SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 8, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gische, J.P., Kapnick, Oing, Moulton, JJ.

5108-
5108A

345 East 69th Street Owners Corp., et al.,
Plaintiffs-Respondents,

-against-

Platinum First Cleaners, Inc., doing business as Splendid Cleaners, et al.,
Defendants,

Kenneth Huang,
Defendant-Appellant.

Index 651505/15

Law Office of Mark Krassner, New York (Mark Krassner of counsel), for appellant.

Press Koral LLP, New York (Matthew J. Press of counsel), for respondents.

Judgment, Supreme Court, New York County (Barry R. Ostrager, J.), entered November 29, 2016, awarding plaintiffs damages as against defendant Kenneth Huang, unanimously modified, on the law, to reduce the award of lost rent from $196,811.88 to $124,811.88 and vacate the award for real estate escalation charges, and otherwise affirmed, without costs. The Clerk is directed to enter an amended judgment accordingly. Appeal from order, same court and Justice, entered on or about November 23,

2016, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff is a cooperative corporation. Defendant Kenneth Huang is a personal guarantor under a commercial sublease, in which plaintiff is the landlord. This action seeks damages against him after the subtenant prematurely vacated the demised premises. Partial summary judgment was granted on the issue of liability and, following a trial on damages, a judgment in the amount of $343,054.30 was entered against Huang. On this appeal Huang argues that the damages were incorrectly awarded on inadmissible, incompetent evidence. We agree in part.

The trial court awarded damages consisting of $196,811.88 representing lost rent over the remainder of the sublease, $48,922.68 in real estate escalation charges, $5,694.18 for the cost of a new sign, $12,300 representing the costs of preparing the demised premises for rerental, and $21,204 representing the proportional real estate broker's fee for obtaining a new tenant. The court also awarded plaintiff $15,000, representing the reasonable attorneys fees attributable to the prosecution of this action. We modify the damages to reduce the amount for lost rent to $124,811.88 and to vacate the award for real estate escalation charges. The award of damages is in all other respects affirmed.

The only witnesses who testified at trial were Larry Kopp

and Rahol Sharma, respectively the president and treasurer of plaintiff's board of directors. Huang correctly argues that neither witness established that the records on which they relied to prove damages were plaintiff's business records (see CPLR 4518; *People v Kennedy*, 68 NY2d 569 [1986]). Nonetheless, the court was entitled to credit the testimony each witness gave concerning matters about which they had personal knowledge *(see Tafari v Fisher*, 94 AD3d 1324, 1325 [3d Dept 2012], *lv denied* 19 NY3d 807 [2012]; *People v Baier*, 73 AD2d 649, 650 [2nd Dept 1979]); Voisin v Commercial Mut. Ins. Co., 60 App Div 139, 143 [1st Dept 1901]). Mr. Kopp testified that he was personally involved in arranging for new signage at the demised premises. He also testified that after the subtenant vacated the premises he was personally involved in hiring a contractor to make the space suitable for re-renting and a real estate broker to find a new tenant. The sublease requires the subtenant to pay these expenses, and the trial court properly found Mr. Kopp's testimony on the amounts plaintiff actually paid for these items to be credible.

Although Mr. Sharma is plaintiff's treasurer, he did not establish any personal knowledge regarding the matters about which he testified. The monies Mr. Sharma testified were owed in lost rent were based upon an exhibit that was obviously prepared

for litigation[1]. The trial court improperly permitted the schedule to come into evidence (*see People v Foster*, 27 NY2d 47, 52 [1970]) and then improperly let Mr. Sharma testify to its contents. The court also incorrectly concluded that just because the amounts claimed owed were set forth in the plaintiff's verified bill of particulars, Mr. Sharma could competently testify to those amounts. The function of a bill of particulars is to amplify a pleading, limit proof and prevent surprise at trial (CPLR 3041; *State of New York v Horseman's Benevolent & Protective Assn. [N.Y. Div.]*, 34 AD2d 769 (1st Dept 1970]). A bill of particulars cannot be used to relieve a party of its evidentiary burden to prove the facts asserted therein (*White Plains Towing Corp. v State of New York*, 187 AD2d 503 [2d Dept 1992]).

With respect to the rent owed under the sublease, the record before the court established the following: the underlying sublease term was due to end June 30, 2014. The subtenant prematurely moved out June 2012. On October 25, 2012, plaintiff

[1]Plaintiff's exhibit 16 was a schedule comparing and calculating rent differential between rent reserved in the sublease and rent reserved in the lease with the new tenant. It was not a business record prepared in any ordinary course of plaintiff's business. Moreover it was factually incorrect in that it sought base rent for June 2012, which plaintiff had already conceded in July 1, 2012 correspondence had been paid.

entered into a 15-year lease with a new tenant, Dr. Wine. Under the new lease, Dr. Wine's rent commencement date "[is] the date which is the earlier to occur of one hundred and twenty (120) days from the Commencement Date and the date Tenant opens for business." Although plaintiff claims that Dr. Wine did not start paying rent until March 2013 (the last date on which Dr. Wine could start paying rent under the lease), the applicable provision has a condition triggering earlier rent payments. No competent proof was adduced about when the condition precedent to the payment of rent was fulfilled or when Dr. Wine actually started paying rent. No rent ledgers or other probative documents were produced, nor could either witness competently testify about this issue. Mr. Sharma's testimony concerning when Dr. Wine actually started paying rent was based upon what Dr. Wine had told him. Mr. Sharma's testimony was inadmissible hearsay and insufficient to prove the underlying fact. Mr. Kopp did not provide any basis for his knowledge. The witnesses' voluntary board positions with plaintiff corporation, without any information about their duties and/or responsibilities, did not provide the requisite basis for knowledge.

The evidence adduced proved rent owed for the months of July, August, September and October 2012 in the base amount of $19,980.88 per month as reserved in the sublease, for a total of

$79,923.52. The evidence also proved that for the remaining 20-month period, beginning November 2012 and ending June 30, 2014, plaintiff is entitled to additional damages in the amount of $44,888.36 representing the difference between the base rent the subtenant was required to pay under the sublease and the amount of base rent being charged Dr. Wine under the new lease.[2] The damages for lost rent should be adjusted accordingly. The court, however, correctly credited Huang for the $36,000 security deposit that the subtenant had paid under the sublease.

Plaintiff also failed to prove that it was entitled to additional rent based upon the real estate escalation provision in the sublease. Although the sublease entitles plaintiff to collect "additional rent" for real estate escalations, the calculation is required to be based upon a percentage of real estate taxes imposed on plaintiff, over and above a lease base year. No tax bill from any taxing authority or any other document proving the taxes actually imposed on plaintiff was ever

[2] For the eight-month period November 1, 2012 through June 30, 2013, the rent differential is $15,847.04, calculated at $1980.88 per month ($19,980.88 less $18,000). For the four month period July 1, 2013 through October 31, 2013, the rent differential is $11,120.44, calculated at $2,780.11 per month ($20,780.11 less $18,000). For the eight month period November 1, 2013 through June 30, 2014, the rent differential is $17,920.88, calculated at $2240.11 per month ($20,780.11 less $18,540).

produced at trial. In determining the amount owed for real estate escalations, the court improperly relied on Mr. Sharma's testimony and the bill of particulars. As indicated, this proof did not provide a sufficient evidentiary basis for the monetary awards made.

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

ENTERED: FEBRUARY 8, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Andrias, Kapnick, Moulton, JJ.

5634-
5635 Ind. 3333/13

The People of the State of New York,
Respondent,

-against-

James Howard,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Samuel E. Steinbock-Pratt of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered May 19, 2015, as amended May 19, 2016, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him, as a second violent felony offender, to a term of 5 years, unanimously affirmed.

The court providently exercised its discretion when it precluded defendant from cross-examining the police witnesses about a civil lawsuit he had filed against them after his arrest, in which he claimed that they used excessive force in making the instant arrest. The ruling did not deprive defendant of his right to cross-examine witnesses and present a defense (*see Crane v Kentucky*, 476 US 683, 689-690 [1986]; *Delaware v Van Arsdall*, 475 US 673, 678-679 [1986]). Defendant did not seek to cross-

examine the officers about the underlying facts of the lawsuit (*see People v Smith*, 27 NY3d 652 [2016]), which are essentially the same facts litigated at this trial, but about the lawsuit itself. Defendant has not demonstrated a "good faith basis" for the proposed cross-examination (*People v Spencer*, 20 NY3d 954, 956 [2012]). The principal defense theory was that the officers' account of this arrest was false from its inception. Defendant's contention that the onset of the lawsuit gave the officers a new motive to create an even more fabricated version of the incident, because the officers had now acquired an incentive to insulate themselves from civil liability, is speculative and unsupported. Furthermore, any probative value would have been outweighed by the prejudicial effect of potentially misleading the jury about the significance of the lawsuit. Among other things, the jurors might not have been familiar with the effect of indemnification under General Municipal Law § 50-k on the officers' alleged "financial interest" in the case.

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]). There is no basis for disturbing the jury's credibility determinations, including those relating to the injured officer's descriptions of his level of pain (*see People v Guidice*, 83 NY2d 630, 636 [1994]). The element of

physical injury was satisfied by proof showing that the officer required a suture to the cut on his hand as well as pain medication, and that he experienced pain and tenderness the following two weeks, which prevented him from writing and grabbing with his thumb (*see e.g. People v Moye*, 81 AD3d 408 [1st Dept 2011], *lv denied* 16 NY3d 861 [2011]; *People v Smith*, 283 AD2d 208 [1st Dept 2001], *lv denied* 96 NY2d 907 [2001]; *People v Marsh*, 264 AD2d 647 [1st Dept 1999], *lv denied* 94 NY2d 825 [1999]). The jury could have reasonably found that this cut went beyond mere "petty slaps, shoves, kicks and the like" (*Matter of Philip A.*, 49 NY2d 198, 200 [1980]), and that it caused "more than slight or trivial pain" (*People v Chiddick*, 8 NY3d 445, 447 [2007]). We find it unnecessary to address other forms of injury that the officer may have sustained.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see*

People v Benevento, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

We perceive no basis for directing, in the interest of justice, that defendant's sentence be served concurrently with his sentence on his robbery conviction. Notably, we have already rejected defendant's request for similar relief on his appeal from the robbery conviction (*People v Moye*, 154 AD3d 546 [1st Dept 2017]), and we see no reason to depart from that determination.

Defendant's remaining contentions, including his challenges to the People's summation, are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find that none of these arguments warrants reversal.

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

ENTERED: FEBRUARY 8, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Andrias, Kapnick, Moulton, JJ.

5636- Index 102021/15
5637-
5638 Ira Smulyan,
Plaintiff-Appellant,

-against-

New York Liquidation Bureau, et al.,
Defendants-Respondents.

_____

Ira Smulyan, appellant pro se.

Jackson Lewis P.C., White Plains (Michael A. Frankel of counsel), for New York Liquidation Bureau, respondent.

Daren J. Rylewicz, Albany (Leslie C. Perrin of counsel), for Civil Service Employees Association, respondent.

Hite & Beaumont, P.C., Albany (John H. Beaumont of counsel), for Allen C. DeMarco, respondent.

_____

Orders, Supreme Court, New York County (Shlomo Hagler, J.), entered April 19, 2016, which granted defendants' motions to dismiss the complaint as against them, unanimously affirmed, without costs.

The defamation claim against New York Liquidation Bureau (NYLB), plaintiff's former employer, and Civil Service Employees Association (CSEA), the union of which he was formerly a member, is time-barred to the extent it is based on alleged instances of defamation that occurred before November 13, 2014 – more than one year before plaintiff commenced this action (*see* CPLR 215[3]).

To the extent it is based on an alleged instance of defamation that occurred within the limitations period, the claim is wholly speculative (*see Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]). Plaintiff contends, based on nothing but conjecture, that the reason he did not receive a job offer from a third party that was considering him for employment is that the third party contacted NYLB for a reference, and NYLB defamed him.

The fraud claims against NYLB and Alan C. DeMarco, the chairperson of its Performance Appraisal Appeal Board, allege collusion in connection with a 2009 grievance proceeding and plaintiff's 2010 separation from employment. These claims were waived under the terms of a release executed by plaintiff on March 31, 2010, in connection with his separation from NYLB. The release provided that, in exchange for consideration, plaintiff released, among others, NYLB and its officers, employees and representatives "from any and all causes of action ... of any nature whatsoever, whether known or unknown," including "any claims arising out of or in connection with employment and/or termination of that employment," and "any claims for ... fraud."

The fraud claim against CSEA is based upon allegations that CSEA failed to properly represent plaintiff in 2009-10, during

employee grievance and separation proceedings. This claim is duplicative of the claim for breach of the duty of fair representation, which, having been brought more than four months after plaintiff knew or should have known that the breach occurred, is untimely (CPLR 217[2][a]).

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

ENTERED: FEBRUARY 8, 2018

CLERK

Manzanet-Daniels, J.P., Andrias, Kapnick, Moulton, JJ.

5640-
5641 James H. Brady,
Plaintiff-Appellant,

-against-

The New York County District Attorney's Office, et al.,
Defendants-Respondents.

- - - - -

James H. Brady,
Claimant-Appellant,

-against-

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

Index 154496/15
Claim No. 126067
126268

James H. Brady, appellant pro se.

Cyrus R. Vance, Jr., District Attorney, New York (Elizabeth N. Krasnow of counsel), for the New York County District Attorney's Office, respondent.

Zachary W. Carter, Corporation Counsel, New York (Julie Steiner of counsel), for City of New York, respondent.

Eric T. Schneiderman, Attorney General, New York (David Lawrence III of counsel), for State respondents.

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered November 30, 2015, which granted defendant District Attorney's Office's motion to dismiss the complaint, and dismissed the complaint as against the City of New York, unanimously affirmed, with costs. Order, Court of Claims (Thomas H. Scuccimarra, J.), entered February 10, 2016, which, insofar as

appealed from as limited by the briefs, granted defendants' motion to dismiss Claim No. 126268 as against the State and the Attorney General's Office, and dismissed Claim No. 126067 as against the State and the Attorney General's Office, unanimously affirmed, with costs.

In these actions, plaintiff/claimant, acting pro se, asserts claims under 42 USC § 1983 and state law alleging that defendants' refusal to investigate his allegations of judicial corruption constitutes gross negligence, willful misconduct, prima facie tort, negligent infliction of emotional distress, and a violation of the equal protection clause. To the extent any of these defendants can be sued at all, they are protected by absolute prosecutorial immunity, which applies to the decision whether or not to initiate a prosecution (*see Imbler v Pachtman*, 424 US 409, 431 [1976]), as well to the investigative and administrative acts that are intertwined with this decision, such

as the decision not to investigate a complaint (*see Moore v Dormin*, 252 AD2d 421 [1st Dept 1998, Rosenberger, J., concurring], *lv denied* 92 NY2d 816 [1998]).

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

ENTERED: FEBRUARY 8, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Andrias, Kapnick, Moulton, JJ.

5642 The People of the State of New York, Ind. 3668/14
Respondent,

-against-

Justin Merritt,
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 (Alan Gadlin of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered October 21, 2015,

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

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

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

ENTERED: FEBRUARY 8, 2018

CLERK

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

Renwick, J.P., Manzanet-Daniels, Andrias, Moulton, JJ.

5644 Multibank, Inc., Index 650637/16
Plaintiff-Respondent,

-against-

Access Global Capital LLC, et al.,
Defendants-Appellants,

Novel Commodities S.A.,
Defendant.

_____

Solomon & Cramer LLP, New York (Andrew T. Solomon of counsel), for appellants.

Kaplan Rice LLP, New York (Michelle A. Rice of counsel), for respondent.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered January 10, 2017, which, to the extent appealed from, denied defendants Access Global Capital LLC (Access), Global Commodities Group LLC (Global), and James Besch's (together, defendants) motion to dismiss the breach of contract claim as against Access and Besch and the tortious interference with contract claim, unanimously affirmed, with costs.

Plaintiff, a Panamanian bank, purchased a $4.9 million account receivable (A/R) from defendant Novel Commodities S.A. on Novel's sale of beans to nonparty Cia Arrocera Covadonga S.A. de C.V. (Covadonga). The purchase was insured, at plaintiff's

insistence, and was secured by a promissory note. Defendant Access was engaged to assist Novel in procuring the insurance policies. Defendant Global was also involved in the structuring of the sale transaction. Access and Global are closely held LLCs, whose controlling principal is defendant Besch. This action was commenced after Covandoga defaulted on the A/R and plaintiff was denied insurance coverage proceeds due to the way the sale transaction was structured.

Defendants failed to establish that the claims against them are time-barred. As the motion court noted, they did not provide the "substance of the foreign law relied upon" (CPLR 3016[e]) or "a printed copy of the statute or other written law" (CPLR 4511[d]). Nor did defendants provide a sufficient explanation for their contention that the breach of contract claim accrued on the dates on which the contracts were executed or that the Panamanian statute of limitations preempts the express language in one of the contracts that provided that the relevant statute of limitations would not expire until February 10, 2016, which renders the action timely.

In any event, this Court declines – as did the motion court – to engage in a full analysis of the Panamanian and New York limitations periods and the accrual dates for each cause of action, in light of the express terms of a tolling agreement

that, if operative, undisputedly renders plaintiff's claims timely. Defendants contend that this tolling agreement does not apply to them. However, the circumstances surrounding its execution raise a number of issues of fact as to its applicability. For reasons that are disputed, Access did not sign the tolling agreement, but it participated in negotiating the agreement, was a named party to the agreement, and received benefits from the agreement.

Defendants argue that they cannot be held liable to plaintiff for breach of contract because there was no privity of contract between them with respect to the contracts sued upon. However, the fact that the signature block for Access on the October 2010 "Finance Facility Contract" reflects that Access only "[a]cknowledged and confirmed" the contract does not compel a conclusion as a matter of law but raises an issue of fact as to Access's obligations and whether it was bound as a party. The Finance Facility Contract refers to Access throughout, and, while Access does not make any express warranties to plaintiff in it, the contractual terms reflect that Access was responsible for procuring insurance and for ensuring compliance with the policy terms.

With respect to the June 2010 administration agreement, to which Access and Novel were signatories, defendants acknowledge

that privity of contract with plaintiff is not necessary to establish a breach of contract claim because plaintiff seeks recovery as a third-party beneficiary (*see Aetna Health Plans v Hanover Ins. Co.*, 116 AD3d 538, 539 [1st Dept 2014], *affd* 27 NY3d 577 [2016]). Contrary to defendants' contention, plaintiff alleges that, like the Finance Facility Contract, the administration agreement required Access to strictly comply with the terms of the insurance policy and that the policy was procured specifically on plaintiff's behalf. This allegation is supported by the record; the policy names plaintiff as an additional insured.

Defendants argue that the complaint fails to state a cause of action for tortious interference with contract against Global. They argue primarily that Global cannot be held liable for tortious interference if it was acting on behalf of its principal, Novel, within the scope of its authority. However, the complaint alleges that Global was not acting in the best interest of its principal and received a pecuniary benefit for interfering with the principal's contract (*see e.g. Buckley v 112 Cent. Park S., Inc.*, 285 App Div 331, 334 [1st Dept 1954]). The record supports plaintiff's contention that Global was not acting in Novel's best interest when it inserted itself into the three-

legged sale transaction and that it realized that doing so could invalidate the insurance policy.

We have considered defendants' remaining contentions and find them unavailing.

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

ENTERED: FEBRUARY 8, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Andrias, Kapnick, Moulton, JJ.

5645- Index 152852/15
5646 Anuragini Pandey, et al.,
Plaintiffs-Appellants,

-against-

Paul Pierce, et al.,
Defendants-Respondents.

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

Cuttita LLP, New York (Scott A. Koltun of counsel), for respondents.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered July 22, 2016, which denied plaintiffs' motion for partial summary judgment on their first cause of action, alleging defendants' breach of the lease, unanimously affirmed, with costs. Order, same court and Justice, entered March 29, 2017, which denied plaintiffs' motion to dismiss defendants' first counterclaim, for fraud, pursuant to CPLR 3211(a)(1), (a)(7) and CPLR 3016(b), unanimously affirmed, without costs.

Plaintiffs established prima facie entitlement to partial summary judgment on their first cause of action based on the clear and unambiguous language contained in the rider to the lease, which expressly overrode any inconsistent provisions in the standard form lease (*see Er-Loom Realty, LLC v Prelosh*

Realty, LLC, 77 AD3d 546 [1st Dept 2010], *lv denied* 16 NY3d 710 [2011]; *Home Fed. Sav. Bank v Sayegh*, 250 AD2d 646 [2d Dept 1998]). The rider provided that the residential lease term was for two years, and that defendants could cancel the lease during its second year upon 90 days prior written notice served personally upon the "owner" or sent to the owner by registered mail to the owner's Singapore address. About 60 days before the first year of the lease ended, defendants verbally informed the brokers who were involved in securing the lease that they would be vacating the premises at the conclusion of the first year of the lease. Defendants vacated the premises at the end of the first year and paid all rental obligations that were due up to that point. Plaintiffs seek to recover, inter alia, approximately five months of unpaid rent from defendants for the period the condominium unit remained unoccupied, plus the shortfall in rent for the remaining seven months of the second lease term where the premises was relet at a lower rental rate to secure a replacement tenant.

However, defendants established that triable factual issues exist as to whether the 2013 lease was void or voidable because it was executed only by the plaintiff husband, as "owner," despite the fact that he had transferred his joint interest in the condominium to his wife in 2005, and the wife (also a

plaintiff herein) became the sole owner of the premises at that time. There is no evidence in the record to show that the defendants, at the relevant times during the lease execution and defendants' occupation of the unit, were aware of the wife, let alone of her legal interest in the condominium unit. The plaintiff husband, at all relevant times, held himself out as the true owner of the unit, submitted documentation to the condominium board for lease approval and had collected the checks for the rent and security deposit in his own name. At no time did plaintiff husband indicate he was acting as an agent on behalf of his wife during the lease. Those facts raise triable issues regarding the plaintiff husband's ability to independently enforce the lease terms, inasmuch as he has not shown an ownership interest in the unit (as he so claimed in the lease) and issues also exist whether he acted in the capacity of agent on behalf of his wife during the transaction at issue. As for the plaintiff wife, she was not a signatory to the lease and cannot enforce its terms.

The aforementioned facts, and reasonable inferences to be drawn therefrom, support defendants' first counterclaim, which alleges a viable cause of action for fraud connected with plaintiff husband's misrepresentations in the lease as the condominium owner, as well as his failure to return a security

deposit that he was to hold in escrow and that he has not demonstrated a lawful right to retain (*see generally Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *Kaufman v Cohen*, 307 AD2d 113 [1st Dept 2003]). To the extent plaintiffs argue that justifiable reliance upon the husband's alleged misrepresentations, as owner, could not be claimed since such information can be readily gleaned through an Internet search, we find that given the present record, no facts have been cited as would have reasonably alerted defendants to question the husband's ownership claim, particularly given the plaintiffs' broker's conduct, which buttressed the husband's ownership claim (*see Port Parties, Ltd. v ENK Intl. LLC*, 84 AD3d 685 [1st Dept 2011]; *Cervera v Bressler*, 126 AD3d 924 [2d Dept 2015]).

We have considered plaintiffs' remaining arguments and find them unavailing.

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

ENTERED: FEBRUARY 8, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Andrias, Kapnick, Moulton, JJ.

5647 The People of the State of New York, Ind. 1422/14
Respondent,

-against-

Sassony Bryant,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered November 10, 2015), convicting defendant, upon his plea of guilty, of assault in the first degree, and sentencing him to a term of nine years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the prison component of the sentence to seven years, 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: FEBRUARY 8, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Andrias, Kapnick, Moulton, JJ.

5648-
5648A The People of the State of New York,
Respondent,

Ind. 2344N/11
3493N/11

-against-

Salvador Fernandez,
Defendant-Appellant.

_____

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

Salvador Fernandez, appellant pro se.

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

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Judgments, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered February 16, 2014, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the first and third degrees, criminally using drug paraphernalia in the second degree, money laundering in the second degree (two counts) and bail jumping in the first degree, and sentencing him to an aggregate term of 8 to 21 years, unanimously affirmed.

Defendant's claim that his counsel rendered ineffective assistance with regard to the suppression proceedings in this case is unreviewable on direct appeal because it involves matters that are not fully explained by the record (*see People v Carver*,

27 NY3d 418, 420-421 [2016]; *People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). The Court of Appeals has observed that an attorney's failure to pursue a particular suppression issue may be explained by, among other things, the attorney's recognition that success would be a remote possibility (*see People v Gray*, 27 NY3d 78, 82 [2016]). The attorney's analysis would not necessarily be reflected in an unexpanded record. Here, the existing record is insufficient to establish that any of counsel's alleged deficiencies in handling potential suppression issues was a product of his misunderstanding of the law. Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claim may not be addressed on appeal.

As an alternative holding, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713–714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that any of counsel's alleged deficiencies fell below an objective standard of reasonableness, or that they deprived defendant of a fair trial or affected the outcome of the case.

Upon our in camera review of sealed materials, we find that there was probable cause for defendant's arrest.

Defendant's legal sufficiency claim is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence supported the conclusion that defendant conducted a transaction within the meaning of the money laundering statute.

Defendant also failed to preserve his claim that a court file admitted into evidence in support of the bail jumping charge did not qualify as a business record, and we decline to review it in the interest of justice. As an alternative holding, we find that the file was correctly admitted (*see* CPLR 4518).

We have considered and rejected defendant's pro se claims.

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

ENTERED: FEBRUARY 8, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Andrias, Kapnick, Moulton, JJ.

5649 Ruby Nieves, Index 22439/14E
Plaintiff-Respondent,

-against-

The Trustees of Columbia University
in the City of New York, et al.,
Defendants-Appellants.

_____

Rivkin Radler LLP, Uniondale (Henry Mascia of counsel), for appellants.

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered December 9, 2016, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment on the issue of liability on her Labor Law § 240(1) claim, unanimously reversed, on the law, without costs, and the motion denied.

Triable issues of fact as to how the accident occurred warrant the denial of plaintiff's motion. Plaintiff testified that she was injured when, while standing on a scaffold and constructing a wall, she fell from the scaffold to another platform several feet below. However, defendants submitted evidence showing that she never fell from the scaffold. Defendants submitted an affidavit from plaintiff's foreman in

which he stated that when he responded to the accident scene, he found plaintiff sitting on the scaffold platform on which she had been working and she had to be carried down (*see Perez v Folio House, Inc.*, 123 AD3d 519 [1st Dept 2014]). Furthermore, the accident reports also state that following the accident, plaintiff was found sitting on top of the scaffold (*see Buckley v J.A. Jones/GMO*, 38 AD3d 461, 463 [1st Dept 2007]).

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

ENTERED: FEBRUARY 8, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Andrias, Kapnick, Moulton, JJ.

5650 International Brain Research Foundation, Inc., Plaintiff-Appellant, Index 159685/13

-against-

John A. Cavalier, et al., Defendants-Respondents.

_____

Gregory A. Sioris, New York, for appellant.

Cozen O'Conner, New York (Martin S. Bloor of counsel), for respondents.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered on or about May 2, 2016, which granted defendants' motion to dismiss the complaint pursuant to CPLR 3126, and denied plaintiff's cross motion for sanctions pursuant to 22 NYCRR 130-1.1, unanimously affirmed, with costs.

Defendants demonstrated that, despite their repeated requests, plaintiff failed to produce responsive, relevant documents, many of which were favorable to defendants, as was discovered when they were provided to defendants by a third party. This failure to disclose is sufficient to support an inference of willfulness (*see Henderson-Jones v City of New York*, 87 AD3d 498, 504 [1st Dept 2011]; *DiDomenico v C & S Aeromatik Supplies*, 252 AD2d 41, 52 [2d Dept 1998]; CPLR 3126[3]).

Plaintiff failed to proffer an excuse for its failure to

disclose (*see Sage Realty Corp. v Proskauer Rose*, 275 AD2d 11, 18 [1st Dept 2000], *lv dismissed* 96 NY2d 937 [2001]). Its claim that a former employee stole the subject documents and deleted them from its servers is not credible. However, even if this claim were true, it would be unavailing, since plaintiff had failed to issue a litigation hold or take precautions to preserve the documents before the date of the alleged theft, which was well after the commencement of litigation, and failed to notify defendants upon discovery of the alleged theft.

The fact that defendants ultimately obtained these documents from a third party does not diminish plaintiff's culpability. Had the third party not come forward, defendants would never have known these documents existed. Moreover, it is impossible to know whether there are additional relevant documents that still have not been turned over.

Contrary to its contention, plaintiff received sufficient notice and opportunity to be heard before the complaint was dismissed. Defendants made a motion to dismiss, which plaintiff had ample opportunity to oppose.

Defendants also complied with the procedural requirements set forth in both the trial court and the local rules.

Plaintiff's cross motion for sanctions was properly denied, since there is no evidence in the record that defendants or their counsel knew that the documents provided by the third party were "stolen," if this claim is even true.

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

ENTERED: FEBRUARY 8, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Andrias, Kapnick, Moulton, JJ.

5651 Rubinald Pronk, Index 157267/12
Plaintiff-Respondent,

-against-

The Standard Hotel also known
as the Standard Highline Hotel,
et al.,
Defendants-Appellants.

_____

Eustace, Marquez, Epstein, Prezioso & Yapchanyk, New York (Christopher M. Yapchanyk of counsel), for appellants.

Lewis Johs Avallone Aviles, LLP, Islandia (Michael T. Colavecchio of counsel), for respondent.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered November 18, 2016, which, upon reargument, denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff cut his left foot on a glass votive candleholder while entering a spa pool in the "Le Bain Club," which was owned by defendants the Standard Hotel a/k/a the Standard Highline Hotel and Andre Balazs Properties, and managed by defendant Hotels AB, LLC.

There are triable issues of fact as to whether defendants breached their duty to maintain the premises in a reasonably safe condition by placing glass candleholders on tables in close proximity to the spa pool, where people could be expected to be

walking barefoot, and whether that breach proximately caused plaintiff's injuries (*see Boderick v R.Y. Mgt. Co., Inc.*, 71 AD3d 144, 147 [1st Dept 2009]).

Additionally, defendants never met their initial burden to show that they lacked notice. In particular, defendants failed to show that they lacked actual notice of glass in the spa pool, because none of their witnesses testified or averred that they never received any complaints about the area before the accident (*see O'Connor v Restani Constr. Corp.*, 137 AD3d 672, 673 [1st Dept 2016]). Defendants failed to show that they lacked constructive notice, because their employee who was responsible for checking the spa pool averred that she did not check the pool for about five hours before the accident (*see id.; see also Jahn v SH Entertainment, LLC*, 117 AD3d 473, 473 [1st Dept 2014]). Given defendants' failure to meet their initial burden, the burden never shifted to plaintiff (*see Sabalza v Salgado*, 85 AD3d 436, 438 [1st Dept 2011]).

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

ENTERED: FEBRUARY 8, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Andrias, Kapnick, Moulton, JJ.

5652 The People of the State of New York, Respondent, Ind. 4710/14

-against-

Wakasuyi Tshimanga, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Anthony Ferrara, J.), rendered August 21, 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: FEBRUARY 8, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Andrias, Kapnick, Moulton, JJ.

5653 Scott Miller, et al., Index 155573/12
Plaintiffs-Respondents,

-against-

177 Ninth Avenue Condominium, et al.,
Defendants-Appellants,

Chelsea Enclave Owners Corp., et al.,
Defendants.

_____

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Christopher Simone of counsel), for appellants.

Slater, Sgarlato & Cappello, P.C., Staten Island (Robert A. Sgarlato of counsel), for respondents.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered August 24, 2017, which, insofar as appealed from as limited by the briefs, granted plaintiffs' cross motion for summary judgment as to liability on the Labor Law § 240(1) claim, unanimously affirmed, without costs.

Plaintiffs established that the accident was proximately caused by the undisputed absence of safety devices affording adequate protection against the elevation-related risks that the injured plaintiff faced as he and another laborer hoisted a 300-pound laundry bin to empty the debris within it into a dumpster (*see Harris v City of New York*, 83 AD3d 104, 109-110 [1st Dept 2011], citing *Runner v New York Stock Exch., Inc.*, 13 NY3d 599,

603 [2009]). In light of the weight of the bin and the significant force it was capable of generating over the course of its five- to seven-foot fall, the height differential is not de minimis (*see Runner*, 13 NY3d at 605; *Jordan v City of New York*, 126 AD3d 619 [1st Dept 2015]).

We have considered defendants' remaining arguments and find them unavailing.

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

ENTERED: FEBRUARY 8, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Andrias, Kapnick, Moulton, JJ.

5654 The People of the State of New York, Respondent, Ind. 3159N/15

-against-

Julio Serrano, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered November 10, 2015, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of four years, unanimously affirmed.

Defendant made a valid waiver of his right to appeal (*see People v Bryant*, 28 NY3d 1094, 1096 [2016]; *People v Lopez*, 6 NY3d 248 [2006]).

Regardless of the validity of defendant's waiver of the right to appeal, we perceive no basis for reducing the sentence, or remanding for resentencing. Defendant did not preserve his contention that his presentence report was deficient, or effectively a nullity, because he was not interviewed (*see People*

v Medero, 155 AD3d 469 [1st Dept 2017]; *People v Pinkston*, 138 AD3d 431 [1st Dept 2016], *lv denied* 27 NY3d 1137 [2016], and we decline to review it in the interest of justice. As an alternative holding, we find defendant's claim unavailing, because he received the sentence he was promised, he showed no inclination to seek even greater leniency, and had he wished to be interviewed, he could have requested an adjournment for such an interview instead of agreeing, through counsel, to proceed to sentencing without one (*see People v Rosa*, 150 AD3d 442 [1st Dept 2017], *lv denied* 29 NY3d 1094 [2017]; *People v Davis*, 145 AD3d 623 [1st Dept 2016], *lv denied* 28 NY3d 1183 [2017]; *Pinkston*, 138 AD3d at 432). This was not a case where no presentence report had been prepared at all (*see People v Andujar*, 110 AD3d 606, 607 [1st Dept 1985]), and we reject defendant's argument that the report here was so deficient as to be a nullity. Moreover, "there is no statutory requirement that a defendant be interviewed" (*Medero*, 155 AD3d at 469).

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

ENTERED: FEBRUARY 8, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Andrias, Kapnick, Moulton, JJ.

5656 The People of the State of New York, Respondent, Ind. 5061/13

-against-

David Cepeda, Defendant-Appellant.

_____

Law Office of Randall D. Unger, Bayside (Randall D. Unger of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J. at suppression hearing; A. Kirke Bartley, Jr., J. at jury trial and sentencing), rendered November 5, 2015, as amended December 9, 2015, convicting defendant of burglary in the first degree and robbery in the first and second degrees, and sentencing him, as a second felony offender, to an aggregate term of 15 years, unanimously affirmed.

The court properly denied defendant's motion to suppress physical evidence and his statement to police. Probable cause for defendant's arrest resulted from the totality of the circumstances, most notably the fact that the police found defendant hiding under garbage in a dumpster, in very close spatial and temporal proximity to a reported crime from which the suspects had fled (*see generally People v Shulman*, 6 NY3d 1, 26

[2005]). Even without a description of the suspects, the only reasonable inference, from all the information known to the police, was that defendant was one of the participants (*see People v Santos*, 41 AD3d 324, 326 [1st Dept 2007], *lv denied* 9 NY3d 926 [2007]).

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]). Moreover, the evidence of defendant's guilt was overwhelming. There is no basis for disturbing the jury's credibility determinations. In addition to defendant's spontaneous and highly incriminating statement to the police, there was extensive circumstantial evidence, including cell phone evidence and conduct displaying consciousness of guilt.

The trial court providently exercised its discretion in admitting into evidence a handgun recovered near the crime scene, about 13 hours later (*see e.g. People v Sosa*, 255 AD2d 236 [1st Dept 1998], *lv denied* 93 NY2d 979 [1999]). The pistol met the description of a weapon used in the crime, and it was found on a nearby rooftop under circumstances suggesting that one of the participants may have left it there.

The court also providently exercised its discretion in precluding the defense from cross-examining a police witness about allegations of misconduct in a civil lawsuit filed against

him and other officers involved in an allegedly false arrest, and subsequently settled by the City of New York. Defendant failed to identify "specific allegations that are relevant to the credibility of the law enforcement witness" (*People v Smith*, 27 NY3d 652, 662 [2016]). There was no showing of this officer's role in the underlying allegedly false arrest, other than signing a criminal complaint based on information received from a fellow officer. Defendant's constitutional claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits (*see Delaware v Van Arsdall*, 475 US 673, 678-679 [1986]).

In any event, in light of the overwhelming evidence of defendant's guilt, any error in the trial court's rulings on the admission of the pistol into evidence and the limitation of defendant's cross-examination was harmless (*see People v Crimmins*, 36 NY2d 230, 243 [1975]).

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 8, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Andrias, Kapnick, Moulton, JJ.

5657N Olga Shmuklyer, Index 656263/16
Plaintiff-Appellant,

-against-

Feintuch Communications, Inc.,
Defendant-Respondent.

_____

Ira Daniel Tokayer, New York, for appellant.

Lawrence W. Rader, New York, for respondent.

_____

Order, Supreme Court, New York County (David B. Cohen, J.), entered August 28, 2017, which granted defendant's motion to vacate the default judgment against it, unanimously affirmed, with costs.

"A defendant seeking to vacate a default under [CPLR 5015(a)] must demonstrate a reasonable excuse for its delay in appearing and answering the complaint and a meritorious defense to the action" (*Eugene Di Lorenzo, Inc. v A. C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]). Moreover, "section 5015(a) does not provide an exhaustive list as to when a default judgment may be vacated. Indeed, the drafters of that provision intended that courts retain and exercise their inherent discretionary power in situations that warranted vacatur but which the drafters could not easily foresee" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]).

The court providently exercised its discretion in finding that defendant presented a reasonable excuse, based on counsel's family crises, the particulars of which were explained in defendant's papers, occurring at the time the answer was due. It is noteworthy too that plaintiff's counsel, who had communicated several times with defendant's counsel, and which communications made it clear that defense counsel was unaware of the pending default motion, chose to remain silent, thereby contributing to defendant's default in opposing it. Additionally, contrary to plaintiff's argument, the record does not support any finding of willful delay or neglect. Plaintiff has also waived any appellate review of defendant's meritorious defense, by failing to make any mention of such defense until plaintiff's reply brief (*see Ginsberg v Rudey*, 280 AD2d 267 [1st Dept 2001], *lv denied* 96 NY2d 711 [2001]; *Blech v West Park Presbyt. Church*, 102 AD3d 596, 597 [1st Dept 2013]). In any event, defendant demonstrated a sufficient a meritorious defense to the court below.

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

ENTERED: FEBRUARY 8, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Andrias, Kapnick, Moulton, JJ.

5658N In re Hereford Insurance Company, Index 22721/16E
Petitioner-Respondent,

-against-

Virgen Vazquez,
Respondent,

New Rochelle Hyundai, et al.,
Proposed Additional Respondents,

State Farm Insurance Company,
Proposed Additional Respondent-Appellant.

_____

Rubin, Fiorella & Friedman LLP, New York (Joseph R. Federici, Jr. of counsel), for appellant.

Shayne, Dachs, Sauer & Dachs, LLP, Mineola (Jonathan A. Dachs of counsel), for Hereford Insurance Company, respondent.

_____

Order, Supreme Court, Bronx County (Lizbeth González, J.), entered January 18, 2017, which, to the extent appealed from as limited by the briefs, granted petitioner Hereford Insurance Company's application to stay arbitration pending a framed issue hearing on coverage and to add State Farm Insurance Company as an additional respondent, unanimously affirmed, without costs.

Petitioner Hereford insured a vehicle that was hit in the rear by a Mercedes Benz that left the scene of the accident. After respondent Virgen Vazquez, a passenger in the Hereford vehicle, demanded uninsured motorist arbitration, Hereford commenced this proceeding seeking to stay the arbitration and add

additional respondents, including State Farm and Kelly Lyons. Hereford alleged that, at the time of the accident, the Mercedes was owned by Lyons or others, and that State Farm had issued insurance policy number 596798N11 insuring the Mercedes. In opposition, State Farm neither admitted nor denied the allegations relating to coverage. In reply, Hereford submitted documents demonstrating that the Mercedes had been sold to Lyons three days before the accident, and insured by State Farm under the same policy number previously identified, effective the same date.

Absent any surprise or prejudice to State Farm, which was aware that Hereford alleged that it had insured the Mercedes under a specified policy and which did not seek to submit a surreply, the motion court providently exercised its discretion in considering the documents submitted by Hereford in reply (*see Matter of Kennelly v Mobius Realty Holdings, LLC*, 33 AD3d 380, 381-382 [1st Dept 2006]; *Kelsol Diamond Co. v Stuart Lerner, Inc.*, 286 AD2d 586, 587 [1st Dept 2001]; *Jones v Geoghan*, 61 AD3d 638, 640 [2d Dept 2009]). Notably, Hereford could have sought leave to amend the petition based on the same documents, leading to the same outcome (*see Matter of Allcity Ins. Co. [Russo]*, 199 AD2d 88 [1st Dept 1993]; *see also Matter of Government Empls. Ins. Co. v Albino*, 91 AD3d 870, 871 [2d Dept 2012]).

Since Hereford met its burden of showing "sufficient evidentiary facts" to establish a "genuine preliminary issue" justifying the stay, the motion court properly stayed arbitration pending a trial of the threshold issue of coverage (*Matter of Empire Mut. Ins. Co. [Zelin]*, 120 AD2d 365, 366 [1st Dept 1986]; *see also Matter of AIU Ins. Co. v Cabreja*, 301 AD2d 448, 449 [1st Dept 2003]).

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

ENTERED: FEBRUARY 8, 2018

CLERK

Friedman, J.P., Sweeny, Kahn, Gesmer, Singh, JJ.

5660 The People of the State of New York, Respondent, Ind. 3445/08

-against-

Cadman Williams, Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (T. Charles Won of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered August 27, 2015, convicting defendant, after a jury trial, of manslaughter in the first degree and criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 20 years, unanimously affirmed.

Defendant's challenges to the court's justification charge are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. The charge, viewed as a whole, conveyed the correct principles of law as applied to the particular facts, with regard to the issues of whether defendant used excessive force (*see People v Del-Debbio*, 244 AD2d 195, 195 [1st Dept 1997], *lv denied* 91 NY2d 925 [1998]), and whether he was the initial aggressor (*see People v Valentin*, 29 NY3d 57, 62 [2017]). Nothing in the

charge prevented the jury from fairly assessing defendant's justification defense under the facts presented.

To the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

Defendant did not preserve his Confrontation Clause challenge to testimony by a forensic witness, based solely on test results conducted by others, that defendant's DNA may have been on the revolver used in this homicide, and we decline to review this claim in the interest of justice. "We note that where a defect may be readily corrected by calling additional witnesses or directing the People to do so, requiring a defendant to call the defect to the court's attention at a time when the error complained of could readily have been corrected serves an important interest" (*People v Rios*, 102 AD3d 473, 474-475 [1st Dept 2013], *lv denied* 20 NY3d 1103 [2013] [internal quotation marks and citation omitted]). As an alternative holding, we find that this testimony was inadmissible, but that the error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). The DNA evidence was only relevant to the issue of defendant's identity as the person who shot the deceased. However, identity was both uncontested at trial and established by various other evidence

(*see e.g. People v Lopez-Mendoza*, 155 AD3d 526, 526 [1st Dept 2017]; *People v Suarez*, 148 AD3d 606, 607 [1st Dept 2017], *lv denied* 29 NY3d 1037 [2017]).

We have considered and rejected defendant's arguments concerning low copy number and forensic statistic tool DNA evidence (*see People v Gonzalez*, 155 AD3d 507 [1st Dept 2017]), and an incriminating phone call that defendant made while incarcerated (*see People v Cisse*, 149 AD3d 435, 436 [1st Dept 2017], *lv granted* 29 NY3d 1124 [2017]). As noted, additional cumulative evidence on the uncontested issue of identity added nothing to the People's case, so that had there been any error it would have been harmless. We find unpersuasive defendant's suggestion that he may have chosen to concede identity and present a justification defense because of the presence of allegedly inadmissible evidence bearing on identity.

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 8, 2018

CLERK

Friedman, J.P., Sweeny, Kahn, Gesmer, Singh, JJ.

5661 In re Ramon Catala, Index 250212/16
Petitioner-Respondent,

-against-

New York State Division of Housing
and Community Renewal,
Respondent-Appellant,

Topping Ave Catch HDFC,
Respondent.

_____

Mark F. Palomino, New York (Jack Kuttner of counsel), for appellant.

Seymour W. James, Jr., The Legal Aid Society, New York (Jeanne Schoenfelder of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered on or about September 1, 2016, which granted the petition challenging a sua sponte determination of respondent New York State Division of Housing and Community Renewal (DHCR), dated February 18, 2016, to revoke a final determination dated December 8, 2015, granting petitioner's petition for administrative review, and ordered DHCR to reinstate the revoked order, unanimously reversed, on the law, without costs, the petition denied, the order to reinstate vacated, and the proceeding brought pursuant to CPLR article 78 dismissed.

DHCR properly reopened petitioner tenant's underlying proceeding challenging the rent set by the New York City Housing

and Preservation Development (HPD). While DHCR had granted petitioner's overcharge complaint, it subsequently denied the complaint of another tenant, in the same building, who had made identical claims. This irregularity in a vital matter warranted the reopening of petitioner's overcharge proceeding, upon notice to the parties (*see* 9 NYCRR 2529.9; *Matter of 60 E. 12th St. Tenants' Assn. v New York State Div. of Hous. & Community Renewal*, 134 AD3d 586, 588 [1st Dept 2015], *affd* 28 NY3d 962 [2016]; *Matter of Sherwood 34 Assoc. v New York State Div. of Hous. & Community Renewal*, 309 AD2d 529, 532 [1st Dept 2003]).

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

ENTERED: FEBRUARY 8, 2018

CLERK

Friedman, J.P., Sweeny, Kahn, Gesmer, Singh, JJ.

5662 SIBA Contracting Corp., Index 654180/15
Plaintiff-Appellant,

-against-

Stantec Inc., also known as Stantec Consulting Services, Inc.,
Defendant-Respondent,

Westchester Fire Insurance Company, Inc.,
Defendant.

_____

Morrison Law Offices of Westchester, P.C., New York (Arthur Morrison of counsel), for appellant.

Milber Makris Plousadis & Seiden, LLP, Woodbury (Lorin A. Donnelly of counsel), for respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered October 18, 2016, which granted defendant Stantec Inc.'s motion to dismiss the complaint as against it, unanimously affirmed, with costs.

The motion court correctly determined that plaintiff assigned its claims to defendant Westchester Fire Insurance Company under the parties' indemnification agreement, and accordingly has no standing to bring this action against Stantec (*James McKinney & Son v Lake Placid 1980 Olympic Games*, 61 NY2d 836, 838 [1984]).

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

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

ENTERED: FEBRUARY 8, 2018

CLERK

Friedman, J.P., Sweeny, Kahn, Gesmer, Singh, JJ.

5663 Dorothy Jones, Index 301984/11
Plaintiff-Appellant,

-against-

New York Presbyterian Hospital
also known as Columbia University
Medical Center, et al.,
Defendants-Respondents.

Pollack, Pollack Isaac & DeCicco, New York (Brian J. Isaac of counsel), for appellant.

Martin Clearwater & Bell LLP, New York (Barbara D. Goldberg of counsel), for respondents.

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about August 25, 2017, which granted defendant's motion to reduce the jury's damages awards, and ordered a new trial on damages unless plaintiff stipulated to reduce the award for past pain and suffering from $600,000 to $150,000 and the award for future pain and suffering over a five-year period from $400,000 to $150,000, unanimously modified, on the facts, to order a new trial on damages for past pain and suffering unless plaintiff stipulates, within 30 days after entry of this order, to reduce the award for such damages to $400,000, and otherwise affirmed, without costs.

As a result of defendant's negligence, plaintiff suffered a comminuted proximal humerus fracture, which healed in a

misaligned manner. The injury resulted in chronic pain and a permanent reduction in plaintiff's range of motion and has had a significant impact on plaintiff's quality of life, as she remains unable to care for herself.

Under these circumstances, an award for past pain and suffering in excess of $400,000 deviates materially from what would be reasonable compensation (*see* CPLR 5501[c]), and we modify Supreme Court's order accordingly.

In light of plaintiff's age (84 when injured and 89 at the time of trial), Supreme Court correctly determined that an award for future pain and suffering in excess of $150,000 deviates materially from what would be reasonable compensation (*see Konfidan v FF Taxi, Inc.*, 95 AD3d 471 [1st Dept 2012]; *Elescano v Eighth-19th Co., LLC*, 17 AD3d 250 [1st Dept 2005]; *Holland v Gaden*, 260 AD2d 604 [2d Dept 1999]).

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

ENTERED: FEBRUARY 8, 2018

CLERK

Friedman, J.P., Sweeny, Kahn, Gesmer, Singh, JJ.

5664 The People of the State of New York, SCI 2511/15
Respondent,

-against-

Mark McClennon,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered October 14, 2015, convicting defendant, upon his plea of guilty, of perjury in the first degree, and sentencing him, as a second felony offender, to a term of two to four years, unanimously affirmed.

Defendant made a valid waiver of his right to appeal, which forecloses his right to challenge his sentence as excessive (*see People v Bryant*, 28 NY3d 1094 [2016]. Regardless of whether defendant validly waived his right to appeal, we find no basis for running his mandatory minimum sentence nunc pro tunc to May 1, 2014, which is the only relief requested on appeal. Defendant's argument that the court "reneged" on its original promise to run the sentence nunc pro tunc to the 2014 date would, if meritorious, go to the issue of voluntariness, but defendant

expressly declines any vacatur of the plea. In any event, this claim is without merit because, during the course of the plea proceeding, the court and parties realized that the correct date was May 1, *2015*, and defendant's plea was entered after the correction was made.

We also find no basis for changing the nunc pro tunc date in the interest of justice. The May 2015 date gave defendant the proper amount of jail time credit, as the parties agreed, and applying the 2014 date would give defendant an undeserved windfall.

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

ENTERED: FEBRUARY 8, 2018

CLERK

Friedman, J.P., Sweeny, Kahn, Gesmer, Singh, JJ.

5665 The People of the State of New York, Ind. 3708/14
Respondent,

-against-

Derrick Reliford,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Paul A. Anderson 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 Bruce, J.), rendered November 16, 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 8, 2018

CLERK

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

Friedman, J.P., Sweeny, Kahn, Gesmer, Singh, JJ.

5666 Elena Santos, Index 114462/09
Plaintiff-Respondent,

-against-

Drain King LLC,
Defendant-Appellant-Respondent,

A.R.O. Construction Corp., et al.,
Defendants-Respondents-Appellants,

No. 604 Fifth Avenue Restaurant, Inc., et al.,
Defendants,

604 Fifth Owner, LLC,
Defendant-Respondent.

_____

Appeals having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Paul Wooten, J.), entered on or about June 27, 2016,

And said appeals having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated January 31, 2018,

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

ENTERED: FEBRUARY 8, 2018

CLERK

Friedman, J.P., Sweeny, Kahn, Gesmer, Singh, JJ.

5667 Michael Puchades, Index 152720/12
Plaintiff-Respondent,

-against-

Taube Management Realty LLC, et al.,
Defendants-Respondents,

H.J Development LLC, et al.,
Defendants,

Triumph Construction Corp.,
Defendant-Appellant.

- - - - -

[And Third-Party Actions]

- - - - -

Consolidated Edison Company of New York,
Fourth-Party Plaintiff-Respondent,

-against-

Triumph Construction Corp.,
Fourth-Party Defendant-Appellant.

_____

Barry, McTiernan & Moore LLC, New York (Laurel A. Wedinger of counsel), for appellant.

Hach & Rose, LLP, New York (Robert F. Garnsey of counsel), for Michael Puchades, respondent.

Mischel & Horn, P.C., New York (Lauren Bryant of counsel), for Taube Management Realty LLC and 211-51 Property, LLC, respondents.

Law Office of Nadine Rivellese, New York (Stephen T. Brewi of counsel), for Consolidated Edison Company of New York, respondent.

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.),

entered January 12, 2017, which, insofar as appealed from as

limited by the briefs, denied defendant and fourth-party defendant Triumph Construction Corp.'s (Triumph) motion for summary judgment dismissing the complaint, all cross claims and the fourth-party action against it, unanimously modified, on the law, to grant Triumph's motion to the extent of dismissing the complaint and all cross claims (except the fourth-party action), as against it, and, upon a search of the record, to grant summary judgment to defendant/fourth-party plaintiff Consolidated Edison Company of New York (Con Ed) dismissing the complaint and all cross claims against it, and otherwise affirmed, without costs.

Triumph met its burden of showing entitlement to summary judgment by showing that, by applying an expanding foam to fill the void between conduits which it installed and preexisting sleeves transiting the wall of the subject building, it exercised care to prevent the precise hazard of which plaintiff complains, namely, infiltration of water into the building resulting in flooding and slippery conditions. In opposition, plaintiff, via his expert, offered only conclusory speculation that the sealing foam must have failed. This is not enough to show negligence (*see Villa-Capellan v Mendoza*, 135 AD3d 555, 556 [1st Dept 2016]; *Murchison v Incognoli*, 5 AD3d 271, 271 [1st Dept 2004]).

The record shows that, as Con Ed's contractor, Triumph performed the excavation work which plaintiff contends led to his

injury; no party claims otherwise. Thus, if Triumph is not liable for plaintiff's injury, then Con Ed cannot be liable either (*see Burke v Hilton Resorts Corp.*, 85 AD3d 419, 420 [1st Dept 2011]; *Whitehead v Riethoffer Shows*, 304 AD2d 754, 755 [2d Dept 2003]). Accordingly, upon our search of the record, we grant summary judgment to Con Ed to the extent indicated. We note, however, that our modification leaves in place Con Ed's fourth-party action against Triumph for contractual indemnification and its pending motion for summary judgment.

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

ENTERED: FEBRUARY 8, 2018

CLERK

Friedman, J.P., Sweeny, Kahn, Gesmer, Singh, JJ.

5668 The People of the State of New York, Ind. 18/15
Respondent,

-against-

Jose Duran,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Jennifer L. Watson 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 (Marc Whiten, J.), rendered March 11, 2015,

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

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

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

ENTERED: FEBRUARY 8, 2018

CLERK

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

Friedman, J.P., Sweeny, Kahn, Gesmer, Singh, JJ.

5669 Marilyn Hendricks, et al., Index 300175/12
Plaintiffs-Appellants,

-against-

Transcare New York, Inc., et al.,
Defendants-Respondents.

Law Office of Nicholas Rose, PLLC, Forest Hills (Jill B. Savedoff of counsel), for appellants.

Lewis Brisbois Bisgaard & Smith LLP, New York (Meredith Drucker Nolen of counsel), for Transcare New York, Inc. and Adriana Catus, respondents.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Marjorie E. Bornes of counsel), for American United Transportation Inc. and Franklin Martinez, respondents.

Order, Supreme Court, Bronx County (Ruben Franco, J.), entered on or about February 10, 2017, which, insofar as appealed from as limited by the briefs, granted defendants' motions for summary judgment dismissing plaintiffs Marilyn Hendricks and Livanessa Martinez's complaint based on their inability to satisfy the serious injury threshold of Insurance Law § 5102(d), and plaintiff Victor Rodriguez's claim that he suffered serious injury to his right knee within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to deny the motions as to Hendricks's claims for injuries to her cervical and lumbar spine and right knee, Martinez's claims for injuries to her

cervical spine and right knee, and Rodriguez's claim for injuries to his right knee, and otherwise affirmed, without costs.

Although defendants carried their initial burden of establishing a prima facie entitlement to judgment, plaintiffs' submissions in opposition raised triable issues as to whether they suffered serious injuries within the meaning of Insurance Law § 5102(d) as a result of the subject accident, to the extent indicated. Plaintiffs' physician submitted an affirmation opining that the subject injuries were traumatic in origin, based on his examinations, surgical observations and review of MRI films. The medical experts' conflicting opinions on the cause and extent of these injuries raise issues of fact that must be resolved at trial (*see Perl v Meher*, 18 NY3d 208, 218-219 [2011]).

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

ENTERED: FEBRUARY 8, 2018

CLERK

Friedman, J.P., Sweeny, Kahn, Gesmer, Singh, JJ.

5670 The People of the State of New York, Respondent, Ind. 3234/73

-against-

Roberto Roman,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (David A. Slott of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Efrain Alvarado, J.), entered February 8, 2017, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant were adequately taken into account by the risk assessment instrument, or were outweighed by the egregiousness of the underlying crime and defendant's criminal history.

Even without the disputed assessment of 10 points for failure to accept responsibility, defendant would remain a level three offender with a score of 125. In any event, we find that the points at issue were correctly assessed.

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

ENTERED: FEBRUARY 8, 2018

CLERK

Friedman, J.P., Sweeny, Kahn, Gesmer, Singh, JJ.

5671-
5672 The People of the State of New York, Respondent,

SCI 2575/08
Ind. 2410/09

-against-

Anonymous,
Defendant-Appellant.

_____

Law Office of Murray Richman, New York (Murray Richman of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Lori Ann Farrington of counsel), for respondent.

_____

Judgments, Supreme Court, Bronx County (Steven L. Barrett, J.), rendered July 5, 2012, convicting defendant, upon his pleas of guilty, of criminal sale of a controlled substance in the third degree, robbery in the first degree and tampering with physical evidence, and sentencing him, as a second violent felony offender, to an aggregate term of 15 years, unanimously affirmed.

Defendant's claim that he should have received the originally-promised sentence in accordance with his plea agreement, or an evidentiary hearing on the issue of his degree of cooperation, is unpreserved because defendant neither requested a hearing nor moved to withdraw his plea before sentence was imposed (*see e.g. People v Saxon*, 28 AD3d 330, 331 [1st Dept 2006], *lv denied* 7 NY3d 763 [2006]), and we decline to

review it in the interest of justice. As an alternative holding, we find that the court properly imposed an enhanced sentence, regardless of defendant's level of cooperation, because evidence properly before us shows that he violated the plea agreement by undisputedly committing new crimes.

We further reject defendant's claim that his counsel's failure to request an evidentiary hearing constituted ineffective assistance. Given defendant's clear violation of the plea agreement, there was no factual dispute that required a hearing (*see e.g. People v Malaj*, 69 AD3d 487 [1st Dept 2010], *lv denied* 15 NY3d 776 [2010]).

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

ENTERED: FEBRUARY 8, 2018

CLERK

Friedman, J.P., Sweeny, Kahn, Gesmer, Singh, JJ.

5673 Debra Milano, as Administratrix of the Estate of Keith Mastronardi, Deceased, et al., Plaintiffs-Appellants, Index 150806/12

-against-

340 East 74th Street Owners Corp., et al., Defendants-Respondents.

Shayne, Dachs, Sauer & Dachs, LLP, Mineola (Jonathan A. Dachs of counsel), for appellants.

Flynn, Gibbons & Dowd, New York (Lawrence A. Doris of counsel), for respondents.

Order, Supreme Court, New York County (George J. Silver, J.), entered July 13, 2016, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Decedent fell to his death through the window of his fifth floor apartment, while intoxicated. It was undisputed that decedent's three children, all under 10 years of age, lived in the apartment, which was not equipped with window guards in violation of New York City Health Code § 131.15(a)(1). Plaintiffs also contend that defendants violated 24 RCNY 12-10(g), mandating window stops on windows with window guards.

Supreme Court properly concluded that defendants had no statutory or common-law duty to decedent to install window guards

or stops in the apartment since the window guard regulation does not impose a duty on owners to adults injured by the failure to install the guards (*see Rodriguez v City of New York*, 272 AD2d 68 [1st Dept 2000], *lv dismissed in part and denied in part* 95 NY2d 919 [2000]; *Ramos v 600 W. 183rd St.*, 155 AD2d 333 [1st Dept 1989]). Moreover, since there was no duty to install window guards to protect adults, there was similarly no duty owed to decedent to install window stops.

Defendants also had no duty under Multiple Dwelling Law § 78 or the common law to install window guards or stops to protect decedent, since no evidence was presented that the window or ledge was in need of repair (*see Rivera v Nelson Realty, LLC*, 7 NY3d 530, 535 [2006]). Even if the window or ledge were viewed as a dangerous condition, the duty to eliminate the danger by installing guards or stops was imposed on the tenant, not the landlord, under the common law (*see Ramos* at 334-335). The court properly concluded that decedent's completion of the Notice to Tenants form mandated by the City concerning the window guard requirement did not constitute a written request for a window guard.

It is further noted that defendants established that it was decedent's own action of leaning out the subject window to smoke while highly intoxicated that was the proximate cause of the

accident (*see e.g. Rivera v St. Nicholas 184 Holding, LLC*, 135 AD3d 496 [1st Dept 2016]), and plaintiffs failed to raise a triable issue of fact in this regard.

We have considered plaintiffs' remaining arguments and find them unavailing.

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

ENTERED: FEBRUARY 8, 2018

CLERK

Friedman, J.P., Sweeny, Kahn, Gesmer, Singh, JJ.

5674 The People of the State of New York, Ind. 1572/14
Respondent,

-against-

Hurbert Tyler,
Defendant-Appellant.

_____

Rosemary Herbert, Office of the Appellate Defender, New York (Christina A. Swarns of counsel), for appellant.

_____

Judgment, Supreme Court, Bronx County (Robert Torres, J.), rendered December 14, 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: FEBRUARY 8, 2018

CLERK

Friedman, J.P., Sweeny, Kahn, Gesmer, Singh, JJ.

5675 In re Empire State Beer Distributors Association, Inc., et al., Petitioners-Respondents, Index 102016/15

-against-

New York State Liquor Authority, Respondent-Appellant,

Costco Wholesale Corporation, et al., Respondents-Intervenors-Appellants.

_____

Christopher R. Riano, Albany (Mark D. Frering of counsel), for New York State Liquor Authority, appellant.

Nolan & Heller, LLP, Albany (Richard L. Burstein of counsel), for Costco Wholesale Corporation and BJ's Wholesale Club, Inc., appellants.

Gerstman Schwartz & Malito, LLP, Garden City (Ian-Paul A. Poulos of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered October 3, 2016, granting the petition to the extent of directing respondent New York State Liquor Authority (NYSLA) to disclose unredacted copies of stipulations entered into between NYSLA and respondents-intervenors Costco Wholesale Corporation and BJ's Wholesale Club, Inc., requested by petitioners pursuant to the Freedom of Information Law (FOIL), unanimously reversed, on the law, without costs, the petition denied, and the proceeding brought pursuant to CPLR article 78, dismissed.

NYSLA's determination denying petitioner's FOIL request was not "affected by an error of law" (CPLR 7803[3]; *see Mulgrew v Board of Educ. of the City School Dist. of the City of N.Y.*, 87 AD3d 506 [1st Dept 2011], *lv denied* 18 NY3d 806 [2012]). Respondents met their burden of establishing that disclosure of the redacted portions of NYSLA's separate stipulations with the two intervenors "would cause substantial injury to the competitive position of the subject enterprise[s]" (Public Officers Law § 87[2][d]). Although NYSLA's promise to keep the stipulations confidential does not automatically exempt them from FOIL (*see Matter of Washington Post Co. v New York State Ins. Dept.*, 61 NY2d 557, 567 [1984]), under the particular circumstances of this case, disclosing the stipulation terms at issue, would likely deter some customers from patronizing those stores, leading to economic loss (*see Matter of New York State Elec. & Gas Corp. v New York State Energy Planning Bd.*, 221 AD2d 121, 125 [3d Dept 1996], *appeal withdrawn* 89 NY2d 1031 [1997]). Contrary to petitioners' argument, intervenors met their burden of presenting "specific, persuasive evidence that disclosure will cause [them] to suffer a competitive injury," and did not "merely

rest on a speculative conclusion that disclosure might potentially cause harm" by leading to negative publicity (*Matter of Markowitz v Serio*, 11 NY3d 43, 51 [2008]).

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

ENTERED: FEBRUARY 8, 2018

CLERK

Friedman, J.P., Sweeny, Kahn, Gesmer, Singh, JJ.

5676 The People of the State of New York, Ind. 3349/12
Respondent,

-against-

Jose Melenciano,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (David A. Slott 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 (James Hubert, J.), rendered November 17, 2015,

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

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

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

ENTERED: FEBRUARY 8, 2018

CLERK

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

Friedman, J.P., Sweeny, Kahn, Gesmer, Singh, JJ.

5677N Tertiary, Inc., Index 156930/15
Plaintiff-Respondent,

-against-

Liberty Mutual Fire Insurance Company, et al.,
Defendants-Appellants.

_____

Jaffe & Asher LLP, New York (Marshall T. Potashner of counsel), for appellants.

Pillsbury Winthrop Shaw Pittman, LLP, New York (Alexander D. Hardiman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Kelly O'Neill Levy, J.), entered July 19, 2016, which granted plaintiff's motion for a default judgment and denied defendants' motion to compel acceptance of an answer, unanimously reversed, on the law and the facts, and in the exercise of discretion, without costs, plaintiff's motion denied, and defendants' motion granted.

Plaintiff failed to establish prima facie that it is entitled to a default judgment declaring that defendants are obligated to defend and indemnify it in a personal injury action (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]; *AMEC Constr. Mgt., Inc. v City of New York*, 132 AD3d 547, 549 [1st Dept 2015]), since it has not been sued in that action (*see QBE Ins. Corp. v Adjo Contr. Corp.*, 121 AD3d 1064, 1080 [2d Dept

2014]; *Sirignano v Chicago Ins. Co.*, 192 F Supp 2d 199, 206 [SD NY 2002]).

In view of defendants' excuse for their default in answering the complaint, namely, that a clerical error prevented the matter from reaching the appropriate individuals in the companies, as well as the absence of willfulness, the fact that plaintiff has not claimed prejudice, and counsel's prompt action upon discovering the error, we find that the motion to compel should be granted (*see e.g. Interboro Ins. Co. v Perez*, 112 AD3d 483, 483 [1st Dept 2013]; *Gamiel v Sullivan & Liapakis*, 254 AD2d 96 [1st Dept 1998]; *Elkman v Southgate Owners Corp.*, 243 AD2d 356 [1st Dept 1997]).

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

ENTERED: FEBRUARY 8, 2018

CLERK

Friedman, J.P., Sweeny, Kahn, Gesmer, Singh, JJ.

5678N- Index 152751/14
5678NA Eli Cabinetry, Inc., etc., et al., 650700/15
Plaintiffs,

-against-

P.C. Consulting Management Corp., et al.,
Defendants-Appellants,

SP 103 E 86 LLC,
Defendant-Respondent,

"John Doe," etc.,
Defendant.

- - - - -

P.C. Consulting Management Corp.,
Plaintiff-Appellant,

-against-

SP 103 E 86 LLC, et al.,
Defendants-Respondents.

_____

Rabinowitz, Galina & Rosen, Mineola (Gayle A. Rosen of counsel), for appellants.

Greenberg Traurig, LLP, New York (Michael P. Manning of counsel), for respondents.

_____

Order, Supreme Court, New York County (Michael L. Katz, J.), entered on or about January 14, 2016, as amended by order entered February 5, 2016, which, among other things, granted the motion of SP 103 E 86 LLC (defendant in both actions) and the Guarantee Company of North America-USA (defendant in the second action) and the cross motion of Eli Cabinetry, Inc. (plaintiff in the first

action) to strike the answer of P.C. Consulting Management Corp. (defendant in the first action and plaintiff in the second) and Paul Gambino (defendant in the first action); granted judgment in favor of SP 103 and Eli Cabinetry on their claims against P.C. Consulting and Gambino; directed an inquest on damages, attorney's fees and expenses; and dismissed P.C. Consulting's complaint; and cancelled a $360,778 undertaking, unanimously affirmed, without costs. Appeal from so-ordered transcript, same court (Donna M. Mills, J.), entered December 22, 2015, unanimously dismissed, without costs.

The motion court providently exercised its discretion in granting the motion and cross motion to strike the pleadings of P.C. Consulting and Paul Gambino (together, appellants) on the ground that they willfully and contumaciously failed to comply with their discovery obligations set forth in the court's order entered July 20, 2015 (*see G.M. Data Corp. v Potato Farms, LLC*, 95 AD3d 592, 593 [1st Dept 2012]; *Toribio v J.D. Posillico, Inc.*, 268 AD2d 394, 395 [1st Dept 2000]).

We have considered appellants' remaining contentions and find them unavailing.

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

ENTERED: FEBRUARY 8, 2018

CLERK

Friedman, J.P., Andrias, Kapnick, Gesmer, JJ.

3306 AlbaniaBEG Ambient Sh.p.k., Index 152679/14
Plaintiff-Respondent,

-against-

Enel S.p.A., et al.,
Defendants-Appellants.

_____

Davis Polk & Wardwell LLP, New York (Antonia J. Perez-Marques of counsel), for appellants.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Tai-Heng Cheng of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered October 22, 2014, reversed, on the law, without costs, and the motion to dismiss granted. The Clerk is directed to enter judgment accordingly.

Opinion by Friedman, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Richard T. Andrias
Barbara R. Kapnick
Ellen Gesmer, JJ.

3306
Index 152679/14

_____x

AlbaniaBEG Ambient Sh.p.k.,
Plaintiff-Respondent,

-against-

Enel S.p.A., et al.,
Defendants-Appellants.
_____x

Defendants appeal from the order of the Supreme Court, New York County (Paul Wooten, J.), entered October 22, 2014, which, insofar as appealed from, denied their motion to dismiss plaintiff's motion for summary judgment in lieu of complaint for recognition and enforcement of a foreign country judgment pursuant to CPLR article 53.

Davis Polk & Wardwell LLP, New York (Antonio J. Perez-Marques, David B. Toscano, Gina M. Cora and Joseph M. Spadola of counsel), for appellants.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Tai-Heng Cheng, Julia J. Peck and Cory D. Struble of counsel), for respondent.

FRIEDMAN, J.P.

This appeal arises from a proceeding to recognize and enforce a foreign country judgment under CPLR article 53. Defendants have raised colorable statutory grounds for denying the foreign judgment recognition. Under these circumstances, we hold that there must be either an in personam or an in rem jurisdictional basis for maintaining the recognition and enforcement proceeding against defendants in New York. Because plaintiff does not claim that such jurisdiction is demonstrated on the existing record, and, on appeal, does not seek an opportunity to gather evidence to demonstrate that such jurisdiction exists, we conclude that New York lacks jurisdiction to entertain this proceeding. Accordingly, we reverse the order appealed from and grant defendants' motion to dismiss the proceeding pursuant to CPLR 3211(a)(8).

Plaintiff AlbaniaBEG Ambient Sh.p.k. (ABA) is an Albanian subsidiary of nonparty Becchetti Energy Group S.p.A. (BEG), an Italian company. Defendants Enel S.p.A. and Enelpower S.p.A. are, respectively, parent and subsidiary, both organized under Italian law and having their principal places of business in Italy. Enel is Italy's largest power company.

In February 2000, BEG and Enelpower entered into an agreement (hereinafter, the BEG-Enelpower agreement) for the

possible construction of a hydroelectric power plant in Albania, pursuant to a concession previously granted to BEG by the Albanian government. The BEG-Enelpower agreement contained an Italian choice-of-law clause and provided for the resolution of any disputes by arbitration in Rome. Less than a year later, Enelpower concluded that the project was not feasible and withdrew from it, pursuant (as Enelpower claimed) to its right of withdrawal under the BEG-Enelpower agreement.

After Enelpower withdrew from the Albanian project, BEG initiated an arbitration against it in Rome, claiming that the withdrawal was a breach of contract and an act of bad faith. In December 2002, the Rome arbitration panel issued an award dismissing BEG's claims against Enelpower. BEG brought proceedings in the Italian courts seeking to have the award nullified. BEG's arguments for nullification of the award were rejected by a judgment of the Court of Appeals of Rome in 2009, and that judgment was affirmed by the Supreme Court of Italy in 2010.[1]

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[1]Although not relevant to the merits of this appeal, ABA notes that, during the pendency of the Rome arbitration, BEG sought to disqualify the arbitrator appointed by Enelpower on the ground that he had undisclosed conflicts of interest. The arbitration panel thereafter issued the award, by a vote of 2-1, without ruling on the disqualification motion. In the subsequent judicial proceedings, the Italian courts rejected BEG's arguments that the arbitrator's alleged conflicts of interest warranted

In 2004, after BEG's claim had been rejected in the Rome arbitration, ABA — an Albanian subsidiary that BEG had formed to hold its power concession from the Albanian government — sued Enel and Enelpower in an Albanian court (the Tirana District Court) on claims of "tort and unfair competition." ABA took the position that its claims were not precluded by the arbitration clause of the BEG-Enelpower agreement, or by the award rendered against BEG in the Rome arbitration, because ABA was not a party to the BEG-Enelpower agreement (which had been executed before ABA was in existence), was not asserting contractual claims, and had not been a party to the arbitration. In March 2009, the Tirana District Court rendered a judgment in favor of ABA, awarding it damages in the amount of €25,188,500 for the year 2004 and in an amount to be calculated by a specified formula for each of the years 2005 through 2011.[2] The Tirana Court of

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setting aside the award.

[2]The judgment's formula for determining damages for each year from 2005 through 2011, with the court's explanation (as translated in the record), is:

> "Vn = (Q x Pn) + (Q x Pcn), where (n) is the corresponding year, V is the total revenue, collections from the sale of electricity, Q = the amount of energy that would be exported in 2005-2006-2007-2008-2009-2010-2011, which is equal to 371,000,000 KWh/Year, P is the price of electricity sale [sic] according to the market, Pc is the price of Green Certificates for the following years according to the definitions of MSE

Appeals affirmed the judgment in April 2010, and, in 2011, the Supreme Court of Albania declined to entertain a further appeal.

In March 2014, ABA served on defendants, and filed in Supreme Court, New York County, a summons and a motion for summary judgment in lieu of complaint pursuant to CPLR 3213, seeking recognition and enforcement of the Albanian judgment pursuant to CPLR article 53 ("Recognition of Foreign Country Money Judgments") in the amount of €433,091,870, plus interest.[3] ABA simultaneously moved by order to show cause for a prejudgment order of attachment and expedited discovery. The order to show cause granted ABA an ex parte temporary restraining order directing defendants "and all other persons, entities, subsidiaries, affiliates, attorneys, agents and garnishees acting in concert with them" not to sell, assign or transfer any New York assets, "to the extent of $597,493,543.85," in which defendants "and/or their alter egos" might have an interest, pending the hearing on the application for an attachment.

The affirmation by counsel supporting ABA's summary judgment

(Italian Electricity System Operator) S.p.A."

[3]ABA alleged that €433,091,870 — a figure that does not appear in the Albanian judgment — was the total principal amount of damages thereunder, derived by adding the judgment's damages figure for 2004 to the amounts yielded by the formula for the years 2005 through 2011.

motion and TRO application stated that defendants had "no known presence in the state of New York," and did not identify any property that defendants might own in New York. However, the memorandum of law in support of the summary judgment motion stated: "Defendants have subsidiaries in New York that own multiple power plants. Defendants have also raised billions of dollars of financing through the issuance of capital securities that are governed by the laws of the state of New York."

In April 2014, defendants, before submitting their opposition on the merits to the motion for summary judgment in lieu of complaint, moved by order to show cause to dismiss the action for lack of personal jurisdiction (CPLR 3211[a][8]) and for lack of subject matter jurisdiction under Business Corporation Law § 1314 (CPLR 3211[a][2]). In support of the branch of the application seeking dismissal for lack of personal jurisdiction, defendants pointed out that ABA had conceded that both defendants were "'foreign corporations with no known presence in the state of New York.'" Defendants further noted that ABA had neither "identif[ied] any property of defendants within the jurisdiction" nor "allege[d] any contacts between the defendants and New York that bear the slightest relation to the dispute" underlying the Albanian judgment. On this basis, defendants argued that dismissal was required by the United

States Supreme Court's decision in *Daimler AG v Bauman* (571 US __, 134 S Ct 746 [2014]), which had been issued three months earlier.

In addition to their jurisdictional arguments, defendants noted that, if their motion to dismiss on jurisdictional grounds were denied, they intended to oppose the summary judgment motion based on the existence of "numerous grounds for non-recognition of the Albanian judgment" under article 53. Specifically, defendants argued in their memorandum of law that: (1) "[t]he Albanian judgment conflicts with a prior final and conclusive judgment by the Italian courts" (*see* CPLR 5304[b][5]); (2) "[t]he proceeding in the Albanian court was contrary to an agreement between the parties to adjudicate their disputes by arbitration in Italy" (*see* CPLR 5304[b][6]); (3) "Albania does not provide impartial tribunals or procedures compatible with due process" (*see* CPLR 5304[a][1]); and (4) the Albanian judgment, which sets forth a formula to determine most of the amount to be recovered, "is not for the 'recovery of a sum of money,' rendering it not 'conclusive'" (*see* CPLR 5301, 5302, 5303).

On April 22, 2014, Supreme Court heard oral argument on defendants' application to vacate permanently the previously granted TRO (which the court had previously vacated pending a hearing). At this appearance, defendants' counsel, while not

disputing ABA's contention that Enel had subsidiaries that did business in New York, represented to the court, on the record, that defendants Enel and Enelpower themselves "do no business in New York" and "don't have any property in New York." ABA's counsel, for his part, conceded to the court that he "d[id] not have information" to indicate that defendants Enel and Enelpower (as opposed to certain other subsidiaries of Enel) were doing business in New York. At the close of the hearing, the court permanently vacated the TRO, a determination that is not at issue on this appeal.

By order entered October 22, 2014, Supreme Court denied defendants' motion to dismiss.[4] In so doing, Supreme Court held, as relevant to this appeal, that, under a decision this Court had issued while the motion was pending (*Abu Dhabi Commercial Bank PJSC v Saad Trading, Contr. & Fin. Servs. Co.*, 117 AD3d 609 [1st Dept 2014]), ABA could maintain the article 53 proceeding for recognition and enforcement of the Albanian judgment even if defendants (as they claimed) were not subject to personal jurisdiction in New York and had no property in New York. The court further held that it had subject matter jurisdiction to

[4]It should be noted that the order neither granted nor denied ABA's motion for summary judgment in lieu of complaint, but set a future return date for that motion.

entertain the proceeding under Business Corporation Law § 1314. This appeal by defendants ensued.[5]

Initially, we briefly review CPLR article 53, which, as previously noted, is entitled "Recognition of Foreign Country Money Judgments." The Court of Appeals has explained:

> "New York has traditionally been a generous forum in which to enforce judgments for money damages rendered by foreign courts, and in 1970, New York adopted the Uniform Foreign Money-Judgments Recognition Act [the Uniform Act] as CPLR article 53. Article 53 was designed to codify and clarify existing case law on the subject and, more importantly, to promote the efficient enforcement of New York judgments abroad by assuring foreign jurisdictions that their judgments would receive streamlined enforcement here" (*CIBC Mellon Trust Co. v Mora Hotel Corp.*, 100 NY2d 215, 221 [2003] [citations and footnotes omitted], *cert denied* 540 US 948 [2003]).

Unlike judgments of sister states, to which the Full Faith and Credit Clause of the Constitution applies, judgments of foreign countries are recognized in New York under the doctrine of comity (*see Byblos Bank Europe, S.A. v Sekerbank Turk Anonym Syrketi*, 10 NY3d 243, 247 [2008]), according to the principles and procedures set forth in article 53. While virtually the only ground on which to deny recognition to a sister-state judgment is

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[5]The court also rejected defendants' arguments that they had not been validly served with process under the Hague Convention in this proceeding and that the proceeding should be dismissed on grounds of forum non conveniens. Since defendants do not raise these arguments on appeal, we have no occasion to consider them.

that the rendering court lacked jurisdiction (*see V.L. v E.L.*, __ US __, 136 S Ct 1017, 1020 [2016]; Siegel, NY Prac § 435 at 761-762 [5th ed 2011]; Richard C. Reilly, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5402:2), the grounds for nonrecognition of a foreign country judgment under article 53 are significantly broader, as described below. However, once the absence of grounds for nonrecognition of the foreign country judgment has been established, "the foreign judgment should be enforced in New York under well-settled comity principles without microscopic analysis of the underlying proceeding" (*John Galliano, S.A. v Stallion, Inc.*, 15 NY3d 75, 81 [2010] [internal quotation marks omitted], *cert denied* 562 US 893 [2010]).

Article 53 "applies to any foreign country judgment which is final, conclusive and enforceable where rendered" (CPLR 5302). The term "foreign country judgment" is defined as "any judgment of a foreign state granting or denying recovery of a sum of money" (CPLR 5301[b]), subject to certain exceptions not relevant here. CPLR 5303, the article's operative section, provides:

> "Except as provided in section 5304, a foreign country judgment meeting the requirements of section 5302 is conclusive between the parties to the extent that it grants or denies recovery of a sum of money. Such a foreign judgment is enforceable by an action on the judgment, a motion for summary judgment in lieu of complaint, or in a pending action by counterclaim, cross-claim or affirmative defense."

As noted in CPLR 5303, CPLR 5304 sets forth grounds for denying recognition to a foreign country judgment. As here relevant, CLPR 5304(a) provides that a foreign country judgment "is not conclusive" — meaning that nonrecognition is mandatory — if "the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law" (CPLR 5304[a][1]).[6] In support of their contention that the Albanian courts fell into this category, defendants adduced reports by the United States Departments of State and Commerce noting that corruption and susceptibility to political pressure were serious problems in the Albanian judicial system during the pendency of ABA's lawsuit against defendants.

The next subsection, CPLR 5304(b), sets forth eight grounds on which the court may, in the exercise of its discretion, decline to recognize a foreign country judgment (*see Byblos*, 10 NY3d at 248). As set forth in their appellate brief, defendants have raised three of these discretionary defenses in the ongoing proceedings in Supreme Court:

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[6]Nonrecognition of a foreign country judgment is also mandatory if "the foreign court did not have personal jurisdiction over the defendant" (CPLR 5304[a][2]). However, defendants do not deny that the Albanian court had personal jurisdiction over them.

(1) Based on the arbitration clause of the BEG-Enelpower agreement, defendants claim that "the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court" (CPLR 5304[b][6]);

(2) Based on the Italian courts' rejection of BEG's attempt to have the arbitration award nullified, defendants claim that the Albanian judgment "conflicts with another final and conclusive judgment" (CPLR 5304[b][5]); and

(3) Based on what defendants characterize as the Albanian judgment's "grossly disproportionate damages formula" and its alleged "trampl[ing] [upon] New York's strong policy in favor of arbitration by circumventing a prior arbitration agreement and award," defendants claim that the Albanian judgment is "repugnant to the public policy of this state" (CPLR 5304[b][4]).[7]

In addition to raising the foregoing grounds for nonrecognition under CPLR 5304, defendants claim that the Albanian judgment does not even satisfy the prerequisites for recognition set forth in CPLR 5301, 5302 and 5303. As set forth

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[7]The five remaining discretionary grounds for denying recognition to a foreign country judgment — which apparently are not at issue in this action — are: (1) "the foreign court did not have jurisdiction over the subject matter" (CPLR 5304[b][1]); (2) "the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend" (CPLR 5304[b][2]); (3) "the judgment was obtained by fraud" (CPLR 5304[b][3]); (4) "in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action" (CPLR 5304[b][7]); and (5) the judgment was for defamation, unless the law applied by the foreign court "provided at least as much protection for free speech and press in that case as would be provided by both the United States and New York constitutions" (CPLR 5304[b][8]).

in their appellate brief, defendants have argued that the Albanian judgment does not "grant[] . . . recovery of a sum of money" (CPLR 5301[b], 5302), and therefore is not "conclusive" (CPLR 5303), because the formula it sets forth for calculating the bulk of the damages (for seven of the eight years at issue) uses a variable — the price of energy — that is not clearly defined, leaving its definition to be resolved through future litigation — which appears to be taking place in this proceeding.[8] In fact, defendants argue, the Albanian judgment itself expressly contemplates future proceedings, involving expert evidence, to set the damages for the period 2005-2011, for which it requires ABA to pay a "lawsuit tax" before execution. Because ABA has not paid this tax, and the amount of damages for 2005-2011 has not been calculated by experts, as contemplated by the judgment itself, defendants also argue that the judgment is

[8]The Albanian judgment states only that the price figure to be used in the formula is "the price of electricity sale [sic] according to the market," without specifying which market, at which time, is to supply the figure. The parties advise that, in the proceedings in Supreme Court, the definition of the price of energy to be employed in the damages formula has been one of the issues they have litigated, through the submission of competing expert evidence. While ABA faults defendants for opening the battle of the experts on this issue, ABA does not point to any provision of the Albanian judgment defining the price figure to be used for a given year in terms of an objective referent that would preclude future disputes.

not "enforceable where rendered," as required by CPLR 5302.[9]

Having reviewed article 53 and defendants' substantive objections to recognition of the Albanian judgment thereunder, we now turn to the question of whether this proceeding seeking such recognition requires an in personam or in rem jurisdictional predicate. In this regard, defendants continue to argue on appeal that the United States Supreme Court's 2014 *Daimler* decision requires the dismissal of this article 53 proceeding on the ground that, under *Daimler*, they are not subject to general personal jurisdiction in New York. In *Daimler*, defendants point out, the Supreme Court significantly narrowed the grounds on which a court may, consistent with the requirements of the Due Process Clause (US Const, 14th Amend, § 1), exercise "general or all-purpose jurisdiction" (*id.* at 751) over a defendant, meaning the power "to hear any and all claims against [it]" (*id.* [internal quotation marks omitted]), including claims having no connection to the forum.[10] The *Daimler* Court held that a

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[9]We note, however, that the Albanian judgment does grant recovery of damages for 2004 in a sum certain (€25,188,500) and states that the "lawsuit tax" has been paid with respect to that portion of the recovery.

[10]By contrast, the other category of personal jurisdiction, known as "specific jurisdiction," exists where "the suit arises out of or relates to the defendant's contacts with the forum" (*Daimler*, 134 S Ct at 755 [internal quotation marks and brackets omitted]). In this case, there is no contention that ABA's

corporation is subject to general jurisdiction only in a state where its "affiliations . . . are so continuous and systematic as to render it essentially at home [there]" (*id.* at 761 [internal quotation marks and brackets omitted]), meaning the state "where [the corporation] is incorporated or has its principal place of business" (*id.* at 760).

As entities incorporated under Italian law and having their principal places of business in Italy, defendants plainly are not subject to general jurisdiction in New York under the *Daimler* standard. It is also undisputed that the claim on which the Albanian judgment is based has no connection to New York. From these premises, defendants draw the conclusion that New York lacks jurisdiction to entertain this proceeding seeking the recognition and enforcement of the Albanian judgment under article 53. For the reasons explained below, we do not agree with defendants' contention that *Daimler* compels this conclusion.

At issue in *Daimler* was the existence of personal jurisdiction for purposes of adjudicating, in a plenary action, an unliquidated claim against the corporate defendant in the first instance. The question of the constitutional requirements for jurisdiction to entertain a proceeding to recognize and

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Albanian judgment is based on a claim that arises out of or relates to any New York contacts defendants might have.

enforce an already existing foreign judgment was not before the Supreme Court in *Daimler* and was neither discussed nor alluded to in the Court's opinion (*see* Linda J. Silberman and Aaron D. Simowitz, *Recognition and Enforcement of Foreign Judgments and Awards: What Hath Daimler Wrought?*, 91 NYU L Rev 344, 347 [2016] [hereinafter, Silberman & Simowitz] [noting that *Daimler* and the precedent upon which it chiefly relied, *Goodyear Dunlop Tires Operations, S.A. v Brown* (564 US 915 [2011]), "said nothing about jurisdiction in the very different context of recognition and enforcement"]).

We do not believe that *Daimler*'s restriction of general jurisdiction to states where a corporate defendant is "at home" should be extended to proceedings to recognize or enforce foreign judgments. In *Shaffer v Heitner* (433 US 186 [1977]), the United States Supreme Court held that, for purposes of initially adjudicating a claim on its merits, quasi in rem jurisdiction — that is, jurisdiction based solely on the presence of the defendant's property in the forum state (*see Koehler v Bank of Bermuda Ltd.*, 12 NY3d 533, 538 [2009]; *see also Hanson v Denckla*, 357 US 235, 246 n 12 [1958]; Restatement [Second] of Judgments § 32 [1982]) — may be exercised constitutionally only where "that property is . . . the subject matter of th[e] litigation, [or] . . . the underlying cause of action [is] related to the property"

(433 US at 213), so as to conform to "the standard of fairness and substantial justice" (*id.* at 206) established by *International Shoe Co. v Washington* (326 US 310, 316 [1945] [for a defendant to be subject to jurisdiction in the forum, due process requires that "he have certain minimum contacts with (the forum) so that the maintenance of the suit does not offend traditional notions of fair play and substantial justice"] [internal quotation marks omitted]). At the same time it announced this restriction of quasi in rem jurisdiction for purposes of hearing a plenary action, the Supreme Court stated in *Shaffer* that the presence of a judgment debtor's assets in the forum remained a jurisdictional basis for proceedings to enforce a previously rendered foreign judgment, even if the forum state and the defendant's property therein had no connection to the claim underlying the judgment:

> "Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter" (433 US at 210 n 36).[11]

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[11] *See also Koehler*, 12 NY3d at 544 (*Shaffer*'s footnote 36 "makes clear that the traditional in rem approach of . . . [judgment enforcement] proceedings — permitting judgments to be enforced against property wherever it may be located — is constitutionally acceptable") (Smith, J., dissenting);

Shaffer's continuation of property-based jurisdiction to enforce a foreign judgment is supported by the consideration — particularly weighty in cases of judgment debtors domiciled in foreign countries, where courts may not always be inclined to enforce judgments against local domiciliaries — that "a wrongdoer 'should not be able to avoid payment of his obligations by the expedient of removing his assets to a place where he is not subject to an in personam suit'" (*Shaffer*, 433 US at 210, quoting Restatement [Second] of Conflict of Laws § 66, Comment *a* [1971]; *see also* Silberman & Simowitz, 91 NYU L Rev at 379 ["The Restatement observes that, without postjudgment asset jurisdiction, a debtor could easily render itself judgment-proof simply by removing its assets to a place where it was not subject to personal jurisdiction"]). In view of the need to foreclose avenues by which duly rendered judgments might be defeated, *Shaffer* recognized that it is not "unfair[]" to allow execution on a judgment in any state where the defendant's property is found — provided that the defendant was afforded notice and a fair opportunity to mount a defense upon the original

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Restatement (Third) of Foreign Relations Law § 481, Comment *h* (1987) ("an action to enforce a judgment may usually be brought wherever property of the defendant is found, without any necessary connection between the underlying action and the property, or between the defendant and the forum").

adjudication of the underlying claim "by a court of competent jurisdiction" (433 US at 210 n 36; *see also* Restatement [Third] of Foreign Relations Law § 481, Comment *h* ["The rationale behind wider jurisdiction in enforcement of judgments is that once a judgment has been rendered in a forum having jurisdiction, the prevailing party is entitled to have it satisfied out of the judgment debtor's assets wherever they may be located"]).[12]

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[12]On this appeal, the parties present what are, in our view, competing misinterpretations of *Shaffer*'s footnote 36. ABA asserts that, under *Shaffer*, a court without personal jurisdiction of the defendant may recognize and enforce a foreign judgment, even if the defendant does not own any property in the forum, because "the Supreme Court expressly stated that no jurisdiction was necessary at all." We find no such express statement in the *Shaffer* footnote, which merely approves enforcement of a foreign judgment "in a State where the defendant has property" (433 US at 210 n 36) and opines that, in such a situation, there would be no need for "jurisdiction to determine the existence of the debt as an original matter" (*id.*; *see Frontera Resources Azerbaijan Corp. v State Oil Co. of the Azerbaijan Republic*, 582 F3d 393, 398 [2d Cir 2009] [the *Shaffer* footnote "assumed that such a court would still have jurisdiction over the respondent's property," even if it lacked personal jurisdiction]; Restatement [Fourth] of Foreign Relations Law: Jurisdiction [Tent Draft No. 1] § 402, Reporter's Note 3 ["The better reading is that *Shaffer*'s exception is limited to actions to enforce a judgment where the defendant has property in the enforcing jurisdiction"]). Defendants, on the other hand, read *Shaffer*'s approval of judgment enforcement in any state "where the defendant has property" (433 US at 210 n 36) as limited to enforcement of sister-state judgments entitled to full faith and credit. We disagree. Although, as defendants point out, the *Shaffer* footnote immediately follows the statement that "[t]he Full Faith and Credit Clause . . . makes the valid in personam judgment of one State enforceable in all other States" (*id.* at 210), that statement was part of *Shaffer*'s explanation of why quasi in rem jurisdiction to adjudicate claims unrelated to the

The *Daimler* majority opinion cites *Shaffer* with approval four times and says nothing to cast doubt on the continuing vitality of the statement in *Shaffer*'s footnote 36 preserving asset-based jurisdiction for proceedings to enforce foreign judgments. Therefore, given that *Daimler* addressed the constitutional requirements for personal jurisdiction to adjudicate a claim on its merits in the first instance, we do not read *Daimler*'s contraction of general jurisdiction to entertain plenary actions to apply to proceedings, such as the present one under CPLR article 53, to recognize and enforce previously

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defendant's property in the state, as it had existed up to that time, was not necessary to prevent "a debtor [from] avoid[ing] paying his obligations by removing his property to a State . . . [without] personal jurisdiction over him" (*id.*). While a foreign country judgment is, of course, subject to greater scrutiny in an action for enforcement and recognition than is a judgment of one state of the Union being enforced in another (*compare* CPLR article 53 *with* CPLR article 54), we believe that *Shaffer*'s statement that there is "no unfairness" in allowing an action for recognition and enforcement "where the defendant has property" (433 US at 210 n 36) holds true for a judgment of either kind. Moreover, we agree with the view that the practical rationale recognized by *Shaffer* for allowing property-based jurisdiction for judgment enforcement — preventing a judgment debtor from avoiding the judgment "by the expedient of removing his assets to a place where he is not subject to an in personam suit" (*id.* at 210, quoting Restatement [Second] of Conflict of Law § 66, Comment *a*) — "should apply with equal force to foreign country awards and judgments" (International Commercial Disputes Committee of the Association of the Bar of the City of New York, *Lack of Jurisdiction and Forum Non Conveniens as Defenses to the Enforcement of Foreign Arbitral Awards*, 15 Am Rev Intl Arb 407, 418 [2006] [hereinafter, City Bar Opinion]).

rendered foreign judgments (*see* Silberman & Simowitz, 91 NYU L Rev at 362 [noting that *Shaffer*'s recognition of a "dichotomy" between the jurisdictional standards for plenary actions and those for recognition/enforcement actions "suggests that restrictions on general jurisdiction set forth in *Goodyear* and *Daimler* should not necessarily apply in the recognition and enforcement context"]; *but see Sonera Holding B.V. v Cukurova Holding A.S.*, 750 F3d 221 [2d Cir 2014] [applying the *Daimler* general jurisdiction standard to an action for recognition of a foreign arbitral award], *cert denied* __ US __, 134 S Ct 2888 [2014]).[13]

Our conclusion that *Daimler* is not controlling, however, still leaves open the question of whether this proceeding may be maintained under the jurisdictional principles governing article 53 proceedings. As previously noted, in denying the motion to dismiss, Supreme Court was persuaded by ABA's argument that this Court's 2014 *Abu Dhabi* decision established that no jurisdictional predicate, whether in personam or in rem, is ever

[13]*Sonera* has been criticized for imposing a "standard . . . [that] will prevent recognition and enforcement of awards and judgments that would have been previously recognized in the United States, potentially undermining the effectiveness of cross-border recognition and enforcement on which transnational businesses, among others, rely" (Silberman & Simowitz, 91 NYU L Rev at 349-350).

required for any proceeding seeking recognition and enforcement of a foreign country judgment under article 53. In our view, *Abu Dhabi* should not be read so broadly.

In *Abu Dhabi*, the plaintiff, a bank domiciled in the United Arab Emirates, sought to enforce a judgment of the English High Court of Justice against the defendant, a limited partnership domiciled in Saudi Arabia, under article 53. In opposing the plaintiff's motion for summary judgment in lieu of complaint, the defendant argued for dismissal of the action on the ground that the New York court lacked jurisdiction over the defendant or its property or, alternatively, on the ground that New York was an inconvenient forum. Critically, the *Abu Dhabi* defendant — unlike defendants here — did not raise *any* of the previously described statutory grounds for nonrecognition of a foreign country judgment set forth in CPLR 5304. As reflected in the record of *Abu Dhabi*, neither did the defendant in that case argue — as the instant defendants argue here — that the foreign judgment at issue failed to meet any of the prerequisites to enforcement under article 53, such as being "final, conclusive and enforceable where rendered" (CPLR 5302) or "granting or denying recovery of a sum of money" (CPLR 5301; *see also* CPLR 5303). It was in this particular context, where the defendant opposing recognition of the foreign judgment did not assert any of the

statutory defenses to such recognition, that the *Abu Dhabi* court concluded that the foreign judgment could be recognized even if the defendant were not subject to personal jurisdiction in New York and had no assets in the state:

> "In the present action, defendant has actual notice of the enforcement action and *does not argue that the English judgment fails to meet the requirements of CPLR 5303 or that any grounds for nonrecognition of a foreign country money judgment exist*. Nor does defendant provide a reason why the judgment should not be recognized as a matter of substance. *Under these circumstances*, a party seeking recognition in New York of a foreign money judgment . . . need not establish a basis for the exercise of personal jurisdiction over the judgment debtor by the New York courts" (117 AD3d at 611 [emphasis added and internal quotation marks omitted]).[14]

The *Abu Dhabi* holding applies only "under the[] circumstances" (*id.*) that were presented by that case, namely, where the defendant — unlike defendants in the case before us — does *not* contend that substantive grounds exist to deny recognition to the foreign judgment under article 53. The underlying premise of *Abu Dhabi*'s holding that Supreme Court in that case had properly entered judgment under article 53, even if jurisdiction over the defendant's person or property had been lacking, was that the court had been merely "performing [a]

[14]The *Abu Dhabi* court further concluded that the enforcement action could be maintained in New York even if the defendant maintained no property here (*id.* at 612).

ministerial function" (*id.* at 613) in according recognition to a foreign judgment of unquestioned finality, conclusiveness and validity under the standards of article 53. Thus, in *Abu Dhabi*, entertaining the recognition and enforcement proceeding in New York imposed "no hardship" on the defendant, since "there [was] nothing to defend" (*id.*), given that the defendant was not raising any substantive defenses to the recognition of the English judgment.[15]

Abu Dhabi, by its own terms, is not controlling where — as is the case here — the foreign judgment's entitlement to recognition under article 53 is placed in question. In that situation, there is something to defend, and the court's function ceases to be merely ministerial. In such a case — and the matter before us is such a case — the court will be required to determine contested questions of fact, of law, or of both, and,

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[15]The precedent on which *Abu Dhabi* principally relied is similarly distinguishable from the instant case. In affirming a judgment recognizing an Ontario money judgment in *Lenchyshyn v Pelko Elec.* (281 AD2d 42 [4th Dept 2001]), the Fourth Department stated that "the judgment debtor need not be subject to personal jurisdiction in New York" in an Article 53 proceeding (*id.* at 43), and stated further that the proceeding could be maintained in the state "even if defendants do not presently have assets in New York" (*id.* at 50). However, the *Lenchyshyn* decision expressly notes that the defendants therein had not raised any of the grounds for nonrecognition of a foreign country judgment provided in CPLR 5304 (*id.* at 46-47) and that "plaintiffs sufficiently allege that defendants have assets in New York," including bank accounts in Buffalo (*id.* at 50).

if nonmandatory grounds for nonrecognition of a judgment are raised, to exercise judicial discretion (*see Byblos*, 10 NY3d at 248 ["CPLR 5304(b) contains the discretionary grounds for refusing foreign court judgment recognition"]).[16] To require a defendant to litigate such substantive issues in a forum where it maintains no property, and where it has no contacts that would otherwise subject it to personal jurisdiction, would "offend [the] traditional notions of fair play and substantial justice" (*International Shoe*, 326 US at 316 [internal quotation marks omitted]) at the heart of the Due Process Clause. As the previously cited law review article explains:

> "A judgment debtor has a number of defenses available to challenge the original judgment [under the Uniform Act, enacted in New York as Article 53] and should not be forced to raise those defenses in any forum in which the judgment creditor might choose to bring a recognition/enforcement action. The debtor should only

[16]Given that CPLR 5304 contemplates that a court hearing an article 53 proceeding may be called upon to adjudicate disputed questions of law and fact and to exercise judicial discretion (as expressly recognized in *Byblos*, 10 NY3d at 248), the references in two Court of Appeals decisions to the court's "ministerial function" in such a proceeding (*Galliano*, 15 NY3d at 81 [internal quotation marks omitted]; *CIBC*, 100 NY2d at 222 [internal quotation marks omitted]) cannot be read to mean that the court's *only* function in such a proceeding is ministerial. Rather, the court's function under article 53 becomes ministerial once it is established that there are no grounds for declining to recognize the foreign judgment, either because such grounds are found lacking after being raised by the defendant (as occurred in both *John Galliano* and *CIBC*) or because the defendant does not raise any such grounds (as occurred in *Abu Dhabi* and *Lenchyshyn*).

be required to respond to an action for recognition or enforcement in a court where the debtor's property has some connection to the forum and it is fair to require him to respond there" (Silberman & Simowitz, 91 NYU L Rev at 354).[17]

To go beyond *Abu Dhabi* and hold, as ABA urges, that no jurisdictional nexus is ever required for a proceeding under

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[17]In criticizing a decision in which the Canadian Supreme Court held that no jurisdictional nexus between the defendant and the forum was required for recognition and enforcement of a foreign judgment (*Chevron Corp. v Yaiguaje*, [2015] 3 S.C.R. 69 [Can.]), the same article observes: "It is hardly accurate to say that 'no unfairness' could result from demanding that a judgment debtor with no connection of any kind to Ontario be haled from across the world into a court there and forced to assert its defenses there — or lose its ability to contest the conversion of a foreign judgment into a Canadian judgment. That the judgment debtor has no connection to the enforcing forum does not mean that the debtor has no reason to be troubled by the existence of an outstanding judgment rendered in that forum. If the judgment debtor chooses not to defend a recognition action where it has no assets, the existence of an outstanding judgment may have reverberations during the life of the judgment. [¶] The effect of a rule that permits recognition without a jurisdictional nexus is likely to encourage creditors to shop for the forum that offers the most lax standards for judgment recognition. The problem is compounded if other nations will grant recognition to such a judgment, or if other states within a federal system view the judgment as itself entitled to enforcement without defenses, as under the Full Faith and Credit Clause of the U.S. Constitution" (Silberman & Simowitz, 91 NYU L Rev at 355-356 [footnote omitted]). We note that there is conflicting authority from other states on the question of whether a New York judgment entered under article 53 without a jurisdictional nexus to New York is entitled to full faith and credit (*compare Ahmad Hamad Al Gosaibi & Bros. Co. v Standard Chartered Bank*, 98 A3d 998 [DC App 2014] [answering the question in the negative], *with Standard Chartered Bank v Ahmad Hamad Al Gosaibi & Bros. Co.*, 99 A3d 936 [Pa Super 2014] [answering the question in the affirmative], *appeal denied* 108 A3d 36 [Pa 2015]).

article 53, even if the defendant asserts substantive defenses to recognition of the foreign judgment, would be a substantial departure from the prior general understanding of the law. For example, the Restatement (Third) of Foreign Relations Law takes the position that the creditor on a foreign country judgment "must establish a basis for the exercise of jurisdiction by the enforcing court over the judgment debtor or his property" (§ 481, Comment *g*). Similarly, the previously cited bar association opinion expressed the view that, under the Due Process Clause, "actions for the recognition and enforcement of foreign judgments under the Uniform [Act] require a basis for the exercise of jurisdiction" (City Bar Opinion, 15 Am Rev Intl Arb at 409).[18] In the analogous context of suits for confirmation of foreign arbitral awards, the Second and Ninth Circuits held, even before *Daimler*, that due process required the court to have jurisdiction over the person or the property of the defendant (*see Frontera*,

[18]The same bar association opinion "disagree[d]" with *Lenchyshyn*, which it construed as holding that "an action for recognition [under article 53] may not be dismissed based on lack of jurisdiction of the court where recognition is sought" (15 Am Rev Intl Arb at 410 n 12). The previously cited law review article, based on its interpretation of *Abu Dhabi* and *Lenchyshyn* as "dispens[ing] with any jurisdictional requirement with respect to an action to enforce a foreign judgment," also characterized those cases as "a marked departure from the generally accepted approach that some jurisdictional basis was necessary to enforce . . . a foreign judgment" (Silberman & Simowitz, 91 NYU L Rev at 348 [emphasis omitted]).

582 F3d at 398; *Glencore Grain Rotterdam B.V. v Shivnath Rai Harnarain Co.*, 284 F3d 1114, 1118, 1122 [9th Cir 2002]).

The views of the foregoing authorities are consonant with the Court of Appeals' statement that it is a "basic principle that a court must have jurisdiction in rem or in personam in order to enter a valid judgment of any kind" (*Gager v White*, 53 NY2d 475, 487 [1981] [internal quotation marks and brackets omitted], *cert denied* 454 US 1086 [1981]). That principle has particular salience where, as here, those being haled into an American court are foreign nationals. As the United States Supreme Court has observed, "The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders" (*Asahi Metal Indus. Co. v Superior Ct. of Cal., Solano County*, 480 US 102, 114 [1987]).

In light of the foregoing considerations, and given that "[a] judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere" (*World-Wide Volkswagen Corp. v Woodson*, 444 US 286, 291 [1980]), we decline to extend the holding of *Abu Dhabi* beyond

the particular circumstances under which that case was decided.[19] Moreover, we do not believe that such an extension of *Abu Dhabi*'s holding would be consistent with the decision itself, which expressly qualified its holding by stating that it applied "[u]nder these circumstances," referring to the absence of any "argu[ment] that the English judgment fails to meet the requirements of CPLR 5303 or that any grounds for nonrecognition of a foreign country money judgment exist" (117 AD3d at 611).

In this case, to reiterate, the circumstances under which *Abu Dhabi* was decided are plainly absent. Unlike the defendant in *Abu Dhabi*, the present defendants, as previously discussed, have attacked the Albanian judgment as failing to meet the prerequisites for recognition under article 53 of being for the "recovery of a sum of money" (CPLR 5301, 5303) and of being

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[19]Because we believe that the Constitution requires, as a matter of due process, a jurisdictional nexus with New York as a prerequisite to maintenance in this state of an article 53 proceeding to recognize and enforce a foreign country judgment of contested validity, it is of no moment that article 53 does not expressly provide that lack of such a jurisdictional nexus constitutes a defense in such a proceeding. In the analogous context of a suit to confirm a foreign arbitral award under the applicable international convention, the Ninth Circuit observed that it was "not significant in the least that the legislation implementing the Convention lacks language requiring personal jurisdiction over the litigants" (*Glencore*, 284 F3d at 1121) because "due process requires that the district court have jurisdiction over the defendant against whom enforcement is sought or his property" (*id.* at 1122; *accord Frontera*, 582 F3d at 397-398).

"enforceable where rendered" (CPLR 5302); as subject to one of the article's mandatory defenses to recognition (CPLR 5304[a][1]); and as subject to three of the article's discretionary defenses to recognition (CPLR 5304[b][4], [5], [6]). Moreover, while it would be inappropriate at this juncture to express a view as to whether any of these objections to recognition of the Albanian judgment are likely ultimately to prevail, it cannot be said, on this record, that all of them have been asserted frivolously.[20] Accordingly, to maintain this

[20]At a minimum, on the undeveloped factual record before us, defendants appear to have raised nonfrivolous objections to the Albanian judgment, warranting exploration through further proceedings, under CPLR 5304(a)(1) and 5304(b)(5) and (6). The objection under CPLR 5304(a)(1) is substantiated by the submitted State and Commerce Department reports describing the Albanian courts as subject to corruption and political pressure, although of course such conclusory statements would not ultimately suffice, standing alone, to deny the judgment recognition. The objection that the Albanian judgment "conflicts with another final and conclusive judgment" (CPLR 5304[b][5]) is supported, on its face, by the Italian judgment upholding the arbitration award dismissing BEG's claim, although ABA would be entitled to develop its contention that, in fact, the Italian and Albanian judgments are not in conflict because each involved different parties and different claims. Similarly, the arbitration clause of the BEG-Enelpower agreement appears, on its face, to support defendants' objection that the Albanian proceeding "was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court" (CPLR 5304[b][6]), although, again, ABA would be entitled to develop its claim that, under applicable law, the agreement did not bind it or did not cover its claim. In view of the foregoing, we need not consider whether defendants' remaining objections to recognition of the Albanian judgment are colorable. Nor need we consider defendant's further argument that, apart

proceeding in New York, "[s]ome basis must be shown, whether arising from [defendants'] residence, [their] conduct, [their] consent, the location of [their] property or otherwise, to justify [their] being subject to the court's power" (*Frontera*, 582 F3d at 397 [internal quotation marks omitted]).

On this appeal, however, ABA does not claim that the existing record establishes an in personam or in rem jurisdictional predicate for this proceeding. Neither does ABA request, in case we are not persuaded by its argument that such a jurisdictional nexus is unnecessary, an opportunity to conduct jurisdictional discovery to demonstrate such a nexus. ABA has staked all on its position (which we have rejected) that *Abu Dhabi* is controlling and obviates the need for it to demonstrate that New York has jurisdiction over defendants or their property. Indeed, although its appellate brief points out that Enel has nonparty subsidiaries that operate in New York, and that Enel (directly or through subsidiaries) has obtained financing through the New York capital markets, ABA specifically disclaims any reliance on these facts, stating that such matters are "irrelevant to the legal question on appeal of whether personal

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from the grounds for nonrecognition they assert, the proceeding seeks "new relief" (*Galliano*, 15 NY3d at 81 [internal quotation marks omitted]) that cannot be granted without jurisdiction over defendants or their property.

jurisdiction over a judgment-debtor in New York is required in an Article 53 recognition action."[21] Moreover, the record does not identify any property of either Enel or Enelpower located within New York that could provide an in rem basis for maintaining this proceeding here, and — again — on appeal, ABA does not request jurisdictional discovery to locate any such assets.[22] Accordingly, because ABA does not claim to have demonstrated an in personam or in rem jurisdictional predicate for maintaining this proceeding in New York, and does not ask us for an opportunity to conduct discovery in aid of making such a demonstration, we conclude that defendants' motion to dismiss should be granted.

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[21]With regard to Enel's subsidiaries that do business in New York, ABA makes no claim to have demonstrated that these subsidiaries are either alter egos of Enel, so as to warrant piercing the corporate veil, or that the subsidiaries act as agents of Enel in New York, so as to warrant imputing their conduct in New York to Enel. Nor, to reiterate, does ABA seek on this appeal an opportunity to conduct jurisdictional discovery in the hope of making such a demonstration.

[22]We note that, after the order appealed from was issued in October 2014, nonjurisdictional discovery went forward in Supreme Court for the purpose, among others, of locating assets of defendants in New York against which a judgment could be enforced. ABA's appellate brief, which is dated October 11, 2016, does not claim that any such property was uncovered in the intervening two years. In this regard, we note that, while defendants vigorously opposed the TRO against asset transfer that Supreme Court issued at the outset of this proceeding, the TRO encompassed any assets of Enel's subsidiaries within New York.

Finally, because we are granting the motion to dismiss based on New York's lack of jurisdiction over defendants or their property, we need not address defendants' argument that subject matter jurisdiction was also lacking under Business Corporation Law § 1314.

Accordingly, the order of Supreme Court, New York County (Paul Wooten, J.), entered October 22, 2014, which, insofar as appealed from, denied defendants' motion to dismiss plaintiff's motion for summary judgment in lieu of complaint for recognition and enforcement of a foreign country judgment pursuant to CPLR article 53, should be reversed, on the law, without costs, and the motion to dismiss granted. The Clerk is directed to enter judgment accordingly.

All concur.

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

ENTERED: FEBRUARY 8, 2018

CLERK