International Plaza, its partners or affiliates, 5% of gross receipts (excluding gross receipts from the current golf course operation) until $26,250,000 is paid when the percentage will be 10% ....
>
> "Sincerely,
>
> "Joseph Korff"

Although paragraph 1 of the Agreement is not at issue here,

we note that the legal services referenced therein were delivered beginning in the early 1980s, primarily by plaintiff as a solo practitioner, in connection with Corbett's efforts to develop a 135-acre parcel of land in Tampa, Florida, to which he and International Plaza had acquired the ground lease in 1979. Plaintiff maintains, and defendants do not seriously dispute, that his role with respect to the development extended well beyond traditional legal work to such a degree that plaintiff, in his own words, was the "spearhead" of the project. The project was a resounding success, resulting in a complex consisting of a luxury mall, hotels and office towers.

Plaintiff claims that, even though defendants obtained significant financing for the project, he was never paid the $500,000 plus interest provided for in paragraph 2 of the Agreement. He further alleges that, despite defendants' receipt of significant revenue in connection with the project, he was never paid in accordance with the revenue sharing contemplated by paragraph 3 of the agreement. Defendants moved to dismiss the complaint pursuant to CPLR 3211(a)(1), (5), and (7), and Supreme Court granted the motion on the ground that the Agreement was too indefinite to be enforced. However, this Court reversed, finding, in relevant part, that

"[w]hile the parties' agreement is somewhat imprecise,

> it is clear from its face that they intended to contract. The introductory sentence suggests that a meeting of the minds was perhaps not previously achieved, but the language "[t]o avoid unproductive controversy" suggests that the parties were now settling their differences and putting their agreement in writing. The first paragraph, which is not at issue in this action, refers to plaintiff's firm's outstanding legal bills and supports a finding that there was consideration for the agreement. The next paragraph provides that plaintiff, as opposed to his firm, was to be paid '$500,000 plus interest at 15% per annum from September 5, 1985.' The amount delineated is specific and was clearly agreed to by the parties, and the language used suggests that this amount had already been earned by plaintiff" (18 AD3d 248, 250-251 [1st Dept 2005]).

In light of this Court's reversal, defendants served an answer, in which they interposed a ninth affirmative defense asserting that "[t]he claims in the Complaint are barred due to ... failure to state the consideration for the alleged agreement on which the Complaint is based."

Upon the completion of discovery, defendants moved for summary judgment dismissing the complaint. Among other things, defendants argued that the Agreement was void under General Obligations Law § 5-1105, which bars agreements based on consideration already performed, unless such consideration is explicitly recited in the agreement. Defendants pointed out that the Agreement was silent about the legal services provided by Korff personally, before he joined a law firm in 1989. In

addition to this threshold argument, defendants argued that any claim plaintiff had under paragraph 2 of the Agreement was barred by the statute of limitations, since defendants received financing for the project in February 1994, and plaintiff did not file suit until more than nine years later. As for the claim brought under paragraph 3, defendants argued that defendant CSAT, Inc., an entity set up by Corbett to receive revenue generated by the project, was not an "affiliate" of Corbett's when the Agreement was executed, and so could not be ordered to pay "gross receipts" to plaintiff.

In opposition, plaintiff argued that the General Obligations Law issue had been decided, since this Court's 2005 decision upholding the breach of contract cause of action stated that the Agreement supported the allegation that there was underlying consideration. In any event, he claimed, the consideration was not past consideration requiring an express recitation. Rather, his forbearance from enforcing his claim to legal fees past due and owing constituted present consideration. Plaintiff further contended that his claim under paragraph 2 was not time-barred, since the financing secured by defendants in 1994 was not "decent term financing" as defined by the Agreement and since, in any event, plaintiff had separately agreed with the financing source not to seek payment out of those funds. As for the claim under

paragraph 3, plaintiff argued that the Agreement was sufficiently forward looking that it would embrace an affiliate formed after the Agreement was executed.

The court granted defendants' motion in part and denied it in part. While the court found that law of the case did not bar defendants' arguments based on the General Obligations Law, it also found that the Agreement was supported by sufficiently recited past consideration, since paragraph 2 showed that plaintiff "agreed to forbear ... from collecting the sums [that had been] owed to him" since September 1985. The court further found that paragraph 3 was supported by sufficiently recited past consideration since "[t]he contracting parties utilize terms clearly demonstrating that the purpose of the agreement is to settle past disagreements regarding [plaintiff]'s payment for work performed on the project."

Nevertheless, the court ruled that the claim for breach of paragraph 2, and the related claims for unjust enrichment, a declaratory judgment and an accounting, should be dismissed because, inter alia, they were time-barred. The court held that the record established that "more than 3 years overall financing" was obtained by defendants no later than February 17, 1994. Regarding paragraph 3 of the Agreement, the court dismissed plaintiff's claims as against CSAT on the ground that CSAT was

not, at the time the Agreement was executed, a partner or affiliate of Corbett or International Plaza and so could not be directed to share gross revenue.

General Obligations Law (GOL) § 5-1105 provides:

> "A promise in writing and signed by the promisor or by his agent shall not be denied effect as a valid contractual obligation on the ground that consideration for the promise is past or executed, if the consideration is expressed in the writing and is proved to have been given or performed and would be a valid consideration but for the time when it was given or performed."

It essentially codifies the notion that "[g]enerally, past consideration is no consideration and cannot support an agreement because 'the detriment did not induce the promise.' That is, 'since the detriment had already been incurred, it cannot be said to have been bargained for in exchange for the promise'" (*Samet v Binson*, 122 AD3d 710, 711 [2d Dept 2014], quoting *Umscheid v Simnacher*, 106 AD2d 380, 381 [2d Dept 1984]). However, General Obligations Law § 5-1105 makes an exception where the past consideration is explicitly recited in a writing. To qualify for the exception, the description of the consideration must not be "vague" or "imprecise," nor may extrinsic evidence be employed to assist in understanding the consideration (*see Clark v Bank of N.Y.*, 185 AD2d 138, 140 [1st Dept 1992], *appeal withdrawn* 81 NY2d 760 [1992]). Defendants argue that, because plaintiff provided

all of his legal services before the Agreement was signed, and because paragraphs 2 and 3 of the Agreement say nothing about the past consideration he gave in exchange for the benefits conferred upon him therein, the Agreement is not enforceable. Plaintiff does not dispute this; rather, he argues that General Obligations Law § 5-1105 does not apply at all, because the Agreement was based on present, not past, consideration. Plaintiff claims that the Agreement constitutes a compromise of his claim to a partnership interest in the project and his forbearance from enforcing his right to collect legal fees.

Initially, we reject plaintiff's argument that defendants waived their defense under General Obligations Law § 5-1105. The argument is based on defendants' failure to cite the statute in their answer. It is true that defendants' affirmative defenses did not cite that section. However, in alleging in their ninth affirmative defense that plaintiff "fail[ed] to state the consideration for the alleged agreement on which the Complaint is based," defendants sufficiently invoked the objection, under New York's liberal pleading policy (CPLR 3026). Furthermore, defendants' memorandum of law in support of their summary judgment motion mentioned General Obligations Law § 5-1105, and plaintiff availed himself of the opportunity to oppose the defense in his memorandum of law. Under these circumstances,

"failure expressly to have pleaded the defense in the answer did not mandate denial of defendant[s'] motion for summary judgment based on the statute" (*Rogoff v San Juan Racing Assn.*, 54 NY2d 883, 885 [1981]).

We further reject plaintiff's argument that this Court's decision in the prior appeal from an order granting defendants' motion to dismiss the complaint, pursuant to CPLR 3211(a)(1), (5) and (7), dictates the outcome of this one. The prior appeal did not involve General Obligations Law § 5-1105; rather, the issue was whether the Agreement was sufficiently definite to constitute an enforceable contract. Further, this Court noted, in performing that analysis, that it was to construe the Agreement somewhat liberally, since "[a] strict application of the definiteness doctrine could actually defeat the underlying expectations of the contracting parties" (18 AD3d at 250 [internal quotation marks omitted]). To that end, this Court avoided making any conclusions as to the parties' intent, but rather attempted to infer what the parties could reasonably have meant, based on the language of the Agreement. Thus, we observed that paragraph 1 of the Agreement "supports a finding" that the Agreement included mutual consideration (*id.*) Similarly, we stated that the language employed in paragraph 2 "suggests that [the specific payment of $500,000] had already been earned by

plaintiff" (*id.* at 250-251). We further noted that the requirement that defendants pay the $500,000 to plaintiff only upon their securing a "decent term financing source" was "further evidence of consideration" (*id.* at 251). These statements by this Court in no way reflect a conclusion that the Agreement was, as a matter of law, supported by consideration. Rather, they merely express the belief that the Agreement contained enough language favorable to plaintiff that it would be premature to declare it unenforceable without a full trial or summary judgment record. It is for this reason that "the law of the case doctrine does not apply when a motion to dismiss is followed by a summary judgment motion" (*Moses v Savedoff*, 96 AD3d 466, 468 [1st Dept 2012]).

Turning to the merits, we observe that the Agreement does not say why defendants are agreeing to pay plaintiff the sums recited therein. Although paragraph 1 says, "All my firm's legal bills and interest thereon ... will be cleared up out of the first available financing sources," only plaintiff is the beneficiary of the promises made by defendants in paragraphs 2 and 3. Thus, while paragraph 1 arguably establishes the presence of consideration given by plaintiff's firm, the other two paragraphs say nothing of consideration given by plaintiff himself. One must rely on plaintiff's deposition testimony ("The

consideration for the July 1990 letter involved business services that I had rendered to" Corbett) or affidavit ("the claims here relate to my entitlement to compensation for work I ... performed on behalf of Defendants prior to 1989") to discern the consideration for the payments promised by defendants there. As stated, in seeking the exception afforded by General Obligations Law § 5-1105, resort to such extrinsic evidence is impermissible *(Clark v Bank of N.Y.*, 185 AD2d at 140).

Plaintiff's argument that the Agreement is supported by present consideration is also unavailing. First, we cannot conclude that the Agreement reflects a settlement of claims, because, other than a vague reference in the first sentence to a desire "[t]o avoid unproductive controversy," the Agreement bears no indicia of a settlement agreement, such as an obligation by plaintiff to tender a release of his claims or otherwise incur a new detriment. Plaintiff testified at his deposition that the Agreement was a "settlement of differing points of view on what I should have received." However, that the Agreement may have resolved what plaintiff was to receive for the work he had done in the past does not, without some new, executory promise on his part, create present consideration, and there is no evidence of such a promise. Defendants' own references to "settlement" in their internal memoranda are also too oblique to establish that

plaintiff was tendering new consideration in exchange for payment. It bears reiterating that, to the extent paragraph 1, in mentioning a "clear[ing] up" of legal bills and interest owed by defendants, can be construed as a promise to release a claim, the detriment is being borne by plaintiff's former law firm, not plaintiff individually.

The cases cited by plaintiff, *Holt v Feigenbaum* (52 NY2d 291 [1981]) and *Nolfi Masonry Corp. v Lasker-Goldman Corp.* (160 AD2d 186 [1st Dept 1990]), do not support his argument that the Agreement is based on present consideration in the form of forbearance. In each of those cases the plaintiff's agreement to forbear pursuing a claim against the defendant was plain, having been recited in the writing at issue. In contrast, in *Samet v Binson* (122 AD3d 710 [2d Dept 2014], *supra*), the plaintiff's decedent allegedly loaned the defendant a sum of money and, thereafter, the parties executed a document in which the defendant promised to pay the decedent a sum of money. The document did not mention the underlying debt or any other consideration for the payment. The court held that the document was unenforceable under General Obligations Law § 5-1105 because it was based on unrecited past consideration. There is nothing in the decision to suggest that the court would have ruled differently had the plaintiff asserted that the agreement should

be construed as reflecting his forbearance on the underlying debt in exchange for payment. Here, similarly, there is nothing in the Agreement that suggests that plaintiff was forbearing pursuing a claim, nor does anything in the record otherwise indicate that plaintiff had agreed not to assert his rights against defendants.

In view of the foregoing, we do not reach plaintiff's arguments for affirmative relief.

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

ENTERED: NOVEMBER 2, 2017

CLERK

Sweeny, J.P., Renwick, Kapnick, Kern, Moulton, JJ.

4484 Elmrock Opportunity Master Fund I, L.P., Plaintiff-Appellant, Index 653300/16

-against-

Citicorp North America, Inc., et al., Defendants-Respondents.

Kaplan Fox & Kilsheimer LLP, New York (Gregory K. Arenson of counsel), for appellant.

Goodwin Proctor LLP, New York (Marshall H. Fishman of counsel), for respondents.

Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered December 23, 2016, which, insofar as appealed from as limited by the briefs, granted defendants' motion pursuant to CPLR 3211(a)(1) and (7) to dismiss the breach of fiduciary duty, fraud in the inducement, and fraud causes of action and the request for punitive damages, unanimously affirmed, with costs.

As to Citicorp the fiduciary duty claim was correctly dismissed as duplicative of the contract claim (*see e.g. ABL Advisor LLC v Peck*, 147 AD3d 689, 691 [1st Dept 2017]; *Celle v Barclays Bank P.L.C.*, 48 AD3d 301 [1st Dept 2008]).

On appeal, plaintiff argues that its cause of action against defendant ESSL 2, Inc. for breach of fiduciary duty cannot be duplicative of its contract claim against Citicorp. However, the

complaint shows that the fiduciary duty claim is pleaded against all three defendants, not ESSL alone. In addition, the fiduciary duty claim alleges, "*Under the Option Purchase and Sale Agreements,* Citi [i.e., defendants] had a fiduciary duty [to plaintiff]" (emphasis added).

The key allegation supporting the fraud in the inducement claim is that defendants knew that nonparty Entergy took the position that certain interests would revert to it after the Ground Leases expired. However, because it is pleaded on information and belief, this allegation is insufficient to state the claim (*see Facebook, Inc. v DLA Piper LLP [US]*, 134 AD3d 610, 615 [1st Dept 2015], *lv denied* 28 NY3d 903 [2016]). Moreover, the Ground Leases – which defendants provided to plaintiff before plaintiff signed the option agreements – gave plaintiff notice that the interests might revert to Entergy at the end of the leases.

While the documentary evidence does not utterly refute the allegation in support of the fraud claim that Entergy settled for more than the claimed $60 million, defendants' misrepresentation, if any, of the amount of the settlement did not cause plaintiff's damages (*see e.g. Meyercord v Curry*, 38 AD3d 315, 316 [1st Dept 2007]).

The complaint does not satisfy the requirements for stating a claim for punitive damages (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 316 [1995]).

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

ENTERED: NOVEMBER 2, 2017

CLERK

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

4659 The People of the State of New York, Respondent, Ind. 1372/11

-against-

Devaughn Campbell, Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), and Fried, Frank, Harris, Shriver & Jacobson LLP, New York (Peter Simmons of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered October 16, 2012, convicting defendant, after a jury trial, of attempted murder in the second degree, burglary in the first degree (three counts), robbery in the first degree (four counts), criminal possession of a weapon in the second degree (two counts), criminal use of a firearm in the first degree (four counts) and endangering the welfare of a child, and sentencing him, as a second violent felony offender, to an aggregate term of 23 years, unanimously affirmed.

The court properly denied defendant=s motion to suppress various items recovered by the police at the time of his arrest. The police were permitted to approach defendant to request information because he was found near the crime scene and matched

the general description of the suspect (*People v Hollman*, 79 NY2d 181, 190-191 [1992]). The police, responding to a 1:00 a.m. radio run of shots fired, did not exceed their authority when, upon approaching defendant without drawing their firearms, they directed him to stop and put his hands up in the air. Merely asking defendant to raise his hands was a minimal intrusion in light of the exigent circumstances. "[A]ny inquiry into the propriety of police conduct must weigh the degree of intrusion entailed against the precipitating and attending circumstances out of which the encounter arose" (*People v Stephens*, 47 AD3d 586, 588 [1st Dept 2008], *lv denied* 10 NY3d 940 [2008]).

We also find that defendant abandoned a coat containing a pistol because his decision to drop the coat when he ran from the approaching police officer was a knowing and voluntary one, entitling him to no legitimate expectation of privacy in that property, and resulting in a waiver of his Fourth Amendment protection against unreasonable searches and seizures (*People v Ramirez-Portoreal*, 88 NY2d 99, 110 [1996]). Defendant's unusual behavior of dropping the coat, coupled with his flight, gave the police reasonable suspicion to pursue and ultimately detain him (*People v Woods*, 98 NY2d 627 [2002]). After recovering the gun, the police had probable cause to arrest him.

We also find that the record supports the court's findings

that the photographic lineup was not unduly suggestive. The fact that defendant may have been the only person in the photographic lineup wearing white sneakers does not render the lineup unduly prejudicial--even though the victims' description of the perpetrator included white sneakers--as the clothing at issue is not unusual and is an extremely common item of clothing (*see e.g. People v Drayton*, 70 AD3d 595 [1st Dept 2010], *lv denied* 15 NY3d 749 [2010]; *People v Gilbert*, 295 AD2d 275, 277 [1st Dept 2002], *lv denied* 99 NY2d 558 [2002]). We note that two of the four victims were not able to identify defendant. We have considered and rejected defendant's remaining challenges to the identification procedures.

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 2, 2017

CLERK

Tom, J.P., Renwick, Mazzarelli, Oing, Singh, JJ.

4876 In re Jeremiah D.,

A Child Under Eighteen Years of Age, etc.,

Deon D.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Max O. McCann of counsel), for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the child.

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Purported appeal from decision of fact-finding after a hearing, Family Court, New York County (Susan K. Knipps, J.), entered on or about July 8, 2016, which found that respondent father abused and neglected the subject child, deemed a premature notice of appeal (*see* CPLR 5520[c]; *Matter of Tyler W. [Janice B.]*, 149 AD3d 968 [2d Dept 2017]) from the order of factfinding, same court (Ta-Tanisha D. James, J.), entered on or about July 11, 2016, and, so considered, said order unanimously affirmed, without costs.

We note that the fact-finding order apparently erroneously omitted the finding of abuse made in the decision and, consistent

with the approach taken by the parties, deem it reconciled with the decision.

Petitioner proved by a preponderance of the evidence that respondent neglected and abused the subject child (*see* Family Court Act § 1046[a][ii]). Medical evidence and testimony established that the almost three-month-old child's injuries were the result of an abusive head trauma sustained while he was in the father's exclusive care (*Matter of Philip M.*, 82 NY2d 238, 243 [1993]; Family Court Act § 1046[a][ii]).

Respondent failed to rebut petitioner's case with any credible explanation for the child's condition. The Family Court's credibility findings are entitled to deference and are supported by the record. The court properly rejected respondent's expert's theory that the child's injuries were the result of benign enlargement of the subarachnoid spaces, as this diagnosis, among other things, did not explain the child's retinal hemorrhages or other symptoms, including his having gone

limp and stopped breathing (*see Matter of I-Conscious R. [George S.]*, 121 AD3d 566 [1st Dept 2014], *lv dismissed* 24 NY3d 1205 [2015]).

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

ENTERED: NOVEMBER 2, 2017

CLERK

Tom, J.P., Renwick, Mazzarelli, Oing, Singh, JJ.

4877 Ivan Sutherland, as the Administrator of the Estate of Lillian Sutherland,
Plaintiff-Respondent,

-against-

Comprehensive Care Management Corporation,
Defendant,

Joey Galito doing business as D&J Ambulette Service, et al.,
Defendants-Appellants.

Index 303755/09

_____

Murphy Higgins & Schiavetta, PLLC, New Rochelle (Jody C. Benard Of counsel), for Joey Galito, appellant.

Rivkin Radler LLP, Uniondale (Cheryl Korman of counsel), for Health Acquisition Corp., appellant.

Dubow, Smith & Marothy, New York (Steven J. Mines of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered on or about August 3, 2016, which, to the extent appealed from as limited by the briefs, denied the motions of defendants Joey Galito d/b/a D&J Ambulette Service (D&J) and Health Acquisition Corp. f/k/a Allen Health Care Services, Inc. (HAC) for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Defendants' motions for summary judgment were properly denied in this action where plaintiff's decedent, who suffered

from Alzheimer's disease, was injured when she fell down the stairs in her home after being left unattended. Plaintiff alleges that defendants were negligent because after attending day care, the decedent was to be transported home by D&J and left in the care of an aide, who was employed by HAC. The record presents triable issues as to how the accident occurred, the resolution of which will require assessing the credibility of witnesses with conflicting testimony (*see e.g. Nyala C. v Miniventures Child Care Dev. Ctr., Inc.*, 133 AD3d 467 [1st Dept 2015]; *Sanchez v Finke*, 288 AD2d 122 [1st Dept 2001]).

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

ENTERED: NOVEMBER 2, 2017

CLERK

Tom, J.P., Renwick, Mazzarelli, Oing, Singh, JJ.

4878 Adam Brook, M.D., Ph.D., et al., Index 652265/13
Plaintiffs-Appellants,

-against-

Jay Zuckerman, et al.,
Defendants-Respondents,

John Does #1-5,
Defendants.

_____

Adam Brook, appellant pro se.

Schwartz & Thomashower, L.L.P., New York (William Thomashower of counsel), for Adam Brook, M.D., Ph.D., P.L.L.C., and Brook Cardiothoracic Surgery, L.L.C., appellants.

Garfunkel Wild, P.C., Great Neck (Lauren M. Levine of counsel), for respondents.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered October 18, 2016, which, to the extent appealed from, granted defendants' motion to dismiss the breach of fiduciary duty, tortious interference, defamation, and unfair competition causes of action, unanimously affirmed, without costs.

The court providently exercised its discretion in dismissing the above-cited claims on the grounds of another action pending between the same parties (CPLR 3211[a][4]; *see Whitney v Whitney*, 57 NY2d 731 [1982]). Both this action and a prior action commenced by plaintiffs in 2012 arose out of the same subject

matter or series of alleged wrongs (*see PK Rest., LLC v Lifshutz*, 138 AD3d 434 [1st Dept 2016]), i.e., defendants' response to a 2009 surgical incident involving plaintiff Adam Brook, M.D., including their peer review and internal investigation and their filing of an Adverse Action Report and maintenance of that report with the National Physicians Database. Both actions seek the same relief for the same alleged injuries.

While plaintiff Brook Cardiothoracic Surgery, L.L.C., and defendant George Keckeisen, M.D., are not parties to the 2012 action, there is still substantial identity of the parties in the two actions, which is sufficient (*see id.* at 436).

In any event, the defamation, unfair competition, and breach of fiduciary duty causes of action were dismissed in a decision in the 2012 action (*see Brook v Peconic Bay Med. Ctr.*, 152 AD3d 436 [1st Dept 2017]), and their relitigation is precluded by the doctrine of res judicata.

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

ENTERED: NOVEMBER 2, 2017

CLERK

Tom, J.P., Renwick, Mazzarelli, Oing, Singh, JJ.

4879 The People of the State of New York, Respondent, Ind. 5090/14

-against-

Mady Diabate,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Heidi Bota of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered February 19, 2015, convicting defendant, upon his plea of guilty, of grand larceny in the fourth degree, and sentencing him to a term of 90 days, concurrent with four years' probation, unanimously affirmed.

Defendant, who contends that his plea was involuntary because the court never advised him that he could be deported as a result of his plea (*see People v Peque*, 22 NY3d 168 [2013], *cert denied* 574 US __, 135 S Ct 90 [2014]), has not established that the exception to the preservation requirement set forth in *Peque* (*id.* at 182-183) should apply. The record demonstrates that defendant knew of his potential deportation, by virtue of the notice of immigration consequences served upon him, and the fact that his counsel had "fully discussed" the "immigration

aspect" of the case and "gone over all the relevant questions." Review of defendant's unpreserved claim in the interest of justice is unwarranted, because the circumstances of the plea render it highly unlikely that defendant could make the requisite showing of prejudice under *Peque* (*id.* at 198-201) if granted a hearing.

Defendant made a valid waiver of his right to appeal (*see People v Bryant*, 28 NY3d 1094 [2016]), which forecloses review of his excessive sentence claim. Regardless of whether defendant validly waived his right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 2, 2017

CLERK

Tom, J.P., Renwick, Mazzarelli, Oing, Singh, JJ.

4880 Pablo Alvarez, Index 152073/14
Plaintiff-Respondent,

-against-

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

_____

Cerussi & Spring, P.C., White Plains (Christa D'Angelica of counsel), for appellants.

Jeffrey J. Shapiro & Associates, LLC, New York (Jeffrey J. Shapiro of counsel), for respondent.

_____

Order, Supreme Court, New York County (Robert D. Kalish, J.), entered June 16, 2017, which, insofar as appealed from as limited by the briefs, denied the motion of defendants New York City School Construction Authority, Skanska USA Building, Inc. and All-Safe, LLC. for summary judgment dismissing the Labor Law § 200 and common-law negligence claims, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

Dismissal of the Labor Law § 200 and common-law negligence claims was warranted in this action where plaintiff was injured when, while working as a plasterer on a school construction project, he hit his head on a tie-in that was securing a scaffold to the school building. The record is devoid of evidence

indicating that the existence or placement of the tie-in constituted a dangerous condition.

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

ENTERED: NOVEMBER 2, 2017

CLERK

Tom, J.P., Renwick, Mazzarelli, Oing, Singh, JJ.

4881 In re Rosandre Burgher, Index 102024/15
Petitioner,

-against-

William J. Bratton, etc., et al.
Respondents.

_____

London & Worth, LLP, New York (Howard B. Sterinbach of counsel), for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Fay Ng of counsel), for respondents.

_____

Determination of respondent Police Commissioner, dated July 23, 2015, which terminated petitioner's employment as a New York City police officer, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Lucy Billings, J.], entered May 17, 2016), dismissed, without costs.

The determination finding petitioner guilty of three specifications is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]), and there exists no basis to disturb the credibility determinations of the Hearing Officer (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]). Contrary to petitioner's claim, the Hearing Officer gave

preclusive effect to the minor's conviction for filing a false instrument *(see Matter of State of N.Y. Off. of Mental Health [New York State Correctional Officers & Police Benevolent Assn., Inc.]*, 46 AD3d 1269, 1271 [3d Dept 2007], *lv dismissed* 10 NY3d 826 [2008]), but based her determination on statements of the minor that were not a subject of the false instrument and were corroborated by documents and her assessment of petitioner's credibility.

The penalty of termination does not shock our sense of fairness in light of the seriousness of the charges and respondents' responsibility to account "to the public for the integrity of the Department *(Matter of Hopper v Kelly*, 106 AD3d 530, 530 [1st Dept 2013]; *see Matter of Gonzalez v Kelly*, 114 AD3d 591 [1st Dept 2014]).

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: NOVEMBER 2, 2017

CLERK

Tom, J.P., Renwick, Mazzarelli, Oing, Singh, JJ.

4882 In re Militza L.,
Petitioner-Respondent,

-against-

Ramon Luis C.,
Respondent-Appellant.

_____

Steven N. Feinman, White Plains, for appellant.

Leslie S. Lowenstein, Woodmere, for respondent.

_____

Order, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about July 5, 2016, which, after a fact-finding hearing, granted petitioner a one-year order of protection, unanimously affirmed, without costs.

A fair preponderance of the evidence establishes that respondent committed the family offense of harassment in the second degree (*see* Family Court Act §§ 812; 832). Petitioner testified that, inter alia, respondent intentionally engaged in a course of conduct in 2013 and 2016 to alarm or seriously annoy her for no legitimate purpose (*see* Penal Law § 240.26[3]), and

there exists no basis to disturb the court's credibility determinations (*see e.g. Matter of Peter G. v Karleen K.*, 51 AD3d 541 [1st Dept 2008]).

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

ENTERED: NOVEMBER 2, 2017

CLERK

Tom, J.P., Renwick, Mazzarelli, Oing, Singh, JJ.

4883 The People of the State of New York, Respondent, Ind. 46/98

-against-

Dwan Torres,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Allen Fallek of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Kelly L. Smith of counsel), for respondent.

_____

Order, Supreme Court, New York County (Ronald A. Zweibel, J.), entered on or about July 28, 2014, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Defendant's statements that he was intoxicated at the time of the underlying sex crime, even if intended to be self-serving, were sufficiently reliable, and they were corroborated by the victim's grand jury testimony and the fact that defendant was evaluated as requiring alcohol abuse treatment while he was incarcerated. Accordingly, there was clear and convincing evidence to support the court's assessment of points under the risk factor for alcohol and substance abuse (*see e.g. People v Zewge*, 142 AD3d 880 [1st Dept 2016]). The fact that, at the

trial of the underlying charge, the jury apparently rejected defendant's intoxication defense, which asserted that he was so intoxicated as to be unable to form the requisite intent (*see* Penal Law § 15.25), has no bearing on the reliability of the evidence that he was, in fact, intoxicated.

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

ENTERED: NOVEMBER 2, 2017

CLERK

Tom, J.P., Renwick, Mazzarelli, Oing, Singh, JJ.

4884 Star L. Herrmann, etc., et al., Index 653786/14
Plaintiffs-Appellants,

-against-

CohnReznick LLP, etc., et al.,
Defendants-Respondents.

_____

Law Offices of Timothy Kebbe, White Plains (Timothy P. Kebbe of counsel), for appellants.

Reed Smith LLP, New York (Casey D. Laffey of counsel), for respondents.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered October 12, 2016, which dismissed the complaint against defendant Emma Herrmann, and dismissed the complaint against the remaining defendants without prejudice, unanimously affirmed, without costs.

In July of 2005, the late Edward Herrmann, a well-known actor, and his wife Star Herrmann entered into an engagement letter agreement with Frederic Kantor and Company, P.C., a predecessor firm of defendant CohnReznick LLP, to provide them and their company Baloo Enterprises Ltd. with "bookkeeping and related business management services." Baloo is a corporation that was formed by Mr. Herrmann to lease his services as an actor to third parties, among other things.

Through this action, plaintiffs claim that defendants

mismanaged their account over a nine-year period from 2005 through 2014 by, among other things, (1) failing to pay their expenses in a timely manner; (2) negligently and improperly preparing their tax returns such that they failed to take the proper deductions and owed substantial back taxes, interest and penalties; and (3) making poor investments that left them with no meaningful savings or money to pay for their daughter Emma's college tuition. The second amended complaint alleges causes of action for (1) professional malpractice (tax); professional negligence (other services), (3) breach of fiduciary duty, (4) accounting, and (5) breach of contract for purportedly charging excessive fees.

The IAS Court's conclusion that the allegations of the second amended complaint failed for a lack of specificity is amply supported. Plaintiffs' allegations were not sufficient to apprise defendants of the "transactions, occurrences, or series of transactions and occurrences" at issue, particularly in light of the 73,000 pages of pre-complaint discovery that plaintiffs received and their admission that they now have all of the relevant tax returns in their possession (CPLR 3013).

The second amended complaint and other documents submitted by plaintiffs failed to specify, among other things, the tax years and specific tax returns that were purportedly prepared

improperly and the specific deductions that were not taken. Nor did plaintiffs identify the credit cards or accounts at issue, what the balances were, how many months the balances remained unpaid or the specific amounts of penalties and interest that plaintiffs incurred. The allegations in support of plaintiffs' breach of contract claim for excessive fees were also insufficient in that they did not set forth the fees that were charged and when, which fees were excessive and the proper amount that the fees should have been.

Plaintiffs' claims for breach of fiduciary duty and an accounting, which are subject to a heightened pleading standard set forth in CPLR 3016(b), also fail (Caprer v Nussbaum, 36 AD3d 176, 194 [2d Dept 2006] ["As a general rule, accountants are not fiduciaries as to their clients except where the accountants are directly involved in managing the client's investments"]).

Compounding the pleading deficiencies, the vagueness of plaintiffs' allegations prevented the IAS Court from ruling on defendants' statute of limitation defense. It is noted that the IAS Court dismissed the bulk of the claims without prejudice (with the exception of the professional negligence claim asserted on behalf of Emma Herrmann), and that plaintiffs will be afforded the opportunity to replead their claims a third time. There is no reason to disturb the court's order.

The court also properly dismissed the professional malpractice claim asserted by Emma Herrmann - the only claim asserted on her behalf - and properly did so with prejudice. Emma was not defendants' client. Only Mr. and Mrs. Herrmann signed the engagement letter, which does not mention Emma by name or describe any services to be provided for her. The complaint itself contains minimal references to Emma, and does not set forth any "linking conduct" between defendants and Emma such that they owed her any duty, as would be necessary to sustain the claim (*LaSalle Natl. Bank v Ernst & Young*, 285 AD2d 101, 105 [1st Dept 2001]).

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

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

ENTERED: NOVEMBER 2, 2017

CLERK

Tom, J.P., Renwick, Mazzarelli, Oing, Singh, JJ.

4885 Lynette Saxon, Index 21621/16E
Plaintiff-Respondent,

-against-

Leonila Ramirez, et al.,
Defendants,

Carine Darnell, et al.,
Defendants-Appellants.

_____

Adams & Kaplan, Yonkers (Jeffrey A. Domoto of counsel), for appellants.

Weiss & Rosenbloom, P.C., New York (Erik L. Gray of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered January 11, 2017, which denied the motion of defendants Carine Darnell and Kevin T. Darnell for summary judgment dismissing the complaint and all cross claims as against them, unanimously affirmed, without costs.

In this action involving a four-car motor vehicle accident, the Darnell defendants failed to demonstrate their entitlement to judgment as a matter of law. The inconsistencies between the statements made to the police after the accident and the affidavit submitted by Kevin Darnell in support of the motion show that there are issues of fact as to the sequence of the

collisions (*see Passos v MTA Bus Co.*, 129 AD3d 481, 482-483 [1st Dept 2015]; *Espinal v Volunteers of Am.-Greater N.Y., Inc.*, 121 AD3d 558, 559 [1st Dept 2014]).

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

ENTERED: NOVEMBER 2, 2017

CLERK

Tom, J.P., Renwick, Mazzarelli, Oing, Singh, JJ.

4886-
4886A The People of the State of New York, Respondent,

Ind. 4945/13
5324/13

-against-

Luis Olmeda,
Defendant-Appellant.

_____

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

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

_____

Judgments, Supreme Court, New York County (Michael J. Obus, J.), rendered September 8, 2014, as amended September 30, 2014, convicting defendant, after a nonjury trial, of arson in the second degree and burglary in the second degree, and sentencing him, as a second violent felony offender, to concurrent terms of 12 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis

for disturbing the court's credibility determinations, in which it accepted the victim's testimony and rejected defendant's.

We perceive no reason for reducing the sentence.

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

ENTERED: NOVEMBER 2, 2017

CLERK

Tom, J.P., Renwick, Mazzarelli, Oing, Singh, JJ.

4887 A.M., etc., et al., Index 350551/08
Plaintiffs-Respondents,

-against-

Joseph R. Andrade, M.D.,
Defendant,

Chai-Luk Wo, M.D.,
Defendant-Appellant.

_____

Dwyer & Taglia, New York (Peter R. Taglia of counsel), for appellant.

Jonathan C. Reiter Law Firm, PLLC, New York (Jonathan C. Reiter of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Stanley Green, J.), entered December 2, 2016, which denied the motion of defendant Chai-Luk Wo, M.D. for summary judgment dismissing the complaint as against him, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiffs allege that defendant, an ophthalmologist who saw infant plaintiff once and diagnosed him with a cataract, was negligent in failing to advise plaintiffs to urgently seek follow-up care from a specific pediatric ophthalmologist. Issues of fact exist as to whether defendant departed from good and accepted medical practice (*see generally Anyie B. v Bronx Lebanon*

Hosp., 128 AD3d 1, 2 [1st Dept 2015]). However, plaintiffs cannot establish proximate causation.

Although defendant's failure to urge plaintiffs to promptly consult with a specific subspecialist may have resulted in a delay in intervention until the child's condition had worsened beyond repair, this was not the reason the child did not undergo the purportedly necessary surgery. Rather, the child did not undergo surgery because, when he later consulted with two pediatric ophthalmologists, they both determined that his cataract was congenital and, as a result, surgery would not be effective. There is no basis to infer that these diagnoses would have been different had the pediatric ophthalmologists examined the child earlier. As such, it is purely speculative that an earlier referral would have resulted in different treatment or a better result (*see Berlinger v Kraft*, 60 AD3d 489, 491 [1st Dept 2009]*; Bartha v Lombardo & Assoc.*, 212 AD2d 494 [2d Dept 1995]).

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

ENTERED: NOVEMBER 2, 2017

CLERK

Tom, J.P., Renwick, Mazzarelli, Oing, Singh, JJ.

4888 The People of the State of New York, Respondent, Ind. 407/15 2899/14

-against-

James McKeown, Defendant-Appellant.

_____

Rosemary Herbert, Office of the Appellate Defender, New York (Charity L. Brady of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered July 15, 2015, 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: NOVEMBER 2, 2017

CLERK

Tom, J.P., Renwick, Mazzarelli, Oing, Singh, JJ.

4889 Isaac Thompson, Index 25524/15E
Plaintiff-Respondent,

-against-

Robert Pizzaro, et al.,
Defendants-Appellants.

_____

Wade Clark Mulcahy, New York (Christopher J. Soverow of counsel), for appellants,

William Schwitzer & Associates, P.C., New York (Howard R. Cohen of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered June 22, 2016, which granted plaintiff's motion for partial summary judgment as to liability, unanimously affirmed, without costs.

Plaintiff satisfied his prima facie burden by submitting photographic evidence of the accident site and an affidavit in which he averred that while turning right from a designated lane, defendants' vehicle, which had been in the lane to the immediate left of plaintiff, turned wide to the right, entered plaintiff's lane, and collided with his car. Unless refuted or excused, defendants' actions violated Vehicle and Traffic Law §§ 1128(a) and 1163(a), establishing negligence (*see Delgado v Martinez Family Auto*, 113 AD3d 426, 427 [1st Dept 2014]).

In opposition to plaintiff's prima facie showing, defendants

failed to submit any evidence to raise a triable issue of fact, and instead relied solely upon the pleadings and the arguments of counsel. Since counsel claimed no personal knowledge of the accident, his affirmation has no probative value (*Bendik v Dybowski*, 227 AD2d 228, 229 [1st Dept 1996]).

Plaintiff's motion was not premature. Depositions are unnecessary, since defendants have personal knowledge of the facts, yet "failed to meet their obligation of laying bare their proof and presenting evidence sufficient to raise a triable issue of fact" (*Avant v Cepin Livery Corp.*, 74 AD3d 533, 534 [1st Dept 2010]).

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

ENTERED: NOVEMBER 2, 2017

CLERK

Tom, J.P., Renwick, Mazzarelli, Oing, Singh, JJ.

4890 The People of the State of New York, Ind. 5073/15
Respondent,

-against-

Jose R.,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered May 18, 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.

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

ENTERED: NOVEMBER 2, 2017

CLERK

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

Tom, J.P., Renwick, Mazzarelli, Oing, Singh, JJ.

4891 The People of the State of New York, Respondent, Ind. 1406/13

-against-

Gabriel Shelton, Defendant-Appellant.

_____

Dennis J. Doody, Tarrytown, for appellant.

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

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered June 3, 2014, convicting defendant, upon his plea of guilty, of conspiracy in the second degree and two counts of criminal possession of a weapon in the second degree, and sentencing him to a term of 6 to 18 years, concurrent with consecutive terms of 15 and 6 years, unanimously modified, as a matter of discretion in the interest of justice, to the

extent of directing that all sentences be served concurrently, and otherwise affirmed.

We find the sentence excessive to the extent indicated.

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

ENTERED: NOVEMBER 2, 2017

CLERK

Tom, J.P., Renwick, Mazzarelli, Oing, Singh, JJ.

4892N U.S. Bank National Association, et al., Plaintiffs, Index 600352/09

-against-

GreenPoint Mortgage Funding, Inc., Defendant-Appellant,

Syncora Guarantee Inc., formerly known as XL Capital Assurance Inc., etc., Nonparty Respondent.

_____

Murphy & McGonigle, P.C., New York (Theodore R. Snyder of counsel), for appellant.

Allegaert Berger & Vogel LLP, New York (Michael S. Vogel of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered April 28, 2017, which denied defendant's motion to reverse the order of a special referee, dated December 2, 2016, denying its motion to compel production of documents by nonparty respondent Syncora Guarantee, Inc., unanimously affirmed, with costs.

This is a residential mortgage-backed securities put-back action in which the trustee seeks to enforce its contractual rights of repurchase of the mortgage loans in the trust. Nonparty respondent Syncora is the issuer of a financial guaranty policy for a certain class of notes in the trust. Any losses it

sustained, or efforts it made to mitigate damages, are not relevant to the trust's claims.

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

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

ENTERED: NOVEMBER 2, 2017

CLERK

Renwick, J.P., Manzanet-Daniels, Andrias, Kern, Oing, JJ.

4979 & M-5189 George Nielson,
Plaintiff-Respondent,

-against-

Vornado Forest Plaza, L.L.C.,
Defendant,

PFNY, LLC, et al.,
Defendants-Respondents.

- - - - -

PFNY, LLC, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Pro Aire Design Consultants, Inc.,
Third-Party Defendant-Appellant.

Index 160372/13
590105/14

_____

Milber Makris Plousadis & Seiden, LLP, Woodbury (Sarah M. Ziolkowski of counsel), for appellant.

Cascone & Kluepfel, LLC, Garden City (James K. O'Sullivan of counsel), for respondents.

_____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered on or about July 8, 2016, which, insofar as appealed from as limited by the briefs, denied third-party defendant's (Pro Aire) motion for summary judgment dismissing the third-party contractual indemnification and breach of contract claims, unanimously modified, on the law, to grant the motion as to the contractual indemnification claim, and otherwise affirmed, without costs.

Pro Aire established prima facie that it is not obligated to indemnify defendants/third-party plaintiffs (the PFNY defendants) under their subcontract, because plaintiff's accident cannot have been caused by any negligent act or omission on Pro Aire's part (*see Robinson v Brooks Shopping Ctrs., LLC*, 148 AD3d 522, 523 [1st Dept 2017]). Plaintiff's Labor Law §§ 240(1) and 241(6) claims having been dismissed, the only remaining theory of liability in this case is defective premises (the Labor Law § 200 and common-law negligence claims), and Pro Aire was not responsible for the maintenance of the ladder upon which plaintiff fell. That responsibility fell upon either the owner of the premises or the lessees of the premises (the PFNY defendants) under the lease agreement.

In opposition, defendants contend that an issue of fact as to Pro Aire's negligence is raised by plaintiff's testimony that his supervisor had directed him to continue working despite the rain. However, to the extent we may search the record to review it (*see Dunham v Hilco Constr. Co.*, 89 NY2d 425, 429-430 [1996]; *Biondi v Behrman*, 149 AD3d 562, 564-565 [1st Dept 2017]), we reject this contention. Plaintiff admitted that he left the roof hatch open and that it started raining even before he called his supervisor about the problem with the inducer motors. Further, he would have had to descend the ladder at that point regardless

of whether he been directed to continue working.

In any event, even if Pro Aire could be found partially negligent, the PFNY defendants would not be entitled to contractual indemnification. The indemnification clause is unenforceable, because it requires Pro Aire to indemnify the PFNY defendants for their own negligence (*see* General Obligations Law § 5-322.1[1]; *Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786 [1997]; *Picaso v 345 E. 73 Owners Corp.*, 101 AD3d 511 [1st Dept 2012]).

Pro Aire failed to establish that it procured the insurance coverage for the PFNY defendants required by its contract with nonparty TCB Builders, Inc. The blanket additional insured endorsement in the policy Pro Aire obtained pursuant to that contract defined additional insured as "[a]ny person(s) or organization(s) with whom you have agreed in a valid written contract or written agreement that such person or organization be added as an additional insured." The record contains no written agreement between Pro Aire and the PFNY defendants in which Pro

Aire agreed to name the PFNY defendants as additional insureds on its policy.

M-5189 - *Neilson v Vornado Forest Plaza, L.L.C.*

Motion for a stay pending appeal denied as academic.

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

ENTERED: NOVEMBER 2, 2017

CLERK