SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 6, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Richter, J.P., Mazzarelli, Kahn, Moulton, JJ.

4960-
4961-
4962N Tishman Construction Corp., et al., Index 150585/11
Plaintiffs-Respondents,

-against-

United Hispanic Construction
Workers, Inc.,
Defendant-Appellant.
- - - - -
David Rodriguez,
Nonparty Appellant.

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Trivella & Forte, LLP, White Plains (Christopher A. Smith and John M. Harras of counsel), for appellant.

Milman Labuda Law Group PLLC, Lake Success (Joseph M. Labuda of counsel), for respondents.

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Judgment, Supreme Court, New York County (Anil C. Singh, J.), entered February 28, 2017, in favor of plaintiffs and against defendant United Hispanic Construction Workers, Inc. (UHCW) and nonparty David Rodriguez in the amount of $218,710.08 in attorneys' fees, costs and interest, unanimously affirmed, without costs. Appeals from orders, same court and Justice, entered January 27, 2016 and February 10, 2017, unanimously

dismissed, without costs, as subsumed in the appeal from judgment.

The court properly found that appellants disobeyed the stipulation and order, which was negotiated by the parties and set forth the conditions for protests held by UHCW. These conditions expressed an unequivocal mandate of which appellants were well aware, and their violation of the order prejudiced plaintiffs' right to conduct business without disturbance, thus justifying the finding of contempt (*see El-Dehdan v El-Dehdan*, 26 NY3d 19 [2015]; *McCain v Dinkins*, 84 NY2d 216 [1994]).

The court properly exercised jurisdiction over Rodriguez, who is president of UHCW and who signed the 2012 stipulation and order that was subsequently violated. Although Rodriguez was not personally served in the action, it is undisputed that he was involved in the negotiation of the stipulation, and was knowledgeable of the conditions set forth therein. Furthermore, the evidence presented at the contempt hearing demonstrated that Rodriguez himself violated the court's mandates. Under these circumstances, Rodriguez, even as a nonparty, can be punished for UHCW's violations of the stipulation and order (*see 1319 Third Ave. Realty Corp. v Chateaubriant Rest. Dev. Co., LLC*, 57 AD3d 340 [1st Dept 2008]).

We have considered appellants' remaining arguments and find

them unavailing.

By this decision and order, we are resolving all of the issues raised in the instant consolidated appeals.

The Decision and Order of this Court entered herein on November 14, 2017 (155 AD3d 471 [1st Dept 2017]) is hereby recalled and vacated (*see* M-6681 decided simultaneously herewith).

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

ENTERED: FEBRUARY 6, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Webber, Kahn, Moulton, JJ.

5606 Sigrid Swaney, Index 156822/15
Plaintiff-Respondent,

-against-

Academy Bus Tours of
New York, Inc., et al.,
Defendants-Appellants,

Allied T Pro Inc.,
Defendant.

____

Mintzer Sarowitz Zeris Ledva & Meyers, L.L.P., New York (Peter A. Frucchione of counsel), for appellants.

Kahn, Gordon, Timko & Rodriquez, P.C., New York (Michael Zogala of counsel), for respondent.

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Order, Supreme Court, New York County (Leticia M. Ramirez, J.), entered on or about November 29, 2016, which, insofar as appealed from as limited by the briefs, denied the motion of defendants Academy Bus Tours of New York, Inc., Academy Bus Lines, LLC, Academy Bus Tours, Inc., Academy Express LLC and Harold Rucker s/h/a Harold Rubker to dismiss the complaint as against them pursuant to CPLR 327(a), unanimously affirmed, without costs.

In this personal action arising out of a motor vehicle accident, the motion court did not improvidently exercise its discretion in weighing the relevant factors in denying the motion to dismiss the complaint on the ground of forum non conveniens.

On a motion to dismiss on the ground of forum non conveniens, a defendant bears the burden of demonstrating that the "relevant private or public interest factors militate against accepting the litigation" (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], *cert denied* 469 US 1108 [1985]). After considering and weighing the various factors, a court must determine whether or not to retain jurisdiction (*id*.). Relevant factors include the burden on New York courts, the potential hardship to the defendant, the availability of an alternative forum, the residence of the parties, and the location where the cause of action arose (*id*.). No one factor is dispositive in the calculus (*id*.).[1] It is elementary that the motion court's determination should not be disturbed unless the court improvidently exercised its discretion or failed to consider the relevant factors (*id*.).

The motion court correctly determined that defendants have not met their "heavy burden" on the motion of establishing that "plaintiff's selection of New York is not in the interest of substantial justice" (*Wilson v Dantas*, 128 AD3d 176, 187 [1st

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[1]Defendants rely on a pre-*Pahlavi* Third Department case to argue that plaintiff nonresident, not defendants, has the burden of establishing special circumstances to retain the case in New York (*see Blais v Deyo*, 92 AD2d 998 [3d Dept 1983], *affd* 60 NY2d 679 [1983]). *Blais* is difficult to square with *Pahlavi*, and should be disregarded to the extent inconsistent.

Dept 2015] [internal quotation marks omitted], *affd* 29 NY3d 1051 [2017]). "[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed" (*Gulf Oil Corp. v Gilbert*, 330 US 501, 508 [1947]).

Defendants have failed to establish that the relevant factors militate in favor of maintaining the action in New York. Defendants advertise and operate bus service within the State of New York. The subject "Eastern Triangle" bus tour began and ended at a New York City hotel. Defendant Allied T Pro Inc., which chartered the subject bus, maintained (and continues to maintain) an office on Seventh Avenue in New York County. Defendant Academy Express LLC, the owner of the subject bus, is authorized to conduct business in New York, has an address for service of process in New York County, and regularly solicits business in New York.

Defendants cannot credibly claim that retention of the action in New York constitutes a hardship for potential witnesses. For one, their principal witness, Rucker, resides in Brooklyn. Defendants have not advised of any other witnesses they intend to call.

The 77-year-old plaintiff, who resides in New Jersey, avers that it is easier, less expensive, and more comfortable for her to come to Manhattan than to use the New Jersey courthouses, and

that doing so would cause undue financial hardship. In any event a New Jersey court would lack jurisdiction over defendant Rucker, since he resides in Brooklyn, New York, and the collision occurred in Pennsylvania.

Defendants maintain offices in Hoboken, only 3.5 miles from New York. Any witnesses can drive into the City or avail themselves of the PATH train from Hoboken. The German eyewitnesses who offered to testify on plaintiff's behalf will fly into JFK International Airport, and they intend to stay in Manhattan during their stay, so New York is the most convenient forum for them as well.

The fact that a New York court may be called upon to apply the law of Pennsylvania is not a reason favoring dismissal (*see Wilson v Dantas*, 128 AD3d at 187).

Defendants' argument that New Jersey – where none of the relevant events occurred, and which has no basis for jurisdiction over Rucker – has a greater connection to this action is not persuasive.

Defendants' reliance on *Economos v Zizikas* (18 AD3d 392 [1st Dept 2005]) is misplaced. In *Economos*, unlike here, all of the parties were New Jersey residents.

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

ENTERED: FEBRUARY 6, 2018

CLERK

Richter, J.P., Mazzarelli, Webber, Kern, Oing, JJ.

5611 Pedro Cardenas, Index 154591/13
Plaintiff-Respondent,

-against-

Somerset Partners, LLC, et al.,
Defendants-Respondents,

GM Glass & Mirror Inc.,
Defendant-Appellant.

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Law Office of James J. Toomey, New York (Evy L. Kazansky of counsel), for appellant.

Nguyen Leftt P.C., New York (Stephen D. Chakwin, Jr of counsel), for Pedro Cardenas, respondent.

Law Office Of Harris, King, Fodera & Correia, New York (Brian S. Liferiedge of counsel), for Somerset Partners, LLC, 450 Park Avenue LLC, Jones Lang LaSalle Americas, Inc., Banco Bradesco, S.A., Janko Rasic Architects and John Gallin & Son, Inc., respondents.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered September 21, 2015, which denied defendant GM Glass & Mirror, Inc.'s (GM Glass) motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Plaintiff seeks damages for injuries he allegedly sustained when he walked into a floor-to-ceiling clear glass wall installed by GM Glass. Although GM Glass, in support of its motion, was entitled to rely on documentary evidence and depositions of other parties' witnesses (*see Olan v Farrell Lines*, 64 NY2d 1092, 1093

[1985]), the evidence that it submitted failed to establish that it properly installed the glass wall with blue tape or other markings, or that it owed no duty to plaintiff with respect to its work.

Issues of fact exist as to whether GM Glass was still on site at the time of the accident, whether it was responsible for installing and maintaining blue marking tape on the glass wall, and whether it failed to do so, thereby exacerbating or creating a dangerous condition so as to have "launched a force or instrument of harm" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 141-142 [2002] [internal quotation marks and emphasis omitted]; *see Kramer v Cury*, 92 AD3d 484 [1st Dept 2012]; *Grant v Caprice Mgt. Corp.*, 43 AD3d 708 [1st Dept 2007]).

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

ENTERED: FEBRUARY 6, 2018

CLERK

Richter, J.P., Mazzarelli, Webber, Kern, Oing, JJ.

5612 In re Kyshawn J.,

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

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

Zachary W. Carter, Corporation Counsel, New York (Barbara Graves-Poller of counsel), for presentment agency.

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Appeal from order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about August 30, 2016, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of petit larceny, and placed him on probation for a period of 12 months, with restitution in the amount of $949, unanimously dismissed, as moot, without costs.

This appeal is moot because the order has been vacated and superseded by a subsequent order placing appellant with the Administration for Children's Services' Close to Home program

(*see Matter of Fawaz A. [Franklyn B.C.]*, 112 AD3d 550 [1st Dept 2013]). In any event, the disposition, including the provision for restitution, was a provident exercise of discretion.

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

ENTERED: FEBRUARY 6, 2018

CLERK

Richter, J.P., Mazzarelli, Webber, Kern, Oing, JJ.

5613 Danny Hamilton, Index 301740/13
Plaintiff-Respondent,

-against-

3339 Park Development LLC,
Defendant,

Naica Housing Development Fund
Company, Inc.,
Defendant-Appellant.

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Rutherford & Christie, LLP, New York (Adam C. Guzik of counsel), for appellant.

Ephrem J. Wertenteil, New York, for respondent.

____

Order, Supreme Court, Bronx County (Elizabeth A. Taylor, J.), entered April 11, 2016, which, insofar as appealed from, denied defendants' motion for summary judgment dismissing the complaint as against defendant Naica Housing Development Fund Company, Inc., unanimously affirmed, without costs.

Defendant failed to establish its prima facie entitlement to judgment as a matter of law by submitting evidence establishing that it neither created nor had notice of the alleged wet condition that caused plaintiff to slip and fall (*see e.g. Garcia v Delgado Travel Agency*, 4 AD3d 204 [2004]). In support of the motion, defendant relied on the deposition testimony of the plaintiff; building superintendent, Mr. Turull; and housekeeper

for the building, Mr. Vega. Mr. Turull testified that it was his practice to inspect the staircase daily at approximately 8:00 a.m. and that everyday the floors were mopped at midnight. Mr. Turull further stated that on the morning of the accident, he did not receive any complaints about a wet staircase and his inspection shortly before the accident revealed that the staircase was "clear." Mr. Turull also testified, however, that it was his staff's practice to place wet floor signs on areas near spilled liquids, and that his staff would not leave the floor until such signs were placed. Mr. Vega, on the other hand, testified that he was present at the time of plaintiff's fall, and observed a wet floor sign on the floor at the top of the staircase. Based on the foregoing, issues of fact exist as to whether defendants created or had actual or constructive notice of a hazardous condition (*Geffs v City of New York*, 105 AD3d 681 [1st Dept 2013]; *Rosado v Phipps Houses Servs., Inc.*, 93 AD3d 597 [1st Dept 2012]).

Contrary to defendant's argument, the evidence does not establish that it was a resident who deployed the wet floor sign as opposed to an employee (*see Dabbagh v Newmark Knight Frank Global Mgt. Servs., LLC*, 99 AD3d 448 [1st Dept 2012]). Indeed, while Mr. Turull testified that the wet floor signs were "accessible," the record does not indicate that they were ever

deployed by a resident. Nor was there evidence that the wet floor sign was deployed merely as a precautionary measure (*compare Snauffer v 1177 Ave. of the Ams. LP*, 78 AD3d 583 [1st Dept 2010]).

Defendant argues, improperly for the first time on appeal, that if the wet floor sign was deployed, then plaintiff was adequately warned. However, there was no evidence that the wet floor sign was sufficient to provide warning, as neither plaintiff nor Mr. Turull testified that they observed the sign, nor was a sign placed both in front of the doors leading to the staircase and the staircase itself, as Mr. Turull stated was defendant's practice (*see e.g. Soto v 2780 Realty Co., LLC*, 114 AD3d 503 [1st Dept 2014]). The mere placement of a wet floor warning sign does not automatically absolve defendant of negligence (*see e.g. Felix v Sears*, *Roebuck & Co.*, 64 AD3d 499 [1st Dept 2009]).

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

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

ENTERED: FEBRUARY 6, 2018

CLERK

Richter, J.P., Mazzarelli, Webber, Kern, Oing, JJ.

5614 Barbara Kalsmith, Index 115584/10
Plaintiff-Appellant, 590455/11

-against-

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

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

- - - - -

[And a Third-Party Action]

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Salenger, Sack, Kimmel & Bavaro, LLP, Woodbury (Michael F. Schwartz of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Shannon Colabrese of counsel), for respondents.

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Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered August 26, 2016, which, insofar as appealed from as limited by the briefs, granted defendants the City of New York and New York City Department of Transportation's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants made a prima facie showing that they did not have prior written notice of the defective roadway condition that allegedly caused plaintiff to trip and fall (*see* Administrative Code of City of NY § 7-201[c][2]; *Yarborough v City of New York*, 10 NY3d 726, 728 [2008]). Although the FITS reports submitted by

defendants showed the existence of potholes at the accident site during the nearly two years prior to plaintiff's accident, there was no proof that any of these defects, which were all repaired, were the cause of plaintiff's accident (*see Worthman v City of New York*, 150 AD3d 553, 554 [1st Dept 2017]). "The awareness of one defect in the area is insufficient to constitute notice of a different particular defect which caused the accident" (*Roldan v City of New York*, 36 AD3d 484, 484 [1st Dept 2007]).

In opposition, plaintiff failed to raise a triable issue of fact. There is no evidence that defendants created the defective condition, and therefore that exception to the prior written notice requirement does not apply (*see Yarborough*, 10 NY3d at 728). Moreover, neither actual nor constructive notice of the defect may substitute for prior written notice (*see Campisi v Bronx Water & Sewer Serv.*, 1 AD3d 166, 167 [1st Dept 2003]; *see also Amabile v City of Buffalo*, 93 NY2d 471, 475-476 [1999]).

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

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

ENTERED: FEBRUARY 6, 2018

CLERK

Richter, J.P., Mazzarelli, Webber, Kahn, Oing, JJ.

5615 The People of the State of New York, Ind. 1141/12
Respondent,

-against-

Luis Tejada,
Defendant-Appellant.

____

Seymour W. James, Jr., The Legal Aid Society, New York (David A. Crow of counsel), and Cahill Gordon & Reindel LLP, New York (Vincent C. Papa of counsel), for appellant.

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

____

Judgment, Supreme Court, Bronx County (Robert A. Sackett, J.), rendered July 23, 2014, convicting defendant, after a jury trial, of robbery in the first degree, and sentencing him to a term of five years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The jury could have reasonably concluded that defendant's display of a knife, in conjunction with his demand for the victim's purse and immediate flight with her property, constituted the threatened use of a dangerous instrument, because "there was no reasonable explanation of defendant's conduct other than an implied threat to use the

knife” (*People Sharma*, 112 AD3d 494, 495 [1st Dept 2013], *lv denied* 23 NY3d 1025 [2014]; *see also People v Boisseau*, 33 AD3d 568 [1st Dept 2006], *lv denied* 8 NY3d 844 [2007]).

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

ENTERED: FEBRUARY 6, 2018

CLERK

Richter, J.P., Mazzarelli, Webber, Kern, Oing, JJ.

5617- Index 652664/16
5618 Shirley Shawe, etc., 652482/16
Plaintiff-Appellant,

-against-

Cushman & Wakefield, et al.,
Defendants-Respondents,

Transperfect Global, Inc. et al.,
Nominal Parties.
\- - - - -
Shirley Shawe, etc.,
Plaintiff-Appellant,

-against-

Kidron Corporate Advisors
LLC, et al.,
Defendants-Respondents,

John and Jane Does 1
through 10, etc.,
Defendants,

Transperfect Global, Inc., et al.
Nominal Parties.

Kruzhkov Russo PLLC, New York (Robert Sidorsky of counsel), for appellant.

DLA Piper LLP (US), New York (Jayne A. Risk of counsel), for Cushman & Wakefield and Michael Burlant, respondents.

Kirkland & Ellis LLP, New York (Warren Haskel of counsel), for Kidron Corporate Advisors LLC and Mark B. Segall, respondents.

Judgments, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered July 25, 2017, dismissing the actions

with prejudice, unanimously affirmed, with costs.

As a result of extensive shareholder litigation in Delaware in which the identical issues were finally resolved, these actions are barred by the doctrine of collateral estoppel (*see Betts v Townsends, Inc.*, 765 A2d 531, 535 [Del 2000]; *see also Messick v Star Enter.*, 655 A2d 1209, 1211 [Del 1995]).

Plaintiff's claims in these actions depend on alleged breaches of fiduciary duty by Elizabeth Elting, co-founder and 50% owner of nominal party Transperfect Global, Inc. As the precise issue of Elting's alleged breaches of fiduciary duty was addressed and resolved in the Delaware proceedings, the dismissal with prejudice of claims against her in the course of those proceedings bars re-litigation of the issue here (*see e.g. Troy Corp. v Schoon*, 959 A2d 1130, 1137 [Del Ch 2008]).

Contrary to plaintiff's contention, the resolution of the Delaware proceedings, i.e., the involuntary dismissal of the fiduciary duty claims with prejudice, constitutes an adjudication on the merits (*see* Del Ct Ch R 41[b]; *RBC Capital Mkts. LLC v Education Loan Trust IV*, 87 A3d 632, 643-644 [Del 2014]). Plaintiff presents no authority to controvert the conclusion that, having presided over years of pretrial proceedings and a six-day trial and issued an exhaustive 104-page posttrial decision and a lengthy affirmance of that decision, the Delaware

courts “passe[d] directly on the substance” of the fiduciary duty claims (*Sellan v Kuhlman*, 261 F3d 303, 311 [2d Cir 2001] [internal quotation marks omitted]).

The remaining requirements for applying the doctrine of collateral estoppel are readily met. It was established in the course of the Delaware proceedings that plaintiff was in privity with her son, and, as the Delaware courts determined, she had a full and fair opportunity to litigate the issues in those proceedings.

Plaintiff contends that Supreme Court erred in finding, as an alternative ground for dismissal, that she failed to adequately plead demand futility. However, her arguments based on the scope of the custodian’s powers are unsupported by either the statute pursuant to which the custodian was appointed (*see* 8 Del C § 226) or the court order appointing him.

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

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

ENTERED: FEBRUARY 6, 2018

CLERK

Richter, J.P., Mazzarelli, Webber, Kern, Oing, JJ.

5619 Ivalisse Bustamante, etc., et al., Index 13908/99
Plaintiffs-Appellants,

-against-

Green Door Realty Corp., et al.,
Defendants-Respondents.

Richard Janowitz, P.C., Mineola (Richard Janowitz of counsel), for appellants.

Silverson, Pareres & Lombardi LLP, New York (Joseph Marchese of counsel), for respondents.

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered April 7, 2016, which denied plaintiffs' motion to, among other things, extend the time to file the note of issue, and granted defendants' cross motion to dismiss the action for, among other things, failure to prosecute, unanimously affirmed, without costs.

On a prior appeal, this Court granted renewal on plaintiffs' motion to vacate a default entered against them, granted plaintiffs' motion to vacate, and reinstated the complaint "in the interest of justice and substantive fairness" (*Bustamante v Green Door Realty Corp.*, 69 AD3d 521, 522 [1st Dept 2010]). Plaintiffs, however, have squandered their second chance at litigation.

Plaintiffs failed to comply with the motion court's demand,

made pursuant to CPLR 3216, that they serve and file a note of issue by a date beyond the statutory 90-day period. Rather than comply, after the period set forth by the court expired, plaintiffs moved to extend the time to file a note of issue, offering no explanation for not having moved earlier (*see Grant v City of New York*, 17 AD3d 215 [1st Dept 2005]).

Moreover, plaintiffs failed to demonstrate a justifiable excuse for noncompliance with the motion court's CPLR 3126 notice (*see id.*; *Pryce v Montefiore Med. Ctr.*, 114 AD3d 594, 595 [1st Dept 2014]). Plaintiffs failed to produce four plaintiffs for depositions, in defiance of five court orders and a stipulation. Plaintiffs' excuse — that it was difficult to locate some of the plaintiffs — was conclusory and unreasonable, as they failed to identify what efforts were made, when they were undertaken, or when counsel lost touch with these plaintiffs (*see Touray v Munoz*, 96 AD3d 623 [1st Dept 2012]; *Reidel v Ryder TRS, Inc.*, 13 AD3d 170 [1st Dept 2004]).

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

ENTERED: FEBRUARY 6, 2018

CLERK

Richter, J.P., Mazzarelli, Webber, Kern, Oing, JJ.

5620 The People of the State of New York, Ind. 1445/15
Respondent,

-against-

Jaylee Tristani,
Defendant-Appellant.

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

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

____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Raymond L. Bruce, J.), rendered April 22, 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: FEBRUARY 6, 2018

CLERK

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

Richter, J.P., Mazzarelli, Webber, Kern, Oing, JJ.

5621 The People of the State of New York, Ind. 1159/15
Respondent,

-against-

Gilberto Cruz-Perez,
Defendant-Appellant.

____

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

Darcel D. Clark, District Attorney, Bronx (Kristian D. Amundsen of counsel), for respondent.

____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Miriam Best, J.), rendered June 15, 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: FEBRUARY 6, 2018

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CLERK

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

Richter, J.P., Mazzarelli, Webber, Kern, Oing, JJ.

5622 David S., et al., Index 25675/15E
Plaintiffs-Appellants.

-against-

Blizzard Cooling, Inc., et al.,
Defendants-Respondents,

Complete Piping & Hearing, et al.,
Defendants.
- - - -
[And a Third-Party Action]

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Law Office of Scott H. Seskin, New York (Scott H. Seskin of counsel), for appellants.

Gartner & Bloom, P.C., New York (Joseph Rapice of counsel), for Deluxe Home Builders Corp., and United Talmudical Academy of Boro Park Inc., respondents.

Gialleonardo, Gizzo & Rayhill, Elmsford (Jonathan R. Walsh of counsel, for Bayport Construction Corp., respondent.

Vigorito, Barker, Porter & Patterson, LLP, Valhalla (Adonaid C. Medina of counsel), for Blizzard Cooling, Inc., respondent.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about January 23, 2017, which, inter alia, denied plaintiffs' motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

Plaintiffs' motion was properly denied in this action where the 16-year-old infant plaintiff was injured when he allegedly fell from an A-frame ladder while attempting to install a metal duct. The record shows that discovery including depositions has

not yet been completed, and there are various unresolved factual issues (*see e.g. 1626 2nd Ave. LLC v National Speciality Ins. Co., Inc.*, 148 AD3d 529 [1st Dept 2017]; *Brooks v Somerset Surgical Assoc.*, 106 AD3d 624 [1st Dept 2013]).

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

ENTERED: FEBRUARY 6, 2018

CLERK

Richter, J.P., Mazzarelli, Webber, Kern, Oing, JJ.

5623-
5624-
5625-
5626 Index 653600/15

Stang LLC, etc., et al.,
Plaintiffs-Appellants,

-against-

Hudson Square Hotel, LLC, et al.,
Defendants-Respondents,

Joel Braver, et al.,
Defendants.

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D'Agostino, Levine, Landesman & Lederman, LLP, New York (Bruce H. Lederman of counsel), for appellants.

Oved & Oved LLP, New York (Edward C. Wipper of counsel), for Hudson Square Hotel, LLC, Rafi Gibly, Four Boys One Girl, LLC, Paolo Maldini, BB Max, LLC, Christian Vieri, Room 45, LLC, Andriy Shevchenko, Five Boys One Girl, Zinedine Zidane and Z Dream LLC, respondents.

Furman Kornfeld & Brennan LLP, New York (Andrew S. Kowlowitz of counsel), for Fred L. Seeman, respondent.

Lynch Rowin LLP, New York (Marc Rowin of counsel), for Edward J. Bullard, Jr. and Bullard Law Group PLLC, respondents.

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Orders, Supreme Court, New York County (Anil C. Singh, J.), entered December 12, 2016, which, to the extent appealed from as limited by the briefs, granted the motions of defendants Fred L. Seeman, Edward J. Bullard, Jr., Bullard Law Group PLLC, Rafi Gibly, Paolo Maldini, Christian Vieri, Andriy Shevchenko, and Zinedine Zidane to dismiss the claims against them, and denied

plaintiffs' cross motion for leave to amend their complaint, unanimously affirmed, with costs.

Contrary to plaintiffs' contention, the motion court did not engage in improper issue determination; rather, it applied the correct standards on a CPLR 3211 motion to dismiss.

The court correctly dismissed the unjust enrichment claims because there is a valid and enforceable operating agreement governing the subject matter of those claims (*see Kramer v Greene*, 142 AD3d 438, 441 [1st Dept 2016]).

Neither the complaint nor the proposed amended complaint contains a breach of fiduciary duty claim against Maldini. Plaintiffs "may not add a new theory of liability for the first time on appeal" (*Davila v City of New York*, 95 AD3d 560, 561 [1st Dept 2012]).

The breach of fiduciary duty claim was correctly dismissed as against Gibly. Such a claim must be pleaded with particularity (*see* CPLR 3016[b]), and neither the complaint nor the proposed amended complaint describes how Gibly breached his fiduciary duty before his resignation as Managing Member of defendant Hudson Square Hotel, LLC (Hudson Square). Further, although the complaint alleges that Gibly owed plaintiff Stang LLC a fiduciary duty, Gibly owed no such duty to plaintiffs 489 Southwest Canal St., Inc. and Avihu Gerafi, who were not members

of Hudson Square (*see Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014]).

Plaintiffs failed to state a claim against the attorney defendants (Seeman, Bullard, and Bullard Law Group) for aiding and abetting Gibly's and Maldini's alleged breaches of fiduciary duty. The complaint contains no cause of action for aiding and abetting breach of fiduciary duty; the only aiding and abetting claim is for aiding and abetting fraud. While the proposed amended complaint contains a cause of action against the attorney defendants for aiding and abetting breach of fiduciary duty, it is for aiding and abetting breaches by other defendants, not Gibly and Maldini. Again, plaintiffs "may not add a new theory of liability for the first time on appeal" (*Davila*, 95 AD3d at 561).

Given the foregoing, plaintiffs also failed to state a derivative claim on behalf of Hudson Square against the attorney defendants for aiding and abetting Gibly's and Maldini's alleged breaches of fiduciary duty.

We will not consider plaintiffs' contention that they should be allowed to replead, as it is improperly raised for the first time in their reply brief (*see e.g. Matter of Erdey v City of New York*, 129 AD3d 546, 546-547 [1st Dept 2015]). Moreover,

plaintiffs failed to specify or discuss any cause of action with respect to their request (*see e.g. Rivera v Anilesh*, 32 AD3d 202, 204-205 [1st Dept 2006], *affd* 8 NY3d 627 [2007]).

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

ENTERED: FEBRUARY 6, 2018

CLERK

Richter, J.P., Mazzarelli, Webber, Kern, Oing, JJ.

5627 The People of the State of New York, Ind. 5578/14
Respondent,

-against-

Mandel Wilson,
Defendant-Appellant.

Rosemary Herbert, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), for appellant.

Mandel Wilson, appellant pro se.

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

Judgment, Supreme Court, New York County (Larry R.C. Stephen, J.), rendered January 22, 2015, convicting defendant, upon his plea of guilty, of robbery in the third degree, and sentencing him, as a second felony offender, to a term of 3½ to 7 years, unanimously affirmed.

The record as a whole, including, among other things, the court’s order approving the waiver, establishes that defendant properly waived his right to be prosecuted by indictment by executing the written instrument in open court in the presence of his counsel (*see People v Moore*, 137 AD3d 704 [1st Dept 2016], *lv denied* 27 NY3d 1136 [2016]).

The superior court information properly charged defendant with third-degree robbery, because it is a lesser included

offense of second-degree robbery, a charge in the felony complaint on which defendant was held for grand jury action (*see People v Pierce*, 14 NY3d 564, 568 [2010]). Contrary to defendant's argument, the record does not demonstrate any "confusion" in this regard.

Defendant did not preserve his challenges to his guilty plea (*see People v Conceicao*, 26 NY3d 375, 382 [2015]), and we decline to review them in the interest of justice. As an alternative holding, we find that the record establishes that the plea was knowing, intelligent and voluntary (*see People v Tyrell*, 22 NY3d 359 [2013]).

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.

We have considered and rejected defendant’s remaining claims, including those contained in his pro se supplemental brief.

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

ENTERED: FEBRUARY 6, 2018

CLERK

Richter, J.P., Mazzarelli, Webber, Kern, Oing, JJ.

5628 The People of the State of New York, Ind. 3696/09
Respondent,

-against-

Rene Peterson,
Defendant-Appellant.

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

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

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Judgment of resentence, Supreme Court, New York County (Gregory Carro, J.), rendered May 10, 2012, resentencing defendant to a term of three years, unanimously affirmed.

Defendant's right to be sentenced without unreasonable delay was not violated by the passage of 2½ years between his original sentencing proceeding and his resentencing (*see* CPL 380.30[1]). The prompt original proceeding had all the characteristics of a sentencing, including defendant's presence and his opportunity to be heard, except that in granting defendant's request for a brief stay of execution of the agreed-upon sentence, the court neglected to formally pronounce sentence. The resentencing proceeding corrected the procedural error by formally pronouncing the sentence, nunc pro tunc, as of the original sentencing date. "The procedural error during the prompt initial sentencing did

not render that sentence a nullity for purposes of speedy sentencing analysis” (*People v Smith*, 277 AD2d 178 [1st Dept 2000], *lv denied* 96 NY2d 763 [2001]; *see also People v Williams*, 14 NY3d 198, 213 [2010]).

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

ENTERED: FEBRUARY 6, 2018

CLERK

Richter, J.P., Mazzarelli, Webber, Kern, Oing, JJ.

5629 Unitrin Advantage Insurance Company, Index 154138/14
Plaintiff-Respondent,

-against-

All of NY, Inc., et al.,
Defendants,

Andrew J. Dowd, M.D.,
Defendant-Appellant.

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Law Offices of Economou & Economou, P.C., Syosset (Ralph C. Caio of counsel), for appellant.

Rubin, Fiorella & Friedman LLP, New York (Harlan R. Schreiber of counsel), for respondent.

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Order and judgment (one paper) of the Supreme Court, New York County (Debra A. James, J.), entered January 5, 2016, which granted plaintiff Unitrin Advantage Insurance Company's (Unitrin) motion for summary judgment and declared that it had no duty to pay no-fault benefits to defendant Andrew J. Dowd, M.D., in connection with the subject April 16, 2013 collision, unanimously modified, on the law, to deny summary judgment and vacate the declaration as to the May 15, 2013, May 22, 2013, and May 31, 2013 dates of medical services, and otherwise affirmed, without costs.

Although the failure of a person eligible for no-fault benefits to appear for a properly noticed EUO constitutes a

breach of a condition precedent, vitiating coverage, Unitrin was still required to provide sufficient evidence to enable the court to determine whether the notices it served on Dr. Dowd for the EUOs satisfied to the timeliness requirements of 11 NYCRR 65–3.5(b) and 11 NYCRR 65–3.6(b) (*see Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C.*, 147 AD3d 437, 438 [1st Dept 2017], citing *Mapfre Ins. Co. of N.Y. v Manoo*, 140 AD3d 468, 470 [1st Dept 2016]). The bills for the first and second dates of medical services, May 15, 2013, and May 22, 2013, were both received by Unitrin on June 17, 2013. In accordance with 11 NYCRR 65-3.5(b), Unitrin had 15 business days to request the EUO, or by July 1, 2013. Unitrin's July 15, 2013 scheduling letter, even if properly mailed, was not timely as to either date of service.

Although the EUO scheduling letters for the third and fourth dates of medical services, both of which reflected services rendered on May 31, 2013, were timely, the reasons for denial on the NF-10 denial of claim form were stated solely as a failure to appear for an EUO scheduled on July 29, 2013. The second examination date, August 12, 2013, is not mentioned, and therefore did not sufficiently apprise the provider as to the reason for denial (*see Nyack Hosp. v State Farm Mut. Auto. Ins. Co.*, 11 AD3d 664, 664-665 [2d Dept 2004]).

The final claim, for date of medical services June 12, 2013, bill received on July 10, 2013, was timely and properly denied.

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

ENTERED: FEBRUARY 6, 2018

CLERK

Richter, J.P., Mazzarelli, Webber, Kern, Oing, JJ.

5630 The People of the State of New York, Ind. 4545/11
Respondent,

-against-

Clifton Solomon,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin 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 (Richard D. Carruthers, J.), rendered July 12, 2013,

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: FEBRUARY 6, 2018

CLERK

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

Richter, J.P., Mazzarelli, Webber, Kern, Oing, JJ.

5631 The People of the State of New York, SCI 1013/16
Respondent,

-against-

Angel Rivera,
Defendant-Appellant.

____

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

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Judgment, Supreme Court, New York County (Larry Stephen, J.), rendered April 7, 2016, 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: FEBRUARY 6, 2018

CLERK

Richter, J.P., Mazzarelli, Webber, Kern, Oing, JJ.

5632N Unitrin Advantage Insurance Company, Index 157790/15
Plaintiff-Appellant,

-against-

21st Century Pharmacy also known as
21st Century Pharmacy Inc., et al.,
Defendants-Respondents.

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Rubin, Fiorella & Friedman LLP, New York (Aaron F. Fishbein of counsel), for appellant.

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Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered July 18, 2016, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for a default judgment against certain defendants (defaulting defendants) on its first and/or second causes of action for a declaratory judgment, unanimously modified, on the law and the facts, to grant the motion as to defendants 21st Century Pharmacy a/k/a 21st Century Pharmacy Inc.; Advanced Orthopedics and Joint Preservation P.C.; Angelic Physical Therapy P.C.; BMJ Chiropractic, P.C.; Coney Island Medical Practice a/k/a Coney Island Medical Practice Plan, P.C.; Dana Woolfson LMT; Electrophysiologic Medical Diagnostics, P.C.; Excel Surgery Center, L.L.C.; Franklin Hospital; GC Chiropractic P.C.; Hamza Physical Therapy PLLC; LLJ Therapeutic Services, P.T. P.C.; Master Cheng Acupuncture P.C.; Metropolitan Medical & Surgical

P.C.; Noel Blackman Physician, P.C.; North Shore LIJ Health System a/k/a North Shore LIJ Medical PC; Ortho-Med Equip Inc.; Patchogue Open MRI, P.C. d/b/a Southwest Radiology; Quality Health Family Medical Care a/k/a Quality Health Family Medical Care P.C.; Quality Medical & Surgical Supplies, L.L.C. a/k/a Quality Medical Surgical Supplies LLC; Ralph Innovative Medical, P.C.; RM Physical Therapy, P.C.; Total Psychiatric Medical Services, P.C.; Megastar Medical, P.C.; Michele Glispy, LAC; Layne Negrin, LMT; Ruby Galope, PT; and Patrick Masson, and to declare that such defendants have no right to no-fault benefits from plaintiff with respect to a September 19, 2014 motor vehicle accident, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Plaintiff established its entitlement to a default judgment against the defaulting defendants (*see* CPLR 3215[f]) except for defendant Anio Pierriseme, for whom no affidavit of nonmilitary service appears in the record (*see Avgush v De La Cruz*, 30 Misc

3d 133[A], 2011 NY Slip Op 50076[U] [App Term, 2d Dept 2011]; David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3215:16).

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

ENTERED: FEBRUARY 6, 2018

CLERK

Richter, J.P., Mazzarelli, Webber, Kern, Oing, JJ.

5633N Raghida Hejazien, Index 306475/14
Plaintiff-Appellant,

-against-

Eddie Malouf,
Defendant-Respondent,

Jose Santiago,
Defendant.

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Raymond Schwartzberg & Associates, PLLC, New York (Raymond B. Schwartzberg of counsel), for appellant.

Picciano & Scahill, P.C., Bethpage (Andrea E. Ferrucci of counsel), for respondent.

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Appeal from order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about May 13, 2016, which granted the motion by counsel for defendant Eddie Malouf to withdraw, unanimously dismissed, without costs, as taken by a non-aggrieved party.

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

ENTERED: FEBRUARY 6, 2018

CLERK

Richter, J.P., Webber, Kern, Singh, Moulton, JJ.

4847 In re Joan Sheen Cunningham, Index 154933/16
Petitioner-Respondent,

-against-

Trustees of St. Patrick's
Cathedral, et al.,
Respondents-Appellants.

Kelley Drye & Warren LLP, New York (John M. Callagy of counsel), for appellants.

Law Office of Steven Cohn P.C., Carle Place (Steven Cohn of counsel), for respondent.

Order Supreme Court, New York County (Arlene P. Bluth, J.), entered on or about November 17, 2016, reversed, on the law, without costs, and the matter remanded for a hearing in accordance herewith.

Opinion by Richter, J.P. All concur except Webber and Kern, JJ. who dissent in an Opinion by Kern, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rosalyn H. Richter, J.P.
Troy K. Webber
Cynthia S. Kern
Anil C. Singh
Peter H. Moulton, JJ.

4847
Index 154933/16

_______________________________________x

In re Joan Sheen Cunningham,
Petitioner-Respondent,

-against-

Trustees of St. Patrick's
Cathedral, et al.,
Respondents-Appellants.
_______________________________________x

Respondents appeal from the order of the Supreme Court, New York County (Arlene P. Bluth, J.), entered on or about November 17, 2016, which granted the petition to disinter the remains of Archbishop Fulton J. Sheen and transfer them from St. Patrick's Cathedral in New York, New York to St. Mary's Cathedral in Peoria, Illinois.

Kelley Drye & Warren LLP, New York (John M. Callagy, Neil Merkl and Malavika A. Roa of counsel) for appellants.

Law Office of Steven Cohn P.C., Carle Place (Steven Cohn and Alan S. Zigman of counsel), for respondent.

RICHTER, J.P.

Fulton J. Sheen was a renowned Archbishop of the Roman Catholic Church. Archbishop Sheen was born in 1895 in El Paso, Illinois, and grew up in nearby Peoria. After completing his seminary studies in Minnesota, he returned to Peoria where he was ordained a priest and served his first pastoral assignment. After leaving Peoria, Archbishop Sheen taught in Washington, D.C. for about 25 years. While there, Archbishop Sheen regularly traveled to New York City to host *The Catholic Hour*, a weekly radio show that was broadcast from 1930-1950. In 1951, he moved to New York and was consecrated a Bishop of the Archdiocese of New York. From 1952-1957, Archbishop Sheen was the host of *Life is Worth Living,* a weekly television show that drew millions of viewers and won him an Emmy Award. In 1966, Archbishop Sheen was transferred to Rochester, New York, and retired three years later. Archbishop Sheen then returned to New York City, where he remained until his death in 1979.

Five days before his death, Archbishop Sheen executed a will, wherein he directed that his funeral service be celebrated at St. Patrick's Cathedral in New York City, and his burial be in "Calvary Cemetery, the official cemetery of the Archdiocese of New York." Upon Archbishop Sheen's death, Terence Cardinal Cooke, then the Archbishop of New York, approached petitioner

Joan Sheen Cunningham, Archbishop Sheen’s niece and closest living relative, seeking permission to bury her uncle in the crypt at St. Patrick’s Cathedral. Petitioner consented, and Archbishop Sheen was laid to rest in a crypt under the church’s high altar, where he remains interred.

In 2002, Bishop Daniel R. Jenky of the Diocese of Peoria officially began the process of investigating whether Archbishop Sheen should be canonized a Saint of the Roman Catholic Church. According to Bishop Jenky, Archbishop Sheen’s Beatification, the first step toward Sainthood, is “imminent,” and it is anticipated that the Beatification ceremony will take place in Peoria. In 2014, the Diocese of Peoria requested that Archbishop Sheen’s remains be transferred there. Respondents Trustees of St. Patrick’s Cathedral and the Archdiocese of New York declined to transfer the remains, and alleged that petitioner did not want the body to be moved.[1]

In June 2016, petitioner brought a proceeding pursuant to Not-For-Profit Corporation Law § 1510(e) seeking to disinter the remains of Archbishop Sheen for removal and transfer to a crypt located in St. Mary’s Cathedral in Peoria. Petitioner submitted

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[1] Respondents allege that in 2014, Bishop Jenky temporarily suspended the Sainthood process. Petitioner alleges that respondents have no interest in pursuing Sainthood.

the affidavits of her three siblings, all of whom fully support and consent to the transfer.[2] Petitioner and her siblings state that they wish to transfer the remains of their uncle for the following reasons: (i) Archbishop Sheen grew up in Peoria, his parents are buried there, and the majority of his next of kin continue to reside nearby; (ii) St. Mary's Cathedral is the church where Archbishop Sheen attended services with his family, received his First Holy Communion, and was ordained a priest; (iii) Archbishop Sheen frequently visited St. Mary's Cathedral throughout his lifetime; (iv) a shrine to Archbishop Sheen is being built in St. Mary's Cathedral where the burial crypt will be located; and (v) if Archbishop Sheen knew during his lifetime that he would be declared a Roman Catholic Saint, it would have been his wish to be interred at St. Mary's Cathedral. Petitioner and her siblings state that they know of no other relative who would object to the request to transfer the remains.

Respondents answered the petition and objected to the

[2] Petitioner avers that, at the age of 10, she left her parents and siblings in Peoria to live with Archbishop Sheen in New York, and from that point forward, Archbishop Sheen raised her. Archbishop Sheen continued a quasi-parental role as petitioner grew into adulthood. Petitioner remained a trusted friend and loyal assistant to Archbishop Sheen, was extremely close to him, and helped care for him up until his death. Petitioner's three siblings also maintained regular and close contact with Archbishop Sheen during his lifetime.

request for disinterment, arguing that petitioner had previously consented to Archbishop Sheen's burial in St. Patrick's Cathedral, and that his will had directed burial in New York. Respondents submitted an affidavit of Monsignor Hilary C. Franco, who was Archbishop Sheen's assistant from 1962-1967, and remained his close friend thereafter. According to Monsignor Franco, Archbishop Sheen expressed many times a "desire to remain in New York even after his death." Monsignor Franco also related that Archbishop Sheen was "fond of repeating" that Cardinal Cooke had offered that he be buried in the crypt at St. Patrick's Cathedral.

In a decision entered November 17, 2016, the petition court granted the disinterment request. The court found that petitioner had presented "good and substantial reasons" to disinter the remains of Archbishop Sheen and transfer them from St. Patrick's Cathedral to St. Mary's Cathedral in Peoria. The court concluded that because Archbishop Sheen's stated wish to be buried in Calvary Cemetery was not followed, it would defer to the wishes of the family. In reaching its decision, the court stated that there were no conflicting accounts as to Archbishop Sheen's burial wishes, and rejected as "unsupported speculation" respondents' claim that Archbishop Sheen wanted his remains to stay in New York. Respondents now appeal.

A body may be disinterred upon the consent of the cemetery owner, the owners of the lot, and certain specified relatives of the deceased (Not-For-Profit Corporation Law § 1510[e]). If such consent cannot be obtained, a court may grant permission to disinter (*id.*). There must be a showing of "[g]ood and substantial reasons" before disinterment is allowed (*Matter of Currier [Woodlawn Cemetery]*, 300 NY 162, 164 [1949]). Although "each case is dependent upon its own peculiar facts and circumstances" (*id.*), "[t]he paramount factor a court must consider in granting permission to disinter is the known desires of the decedent" (*Brandenburg v St. Michael's Cemetery*, 92 AD3d 631, 632 [2d Dept 2012]). "Among other factors, a court must also consider the desires of the decedent's next of kin" (*id.*). Where issues of fact have been raised concerning the decedent's wishes, the court should order a hearing (*see Matter of Briggs v Hemstreet-Briggs*, 256 AD2d 894, 895 [3d Dept 1998]).

Applying these principles, we believe that a hearing is required because there are disputed issues of material fact as to Archbishop Sheen's wishes. The petition court found that it was speculative that Archbishop Sheen wanted his remains to stay in New York, and that respondent's claim that Archbishop Sheen expressed a general desire to be buried in New York was conjecture. In reaching that conclusion, the court failed to

give appropriate consideration to the affidavit of Monsignor Franco, and too narrowly defined the inquiry into Archbishop Sheen's wishes. Monsignor Franco stated that Archbishop Sheen had repeatedly expressed his "desire to remain in New York even after his death." Contrary to the motion court's conclusion, a fair reading of this alleged exchange, if it is true, is that Archbishop Sheen wished his body to remain somewhere in New York. Likewise, Monsignor Franco recalled Archbishop Sheen's "fond[ly]" repeating an alleged offer from Cardinal Cooke to be buried at St. Patrick's Cathedral. If those conversations did in fact occur, they could fairly be viewed as reflecting Archbishop Sheen's desire to be buried there.

Monsignor Franco's affidavit did not go unchallenged. In her reply affidavit, petitioner stated that there was "nobody in the world closer to my uncle than me," and that Archbishop Sheen was "a second father to me" and that she "was a daughter to him." Petitioner alleges that she spent a significant amount of time with her uncle in the two years before his death, and contends that they discussed his eventual passing. Petitioner maintains that Archbishop Sheen never told her, or anyone else in the family, of any purported offer to allow him burial at St. Patrick's Cathedral. She stated that if such an offer had been made, Archbishop Sheen "unquestionably" would have shared it with

her and the rest of the family, and any bragging as to that fact would have been out of character for her uncle, who was known for his humility. Petitioner also stated that when Cardinal Cooke asked for her permission to inter Archbishop Sheen at St. Patrick's Cathedral, he never mentioned that he had previously made such an offer to her uncle. Petitioner further challenges the credibility of Monsignor Franco, alleging that he had "greatly exaggerate[d]" the closeness of his relationship with Archbishop Sheen.

The affidavits of Monsignor Franco and petitioner raise issues of fact as to Archbishop Sheen's wishes that are best explored in an evidentiary hearing. Furthermore, it is unclear if Archbishop Sheen's direction in his will to be buried in "Calvary Cemetery, the official cemetery of the Archdiocese of New York" evinces an express intention to remain buried in the Archdiocese of New York, or was merely a descriptive term for Calvary Cemetery. We also note that Archbishop Sheen had long-standing close ties to New York City. He lived in New York for 25 years, hosted his radio and televison shows from there, was consecrated a Bishop of the Archdiocese of New York, and preached at St. Patrick's Cathedral and other New York churches. The petition court did not give adequate consideration to these issues, but instead improperly deferred to the family's wishes,

merely because Archbishop Sheen's remains did not end up in Calvary Cemetery, and without a full exploration of Archbishop Sheen's desires.

In concluding that no evidentiary hearing is needed, the dissent understates the significance of Monsignor Franco's affidavit. As previously noted, Monsignor Franco, a long-time close friend and colleague of Archbishop Sheen, recalled that the Archbishop had repeatedly expressed his desire to remain in New York after his death, and "fond[ly]" told the story about Cardinal Cooke's offer of a burial at St. Patrick's Cathedral. Contrary to the dissent's view, these statements cannot be characterized as "vague and speculative."[3] The dissent summarily rejects this compelling evidence of Archbishop Sheen's desires merely because these particular sentiments were not expressed in his will. However, the fact that Archbishop Sheen did not repeat these wishes in a testamentary document does not eviscerate their evidentiary value (*see e.g. Matter of Conroy*, 138 AD2d 212 [3d

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[3] The dissent's conclusion that Monsignor Franco would merely make the same statements at a hearing, without further elaboration, is pure conjecture. It is not known precisely what Monsignor Franco would testify to. In any event, the statements contained in Monsignor Franco's affidavit, in and of themselves, raise issues of fact that should be further explored at a hearing where he will have the opportunity to expand upon his conversations with Archbishop Sheen. Archbishop Sheen's family members, if they so wish, can also expand upon their own affidavits.

Dept 1988], *lv dismissed* 73 NY2d 810 [1988] [ordering a hearing where there was evidence that the decedent had made statements about his burial wishes to his girlfriend and his attorney]).

The dissent relies exclusively on Archbishop Sheen's will in concluding that he did not wish to be buried in St. Patrick's Cathedral.[4] The Court of Appeals rejected such a narrow approach in *Matter of Currier [Woodlawn Cemetery]* (300 NY 162 [1949], *supra*). In that case, the decedent was interred in a mausoleum in Woodlawn Cemetery, in accord with a directive contained in her will. It was the decedent's hope that, in time, her children would also be interred with her in the mausoleum. The decedent's son, however, desired to be buried in a nearby grave, and her daughters made arrangements for their burial in another state. The children subsequently sought to disinter the decedent's remains and move them to her son's intended grave. The Court affirmed the grant of the disinterment request, citing the evidence that, notwithstanding the will, the decedent desired to be laid to rest with her family.

In setting forth the facts, the dissent points to a supposed agreement by the late Edward Cardinal Egan to transfer Archbishop

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[4] To the extent the will provides evidence of Archbishop Sheen's desires, we note that it contains nothing to indicate that he wanted to be buried in Peoria.

Sheen's remains to Peoria if he were to be canonized. This alleged assurance by Cardinal Egan has no relevance to the central issue presented here, namely, the wishes of Archbishop Sheen. There is no indication that, at the time these matters were allegedly discussed, Cardinal Egan had any understanding of Archbishop Sheen's desires. In any event, Cardinal Egan's alleged promise in no way undermines respondents' current position that Archbishop Sheen's remains should not be disturbed.

The fact that respondents did not request a hearing before the petition court does not bar this Court from ordering one now. The dissent cites no authority for the proposition that, in the absence of a specific request below, an appellate court lacks the power to order an evidentiary hearing where it has identified disputed issues of fact (*see Briggs v Hemstreet-Briggs*, 256 AD2d at 895 ["Where the papers and pleadings in a proceeding pursuant to N-PCL 1510(e) raise a material issue of fact concerning the burial wishes of a decedent, an evidentiary hearing is required"]). Because disputed factual issues exist here, the order on appeal should be reversed and the matter remanded for a hearing on the issue of Archbishop Sheen's wishes. We agree with the petition court that any inquiry into whether Archbishop Sheen will become a Saint calls for undue speculation, and thus it

should not be the subject of the hearing.[5]

Accordingly, the order of the Supreme Court, New York County (Arlene P. Bluth, J.), entered on or about November 17, 2016, which granted the petition to disinter the remains of Archbishop Fulton J. Sheen and transfer them from St. Patrick's Cathedral in New York, New York to St. Mary's Cathedral in Peoria, Illinois, should be reversed, on the law, without costs, and the matter remanded for a hearing in accordance herewith.

All concur except Webber, J and Kern J.,
who dissent in an opinion by Kern, J.

[5] Respondents did not preserve their arguments that they are exempt from the governing statute, and that petitioner lacks standing.

KERN, J. (dissenting)

I respectfully dissent and would affirm the decision of the petition court.

It is uncontroverted that Fulton J. Sheen was a renowned Archbishop of the Roman Catholic Church. Archbishop Sheen was born in 1895 in El Paso, Illinois and grew up in nearby Peoria, Illinois. He was ordained a priest in Peoria and served his first pastoral assignment there. In 1951, he moved to New York City and was consecrated a Bishop of the Archdiocese of New York.

Petitioner is Archbishop Sheen's niece. She moved to New York from Illinois when she was 10 years old to live with Archbishop Sheen and was, for all intents and purposes, raised by Archbishop Sheen. Archbishop Sheen provided a Catholic education for petitioner through college, and when she was an adult, Archbishop Sheen continued in a parental role, including helping petitioner locate and furnish her first marital home. When petitioner was older, she became Archbishop Sheen's loyal assistant and confidante, she traveled with Archbishop Sheen, she took care of him during illnesses and she was with him in the 48 hours before he died. Now, at almost 90 years of age, petitioner is his oldest living niece.

Archbishop Sheen passed away in December 1979. Three years before he died, Archbishop Sheen purchased a burial plot in

Calvary Cemetery, the official cemetery of the Archdiocese of New York. Just five days before he died, Archbishop Sheen executed a will in which he stated as follows:

> "It is my will and I direct that my Executor hereinafter named, arrange for my funeral Mass to be celebrated at St. Patrick's Cathedral, New York City, and for my burial in Calvary Cemetery, the official cemetery of the Archdiocese of New York."

Petitioner contends that after Archbishop Sheen's death, Terence Cardinal Cooke of the Archdiocese of New York sought her permission to inter Archbishop Sheen in a crypt in St. Patrick's Cathedral in Manhattan. Petitioner, as Archbishop Sheen's closest living relative, agreed to the request and Archbishop Sheen was interred at St. Patrick's Cathedral in 1979.

In 2002, more than 20 years after Archbishop Sheen's death, Most Reverend Daniel R. Jenky, Bishop of the Diocese of Peoria, Illinois, began the lengthy process of investigating whether Archbishop Sheen had led a life of heroic virtue which could have him declared a Saint of the Roman Catholic Church. Cardinal Edward Egan, on behalf of the Archdiocese of New York, wrote to Bishop Jenky, assuring him that New York had no objection to Bishop Jenky's attempt at canonization of Archbishop Sheen, observing that the Diocese of Peoria was the "ideal diocese" to initiate the cause, given that Archbishop Sheen was a native and served his first pastoral assignment there. Cardinal Egan also

agreed that if Bishop Jenky succeeded in canonizing Archbishop Sheen, he would consent to transfer Archbishop Sheen's remains to the Peoria Diocese.

In 2014, the Chancellor for the Peoria Diocese wrote to the Archdiocese of New York and requested that the remains of Archbishop Sheen be disinterred and transferred to Peoria. A shrine to Archbishop Sheen was in the process of being built at the side altar of St. Mary's Cathedral, with Archbishop Sheen's crypt to be located therein. Counsel for the Archdiocese of New York and the Trustees responded and declined to transfer Archbishop Sheen's remains citing Archbishop Sheen's will and the wishes of his family. Specifically, the Trustees argued that Archbishop Sheen left "explicit instructions . . . that he be buried in New York" and that they had consulted with petitioner, Archbishop Sheen's oldest living relative, who stated that, with the exception of a "distant relative Anne Lyons," the family did not want the Archbishop's remains moved. Archbishop Sheen's closest living relatives, including petitioner, have commenced the present proceeding requesting Archbishop Sheen's remains may be moved from St. Patrick's Cathedral to Peoria.

Specifically, in June 2016, petitioner commenced the instant proceeding pursuant to Not-For-Profit Corporation Law § 1510(e) seeking to disinter Archbishop Sheen's remains from the crypt in

St. Patrick’s Cathedral in New York and transfer them to Peoria, Illinois for interment in the crypt in St. Mary’s Cathedral.

Along with her petition, petitioner submitted the affidavits of Bishop Jenky and petitioner’s three siblings, all of whom fully consent and support the disinterment and transfer for the following reasons: (i) Archbishop Sheen grew up in Peoria, his parents are buried there and the majority of his next-of-kin continue to reside nearby; (ii) St. Mary’s Cathedral is the church where Archbishop Sheen attended services with his family, received his First Holy Communion and was ordained a priest; (iii) Archbishop Sheen frequently visited St. Mary’s Cathedral throughout his lifetime; (iv) a shrine to Archbishop Sheen is being built in St. Mary’s Cathedral where the burial crypt will be located; and (v) if Archbishop Sheen knew during his lifetime that he would be declared a Roman Catholic Saint, it would have been his wish to be interred at St. Mary’s Cathedral.

Respondents answered the petition and objected to the request for disinterment, arguing that petitioner previously consented to Archbishop Sheen’s burial in St. Patrick’s Cathedral and that his will directed burial in New York. In support of their answer, respondents submitted the affidavit of Monsignor Hilary C. Franco, who was Archbishop Sheen’s assistant from 1962-1967 and remained his close friend thereafter. According to

Monsignor Franco's affidavit, Archbishop Sheen "openly expressed [to him] many times his desire to remain in New York even after his death" and was "fond of repeating that Cardinal Cooke had offered him . . . to be buried in the crypt of St. Patrick's Cathedral in New York."

The petition court granted the request for disinterment and transfer of Archbishop Sheen's remains. It found that petitioner had presented good and substantial reasons to disinter Archbishop Sheen's remains and transfer them from St. Patrick's Cathedral to St. Mary's Cathedral in Peoria. The petition court decided that because Archbishop Sheen's stated wish to be buried in Calvary Cemetery was not followed, it would defer to the wishes of the family. In reaching its decision, the petition court found that there was no conflicting evidence regarding Archbishop Sheen's burial wish, which was to be buried in Calvary Cemetery, and rejected as "unsupported speculation" respondents' claim that Archbishop Sheen wanted his remains to stay in New York.

In my opinion, the petition court properly granted the family's request for disinterment and transfer of Archbishop Sheen's remains. "A body may be disinterred upon consent of the cemetery corporation, the owners of the lot, and of the surviving spouse, children, and parents of the deceased" (*Matter of Pring v Kensico Cemetery*, 54 AD3d 766, 767 [2d Dept 2008], citing N-PCL

1510[e]). Where, as here, consent to disinterment cannot be obtained, permission may be obtained by court order (*see* N-PCL 1510[e]). "Good and substantial reasons must be shown before disinterment is to be sanctioned" (*Matter of Currier* [Woodlawn Cemetery], 300 NY 162, 164 [1949]). "[L]ooming large among the factors to be weighed are the wishes of the decedent himself" (*id.*). Indeed, "[t]he paramount factor a court must consider in granting permission to disinter is the known desires of the decedent" (*Brandenburg v St. Michael's Cemetery*, 92 AD3d 631, 632 [2d Dept 2012]). Where the decedent's wishes cannot be ascertained, a court must consider the desires of the decedent's next of kin (*see id.*). An evidentiary hearing is not required unless a material issue of fact is raised as to the burial wishes of the decedent (*see Matter of Pring*, 54 AD3d at 767 ["since the appellants did not raise a material issue of fact as to the decedent's wishes, the Supreme Court properly determined that no evidentiary hearing was required"]).

In support of its determination the petition court properly found that Archbishop Sheen's burial wishes to be buried in Calvary Cemetery were not followed, that Archbishop Sheen did not express any other wishes with regard to his burial and that petitioner and Archbishop Sheen's other close family members demonstrated good and substantial reasons for the disinterment

and transfer of Archbishop Sheen's remains. Such reasons include that Archbishop Sheen's parents are buried only a few blocks from St. Mary's Cathedral in Peoria, that a majority of Archbishop Sheen's next of kin reside nearby, that St. Mary's Cathedral is where Archbishop Sheen was ordained a priest and is a place Archbishop Sheen visited often and that a shrine to Archbishop Sheen is being built in St. Mary's Cathedral where the burial crypt will be located.

Contrary to the majority's decision, an evidentiary hearing is not required as there are no disputed issues of fact as to Archbishop Sheen's burial wishes. The only evidence offered that is contrary to the burial wishes expressed in Archbishop Sheen's will is the affidavit of Monsignor Franco, who affirmed that Archbishop Sheen had repeatedly expressed to him his "desire to remain in New York even after his death" and that he was offered burial in St. Patrick's Cathedral. Given the opportunity to testify at an evidentiary hearing, Monsignor Franco would make the same statements he made in his affidavit, which are insufficient to raise an issue of fact as they are vague and merely speculative as to Archbishop Sheen's burial wishes, as opposed to the clear and concrete statements made in his will that he wanted to be buried in Calvary Cemetery. If Archbishop Sheen knew of the offer to be buried in St Patrick's Cathedral

and wanted to be buried there or if he merely had a desire to be buried somewhere in New York, he could have expressed such desires in his will, which was executed just five days before he died. However, Archbishop Sheen's will did not mention anything about being buried in St. Patrick's Cathedral or a general desire to be buried somewhere in New York. That Archbishop Sheen had long-standing close ties to New York City, was a consecrated Bishop of the Archdiocese of New York, and preached at St. Patrick's Cathedral, does not, as the majority suggest, detract from the fact that Archbishop Sheen's will explicitly stated his desire that he be buried in Calvary Cemetery upon his death.

While, the majority states that an evidentiary hearing may be required even where a decedent expresses his or her burial wishes in a will, for an evidentiary hearing to be required, there must be some evidence of a clear alternate desire by the decedent to be buried elsewhere. The statements made by Monsignor Franco in his affidavit are insufficient to require an evidentiary hearing as they do not demonstrate a clear desire by Archbishop Sheen to be buried somewhere other than in Calvary Cemetery. As a result, Archbishop Sheen's family's wishes should be followed.

Moreover, the statement by the majority that "it is unclear if Archbishop Sheen's direction in his will to be buried in

‘Calvary Cemetery, the official cemetery of the Archdiocese of New York’ evinces an express intention to remain buried in the Archdiocese of New York, or was merely a descriptive term for Calvary Cemetery” is belied by the record. Archbishop Sheen’s will is clear and specifies Calvary Cemetery as his desired final resting place. The undisputed fact that Archbishop Sheen purchased a plot for himself in Calvary Cemetery in 1976, just three years before his death, is overwhelming evidence that Calvary Cemetery was Archbishop Sheen’s desired final resting place.

Finally, as it is undisputed that respondents failed to request an evidentiary hearing before the petition court, and did not pursue such a hearing until they were unsuccessful, their belated request should not be considered.

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

ENTERED: FEBRUARY 6, 2018

CLERK