SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 7, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Richter, Webber, Gesmer, Moulton, JJ.

6347 The People of the State of New York, Respondent, Ind. 4460/11

-against-

Travis Breckenridge,
Defendant-Appellant.

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Christina Swarns, Office of the Appellate Defender, New York (Katherine M.A. Pecore of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Megan DeMarco of counsel), respondent.

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Judgment, Supreme Court, New York County (Michael J. Obus, J. at CPL article 730 hearings; Laura A. Ward, J. at jury trial and sentencing), rendered September 3, 2014, convicting defendant of assault in the first degree and criminal possession of a weapon in the second degree (two counts), and sentencing him to concurrent terms of 15, 10, and 10 years, respectively, modified, as a matter of discretion in the interest of justice, to the extent of vacating the assault conviction and remanding for a new trial on that count, and otherwise affirmed.

As in cases such as *People v Velez* (131 AD3d 129 [1st Dept

2015]), the court's jury charge failed to convey that an acquittal on the top count of attempted second-degree murder based on a finding of justification would preclude consideration of the count of first-degree assault. We find that this error warrants reversal of the assault conviction in the interest of justice, and we reject our dissenting colleague's contention that the error was harmless. In *Velez*, we held that, "[b]ecause there is no way of knowing whether the acquittal of the top count of attempted murder in the second degree was based on a finding of justification by the jury, the two counts of the indictment that resulted in conviction must be reversed" (*Velez*, 131 AD3d at 134).

Our dissenting colleague takes the position that the jury's acquittal on the top count of attempted murder in the second degree could not possibly have been based on justification. We disagree. Given the testimony of an eyewitness that the victim was running toward defendant holding a knife when defendant fired the weapon, a jury may well have concluded that defendant's conduct was justified. Thus, it cannot be said that there was "overwhelming evidence disproving the justification defense and no reasonable possibility that the verdict would have been different had the charge been correctly given" (*People v Petty*, 7 NY3d 277, 286 [2006]).

"While the jury may have acquitted on the top charge without relying on defendant's justification defense . . . it is nevertheless impossible to discern whether acquittal of the top count . . . was based on the jurors' finding of justification so as to mandate acquittal on the two lesser counts" (*People v Rodriguez*, 143 AD3d 497, 498 [1st Dept 2016] [internal quotation marks omitted], *lv dismissed* 28 NY3d 1150 [2017]; *People v Rowley*, 138 AD3d 577, 578 [1st Dept 2016], *lv denied* 27 NY3d 1138 [2016]; *see also People v Colasuonno*, 135 AD3d 419, 419-420 [1st Dept 2016]).

The court properly found defendant fit to proceed to trial following CPL article 730 examinations. Psychiatric reports and defendant's own statements in court showed that he "evinced an understanding of the purpose of a trial, the actors in a trial, their roles, the nature of the charges against him, and the severity of a potential conviction and sentence" (*People v Phillips*, 16 NY3d 510, 518 [2011]). The court reasonably credited experts who found that defendant's psychiatric symptoms had been alleviated by compliance with his medication regimen, thus rendering his past history an unreliable indicator of his present competency. Defendant's "questionable decisions" as to trial strategy (*People v Snyder*, 29 AD3d 310, 310 [1st Dept 2006], *lv denied* 7 NY3d 818 [2006]), such as presenting

inconsistent defenses and denying any participation in the shooting despite the strong evidence of his guilt, did not establish that he was suffering from delusions preventing him from having a "factual understanding of the proceedings against him" (*People v Mendez*, 1 NY3d 15, 19 [2003] [internal quotation marks omitted]) or from cooperating with his attorney. "Moreover, the [hearing] court had the opportunity to observe defendant's behavior and to evaluate the testimony of the psychiatrists in that context" (*id.* at 20).

We perceive no basis for reducing the sentences imposed on the remaining counts.

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

WEBBER, J. (dissenting in part)

While I concur that we are bound by this Court's prior rulings in *People v Velez* (131 AD3d 129 [1st Dept 2015]), and its progeny, I disagree that such adherence mandates remand for a new trial on the charge of assault in the first degree. Accordingly, I would affirm the conviction in all respects.

Lonnie Payne testified that on September 5, 2011 at approximately 11:45 a.m., he was walking east on West 127th Street, between Seventh and Eighth Avenues, in New York County, toward his apartment. While he was about halfway between Seventh and Eighth Avenues, he saw two men "pop[]out" from between two parked cars, about 25 feet ahead of him. One of those men wore glasses and dark clothing, and held a black coat over his left arm. Payne recognized him as defendant, having bought loose cigarettes from defendant at a nearby street corner. The two men faced each other and seemed to be "wrestling" or "slap-fighting." Less than one minute after the men emerged, Payne heard three to five "bangs" or "pops," then saw feathers flying out of the coat being held by defendant, who quickly walked away, toward Eighth Avenue. Payne approached the other man, whom he did not know, and who was later identified as Leo O'Brien, and saw that he was bleeding profusely from his abdomen. O'Brien briefly walked but collapsed near the corner of West 127th Street and Seventh

Avenue. Payne testified that he remained with O'Brien throughout, and after calling 911 stayed until the police and the ambulance arrived. According to Payne, he did not see a knife, broken bottle or sharp object in O'Brien's hand or on his person before or after the shooting. O'Brien sustained two gunshot wounds to his abdomen and one to his left arm.

Detective Joseph Carinha testified that on September 5, 2011, after having been assigned the shooting, he and Detective Antonio Rivera went to defendant's apartment located at 277 West 127th Street, apartment 2G. Detective Donna Torres and Officer Diana Rodriguez went to the side of the building corresponding to the "G" units. As Detective Carinha knocked on the door to apartment 2G and announced that he was a police officer, Detective Torres and P.O. Rodriguez observed a hand open the bathroom window on the second floor and drop a black bag onto the grass-covered ground. Defendant exited the apartment approximately five minutes after Detective Carinha knocked and was arrested at the scene. The police found no one else in the apartment. Detective Torres identified defendant's apartment as the one from which the bag was thrown. Police Officer Elmer Lopez retrieved a loaded semiautomatic 9 millimeter pistol from the bag. There were two rounds in the magazine and one in the chamber. While there were no discernable fingerprints found on

the gun, defendant's DNA was found on it.

Testimony was elicited that pursuant to a search warrant of defendant's apartment, a black down jacket that was torn in multiple places and covered in feathers was recovered. Cartridge cases were found at the scene; however, no weapons, including a knife, were found. The cartridge cases were determined to have been ejected from the 9 millimeter pistol found in the bag tossed from defendant's apartment window.

Finally, the People introduced surveillance video which showed defendant wearing a white T-shirt, white shorts, and sneakers, entering the location of 277 West 127th Street at 11:40 a.m. Four minutes later, defendant is seen exiting, wearing glasses, a dark hoodie, jeans, and boots; the front pocket of his sweatshirt appears weighted down. Then, at 11:49 a.m., the video shows defendant entering his apartment building while holding a puffy black coat.

Defendant testified that he did not sell cigarettes and that he did not know either Leo O'Brien or Lonnie Payne. He stated that he may have seen O'Brien around but did not know him or know his name. He stated that on September 5, 2011, he might have left his apartment "a couple of times" to go to a store for soda and cigarettes, but did not fight with anyone or have a gun that day. He testified that he retrieved his jacket that day, but did

not remember from whom he retrieved it. He also did not know why the jacket was torn, but believed he might have torn it himself.

According to defendant, on the date of the incident he lived alone and on that date, when the police arrived at his apartment, there was no one in the apartment other than himself. Defendant admitted that he was the person shown on the surveillance video footage.

Adrian Knowles testified that on the morning of September 5, 2011, she was sitting on a bench outside her apartment building, located near defendant's building, talking to a woman who was gardening. According to Knowles, she saw defendant walking toward Eighth Avenue while wearing a coat with a torn sleeve. Knowles said "hello" to defendant, who merely kept walking. About two to five minutes after seeing defendant walk by, Knowles testified, she saw O'Brien running behind defendant while carrying a knife. According to Knowles, O'Brien had the knife by his head with his hand extended outward. Knowles demonstrated this for the jury. Upon seeing O'Brien with the knife, Knowles called out defendant's name to warn him. Defendant turned around, and Knowles then heard three gunshots.

According to Knowles, she saw defendant continue walking while O'Brien stayed where he was. Knowles went into her building and called defendant's family but did not call the

police. Knowles testified that she and the woman gardening were the only other people on the street at the time of the incident. Knowles acknowledged that she had known defendant for 12 years and had been in an intimate relationship with him which ended in 2008. She also testified that she had known O'Brien, whom she knew as "O," for about one year before he was shot. Defendant testified that he did not remember whether he saw Knowles that day. He described their relationship as "hi and bye."

It was the People's theory that defendant and O'Brien had earlier engaged in an altercation wherein O'Brien cut or tore defendant's jacket and that defendant then went to his apartment, retrieved a gun, returned to the street and shot O'Brien three times.

The court submitted to the jury the charges of attempted murder in the second degree, assault in the first degree, and two counts of criminal possession of a weapon in the second degree. Defendant was acquitted of attempted murder in the second degree, but convicted of assault in the first degree and two counts of criminal possession of a weapon in the second degree.

The court instructed the jury, in pertinent part, as follows:

> "Now, with respect to Counts 1 and 2 which are the Attempt to Commit the Crime of Murder in the Second Degree and Assault in the Second Degree, the defendant has raised the

defense of justification also known as self-defense. The defendant, however, is not required to prove that he was justified. The People are required to prove beyond a reasonable doubt that the defendant was not justified.
. . .

"Under our law, a person may use deadly physical force upon another individual when and to the extent that he reasonably believes it to be necessary to defend himself from what he reasonably believes to be the use or imminent use of deadly physical force.

"Some of the terms used in the definition have their own special meaning. So I will now define 'deadly physical force,' and 'reasonably believes.'

"Deadly physical force means physical force which under the circumstances in which it's used is repeatedly capable of causing death or other serious physical force.

"Serious physical force means impairment of a person's physical condition which creates a substantial risk of death or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or function of any bodily organ.

"The determination of whether a defendant reasonably believed deadly physical force to be necessary to defend himself from what he reasonably believes to be the use or imminent use of deadly physical force by another individual requires the application of a two-part test.

"First, the defendant must have actually believed that Leo O'Brien was using or was about to introduce deadly physical force against him and that the defendant's own use of deadly physical force was necessary to defend himself.

"Second, a reasonable person in the defendant's position knowing what the defendant knew and being in the same circumstances would have the same beliefs.
. . .

"The defendant would not be justified if he was the initial aggressor of deadly physical force, except that the defendant's use of deadly physical force would,

nevertheless, be justified if he had withdrawn from the encounter and effectively communicated such withdrawal to Leo O'Brien, but Leo O'Brien persisted in continuing the incident by use or threatened use of imminent deadly physical force.
. . .

"The defendant would not be justified if he knew he could, with complete safety to himself, avoid the necessity of using deadly physical force by retreating. The defendant would not be justified if Leo O'Brien's conduct was provoked by the defendant himself with the intent to cause physical injury to Leo O'Brien."

The court concluded the instruction on justification as follows:

"The People are required to prove beyond a reasonable doubt that the defendant was not justified. It is thus an element of Counts 1 and 2 that the defendant was not justified. As a result, if you find that the People have failed to prove beyond a reasonable doubt that the defendant was not justified, then you must find the defendant not guilty of Counts 1 and 2."

The court then instructed the jury as to the elements of attempted murder in the second degree and assault in the first degree:

"Under our law, a person is guilty of Murder in the Second Degree when with intent to cause the death of another person, he causes the death of such person.
. . .

"The question naturally arises as to how to determine whether or not a defendant had an intent required for the commission of a crime. To make that determination in this case, you must decide if the required intent can be inferred beyond a reasonable doubt from the proven facts. In doing so, you may consider the person's conduct and all of the circumstances surrounding that conduct including but not limited to the following:

"What, if anything, did the person do or say?

> "What result, if any, followed from the person's conduct?
>
> "Was that the result of the natural, necessary and probable consequence of that conduct?
> . . .
>
> "The second count of the indictment charges the defendant with the crime of Assault in the First Degree. Under our law, a person is guilty of Assault in the First Degree when with intent to cause serious physical injury to another person, he causes such injury to that person by means of a deadly weapon.
> . . .
>
> "Serious physical injury means impairment of a person's physical condition which creates a substantial risk of death or which causes death or serious and protracted disfigurement or protracted impairment of health or protracted loss or impairment of the function of any bodily organ.
> . . .
>
> "Deadly weapon means any loaded weapon from which a shot readily capable of producing death or serious physical injury may be discharged."

When reading the elements of each of the two charges, attempted murder in the second degree and assault in the first degree, the court stated that the third element was "that the defendant was not justified."

In my opinion, any error in the charge to the jury was harmless as "there was overwhelming evidence disproving the justification defense and no reasonable possibility that the verdict would have been different had the charge been correctly given" (*People v Petty*, 7 NY3d 277, 286 [2006]; *People v Jones*, 3 NY3d 491, 497 [2004]). We have specifically stated in numerous

decisions that the *Velez* error was not harmless, suggesting that under certain facts any *Velez* error may be deemed harmless (*see People v Marcucci*, 158 AD3d 434 [1st Dept 2018]; *People v Valentin*, 154 AD3d 474, 475 [1st Dept 2017]; *People v Flores*, 145 AD3d 568, 569 [1st Dept 2016], *lv dismissed* 29 NY3d 997 [2017]; *People v Delin*, 145 AD3d 566, 567 [1st Dept 2016], *lv dismissed* 29 NY3d 996 [2017]. In my opinion the facts in this case support such a finding.

It is clear that as instructed, the jury first considered the defense of justification. And, after considering it, found that it was not supported by the credible evidence. The only "evidence" of justification was the testimony of Knowles. As argued by the People and conceded in part by the defense, her testimony was at times inconsistent, vague and confusing. Further, her testimony was contrary not only to that of the other witnesses (including that of defendant) but also to the physical evidence.

Payne testified that at the time of the incident he saw no one on the street other than O'Brien and defendant. According to Payne, he did not see (or hear) Knowles or see a woman gardening. Knowles testified that at one point O'Brien was holding the knife close to his head, extended outward. The eyewitness did not testify, as suggested by the majority, that she observed O'Brien

running toward defendant and then heard shots fired.[1] Payne testified that he never saw a knife in O'Brien's hand or saw O'Brien chasing defendant down the street. No knife was recovered from the scene, the surrounding area or from O'Brien's person at the scene or at the hospital. According to Payne, he remained with O'Brien until O'Brien was actually placed in the ambulance. During this time he never saw O'Brien in possession of a knife.

Perhaps most telling, and not mentioned by the majority, is the testimony of defendant. Defendant testified that he did not know O'Brien and never had a physical altercation with him. Thus, defendant himself refuted the defense of justification. Based upon his testimony that there was no altercation with O'Brien, defendant could not have been in imminent danger of O'Brien's use of deadly force, and such a belief would be objectively unreasonable (*see People v Daggett*, 150 AD3d 1680 [4th Dept 2017], *lv denied* 29 NY3d 1125 [2017]; *People v Palmer*, 34 AD3d 701, 703-704 [2d Dept 2006], *lv denied* 8 NY3d 848 [2007]). It is clearly discernable that acquittal of the top count was not based on the jurors' finding of justification.

The evidence supports the conclusion that after considering

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[1] I assume the majority is referring to the testimony of Knowles.

and rejecting the defense of justification, the jury then proceeded to consider the charges of attempted murder in the second degree and assault in the first degree. In doing so, they concluded that defendant did not intend to cause O'Brien's death, but that he did intend to cause serious physical injury to O'Brien.

It is certainly plausible that the jury found that defendant, while angry that O'Brien had earlier cut or tore defendant's jacket, did not intend to kill O'Brien for the damage he caused to the jacket. This is buttressed by the fact that the evidence elicited was that defendant shot O'Brien three times. The 9 millimeter semiautomatic that was recovered had one round in the chamber and two rounds in the magazine. Thus, the jury could have reasonably concluded that if defendant had actually intended to kill O'Brien he had three additional rounds of

ammunition to do so.

Therefore, for the reasons stated above, I would affirm the conviction in all respects.

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

ENTERED: JUNE 7, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Webber, Oing, Moulton, JJ.

6503 In re Wimbledon Financing Master Fund, Ltd., Petitioner-Respondent, Index 652771/16

-against-

Wimbledon Fund, SPC on behalf of Class C Segregated Portfolio, Respondent-Appellant,

Wimbledon Real Estate Financing Master Fund Ltd., et al., Respondents.

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Sadis & Goldberg, LLP, New York (Douglas Hirsch of counsel), for appellant.

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

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered February 1, 2017, which, insofar as appealed from, denied the motion by respondent Wimbledon Fund, SPC on behalf of Class C Segregated Portfolio to dismiss the petition, and ordered respondent to pay $700,000 and attorneys' fees to petitioner, unanimously affirmed, without costs.

Petitioner, the assignee of nonparty Weston Capital Partners Master Fund II, Ltd. (Partners), seeks to collect on a judgment that Partners obtained against nonparty Arius Libra, Inc., after Arius defaulted on a loan it received from Partners. Petitioner alleges that Partners' investment managers caused Partners to

make the loan "and then promptly authorized" the transfer of $700,000 of the loan proceeds to respondent Wimbledon Fund, SPC on behalf of Class C Segregated Portfolio (Class C), another investment fund they managed. Petitioner contends that since Arius owed no debts to Class C and Class C provided no services to Arius in exchange for the $700,000, the transfer was a fraudulent conveyance.

Class C makes various arguments as to why the transfer was not a fraudulent conveyance. We decline to consider most of them because they are based on new facts that are not in the record (*see e.g. DeBenedictis v Malta*, 140 AD3d 438 [1st Dept 2016]), and the facts of which Class C asks us to take judicial notice are not the types of facts of which such notice may properly be taken (*see Walker v City of New York*, 46 AD3d 278, 282 [1st Dept 2007]).

Class C's fraudulent conveyance arguments that are based on the record are unavailing. To determine whether a transfer is fraudulent, "its economic substance must be evaluated" (*Stillwater Liquidating LLC v Partner Reins. Co., Ltd.*, 2017 NY Slip Op 30257[U], *8 [Sup Ct, NY County 2017], *affd* 151 AD3d 585 [1st Dept 2017]). Thus, it is of no moment that, technically, the money was wired from Partners' bank account rather than from Arius.

Class C argues that the court improperly accepted petitioner's allegation that Arius was insolvent at the time of the transfer. However, because Class C moved to dismiss the petition for failure to state a cause of action, the court was obligated to accept the petition's allegations as true unless Class C refuted them (*see Matter of Nistal v Hausauer*, 308 NY 146, 149 [1954], *cert denied* 349 US 962 [1955]; *Matter of Schwab v McElligott*, 282 NY 182, 184-186 [1940]).

Class C (the transferee) argues that it acted in good faith. However, "[g]ood faith is required of both the transferor and the transferee" (*Matter of CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd. Partnership*, 25 AD3d 301, 303 [1st Dept 2006] [internal quotation marks omitted]).

On appeal, Class C now argues that petitioner's claims are barred by the doctrine of in pari delicto. This doctrine may be raised for the first time on appeal (*see Janke v Janke*, 47 AD2d 445, 449-450 [4th Dept 1975] [unclean hands can be considered for first time on appeal], *affd* 39 NY2d 786 [1976]); *FIA Leveraged Fund Ltd. v Grant Thornton LLP*, 50 Misc 3d 1213[A], 2016 NY Slip Op 50093[U], *5 [Sup Ct, NY County 2016] [in pari delicto is equivalent to unclean hands], *affd* 150 AD3d 492 [1st Dept 2017]). However, the argument does not avail Class C. We have already held that "in pari delicto is not a defense to a fraudulent

conveyance suit" (*FIA Leveraged Fund Ltd. v Grant Thornton LLP*, 150 AD3d 492, 497 [1st Dept 2017] [internal quotation marks omitted]). The court properly denied Class C's motion to dismiss, finding that the $700,000 transfer to Class C was both constructively fraudulent (Debtor and Creditor Law § 273) and intentionally fraudulent (Debtor and Creditor Law § 276).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: JUNE 7, 2018

CLERK

Manzanet-Daniels, J.P., Tom, Andrias, Kapnick, Singh, JJ.

6785-		Ind. 662/14
6785A-		Dkt. 1532C/13
6785B-		10667C/13
6785C-		5456C/14
6785D	The People of the State of New York, Respondent,	33011C/14

-against-

Carlos Polanco,
Defendant-Appellant.

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

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

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Judgments, Supreme Court, Bronx County (Jeanette Rodriguez-Morick, J.), rendered March 4, 2016, convicting defendant, upon his pleas of guilty, of assault in the third degree, resisting arrest, theft of services, criminal sale of marihuana in the fourth degree and attempted assault in the third degree, and sentencing him to concurrent terms of 90 days, unanimously affirmed.

The record establishes that defendant's pleas were knowing, intelligent and voluntary. Defendant did not make any statements that cast significant doubt on the voluntariness of the pleas or require further inquiry (*see People v Toxey*, 86 NY2d 725 [1995]).

In any event, the only relief defendant requests is dismissal of all accusatory instruments rather than vacatur of the pleas, and he expressly requests this Court to affirm the convictions if it does not grant a dismissal. Because we do not find that dismissal would be appropriate, we affirm on this basis as well (*see e.g. People v Teron*, 139 AD3d 450 [1st Dept 2016]).

We have considered and rejected defendant's claim that two of the misdemeanor accusatory instruments to which he pleaded guilty were jurisdictionally defective (*see generally People v Jackson*, 18 NY3d 738 [2012]). The nonpayment element of theft of services was sufficiently charged by way of allegations explaining the procedure for riding a select bus and stating that defendant rode such a bus without being able to produce a payment receipt, which effectively constituted failure to pay. The authorized arrest element of resisting arrest was sufficiently

charged by way of allegations establishing probable cause to arrest defendant for menacing and other offenses arising out of his physically and verbally threatening conduct in a courthouse.

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

ENTERED: JUNE 7, 2018

CLERK

Manzanet-Daniels, J.P., Tom, Andrias, Kapnick, Singh, JJ.

6786 Linda Carey, as the Administrator of the Estate of Viola Carey, deceased,
Plaintiff-Respondent,

-against-

St. Barnabas Hospital,
Defendant-Appellant,

Split Rock Rehabilitation and Health Care Center, LLC,
Defendant.

Index 300917/11

Garbarini & Scher, P.C., New York (William D. Buckley of counsel), for appellant.

Buzin & Berman, P.C., New York (Heath T. Buzin of counsel), for respondent.

Order, Supreme Court, Bronx County (Stanley Green, J.), entered October 3, 2016, which denied the motion of defendant St. Barnabas Hospital for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Defendant hospital failed to make a prima facie showing of entitlement to summary judgment. In reaching the conclusion that the hospital staff took appropriate measures to prevent pressure sores, defendant's expert asserted that decedent's right heel ulcer was first observed on March 17, 2009, after which the hospital took appropriate measures. However, hospital records show that a nurse first observed the ulceration on March 4, 2009,

but that no action was taken until March 17th (*see Mezzone v Goetz*, 145 AD3d 573 [1st Dept 2016], *lv dismissed* 29 NY3d 1074 [2017]).

In any event, plaintiff's expert raised questions of fact barring summary resolution of plaintiff's claims against defendant hospital (*see Cregan v Sachs*, 65 AD3d 101, 108-109 [1st Dept 2009]). Decedent's records do not confirm that protocols were followed with regard to repositioning to prevent ulcers, and nothing in the record indicates that decedent presented with ulcers until nearly two weeks after her admission (*compare Craig v St. Barnabas Nursing Home*, 129 AD3d 643 [1st Dept 2015]).

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

ENTERED: JUNE 7, 2018

CLERK

Manzanet-Daniels, J.P., Tom, Andrias, Kapnick, Singh, JJ.

6787 In re Matthew C.,
Petitioner-Respondent,

-against-

Robin B.,
Respondent-Appellant.

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Douglas H. Reiniger, New York, for appellant.

Leslie S. Lowenstein, Woodmere, for respondent.

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

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Order, Family Court, New York County (J. Machelle Sweeting, J.), entered on or about February 27, 2017, which granted petitioner a final order of sole legal and physical custody of the subject child, unanimously affirmed, without costs.

Respondent failed to demonstrate a reasonable excuse for her default (*see* CPLR 5015[a][1]; *Matter of Commissioner of Social Servs. of the City of N.Y. v Juan H.M.*, 128 AD3d 501 [1st Dept 2015]). She presented no evidence to substantiate her alleged lack of funds to travel to New York City to appear at the hearing (*see Matter of Isaac Howard M. [Fatima M.]*, 90 AD3d 559, 560 [1st Dept 2011], *lv dismissed in part, denied in part* 18 NY3d 975 [2012]). She failed to timely contact the court to inform it of her unavailability, and she failed to make herself available by

telephone at the time the case was called. Instead, she went about her day, as scheduled, including attending a physical therapy appointment, and waited until after the case was called and adjudicated in her absence to make contact with the court (*see Matter of Zion Nazar H-S. [Shaniqua W.]*, 122 AD3d 486 [1st Dept 2014]).

In the absence of a reasonable excuse for her default, we need not determine whether respondent demonstrated a meritorious defense to the petition for custody (*Matter of Ne Veah M. [Michael M.]*, 146 AD3d 673, 674 [1st Dept 2017]). We note in any event that respondent's claims that the child had spent most of her life with respondent, had more closely bonded with her than with petitioner, and wished to live with her, and that the child was struggling in school in New York City were unsubstantiated (*see Matter of Gloria Marie S.*, 55 AD3d 320, 321 [1st Dept 2008], *lv dismissed* 11 NY3d 909 [2009]; *and see Matter of Christian E.*,

66 AD3d 433 [1st Dept 2009]). Moreover, these claims were belied by petitioner's testimony and the report of the court-ordered investigation, which the court considered.

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

ENTERED: JUNE 7, 2018

CLERK

Manzanet-Daniels, J.P., Tom, Andrias, Kapnick, Singh, JJ.

6788-
6789 Index 35168/14E

Wells Fargo Bank, N.A.,
Plaintiff-Appellant,

-against-

Jose McSwene Gore,
Defendant-Respondent,

City Of New York Environmental Control Board, et al.,
Defendants.

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Knuckles, Komosinski & Manfro, LLP, Elmsford (Loretta Carty of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Donna M. Mills, J.), entered October 20, 2017, which, after a traverse hearing, granted the motion of defendant Jose McSwene Gore to vacate a default judgment for lack of personal jurisdiction, dismissed the action on the basis that plaintiff failed to obtain personal jurisdiction over him, and vacated the judgment of foreclosure and sale, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered April 6, 2017, which directed a traverse hearing, unanimously dismissed, without costs, as academic.

Plaintiff failed to sustain its burden of demonstrating, by

a preponderance of the evidence, that service of process was effective as to defendant (*see generally Gass v Gass*, 42 AD3d 393 [1st Dept 2007]). Any presumption of service raised by the process server's affidavit of service was overcome by defendant's testimony and documentary evidence, as reflected in the transcript for the traverse hearing, that he was out of the country when the purported service was made and that no one stayed at the property while he was away. There exists no basis for disturbing the traverse court's findings (*see Holtzer v Stepper*, 268 AD2d 372 [1st Dept 2000]).

The appeal from the April 6, 2017 order, which directed that a traverse hearing be held, is dismissed as academic since the traverse hearing has been held and the jurisdictional issue determined by the October 20, 2017 order (*see B.N. Realty Assoc. v Lichtenstein*, 21 AD3d 793, 797 [1st Dept 2005]).

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

ENTERED: JUNE 7, 2018

CLERK

Manzanet-Daniels, J.P., Tom, Andrias, Kapnick, Singh, JJ.

6790- Index 22728/15E
6791 Shantel Hayes,
Plaintiff-Appellant,

-against-

Noureddine Gaceur, et al.,
Defendants-Respondents.

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McMahon & McCarthy, Bronx (Daniel C. Murphy of counsel), for appellant.

Marjorie E. Bornes, Brooklyn, for respondents.

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Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered July 5, 2017, which granted defendants' motion for summary judgment dismissing the complaint based on plaintiff's inability to satisfy the serious injury threshold of Insurance Law § 5102(d), unanimously modified, on the law, to deny the motion to the extent it sought dismissal of plaintiff's claims that she suffered serious injuries to her cervical spine, both shoulders, and left knee, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered October 26, 2017, which, upon reargument, adhered to the prior order, unanimously dismissed, without costs, as academic.

Plaintiff alleges that she suffered serious injuries to her cervical, thoracic and lumbar spine, both shoulders and left knee, as a result of an accident that occurred when defendants'

vehicle hit the side of her vehicle.

Defendants satisfied their prima facie burden of demonstrating that plaintiff did not sustain any serious injury by submitting the reports of a neurologist and orthopedist, who found full range of motion in all parts and opined that plaintiff's injuries had resolved (*see Latus v Ishtarq*, 159 AD3d 433, 433 [1st Dept 2018]; *Moreira v Mahabir*, 158 AD3d 518, 518 [1st Dept 2018]). Defendants also submitted a radiologist's report opining that the MRI of plaintiff's cervical spine was normal and showed no traumatic injury, and the emergency medicine expert, who opined that plaintiff's hospital records were inconsistent with her claimed serious injuries (*see Frias v Gonzalez-Vargas*, 147 AD3d 500, 501 [1st Dept 2017].

In opposition, however, plaintiff raised an issue of fact as to her claimed cervical spine, shoulder and left knee injuries through the report of her treating orthopedic surgeon. The physician examined plaintiff the day after the accident and on several occasions thereafter. He found limitations in range of motion of her cervical spine the day after the accident and on recent examination; he examined plaintiff's shoulders and left knee within a month after the accident and found limitations in range of motion at the initial examination and recently (*see Perl v Meher*, 18 NY3d 208, 218 [2011] ["Injuries can become

significantly more or less severe as time passes"]; *Windham v New York City Tr. Auth.*, 115 AD3d 597, 598 [1st Dept 2014]). In addition, he personally reviewed the MRI examinations of plaintiff's cervical spine, shoulders and left knee, and opined that they revealed objective evidence of injuries caused by the accident, rather than by degeneration (*see Venegas v Signh*, 103 AD3d 562, 563 [1st Dept 2013]; *Yuen v Arka Memory Cab Corp.*, 80 AD3d 481, 482 [1st Dept 2011]).

Defendants' argument that plaintiff had a "gap" in treatment was not raised by defendants in their motion papers, when plaintiff would have had an opportunity to respond by submitting proof in support of her testimony that she received extensive treatment. Defendants' experts did not review any medical records, but plaintiff's physician affirmed that he reviewed medical records that demonstrated that plaintiff received continuing treatment after the accident. Accordingly, defendants' argument was waived and is unsupported by the record (*see Paulling v City Car & Limousine Servs., Inc.*, 155 AD3d 481, 481 [1st Dept 2017]; *Tadesse v Degnich*, 81 AD3d 570 [1st Dept 2011]).

Defendants' contention that plaintiff's MRIs show degenerative conditions in the shoulders and left knee is improperly raised on appeal for the first time and is unsupported

by their own medical experts. In any event, plaintiff's physician acknowledged findings of mild degeneration in the left knee MRI and opined that, given the absence of any prior symptoms, the accident caused her injury, which was an equally plausible explanation (*Yuen*, 80 AD3d at 482).

Plaintiff failed to raise an issue of fact as to whether she suffered injury to her thoracic or lumbar spine as a result of the accident, since she presented no objective evidence of injury causally related to the accident, but only findings of tenderness and limitations (*see Shaw v Looking Glass Assoc., LP*, 8 AD3d 100, 101 [1st Dept 2004]). Nevertheless, if plaintiff establishes at trial that she sustained a serious injury to her cervical spine, shoulders or left knee within the meaning of the Insurance Law, then she can recover damages for all injuries proximately caused by the accident (*Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549 [1st Dept 2010]).

Defendants are entitled to dismissal of plaintiff's 90/180-day claim, based on the allegation in her bill of particulars that she was incapacitated from work for approximately four days after the accident, and her deposition testimony that she was confined to bed and home for approximately five weeks after the

accident and was able to continue with work and studies in the relevant period (*see Nakamura v Montalvo*, 137 AD3d 695, 695 [1st Dept 2016]; *Frias v Son Tien Liu*, 107 AD3d 589, 590 [1st Dept 2013]).

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

ENTERED: JUNE 7, 2018

CLERK

Manzanet-Daniels, J.P., Tom, Andrias, Kapnick, Singh, JJ.

6792 The People of the State of New York, Ind. 3469/14
Respondent,

-against-

Hector Caraballo,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Dmitriy Povazhuk 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, Bronx County (William Mogulescu, J. at plea; Raymond Bruce, J. at sentencing), rendered September 23, 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: JUNE 7, 2018

CLERK

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

Manzanet-Daniels, J.P., Tom, Andrias, Kapnick, Singh, JJ.

6795 Paul Lazzari, Index 305450/11
Plaintiff-Respondent,

-against-

Qualcon Construction, LLC, et al.,
Defendants-Appellants.

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Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for appellants.

Law Offices of Michelle S. Russo, P.C., Port Washington (Michelle S. Russo of counsel), for respondent.

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Order, Supreme Court, Bronx County (Robert T. Johnson, J.), entered on or about May 16, 2017, which denied defendants' motion for summary judgment dismissing the complaint alleging that plaintiff sustained serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Plaintiff alleges he sustained serious injuries to his lumbar spine as the result of an accident in which his vehicle struck the bucket of a parked excavator/backhoe that was protruding into the roadway. The excavator was leased to defendant Qualcon, who was performing work for defendant Consolidated Edison.

Initially, we agree with defendants that the serious injury threshold applies because the action is between "covered persons" (Insurance Law §§ 5104[a], 5102[j]). Defendants' excavator does

not fall under the "self-propelled caterpillar or crawler-type equipment while being operated on the contract site" exclusion to the term "motor vehicle" (Vehicle and Traffic Law § 311[2]). While it is a "self-propelled caterpillar or crawler-type equipment" (*see Masotto v City of New York*, 38 Misc 3d 1226[A] n 5 [Sup Ct, Kings County 2013]), it was being operated on a "public highway," adjacent to and encroaching into the road on which plaintiff was driving (*see* Vehicle and Traffic Law §§ 125, 134). In addition, the accident arose out of the "use or operation" of the excavator, as the excavator was the "instrumentality" that produced plaintiff's injuries (*see Cividanes v City of New York*, 95 AD3d 1 [1st Dept 2012], *affd* 20 NY3d 925 [2012]*; Walton v Lumbermens Mut. Cas. Co.*, 88 NY2d 211 [1996]). The fact that it was not being operated and was unattended at the time of the accident does not preclude application of the statute, as it was only temporarily parked during ongoing construction work (*see Trentini v Metropolitan Prop. & Cas. Ins. Co.*, 2 AD3d 957 [3d Dept 2003], *lv dismissed* 2 NY3d 823 [2004]; *cf. Wooster v Soriano*, 167 AD2d 233 [1st Dept 1990]).

With respect to the seriousness of plaintiff's injuries, the court properly found that defendants met their prima facie burden of demonstrating that plaintiff did not suffer a serious injury

to his lumbar spine causally related to the accident. Defendants submitted the affirmed reports of a neurosurgeon and radiologist who both opined that the MRI and other radiological studies revealed existence of severe chronic degenerative disease and absence of a traumatic injury (*see Cruz v Martinez*, 106 AD3d 482, 482 [1st Dept 2013]; *Graves v L&N Car Serv.*, 87 AD3d 878, 879 [1st Dept 2011]). Defendants also relied on plaintiff's testimony and medical records admitting his long-term history of degenerative lumbar spine conditions (*see Westerband v Buitraso*, 146 AD3d 486 [1st Dept 2017]).

In opposition, plaintiff raised triable issues of fact sufficient to defeat summary judgment through the affirmation of his neurosurgeon. Contrary to defendants' contention, a certificate of conformity (*see* CPLR 2309[c]) was not required since the physician is licensed to practice in New York and signed the affirmation in New York. The neurosurgeon acknowledged plaintiff's documented history of lower back problems, and explained that the accident aggravated plaintiff's preexisting conditions, causing new post-accident symptoms of bilateral weakness, urinary dysfunction and spinal instability that were not previously present and required emergency surgery. He concluded that the accident caused "significant deterioration." His findings, based on his review of the pre-

and post-accident medical records, and his treatment of plaintiff, adequately ruled out the prior degenerative changes as the cause of the injuries (*see Matos v Urena*, 128 AD3d 435, 435-436 [1st Dept 2015]). The neurosurgeon raised an issue of fact as to the existence of an injury involving "significant" limitation of use, which required surgical intervention (*see Perdomo v City of New York*, 129 AD3d 585 [1st Dept 2015]; *Thomas v NYLL Mgt. Ltd.*, 110 AD3d 613, 614 [1st Dept 2013]). Plaintiff addressed his cessation of treatment after the surgery, and his neurosurgeon provided a qualitative assessment of plaintiff's continuing limitations in use of his lumbar spine during his recent examination of plaintiff (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353 [2002]).

The neurosurgeon's certification that plaintiff was disabled and unable to work for more than 90 days following the accident raised an issue of fact as to existence of a 90/180-day injury

(*see Coley v DeLarosa*, 105 AD3d 527, 529 [1st Dept 2013]; *Fuentes v Sanchez*, 91 AD3d 418, 420 [1st Dept 2012]).

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

ENTERED: JUNE 7, 2018

CLERK

Manzanet-Daniels, J.P., Tom, Andrias, Kapnick, Singh, JJ.

6796 Fairmont Tenants Corp., Index 152489/15
Plaintiff-Respondent,

-against-

Michael Braff,
Defendant-Appellant,

Gladys Wanich,
Defendant.

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Michael Braff, New York, appellant pro se.

Boyd Richards Parker Colonnelli, P.L., New York (Jennifer L. Stewart of counsel), for respondent.

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Order, Supreme Court, New York County (Melissa Crane, J.), entered on or about October 10, 2017, which granted plaintiff coop's motion for summary judgment, denied defendant Braff's motion for summary judgment, and declared that plaintiff has right, title, and interest to the roof adjacent to apartments 2F and 2G, and enjoined defendants from occupying or using that space, unanimously affirmed, with costs.

There are no issues of fact requiring a trial. The proprietary lease defines the apartment as "the rooms in the building as partitioned on the date of the execution of this lease designated by the above-stated apartment number, together with their appurtenances and fixtures and any closets, terraces, balconies, roof, or portion thereof outside of said partitioned

rooms, *which are allocated exclusively to the occupant of the apartment*" (emphasis added). This clause is ambiguous because it is unclear from the lease whether the disputed roof area has been exclusively assigned to defendants. As such, the court properly looked to extrinsic evidence, including the offering plan (*see South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 277-278 [2005]), which is a "controlling document" that gives the proprietary lease meaning (*see Sassi-Lehner v Charlton Tenants Corp.*, 55 AD3d 74, 78-79 [1st Dept 2008]; *see also Rotblut v 150 E. 77th St. Corp.*, 79 AD3d 532, 532 [1st Dept 2010]; *Prospect Owners Corp. v Sandmeyer*, 62 AD3d 601, 603 [1st Dept 2009], *lv denied* 13 NY3d 717 [2010]; *1050 Fifth Ave. v May*, 247 AD2d 243, 243 [1st Dept 1998]). The offering plan makes clear that there is no outdoor space allocated exclusively to defendants' apartment.

Supreme Court also properly granted plaintiff summary judgment dismissing defendants' waiver defense and counterclaim. Paragraph 26 of the lease addresses "facilities outside the apartment," and under this provision, the Coop has a revocable license to that area (*see Prospect Owners*, 62 AD3d at 602). Further, the coop's knowledge of defendants' use of the roof space does not raise issues of fact regarding the coop's waiver of a right under the lease in light of an unambiguous no waiver

clause (*see 457 Madison Ave. Corp. v Lederer De Paris, Inc.*, 51 AD3d 579 [1st Dept 2008]; *Rotblut*, 79 AD3d at 532-533).

Supreme Court also properly dismissed defendants' adverse possession defense and counterclaim. It is undisputed that defendants have permitted workmen on the roof at issue in 2015, and that they have given access to the roof space to building staff from time to time. Accordingly, the court properly found that defendants' use of the roof space was not "exclusive" for any period of time prior to 2015 (*Keena v Hudmor Corp.*, 37 AD3d 172, 173-174 [1st Dept 2007]; *see Brand v Prince*, 35 NY2d 634, 636 [1974]).

Finally, defendants' continued trespassing on the roof space entitles the coop to injunctive relief as the irreparable injury is the interference with the coop's property rights (*see Long Is. Gynecological Servs. v Murphy*, 298 AD2d 504, 504 [2d Dept 2002]; *see also 1050 Fifth Ave.*, 247 AD2d at 243).

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

ENTERED: JUNE 7, 2018

CLERK

Manzanet-Daniels, J.P., Tom, Andrias, Kapnick, Singh, JJ.

6797 In re Justin R.,

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

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Dawne A. Mitchell, The Legal Aid Society, New York (John A. Newbery of counsel appellant.

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

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Order of disposition, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about December 19, 2016, as amended, December 21, 2016, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of robbery in the second degree, grand larceny in the fourth degree, criminal possession of stolen property in the fifth degree, menacing in the third degree and attempted assault in the third degree, and placed him on probation for a period of 18 months, unanimously affirmed, without costs.

The court's finding 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 court's determinations concerning identification

and credibility. The victim had an ample opportunity to observe appellant before and during the incident, he made an identification of appellant that was nonsuggestive and reliable under all the circumstances, and he provided a detailed and accurate description of appellant, including a specific clothing item he was still wearing at the time of his arrest. We have considered and rejected appellant's arguments to the contrary.

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

ENTERED: JUNE 7, 2018

CLERK

Manzanet-Daniels, J.P., Tom, Andrias, Singh, JJ.

6798 Robert B. Jetter, M.D., PLLC, Index 654159/12
Plaintiff-Appellant,

Abbey Road Office Based Surgery PLLC,
Plaintiff,

-against-

737 Park Avenue Acquisition LLC,
Defendant-Respondent,

Macklowe Properties, et al.,
Defendants.

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The Heppt Law Office, PLLC, New York (Joseph M. Heppt of counsel), for appellant.

Stemphel Bennett Claman & Hochberg, P.C., New York (Richard L. Claman of counsel), for respondent.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered April 19, 2017, which, insofar as appealed from, granted defendant 737 Park Avenue Acquisition LLC's motion for summary judgment on its counterclaim for a declaration that plaintiff Robert B. Jetter, M.D., PLLC (Jetter), has no right to exercise the lease renewal option, and so declared, unanimously affirmed, without costs.

While plaintiff Jetter's time to exercise its renewal option will not begin until October 2019, because this future event is within Jetter's control, a declaratory judgment is not merely advisory (*see New York Pub. Interest Research Group v Carey*, 42

NY2d 527, 530-531 [1977]).

Jetter argues that denial of its renewal option would work an unjust forfeiture within the meaning of *J.N.A. Realty Corp. v Cross Bay Chelsea* (42 NY2d 392 [1977]) and its progeny. He may raise this argument for the first time on appeal (*see generally Carlyle CIM Agent, L.L.C. v Trey Resources I, LLC*, 148 AD3d 562, 565 [1st Dept 2017]). However, on the merits, it is unavailing. The parties' lease gives Jetter a renewal option provided that it has not incurred late payment charges more than three times and has not caused, inter alia, any lawsuit to have been commenced against the landlord. Jetter's incurrence of late fees on more than three occasions was not due to "neglect or inadvertence" (*J.N.A.*, 42 NY2d at 398). Rather, it was the result of a deliberate choice to withhold rent. The Court of Appeals has cautioned that *J.N.A.* is a "narrow . . . doctrine" (*Baygold Assoc., Inc. v Congregation Yetev Lev of Monsey, Inc.*, 19 NY3d 223, 228 [2012]). Therefore, we decline to extend it to the

instant situation, where Jetter is arguing that it was justified in withholding rent. Moreover, even setting late fees aside, Jetter did not satisfy the second condition to renewal, since it has sued the landlord in the instant action.

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

ENTERED: JUNE 7, 2018

CLERK

Tom, J.P., Andrias, Kapnick, Webber, JJ.

6799-
6800 Index 603561/09

IGS Realty Co., L.P.,
Plaintiff-Respondent,

-against-

James H. Brady,
Defendant-Appellant.

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James H. Brady, appellant pro se.

Law Office of Gregory Sheindlin, PLLC, New York (Gregory Sheindlin of counsel), for respondent.

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Appeal from order, Supreme Court, New York County (Barry R. Ostrager, J.), entered April 10, 2017, deemed an appeal from judgment (CPLR 5520[c]), same court and Justice, entered May 31, 2017, in favor of plaintiff, and as so considered, said judgment unanimously affirmed, without costs. Appeal from order, same court and Justice, entered February 17, 2017, unanimously dismissed, without costs, as abandoned.

Pro se defendant's arguments on this appeal, previously raised and rejected by this Court and supported by no new

evidence or change of law, are barred by law of the case (*see Delgado v City of New York*, 144 AD3d 46, 51 [1st Dept 2016]; *Carmona v Mathisson*, 92 AD3d 492, 492-493 [1st Dept 2012]).

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

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

ENTERED: JUNE 7, 2018

CLERK

Manzanet-Daniels, J.P., Tom, Andrias, Kapnick, Singh, JJ.

6801 The People of the State of New York, Ind. 407/16
Respondent,

-against-

Rafael Polo,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Diana J. Lewis of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Albert Lorenzo, J. at suppression motion and plea; John W. Carter, J. at sentencing), rendered November 28, 2016, convicting defendant of criminal possession of a controlled substance in the fifth degree, and sentencing him, as a second felony offender, to a term of 2½ years, unanimously affirmed.

Defendant made a valid waiver of his right to appeal, which forecloses his suppression and excessive sentence claims. The court's oral colloquy with defendant concerning the waiver avoided conflating the right to appeal with the rights normally

forfeited upon a guilty plea, and it satisfied the standards for such a colloquy (*see People v Bryant*, 28 NY3d 1094 [2016]). After consulting with counsel, defendant also signed a written waiver that thoroughly explained the rights he was relinquishing, and the record shows that he understood the waiver.

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

ENTERED: JUNE 7, 2018

CLERK

Manzanet-Daniels, J.P., Tom, Andrias, Singh, JJ.

6802 Srikumar Kesavan, Index 307850/15
Plaintiff-Respondent,

-against-

Margaret Ebert Kesavan,
Defendant-Appellant.

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Marzano Lawyers, PLLC, New York (Naved Amed of counsel), for appellant.

Buchanan Ingersoll & Rooney PC, New York (Daniel Z. Rivlin of counsel), for respondent.

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Order, Supreme Court, New York County (Michael L. Katz, J.), entered March 17, 2017, which, after a trial, denied defendant's motion to implement the parenting coordinator's recommendation that each party be free to feed the subject child as he or she chooses during his or her parenting time, to amend the parties' parenting agreement to give defendant final decision-making authority with respect to the child, and for an award of counsel fees, and ordered that neither party shall feed or permit any other person to feed fish, meat or poultry to the child without the other party's consent, unanimously modified, on the law and the facts, to grant defendant's motion as to implementing the parenting coordinator's recommendation, and to vacate the portion of the order that prohibits either party from feeding or permitting any other person to feed the child fish, meat, or

poultry without the other's consent, and otherwise affirmed, without costs.

In their parenting agreement, the parties, who were represented by counsel, agreed to jointly determine all major matters with respect to the child, including "religious choices." However, the 24-page agreement does not otherwise mention the child's religious upbringing and makes no reference at all to dietary requirements. Although the parenting coordinator found that the child's diet was a day-to-day choice within the discretion of each party, the trial court explicitly determined that the child's diet was a religious choice, and dictated the child's diet by effectively prohibiting the parties from feeding her meat, poultry or fish. This was an abuse of discretion (*see De Arakie v De Arakie*, 172 AD2d 398, 399 [1st Dept 1991]). To the extent defendant promised plaintiff, in contemplation of marriage, that she would raise any children they had as vegetarians, the promise is not binding (*Stevenot v Stevenot*, 133 AD2d 820 [2d Dept 1987]), particularly in view of the parenting agreement, which omits any such understanding. Nor is there support in the record for a finding that a vegetarian diet is in the child's best interests.

Defendant's argument that she should have been granted final decision-making authority with respect to the child was

improperly raised for the first time in her reply brief. In any event, the record does not support her contention that the totality of the circumstance warrants modification in the child's best interests (*see Gant v Higgins*, 203 AD2d 23 [1st Dept 1994]).

The court properly denied defendant's request for counsel fees based on plaintiff's litigation conduct (*see Wells v Serman*, 92 AD3d 555, 555 [1st Dept 2012] [an award of counsel fees "merely to punish a party" is inappropriate]).

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

ENTERED: JUNE 7, 2018

CLERK

Manzanet-Daniels, J.P., Tom, Andrias, Kapnick, Singh, JJ.

6803 In re Skyhigh Murals-Colossal Media Inc., etc., Petitioner-Respondent, Index 157348/16

-against-

Board of Standards and Appeals of the City of New York, Respondent-Appellant.

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Zachary W. Carter, Corporation Counsel, New York (Qian Julie Wang of counsel), for appellant.

Akerman, LLP, New York (Richard G. Leland of counsel), for respondent.

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Judgment (denominated decision and order), Supreme Court, New York County (Arthur F. Engoron, J.), entered January 17, 2017, annulling a determination of respondent (BSA), dated May 17, 2016, which affirmed the New York City Department of Buildings' (DOB) denial of petitioner's application to install an advertising sign, and permitting petitioner to install the proposed sign, unanimously reversed, on the law, without costs, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed.

BSA's determination that DOB properly denied petitioner's application to install an advertising sign has a rational basis and is supported by substantial evidence (*see generally Matter of SoHo Alliance v New York City Bd. of Stds. & Appeals*, 95 NY2d

437, 440 [2000]; *Matter of Toys "R" Us v Silva*, 89 NY2d 411, 418 [1996]). BSA rationally found that the proposed sign was prohibited by New York City Zoning Resolution § 42-561 in light of its location within 100 feet of the boundary of a Special Mixed Use District superimposed on a Residence District. The court erred in treating the adjoining district solely as a Special Mixed Use District rather than a Residence District on the basis of the statutory definitions of these districts, i.e., that they are designated "MX" and "R," respectively. The 1997 resolution of the City Planning Commission of the New York City Department of City Planning that created the first Special Mixed Use District indicates that restrictions governing Residence Districts may apply to Special Mixed Use Districts, depending on the particular regulations at issue. The court should have deferred to BSA's determination instead of applying a de novo standard of review, since this case called for BSA to apply its expertise in zoning and land planning matters to regulations that are not entirely clear and unambiguous when read as a whole (*see Matter of Beekman Hill Assn. v Chin*, 274 AD2d 161, 167 [1st Dept 2000], *lv denied* 95 NY2d 767 [2000]; *Matter of*

New York Botanical Garden v Board of Stds. & Appeals of City of N.Y., 91 NY2d 413, 419 [1998]; *cf. Matter of Raritan Dev. Corp. v Silva*, 91 NY2d 98 [1997] [no deference owed to agency interpretation contrary to plain meaning of statutory language]).

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

ENTERED: JUNE 7, 2018

CLERK

Manzanet-Daniels, J.P., Tom, Andrias, Kapnick, Singh, JJ.

6804 In re Estate of Chi-Chuan Wang, Deceased. File 2550B/03

- - - - -

Andrew Wang, et al.,
Petitioners/Proponents-Appellants,

-against-

Yien Koo Wang King,
Respondent/Objectant-Respondent.

_____

Kamerman, Uncyk, Soniker & Klein P.C., New York (Akiva Meir Cohen of counsel), for appellants.

Sam P. Israel P.C., New York, for (Sam P. Israel of counsel), for respondent.

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Decree, Surrogate's Court, New York County (Rita Mella, S.), entered May 9, 2017, which, upon a jury verdict, denying probate to an instrument dated February 18, 2003, dismissing proponents-appellants' cross petition, and revoking the preliminary letters issued to Andrew Wang, and bringing up for review an order, same court (Kristin Booth Glen, S.), entered April 20, 2010, which denied proponents' motion for summary judgment, unanimously affirmed, with costs.

The court properly denied proponents' motion for summary judgment, finding that objectant raised triable issues of fact as to decedent's testamentary capacity when he executed the Codicil and 2003 Will, and as to undue influence and fraud (*see Matter of*

Kumstar, 66 NY2d 691, 692 [1985]; *Matter of Eastman*, 63 AD3d 738, 740 [2d Dept 2009]).

A jury verdict may not be set aside unless it plainly appears that the evidence so preponderates in favor of the losing side that it could not have been reached on any fair interpretation of the evidence. The evidence before the jury must be viewed in the light most favorable to the successful party and must be sufficient as a matter of law to sustain the verdict as to each specific question submitted to the jury (*see Matter of S. Kornblum Metals Co. v Intsel Corp.*, 38 NY2d 376, 379 [1976]).

Here, proponents challenge the documents and testimony admitted into evidence concerning settlement negotiations in Shanghai at which proponent provided objectant with paintings he denied having taken from decedent's bank vault. Although CPLR 4547 precludes presentation of evidence of settlement negotiations, it expressly exempts exclusion of evidence, which is otherwise discoverable, solely because such evidence was presented during the course of settlement negotiations.

The list of paintings that was signed by proponent as part of the settlement conference in Shanghai was admitted into evidence because it included a factual admission that proponent possessed a painting that he accused objectant of stealing.

Thus, its use at trial was permissible, notwithstanding that the factual statement was contained in a settlement document (*see PRG Brokerage Inc. v Aramarine Brokerage, Inc.*, 107 AD3d 559, 560 [1st Dept 2013]).

Proponents also challenge the court's missing witness charge with respect to two of decedent's treating doctors in the hospital and the attorney who drafted the will. The court did not improvidently exercise its discretion in providing a missing witness charge with respect to decedent's treating doctors. The court's missing witness charge with respect to the attorney, Jerome Kamerman, was in error. Mr. Kamerman was living in Florida at the time of trial and was unavailable to proponents (*see Zeeck v Melina Taxi Co.*, 177 AD2d 692, 694 [1st Dept 1991] [Proof that a witness is beyond the jurisdiction of the court is ordinarily sufficient to bar the inference as a matter of law]; *People v Gonzalez*, 68 N.Y.2d 424, 428 [1986]). In light of the testimony at trial regarding decedent's testamentary capacity, we find the error to be harmless as a matter of law (*see* CPLR 2002; *Nestorowich v Ricotta*, 97 NY 2d 393 [2002] ["viewing the charge as a whole, and in light of the evidence presented, counsel's arguments and the otherwise proper jury instructions, there is no indication that the 'error in judgment' charge clouded the issue or negatively influenced the jury's determination"]).

Finally, proponents challenge the testimony of objectant's expert because his opinion was based in part on conversations with objectant regarding decedent's mental capacity. A psychiatrist's opinion may be received in evidence even though some of the information on which it is based is inadmissible hearsay, if the hearsay is "of a kind accepted in the profession as reliable in forming a professional opinion, or if it comes from a witness subject to full cross-examination on [] trial" (*People v Goldstein*, 6 NY3d 119, 124 [2005], *cert denied* 547 US 1159 [2006]). The court properly permitted the expert to testify, despite his conversations with objectant, since she was subject to full cross-examination at trial.

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

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

ENTERED: JUNE 7, 2018

CLERK

Manzanet-Daniels, J.P., Tom, Andrias, Kapnick, Singh, JJ.

6805 The People of the State of New York, Ind. 1792/15
Respondent,

-against-

Charles Gibson,
Defendant-Appellant.

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Laura A. Ward, J.), rendered February 22, 2016,

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

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

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

ENTERED: JUNE 7, 2018

CLERK

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

Manzanet-Daniels, J.P., Tom, Andrias, Kapnick, Singh, JJ.

6806 & M-2279 1471 Second Corp., Plaintiff-Appellant, Index 652594/15

-against-

NAT of NY Corp., Defendant,

Nando Ghorchian, also known as Nasser Ghorchian, Defendant-Respondent.

_____

Woods Lonergan & Read PLLC, New York (James F. Woods of counsel), for appellant.

Lonuzzi & Woodland, LLP, Brooklyn (John Lonuzzi of counsel), for respondent.

_____

Order, Supreme Court, New York County (Cynthia Kern, J.), entered July 29, 2016, which granted defendant Nando Ghorchian's motion for summary judgment dismissing the complaint as against him, unanimously reversed, on the law, without costs, and the motion denied.

Defendant Ghorchian contends that he did not personally guaranty the lease between plaintiff and defendant NAT of NY Corp., because, assuming he signed it, the document defines him as both guarantor and tenant and does not refer to NAT or to any lease with NAT. As a rule, "an interpretation of an instrument that would result in making a person or entity the guarantor of his, her or its own debt must be rejected" (*150 Broadway N.Y.*

Assoc., LP v Bodner, 14 AD3d 1, 8 [1st Dept 2004]; *see PNC Capital Recovery v Mechanical Parking Sys.*, 283 AD2d 268 [1st Dept 2001], *lv dismissed* 96 NY2d 937 [2001], *appeal dismissed* 98 NY2d 763 [2002]). However, this result is not required if the guaranty and lease are read together, under the settled principle that "agreements executed at substantially the same time and related to the same subject matter are regarded as contemporaneous writings and must be read together as one" (*Flemington Natl. Bank & Trust Co. [N.A.] v Domler Leasing Corp.*, 65 AD2d 29, 32 [1978], *affd* 48 NY2d 678 [1979]; *see 1626 Second Ave. LLC v Salsberg*, 105 AD3d 432 [1st Dept 2013]; *Davimos v Halle*, 60 AD3d 576 [1st Dept 2009], *lv denied* 13 NY3d 713 [2009]). Ghorchian contends that the purported guaranty was executed too long after the lease to be read together with it. However, the documents were executed as of the same date, and the guaranty refers to a lease with plaintiff for the premises described in the lease. Under the circumstances, issues of fact exist as to whether the guaranty was intended as a guaranty of NAT's obligations under the lease.

Ghorchian's alternative argument that a subsequent lease amendment discharged any obligation on the lease is contrary to

the terms of the agreement.

M-2279 - *1471 Second Corp. v Nat of NY Corp.*

Motion to supplement the record with the one-page affidavit of Nastasi Agostino, sworn to on October 11, 2013, granted.

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

ENTERED: JUNE 7, 2018

CLERK

Manzanet-Daniels, J.P., Tom, Andrias, Kapnick, Singh, JJ.

6807 The People of the State of New York, Respondent, Ind. 1271/99

-against-

Alfred DiMartini, Defendant-Appellant.

_____

Rosemary Herbert, Office of the Appellate Defender, New York (Lauren Stephens-Davidowitz of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered on or about September 30, 2015, which denied in part defendant's Correction Law § 168-o(2) petition to modify his sex offender classification, unanimously affirmed, without costs.

Assuming that the order is appealable (*see People v Tilley*, 138 AD3d 547 [1st Dept 2016]), we find that the court providently exercised its discretion when it reduced defendant's level three classification to level two but declined to reduce it further. Defendant failed to establish by clear and convincing evidence a

basis for a modification to level one (*see People v Lashway*, 25 NY3d 478 [2015]; *People v Lopez*, 154 AD3d 531 [1st Dept 2017]). The court's grant of only partial relief is supported by the totality of mitigating and aggravating factors.

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

ENTERED: JUNE 7, 2018

CLERK

Manzanet-Daniels, J.P., Tom, Andrias, Kapnick, Singh, JJ.

6808 Ivette Aquino, Index 305823/14
Plaintiff-Appellant,

-against-

Silverio A. Alvarez, et al.,
Defendants-Respondents,

Danny Moses Ramos,
Defendant.

_____

Daniel S. Berke, Brooklyn, for appellant.

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

_____

Order, Supreme Court, Bronx County (Joseph Capella, J.), entered on or about May 4, 2017, which granted defendants' motion for summary judgment dismissing the complaint for lack of serious injury under Insurance Law § 5102(d), unanimously modified, on the law, the motion denied as to plaintiff's claims of serious injury to her cervical and lumbar spine, and otherwise affirmed, without costs.

Defendants met their initial burden through the affirmed reports of their medical experts who found no objective evidence of serious injury to the cervical spine, lumbar spine, and left shoulder, and concluded that any observed conditions were not causally related to the accident (*see Franklin v Gareyua*, 136 AD3d 464, 465 [1st Dept 2016], *affd* 29 NY3d 925 [2017]*; Rickert v*

Diaz, 112 AD3d 451 [1st Dept 2013]). In particular, their orthopedist opined that the findings made by plaintiff's orthopedic surgeon following arthroscopic surgery on the shoulder, including a "rather prominent spur," synovitis, and bursitis, indicated that plaintiff had a degenerative labral tear and impingement, and no causally-related pathology. Defendants also relied on the report of an emergency medical specialist who concluded that plaintiff's post-accident hospital records were inconsistent with any traumatically-induced injuries, and showed no clinical signs of shoulder injury (*see Paulling v City Car & Limousine Servs., Inc.*, 155 AD3d 481 [1st Dept 2017]; *Moore-Brown v Sofi Hacking Corp.*, 151 AD3d 567 [1st Dept 2017]).

In opposition, plaintiff raised an issue of fact as to her cervical and lumbar spine by submitting affirmed reports of her treating physicians who found range of motion limitations, objective evidence of injury, such as bulging discs shown on MRI films, and opined that these injuries were causally related to the accident (*see Encarnacion v Castillo*, 146 AD3d 600 [1st Dept 2017]; *Santana v Tic-Tak Limo Corp.*, 106 AD3d 572 [1st Dept 2013]). Since defendants did not present any evidence of preexisting injuries to the cervical and lumbar spine documented in plaintiff's own medical records, nothing further was required of plaintiff in opposition to the motion as to those claims (*see*

Sanchez v Oxcin, 157 AD3d 561, 563 [1st Dept 2018]).

However, as to plaintiff's claimed shoulder injury, her doctors' conclusory opinions of a causal relationship were insufficient to raise an issue of fact. They did not address her surgeon's operative findings, including the "very extremely large bone spur" and synovitis, and explain why these findings were not degenerative or were not the cause of the shoulder conditions for which she had surgery (*see De La Rosa v Okwan*, 146 AD3d 644 [1st Dept 2017], *lv denied* 29 NY3d 908 [2017]*; Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1044 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]).

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

ENTERED: JUNE 7, 2018

CLERK

Manzanet-Daniels, J.P., Tom, Andrias, Kapnick, Singh, JJ.

6809-
6810N Index 651654/14

Central Amusement International LLC,
Plaintiff-Appellant,

-against-

Lexington Insurance Company,
Defendant-Respondent.

_____

Wilkofsky, Friedman, Karel & Cummins, New York (David B. Karel of counsel), for appellant.

Mound Cotton Wollan & Greengrass LLP, New York (John Mezzacappa of counsel), for respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered on or about December 6, 2016, which granted defendant's motion to amend its answer, unanimously affirmed, without costs. Order, same court and Justice, entered October 23, 2017, which denied plaintiff's motion to amend the complaint and to renew the prior motion, unanimously affirmed, without costs.

The motion court did not abuse its discretion in granting defendant's motion to amend its answer (*see Murray v City of New York*, 43 NY2d 400, 404-405 [1977]; *McGhee v Odell*, 96 AD3d 449, 450 [2012]; CPLR 3025[b]). Plaintiff's argument that it was prejudiced at the time of the amendment because it was time-barred from pursuing a professional malpractice claim against its

engineer, is unavailing. The motion court correctly observed that plaintiff had the opportunity and duty to perform its own investigation to uncover potential culpable conduct by its contractors, engineers, or any other party that may have contributed to the loss, but it chose not to do so. Plaintiff has also not established the validity of its prejudice claim, as it never attempted to sue its engineer (or other third party) following the disclosure of defendant's expert report. The claim that defendant's production of the expert report was delayed finds no support since it was timely produced during expert discovery.

Nor did the court abuse its discretion in denying plaintiff's renewal motion (*see* CPLR 2221[e]; *Matter of South Bronx Unite! v New York City Indus. Dev. Agency*, 138 AD3d 462 [1st Dept 2016]). Plaintiff failed to show any new facts that would have been relevant to the court's consideration of the motion. Furthermore, the court's denial of plaintiff's motion to amend the complaint was properly denied since the proposed

amendment was "palpably improper or insufficient as a matter of law" (*McGhee* at 450 [internal quotation marks omitted]).

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: JUNE 7, 2018

CLERK

Manzanet-Daniels, J.P., Tom, Andrias, Kapnick, Singh, JJ.

6811 In re John Covington, Index 101011/17
[M-1736] Petitioner, Ind. 423/98
OP 144/18

-against-

Jonathan K. Yi, etc., et al.,
Respondents.

_____

John Covington, petitioner pro se.

Richard A. Brown, District Attorney, Kew Gardens (Jonathan K. Yi of counsel), for Jonathan K. Yi, respondents.

_____

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

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

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

ENTERED: JUNE 7, 2018

CLERK

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

6812 The People of the State of New York, Respondent, Ind. 1442/14

-against-

William Ramos, Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (William B. Carney of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (James M. Burke, J.), rendered December 3, 2014, convicting defendant, after a jury trial, of robbery in the second degree and resisting arrest, and sentencing him, as a second violent felony offender, to an aggregate term of nine years, unanimously modified, on the law, to the extent of reducing the second degree robbery conviction to third degree robbery, remanding the matter for resentencing on that conviction, and otherwise affirmed.

We reject defendant's argument that the verdict was not based on legally sufficient evidence and was against the weight of the evidence because the evidence did demonstrate an intent to permanently deprive the victim of her property. Defendant's conduct, including his flight with the victim's purse and necklace, supported the inference that, at the time of the

robbery, he intended to permanently deprive the victim of her property (*see* Penal Law § 155.00 [3]; *People v Kirnon*, 39 AD2d 666, 667 [1st Dept 1972], *affd* 31 NY2d 877 [1972]), notwithstanding that the incident involved domestic violence (*see People v Ramos*, 12 AD3d 316, 317 [1st Dept 2004], *lv denied* 4 NY3d 767 [2005]).

However, we agree with the defendant that the evidence was insufficient to establish "substantial pain" beyond a reasonable doubt to sustain his conviction of robbery in the second degree Penal Law § 160.10 [2] [a]). The People's evidence, presented through photographs and police testimony, was insufficient to establish that plaintiff suffered more than "petty slaps" and, therefore, failed to establish "substantial pain" beyond a reasonable doubt (see *Matter of Philip* A., 49 NY2d 198, 200 [1980]).

Defendant did not preserve any of his challenges to the prosecutor's summation, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d

114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]). To the extent that portions of the summation could be viewed as containing a misstatement of law, any prejudice was avoided by the court's charge, which the jury is presumed to have followed.

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

ENTERED: JUNE 7, 2018

CLERK

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

6813 Tammi Yellin, Index 154544/14
Plaintiff-Respondent,

-against-

Adam Zimmerman,
Defendant-Appellant.

_____

Byrne & O'Neill, LLP, New York (Elaine C. Gangel of counsel), for appellant.

Law Office of Joel J. Ziegler, PLLC, Smithtown (Joel J. Ziegler of counsel), for respondent.

_____

Order, Supreme Court, New York County (Nancy Bannon, J.), entered July 24, 2017, which, to the extent appealed from as limited by the briefs, denied defendant's motion for summary judgment dismissing the complaint to the extent the complaint asserts a cause of action for breach of contract, unanimously affirmed, without costs.

The court correctly determined that the first cause of action, although denominated a claim for professional malpractice, also states a cause of action for breach of contract (*see generally Foley v D'Agostino*, 21 AD2d 60, 65 [1st Dept 1964]).

The court also correctly found that the breach of contract cause of action is not redundant of the malpractice claim (*see Ferro Fabricators, Inc. v 1807-1811 Park Ave. Dev. Corp.*,

127 AD3d 479, 480 [1st Dept 2015]. The breach of contract claim is premised upon obligations distinct from those that flow from professional standards of architectural practice, and it seeks damages distinct from those sought under the dismissed malpractice claim.

The court also correctly denied summary dismissal of the breach of contract cause of action since the record presents issues of fact as to whether defendant complied with the particular terms of the contract at issue.

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

ENTERED: JUNE 7, 2018

CLERK

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

6814-
6815-
6816 In re Imanuel D. W., and Others,

Dependent Children Under the Age
of Eighteen Years of Age, etc.,

Shaunette W.,
Respondent-Appellant,

Sheltering Arms Children and Family
Services,
Petitioner-Respondent.

_____

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

Marion C. Perry, New York, for respondent.

Dawne A. Mitchell, The Legal Aid Society, New York (Patricia Colella of counsel), attorney for the child Imanuel D. W.

Larry S. Bachner, New York, attorney for the children Starr S. W. and Leroy E. R. Jr.

_____

Orders, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about August 12, 2016, which, upon a fact-finding determination that respondent mother is presently and for the foreseeable future unable to care for the subject children by reason of mental illness, terminated her parental rights to the children and committed custody and guardianship of the children to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously

affirmed, without costs.

Clear and convincing evidence supports the finding that the mother, by reason of her mental illness, is unable, at present and for the foreseeable future, to provide proper and adequate care for the children (*see* Social Services Law § 384-b[4][c], [6][a]; *Matter of Abigail Bridget W. [Janice Antoinette W.]*, 112 AD3d 468, 469 [1st Dept 2013]). The court properly relied on the unrebutted court-appointed expert's diagnosis and testimony as to the nature and severity of the mother's illness, which was based on his own evaluation and review of the relevant medical records. The hearing testimony demonstrated, among other things, the mother's lack of insight into her mental illness and ability to care for the children, as well as her lack of compliance with the prescribed medication that was needed to control her illness (*see Matter of Mar De Luz R. [Luz R.]*, 95 AD3d 423 [1st Dept 2012]).

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

ENTERED: JUNE 7, 2018

CLERK

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

6817 David Sternberg, et al., Index 302925/09
Plaintiffs-Respondents,

-against-

Dr. Elena Rugova, et al.,
Defendants,

Dr. M. Mehdi Kazmi, et al.,
Defendants-Appellants.

_____

Brown, Gruttadaro, Gaujean, Prato & Sastow, PLLC, White Plains (Joan Ruddy of counsel), for Dr. M. Mehdi Kazmi and Regional Neurological Associates, P.C, appellants.

Keller, O'Reilly & Watson P.C., Woodbury (Clifford B. Keller of counsel), for The New York Presbyterian Hospital and Dr. Joseph Safdieh, appellants.

Ronemus & Vilensky, Garden City (Lisa M. Comeau of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered February 8, 2017, which, insofar as appealed from as limited by the briefs, denied defendants Regional Neurological Associates, P.C. and Dr. M. Mehdi Kazmi's (the Kazmi defendants) and The New York Presbyterian Hospital and Dr. Joseph Safdieh's (the Safdieh defendants) motions for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motions granted. The Clerk is directed to enter judgment accordingly.

The Kazmi defendants established prima facie that they did

not depart from good and accepted medical practice in failing to diagnose plaintiff David Sternberg (the patient) with a thoracic meningioma, through their expert opinion, based on the symptoms presented, and particularly the absence of complaints of leg weakness or bladder symptoms, that "[t]here was no clinical indication . . . to order imaging studies of the thoracic spine to investigate the presence of a thoracic meningioma." Although the patient complained of urinary symptoms during one phone call, he added that they had "resolved completely" since he had decreased his pain medication, and he declined to follow Kazmi's recommendation of admission to the hospital for further testing.

Plaintiffs' expert affirmation in opposition was insufficient to raise any material issues of fact (*see Anyie B. v Bronx Lebanon Hosp.*, 128 AD3d 1, 3 [1st Dept 2015]). The expert failed to address Kazmi's actual conduct, instead improperly grouping him with the other defendants (*see Tsitrin v New York Community Hosp.*, 154 AD3d 994, 996 [2d Dept 2017]). He also misstated the record, opining that thoracic studies were indicated by several symptoms, including positive Romberg sign, position sense, leg weakness, and rib pain, that the patient never mentioned to Kazmi (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542 [2002]; *Ramirez v Columbia-Presbyterian Med. Ctr.*, 16 AD3d 238 [1st Dept 2005]). In addition, he failed to address the

Kazmi defendants' expert's opinion about the significance of the absence of certain complaints (*see Abalola v Flower Hosp.*, 44 AD3d 522 [1st Dept 2007]).

The Safdieh defendants established prima facie that they did not depart from good and accepted medical practice through an expert opinion similar to the Kazmi defendants' expert opinion, based on the symptoms presented, and particularly the absence of complaints of leg weakness or bladder symptoms, that "there was no clinical indication . . . to order radiological imaging of the thoracic spine to investigate the presence of a thoracic meningioma." The expert also opined that Safdieh's "working diagnosis of peripheral neuropathy and his work-up and treatment were reasonable and in accordance with accepted standards of medical care." Although he acknowledged that plaintiffs reported leg weakness in the patient in their final communication with Safdieh, the expert opined that Safdieh's response to this information - to await a scheduled second opinion before taking further action - was appropriate.

Plaintiffs' expert affirmation in opposition was insufficient to raise any material issues of fact. The expert failed to address the Safdieh defendants' expert's opinion about the significance of the absence of certain complaints or the reasonableness of Safdieh's working diagnosis (*see Abalola*, 44

AD3d at 522; *see also Rivera v Greenstein*, 79 AD3d 564, 568-569 [1st Dept 2010]). His opinion about Safdieh's conduct was also unsupported by the record (*see Diaz*, 99 NY2d at 544; *Wong v Goldbaum*, 23 AD3d 277, 279-280 [1st Dept 2005]). The expert opined that the patient's complaints of rib pain and leg weakness should have prompted Safdieh to order thoracic imaging studies in September 2007. However, the patient did not complain of leg weakness until the following month.

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

ENTERED: JUNE 7, 2018

CLERK

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

6818 In re Marla Eilenberg, Index 654780/16
Petitioner-Appellant,

-against-

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

_____

Glass Krakower LLP, New York (Bryan D. Glass of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Janet L. Zaleon of counsel), for respondents.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered January 20, 2017, which granted respondents' cross motion to dismiss the petition challenging respondents' determination, which, after a hearing, sustained numerous specifications against petitioner and terminated her position as a guidance counselor, unanimously affirmed, without costs.

Petitioner abandons any challenge to the court's determination that the petition was not timely served, and that she had shown no cause to extend the time for service pursuant to CPLR 306-b (see *Henneberry v Borstein*, 91 AD3d 493 [1st Dept 2012]).

In any event, even assuming that the petition was timely served, the penalty of termination does not shock our sense of fairness. The record establishes petitioner's consecutive years

of incompetent performance and resistance to remedial assistance (*see e.g. Matter of March v New York City Bd./Dept. of Educ.*, 157 AD3d 555 [1st Dept 2018]). There exists no basis to disturb the Hearing Officer's credibility determinations (*see Matter of Douglas v New York City Bd./Dept. of Educ.*, 87 AD3d 856, 857 [1st Dept 2011]).

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

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

ENTERED: JUNE 7, 2018

CLERK

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

6819 In re Energy & Environmental Legal Institute, et al., Petitioners-Appellants, Index 101181/16

-against-

Attorney General of the State of New York, Respondent-Respondent.

_____

Law Office of Francis Menton, New York (Francis Menton of counsel), for appellants.

Eric T. Schneiderman, Attorney General, New York (Linda Fang of counsel), for respondent.

_____

Judgment (denominated decision, order and judgment), Supreme Court, New York County (Arlene P. Bluth, J.), entered June 7, 2017, insofar as appealed from as limited by the briefs, denying so much of the petition as sought to compel respondent to disclose an email dated October 30, 2015 in response to petitioners' request pursuant to the Freedom of Information Law (FOIL), and bringing up for review an order (denominated interim decision and order), same court and Justice, entered June 5, 2017, which denied petitioners' request for a search of respondent's personal email accounts, unanimously affirmed, without costs.

Petitioners' FOIL request seeks any personal email correspondence between respondent and any of eight individuals,

containing any of seven terms during a certain time period. Petitioners failed to establish a reasonable likelihood that such accounts contain any records responsive to this particular FOIL request. Further, there was an insufficient showing that respondent used private accounts or devices to carry out his official duties which would warrant ordering respondent's private email account(s), text messages or other private devices be searched.

The court correctly found that respondent's right to invoke the inter- or intra-agency exemption to FOIL as to an email message sent to respondent was not waived when the sender added a third party to the "cc" field" of the email and instructed the third party to print attached materials and deliver them to respondent, in the absence of any expectation that the third party would review the substance of those materials or disclose them to others (*see e.g. Gama Aviation Inc. v Sandton Capital*

Partners, L.P., 99 AD3d 423, 424 [1st Dept 2012]; *Robert V. Straus Prods. v Pollard*, 289 AD2d 130 [1st Dept 2001]).

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

ENTERED: JUNE 7, 2018

CLERK

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

6820 The People of the State of New York, Ind. 3970/16
Respondent,

-against-

Youji Zheng,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Larry Stephen, J. at plea; Laura Ward, J. at sentencing), rendered December 28, 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: JUNE 7, 2018

CLERK

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

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

6821 Rosemarie A. Herman, etc., et al., Plaintiffs-Respondents, Index 650205/11 950354/13

-against-

Julian Maurice Herman, et al., Defendants-Appellants,

Michael Offit, et al., Defendants.

- - - - -

[And a Third Party Action]

_____

Akerman LLP, New York (M. Darren Traub of counsel), for appellants.

Jaspan Schlesinger, LLP, Garden City (Steve R. Schlesinger of counsel), for respondents.

_____

Appeals from order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 2, 2017, which, insofar appealed from as limited by the briefs, confirmed the report of a special referee, and from order, same court and Justice, entered on or about September 26, 2017, which amended the decretal directive in the May order, deemed appeal from judgment, same court and Justice, entered September 26, 2017 (CPLR 5520[c]), (1) directing defendant Julian Maurice Herman (Maurice) to cause defendant Windsor Plaza, LLC, a Delaware limited liability company, to execute and record a deed conveying the real property located at 952 Fifth Avenue, New York, NY, to Maurice and Ariel

E. Belen, as temporary trustee of the trust created by plaintiff Rosemarie A. Herman (plaintiff) on November 27, 1991 (the 1991 Trust), as tenants in common, (2) against Maurice in favor of the temporary trustee in the amount of $78,663,555.61, and (3) against Maurice in favor of plaintiff and Belen, as trustees of the Trust created by Harold Herman on March 1, 1990 (the 1990 Trust), in the amount of $24,973,652.83, and, so considered, said judgment unanimously affirmed, with costs.

Defendants-appellants' (hereinafter defendants) attempt to reargue liability issues – e.g., whether Maurice owed plaintiff a fiduciary duty and whether a conspiracy to commit fraud was established – is precluded by the default judgment against Maurice (*see Herman v Herman*, 134 AD3d 442 [1st Dept 2015]).

Defendants' argument that they were deprived of due process because they were not allowed to participate in the damages inquest is barred by *Herman v Herman* (30 NY3d 925, 926 [2017]).

Defendants contend that the proper measure of damages is the difference between $8 million (the price Maurice paid for the 1990 and 1991 Trusts' interests in six property-owning limited liability companies in December 1998) and the true value of said interests, not the profits the trusts would have received in 2002 if they had not sold their interests. This argument is unavailing. "The measure of damages for breach of fiduciary duty

is the amount of loss sustained, including lost opportunities for profit on the properties by reason of the faithless fiduciary's conduct" (*105 E. Second St. Assoc. v Bobrow,* 175 AD2d 746, 746-747 [1st Dept 1991]; *see also Matter of Rothko,* 43 NY2d 305, 321 [1977]).

Moreover, Maurice previously moved "to exclude from the inquest any evidence that postdates the 1998 transaction" (*Herman v Herman,* 144 AD3d 433, 434 [1st Dept 2016], *affd* 30 NY3d 925 [2017]). We found that the IAS court properly denied that motion, stating, "In light of the default judgment against him, Maurice was liable on numerous claims in the complaint, including unjust enrichment and constructive trust, for which plaintiffs' damages may not be limited to out of pocket losses from the 1998 transaction" (*id.*). The Court of Appeals affirmed (*see Herman,* 30 NY3d at 926).

Plaintiff proved her damages. The case at bar is not like *Paulson v Kotsilimbas* (124 AD2d 513 [1st Dept 1986]), where the record was void as to whether testimony was taken at the inquest and where the record was barren of any evidence supporting the damages award (*see id.* at 514). Nor is the instant action like *Wine Antiques v St. Paul Fire & Mar. Ins. Co.* (40 AD2d 657 [1st Dept 1972], *affd* 34 NY2d 781 [1974]), where "[t]he testimony presented by plaintiff on the inquest was entirely conclusory"

(*id.*). We decline to consider defendants' arguments that depend on materials that are either outside or not properly in the record (*see People v Smith,* 206 AD2d 102, 113 [1st Dept 1994], *affd on other grounds* 85 NY2d 1018 [1995]).

Defendants contend that instead of awarding plaintiff 50% of 952 Fifth Avenue, the court should have awarded her 50% of Windsor, the LLC that owns the building. They contend that unwinding the January 1, 1998 transaction by which the 1991 Trust conveyed its interest in 952 Fifth Avenue to Windsor violates the statute of limitations. The latter argument is barred by prior proceedings in this case. When the IAS court denied Maurice's motion to limit the evidence at the inquest, it stated that, as he had defaulted, he could "no longer contest liability, including a defense based on the statute of limitations" (*Herman v Herman,* 2016 NY Slip Op 30808[U], **5 [Sup Ct, NY County], *affd* 144 AD3d 433 [1st Dept 2016], *affd* 30 NY3d 925 [2017]). As for that portion of defendants' argument which is not barred by prior proceedings, it would be unjust to force plaintiff's trust to be a member of an LLC of which Maurice is the sole managing member. Plaintiff's expert stated that Maurice has paid personal expenses through Windsor's bank account. He also stated that, since 2003, Windsor's legal and professional expenses have far exceeded the industry norm; apparently, Windsor has been making payments

pertaining to lawsuits unrelated to it.

Defendants' arguments regarding prejudgment interest are also unavailing. Plaintiff's failure to bring suit until January 2011, was due to Maurice and defendant Michael Offit's (the former trustee of the trusts, who was responsible for protecting plaintiff's interests) concealment of the 1998 and 2002 transactions. If this action has taken a long time to resolve, it is due in large part to Maurice (*see e.g. Herman,* 144 AD3d at 434).

Defendants claim the judgment is contradictory because it awards plaintiff both (1) 50% of 952 Fifth Avenue and (2) prejudgment interest based on Maurice's breach of the fiduciary duty he owed as managing member of Windsor, the LLC that owned that building. This is incorrect. The damages on which prejudgment interest runs do not include Windsor.

We decline to consider defendants' argument, made for the first time in their reply brief (*see e.g. Shia v McFarlane,* 46

AD3d 320, 321 [1st Dept 2007]), that (1) by ordering Windsor to transfer its only asset, the IAS court de facto dissolved it and (2) a New York court lacks the power to dissolve a Delaware entity.

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

ENTERED: JUNE 7, 2018

CLERK

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

6822 In re Terence Trainer, Index 101227/16
Petitioner-Appellant,

-against-

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

401 Edgecombe Partners, LLC,
Respondent-Intervenor-Respondent.

_____

Himmelstein, McConnell, Gribben, Donoghue & Joseph LLP, New York (Jesse Gribben of counsel), for appellant.

Mark F. Palomino, New York (Aida Patricia Reyes of counsel), for State of New York Division of Housing and Community Renewal, respondent.

Sperber Denenberg & Kahan, P.C., New York (Eric H. Kahan of counsel), for 401 Edgecombre Partners, LLC, respondent.

_____

Order and judgment (one paper) of the Supreme Court, New York County (Arlene P. Bluth, J.), entered July 10, 2017, to the extent it denied the petition to vacate respondent State of New York Division of Housing and Community Renewal's determination dated July 28, 2015, denying petitioner's rent overcharge complaint, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondent's determination that there was no rent overcharge, based largely on its interpretation of the statutes it administers, was not arbitrary and capricious, particularly in

light of the fact that the vacancy lease petitioner originally executed was not for a rent stabilized apartment (*see Matter of Ansonia Residents Assn. v New York State Div. of Hous. & Community Renewal*, 75 NY2d 206, 213 [1989]; *Matter of Hawthorne Gardens v State of New York Div. of Hous. & Community Renewal*, 4 AD3d 135, 136 [1st Dept 2004]; CPLR 7803[3]). To the extent petitioner argues that the landlord is estopped from arguing that the apartment is rent stabilized because he and petitioner erroneously executed a renewal lease for a rent stabilized apartment, before the owner realized it was sent in error and notified petitioner of the error, "[r]ent stabilization coverage is a matter of statutory right and cannot be created by waiver or estoppel" (*Ruiz v Chwatt Assoc.*, 247 AD2d 308 [1st Dept 1998]; *see also 546 W. 156th St. HDFC v Smalls*, 43 AD3d 7, 12 [1st Dept 2007]).

As DHCR concluded, the legal regulated rent on the base date of December 15, 2006 was $1,722.23 for the period from March 1, 2006 to February 28, 2007. Tenants Rachels and Brooks then rented the apartment from June 1, 2007 to February 19, 2008, and received a Notice to First Tenant of Apartment Deregulated After Vacancy Due to a Rent of $2,000 or More, which showed that when the statutory vacancy allowance of $292.78 was added to the then legal regulated rent of $1,722.23, the legal regulated rent rose

to $2,015.01 (*see* Rent Stabilization Law [RSL] § 26-516(a)(2); Rent Stabilization Code [RSC] § 2520.6[f][1]; 2526.1(a)(2). Thus, by the time petitioner took occupancy, the apartment was deregulated (RSC § 2520.11[r][4]). In these circumstances, DHCR was not required to inquire further past the base date to ascertain whether the apartment in question was lawfully deregulated.

Pursuant to the recent ruling by the Court of Appeals in *Altman v 285 W. Fourth LLC*, ___ NY3d ___, 2018 Slip Op 02829 [2018]), the legal regulated rent for petitioner's apartment would have crossed the $2,000 threshold and would have been deregulated by the time of his lease commencing March 1, 2008, even assuming the rent during the prior Rachels/Brooks tenancy is disregarded as not properly registered pursuant to RSL § 26-517[a].

Nor does the record show substantial indicia of fraud to warrant an inquiry beyond the four-year statute of limitations to ascertain whether the rent on the base date is a lawful rent (*Matter of Grimm v State of N.Y. Div. of Hous. and Community Renewal Off. of Rent Admin.*, 15 NY3d 358, 366 [2010]; *Thornton v Baron*, 5 NY3d 175, 181 [2005]; *see* RSL § 26-516 [a]). Although petitioner correctly notes that there was a significant increase in rent from 2003 to 2004, that increase and a few discrepancies

in the registration statement do not suffice as indicia of fraud to require DHCR to inquire beyond the four-year statute of limitations (*Grimm*, 15 NY3d at 367).

We have considered petitioner's remaining contentions and find them unavailing or not properly before this Court.

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

ENTERED: JUNE 7, 2018

CLERK

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

6823 Efrain Auquilla, Index 304708/14
Plaintiff-Appellant,

-against-

Manjit Singh,
Defendant-Respondent.

_____

Ferro, Kuba Mangano Sklyar, P.C., Hauppauge (Kenneth E. Mangano of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Stacy R. Seldin of counsel), for respondent.

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Order, Supreme Court, Bronx County (Joseph E. Capella, J.), entered February 10, 2017, which granted defendant's motion for summary judgment dismissing the complaint based on plaintiff's inability to meet the serious injury threshold of Insurance Law § 5102(d), unanimously affirmed, without costs.

Plaintiff alleges that he suffered serious injuries to his right knee, cervical spine and lumbar spine as the result of a motor vehicle accident. Defendants met their prima facie burden of demonstrating that plaintiff's claimed injuries were not causally related to the accident through the report of their radiologist, who opined that all the conditions shown in the MRI examinations were degenerative in nature, and consistent with plaintiff's age and weight (*see Sanchez v Oxcin*, 157 AD3d 561, 562 [1st Dept 2018]). In addition, as to the right knee and

lumbar spine, defendant submitted X-ray reports by plaintiff's radiologist, which showed arthritic changes in the right knee and multi-level degenerative changes and osteoarthritis in the lumbar spine. At his deposition, plaintiff acknowledged that his orthopedic surgeon told him his knee was "bad" due to his "age and arthritis," and that he ceased all treatment for his injuries about a year after the accident. Thus, the burden shifted to plaintiff to explain the evidence of degeneration in his own medical records (*see Rivera v Fernandez & Ulloa Auto Group*, 123 AD3d 509, 510 [1st Dept 2014], *affd* 25 NY3d 1222 [2015]), and his cessation of treatment (*see Pommells v Perez*, 4 NY3d 566, 574 [2005]).

In opposition, plaintiff failed to raise an issue of fact as to causation of his alleged right knee and lumbar spine injuries. Neither his radiologist nor his orthopedic surgeon addressed the evidence of degeneration in plaintiff's X-ray reports or explained why the degenerative and arthritic conditions could not have been the cause of his conditions (*see* Alvarez v NYLL Mgt. Ltd., 120 AD3d 1043, 1044 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]; *Khanfour v Nayem*, 148 AD3d 426, 427 [1st Dept 2017]). As to his cervical spine claim, plaintiff submitted his medical records showing that he stopped all treatment about six months after the accident, until the examination performed by his

orthopedic surgeon four years later. However, he submitted no admissible evidence explaining the four-year gap, or complete cessation, in treatment (*see Vila v Foxglove Taxi Corp.*, 159 AD3d 431 [1st Dept 2018]).

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

ENTERED: JUNE 7, 2018

CLERK

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

6824 In re Juelz U.,

A Child Under Eighteen Years of Age, etc.,

Chantal Nicole C.-D.,
Respondent-Appellant,

The Administration for Children's Services,
Petitioner-Respondent.

_____

Neal D. Futerfas, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Elina Druker of counsel), for respondent.

Dawne A. Mitchell, The Legal Aid Society, New York (Raymond E. Rogers of counsel), attorney for the child.

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Order of disposition, Family Court, New York County (Jane Pearl, J.), entered on or about March 27, 2017, which, upon a fact-finding determination that respondent mother derivatively neglected the subject child, placed the child in the custody of the Commissioner of Social Services until completion of the next permanency hearing, unanimously affirmed, insofar as it brings up for review the fact-finding determination, and the appeal otherwise dismissed, without costs, as moot.

The child's placement has been rendered moot as the date that was scheduled for the next permanency hearing has passed (*see Matter of Jonathan S. [Ismelda S.]*, 79 AD3d 539 [1st Dept

2010]; *Matter of Qiana C.*, 46 AD3d 479 [1st Dept 2007]).

The court properly determined that petitioner proved by a preponderance of the evidence that the child was derivatively neglected by the mother (*see* Family Ct Act § 1046[b][I]). The conduct underlying the prior findings was sufficiently proximate in time to this neglect proceeding to support the conclusion that the conditions that caused the child's older siblings to enter foster care still existed. The record shows that less than three months after the birth of the subject child, the court entered findings that the mother medically neglected the child's older brother and derivatively neglected the child's older sister and that the mother's untreated mental health symptomology interfered with her ability to properly care for those children (*see Matter of Camarrie B. [Maria R.]*, 107 AD3d 409 [1st Dept 2013]).

Furthermore, the record shows that during the underlying proceedings, the mother continued to display bizarre behavior by absconding with the child, causing the court to issue a warrant for her arrest. She also continued to refuse to submit to a mental health evaluation despite the August 22, 2016

dispositional order directing her to do so, and acknowledged during her fact-finding testimony that she tried to hide the child from the agency (*see Matter of Hunter YY.*, 18 AD3d 899, 900 [3d Dept 2005]).

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

ENTERED: JUNE 7, 2018

CLERK

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

6825-
6826 Index 156255/16

Level 3 Communications, LLC (now known as Centurylink), et al.,
Plaintiffs-Appellants,

-against-

Jacques Jiha, et al.,
Defendants-Respondents.

_____

Law Office of David M. Wise, Babylon (David M. Wise of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Neil Schaier of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Martin Shulman, J.), entered December 8, 2017, dismissing the complaint pursuant to an order, same court and Justice, entered December 6, 2017, which granted defendants' motion to dismiss the complaint and denied plaintiffs' cross motion for summary judgment and to consolidate this action with their RPTL article 7 proceedings, unanimously affirmed, without costs. Appeal from the order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

To the extent that plaintiffs challenge the tax assessments as excessive, unequal or unlawful, or that their real property was misclassified, the court properly determined that their exclusive remedy was a proceeding pursuant to RPTL article 7 (*see*

RPTL 700, 706; *Kahal Bnei Emunim & Talmud Torah Bnei Simon Israel v Town of Fallsburg*, 78 NY2d 194, 204 [1991]). The court properly dismissed plaintiffs' remaining claims, including their speculative challenges to the method employed in the assessments and the constitutionality of the tax itself. Defendants' assessments were not palpably arbitrary or the product of invidious discrimination (*see generally Trump v Chu*, 65 NY2d 20, 25 [1985], *appeal dismissed* 474 US 915 [1985]).

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

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

ENTERED: JUNE 7, 2018

CLERK

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

6827 Ieda Rosa, Index 151687/16
Plaintiff-Respondent,

-against-

Koscal 59, LLC,
Defendant-Appellant.

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Rosenblum & Bianco, LLP, Rockville Centre (John Bianco of counsel), for appellant.

Sokolski & Zekaria, P.C., New York (Robert E. Sokolski of counsel), for respondent.

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Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered January 11, 2018, which, in this action seeking, inter alia, a declaration that the subject apartment is rent-stabilized, denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Contrary to defendant's contention, this action is not a fair market rent appeal and the apartment's rental history may be examined beyond four years to determine its rent-stabilization

status (*see Olsen v Stellar W. 110, LLC*, 96 AD3d 440, 441-442 [1st Dept 2012], *lv dismissed* 20 NY3d 1000 [2013]; *Gersten v 56 7th Ave. LLC*, 88 AD3d 189, 199-200 [1st Dept 2011]).

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

ENTERED: JUNE 7, 2018

CLERK

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

6828 The People of the State of New York, Respondent, Ind. 2083/17

-against-

Keith Wilcher, Defendant-Appellant.

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

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

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered June 27, 2017, convicting defendant, upon his plea of guilty, of attempted criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of one year, unanimously affirmed.

The allegations in defendant's predicate felony statement are not deemed admitted under CPL 400.21(3) so as to result in a waiver of his claim that his out-of-state conviction was not the equivalent of a New York felony. The court did not adequately adhere to the statutory requirement that it ask defendant if he wished to "controvert any allegation made" in the predicate felony statement, which also requires that it provide defendant a clear opportunity to do so in response to that particular

question (*see People v Jurgins*, 26 NY3d 607, 611 [2015]. However, the claim is unpreserved because it was not raised before the sentencing court or by way of a CPL 440.20 motion (*see id.* at 611-12), and we decline to review this issue in the interest of justice.

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

ENTERED: JUNE 7, 2018

CLERK

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

6829 Seaport Global Securities LLC, Index 655723/17
Plaintiff-Respondent,

-against-

SB Group Holdco, LLC,
Defendant-Appellant.

_____

Browne George Ross LLP, New York (Jeffrey A. Mitchell of counsel), for appellant.

Manatt, Phelps & Phillips, LLP, New York (Ronald G. Blum and Danielle Newman of counsel), for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered February 27, 2018, which denied defendant's motion to dismiss the amended complaint and for a stay of discovery pending the motion, unanimously affirmed, with costs.

The motion court properly denied defendant's motion to dismiss the amended complaint, as it states a claim for breach of contract, including breach of the implied covenant of good faith and fair dealing. The amended complaint alleges that the parties entered into a binding contract for the sale of stock, that defendant breached the contract by refusing to transfer the shares of such stock and by failing to make commercially reasonable efforts to settle the trade and that such breach caused injury preventing plaintiff from selling the stock to a third party. Indeed, the trade confirmation in this case states

that it "shall constitute a binding agreement between the parties." Defendant has failed to establish at this juncture that the trade confirmation is not enforceable based on its inclusion of language that "in the event that the trade cannot settle as a sale and assignment of the shares, the trade shall settle by a mutually agreeable alternative structure or other arrangement that affords buyer and seller the economic equivalent of the agreed-upon trade," as courts have found trade confirmations with similar language to be binding agreements (*see Stonehill Capital Mgt. LLC v Bank of the W.*, 28 NY3d 439, 444, 445, 449 [2016]; *Deephaven Distressed Opportunities Tradings, Ltd. v 3V Capital Master Fund Ltd.*, 100 AD3d 505, 505 [1st Dept 2012]; *Goldman Sachs Lending Partners, LLC v High Riv. Ltd. Partnership*, 34 Misc 3d 1209 [Sup Ct, NY County 2011]). The above case law also makes clear that the issue of whether the trade confirmation is an enforceable agreement is properly determined on a motion for summary judgment and not on a motion to dismiss.

Moreover, contrary to defendant's contention, plaintiff is asserting a breach of contract claim and not a claim for failure to negotiate or breach of implied contract. Plaintiff alleges that defendant breached the requirement in the trade confirmation to use "commercially reasonable efforts to settle the transaction

as soon as practicable after the Trade Date."

Finally, the motion court properly denied defendant's motion to dismiss the amended complaint's requests for relief. The amended complaint adequately pleads specific performance, which is applicable to stock that is thinly traded or privately held, such as here (*see Haymarket LLC v D.G. Jewellry of Canada*, 290 AD2d 318, 319 [1st Dept 2002], *lv denied* 98 NY2d 602 [2002]). Additionally, the amended complaint adequately pleads monetary damages, which may be an appropriate remedy in a breach of contract action regarding the issuance of securities. Moreover, whether such remedy is appropriate is an issue properly determined on a summary judgment motion and not on a motion to dismiss (*see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 415 [2001]).

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

ENTERED: JUNE 7, 2018

CLERK

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

6830 Mahmoud Makkieh, Index 161493/15
Plaintiff-Respondent,

-against-

Judlau Contracting Inc., et al.,
Defendants-Appellants,

Metropolitan Transportation Authority,
Defendant.

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Krez & Flores, LLP, New York (Edwin H. Knauer of counsel), for appellants.

The Taub Law Firm, P.C., New York (Christian T. Grim of counsel), for respondent.

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Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered October 13, 2017, which, to the extent appealed from, granted plaintiff's motion for partial summary judgment as to liability against defendant Judlau Contracting Inc. on his claim pursuant to Labor Law § 240(1), and denied defendants Judlau Contracting Inc., New York City Transit Authority and City of New York's (defendants) cross motion for summary judgment dismissing that claim, unanimously affirmed, without costs.

Plaintiff was injured when the nylon sling attaching a one-to-two ton steel plate to an excavator snapped, causing the heavy plate to fall to the ground, bounce, and sever the pole of a nearby street sign. The impact caused the sign to be propelled

toward plaintiff, hitting his right forearm and causing him serious personal injuries.

Plaintiff established a prima facie claim under Labor Law § 240(1). As an engineer supervising the construction of the Second Avenue subway, he was engaged in an activity falling within the protections of the statute; Judlau failed to provide proper protection, in violation of the statute; and the violation was the proximate cause of plaintiff's injuries.

Defendants' reliance on *Melo v Consolidated Edison Co. of N.Y.* (92 NY2d 909, 911 [1998]) is misplaced. There, the plaintiff was injured by a defective hoist lifting a steel plate that was either resting on the ground or hovering slightly above the ground. The Court of Appeals held that Labor Law § 240(1) was not implicated, because the requisite elevation differential was missing (*id.* at 911-912). Here, by contrast, the photographs taken immediately before the accident show that the steel plate was about two or three feet above the ground. This elevation differential cannot be viewed as de minimis, given the weight of the steel plate and the amount of force it generated over the course of its relatively short descent (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 605 [2009]; *Harris v City of New York*, 83 AD3d 104, 109-110 [1st Dept 2011]).

Defendants' efforts to cast doubt on the specific device

used to attach the steel plate to the excavator are irrelevant and fail to raise an issue of fact. Regardless of whether Judlau used a nylon sling, a metal sling, or any other device to attach the steel plate to the excavator, it failed to provide "proper protection" (*see Harris* at 111).

Defendants make the unavailing argument that Judlau is not liable because plaintiff was also at fault. However, the record shows that plaintiff had no involvement in attaching the steel plate to the excavator; that work, as well as the transportation of the plate, was performed solely by Judlau's employees. In any event, defendants do not argue, and there is no evidence, that plaintiff's actions were the sole proximate cause of his injuries. As such, any contributory negligence by plaintiff would not provide Judlau a defense to Labor Law § 240(1) liability (*Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]).

In light of the foregoing, we decline to address the parties' alternative arguments concerning liability under Labor Law § 200 and the applicability of res ipsa loquitur.

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

ENTERED: JUNE 7, 2018

CLERK

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

6831 The City of New York, Index 452725/14
Plaintiff-Respondent,

-against-

Eastern Shipbuilding Group, Inc.,
et al.,
Defendants,

Robert Allan Ltd.,
Defendant-Appellant.

_____

Hill Rivkins LLP, New York (James E. Forde of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Scott Shorr of counsel), for respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered September 8, 2017, which, to the extent appealed from, denied defendant Robert Allan Ltd.'s motion for summary judgment dismissing the complaint as against it, unanimously modified, on the law, to grant the motion as to the professional malpractice claim, and otherwise affirmed, without costs.

In support of dismissing the breach of contract claim, defendant established prima facie that the defects in the fireboats it designed and constructed for plaintiff (the City) did not cause the City to sustain any damages. It submitted testimony by the fire department's director of grants admitting that the City paid 100% of the fireboat repair costs using

federal grant money. In opposition, the City demonstrated that its use of the federal grant money for the fireboat repairs does not "place [it] in the same position as [it] would have been in if the contract had not been breached" (*see Tullett Prebon Fin. Servs. v BGC Fin., L.P.*, 111 AD3d 480, 481 [1st Dept 2013] [internal quotation marks omitted], *lv denied* 22 NY3d 864 [2014]). It submitted evidence that, while a small portion of the federal grant money was approved and earmarked for the fireboat repairs, the City was forced to reallocate funds for other projects covered by the grant when the cost of the fireboat repairs exceeded the amount requested. Moreover, the City established that, if it recovers any money from defendant, it will be required either to repay the federal grant money or make a request to keep the money for other necessary projects.

The cause of action for professional malpractice should be dismissed as duplicative. Although the service that defendant performed was "affected with a significant public interest" and the failure to perform could have had "catastrophic consequences," the City is "essentially seeking enforcement of the bargain" (*see Dormitory Auth. of the State of N.Y. v Samson*

Constr. Co., 30 NY3d 704, 711 [2018] [internal quotation marks omitted]). The City does not allege any damages that were not "within the contemplation of the parties under the contract," i.e., not "already encompassed in [its] contract claim" (*see id.* at 713).

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

ENTERED: JUNE 7, 2018

CLERK

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

6832 The People of the State of New York, Respondent, Ind. 1640/97

-against-

Juan Paulino Rosario, Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Robert M. Mandelbaum, J.), entered May 26, 2016, which, after a hearing, denied defendant's CPL 440.10 motion to vacate a judgment of conviction rendered January 13, 1998, unanimously reversed, on the law, the motion granted, the judgment vacated, and the matter remanded for further proceedings.

Defendant sufficiently demonstrated that his attorney rendered ineffective assistance by providing erroneous and prejudicial advice about the immigration consequences of his guilty plea (*see People v McDonald*, 1 NY3d 109, 114-115 [2003]). Defendant pleaded guilty to a felony relating to the sale of drugs in return for a promised sentence of five years' probation with a certificate of relief from civil disabilities. The record establishes that defense counsel advised defendant that even

though this type of conviction would be likely to result in deportation, the certificate of relief would protect him from that consequence. Counsel's advice about the effect of the certificate was clearly erroneous because defendant's conviction was a deportable offense, from which a certificate of relief provides no shield. The plea and sentencing minutes, including statements made by counsel, corroborate defendant's claim that he was misadvised about the certificate.

Defendant has demonstrated a reasonable probability that he would not have pleaded guilty and would have gone to trial had he known that the plea would have rendered him deportable despite the certificate (*see People v Hernandez*, 22 NY3d 972, 975 [2013]). Statements he made during the plea proceeding and the hearing support his claims that he pled guilty because the plea offer involved no jail time and because he was misled as to the

immigration consequences.

In light of this determination we find it unnecessary to address any other issues.

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

ENTERED: JUNE 7, 2018

CLERK

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

6833 The People of the State of New York, Ind. 261/17
Respondent,

-against-

Julio Carias,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Kevin McGrath, J. at plea; Laurie Peterson, J. at sentencing), rendered May 12, 2017,

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: JUNE 7, 2018

CLERK

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

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

6834 Genesis R., an Infant Over the Age of Fourteen Years, etc., et al., Plaintiffs-Appellants, Index 21034/06

-against-

The City of New York, Defendant,

New York City Department of Education, Defendant-Respondent.

_____

The Orlow Firm, Flushing (Thomas P. Murphy of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Mackenzie Fillow of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about March 7, 2017, which insofar as appealed from, granted the motion of defendant New York City Department of Education (DOE) to vacate its default, and upon vacatur, granted DOE's motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

The court providently exercised its discretion in vacating DOE's default based on law office failure (*see Matter of Rivera v New York City Dept. of Sanitation*, 142 AD3d 463, 464 [1st Dept 2016]). DOE demonstrated that it was unaware that the motion was scheduled for oral argument, perhaps because it was referred from one Justice to another, and plaintiffs also failed to appear.

Moreover, as the motion court recognized, public policy favors resolution of disputes on the merits (*see e.g. Harwood v Chaliha*, 291 AD2d 234 [1st Dept 2002]).

The court also properly concluded that DOE demonstrated a meritorious defense that supported dismissal of the complaint as a matter of law. DOE showed that infant plaintiff's injuries resulted from another student's impulsive and spontaneous act, and that the student had no prior disciplinary history at the school or with plaintiff (*see Summer H. v New York City Dept. of Educ.*, 19 NY3d 1030 [2012]; *Mirand v City of New York*, 84 NY2d 44, 49 [1994]). Plaintiff testified that while the student had prior arguments with the teacher and with others, the student never acted out physically in the teacher's classroom or became physical with her.

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

ENTERED: JUNE 7, 2018

CLERK

Richter, J.P., Tom, Mazzarelli, Gesmer, Moulton, JJ.

6960 REEC West 11th Street LLC, Index 651014/17
Plaintiff-Appellant,

-against-

246 West 11th St. Realty Corp.,
Defendant-Respondent,

John Does 1-10, et al.,
Defendants.

_____

Fischer Porter & Thomas, P.C., New York (Aaron E. Albert of counsel), for appellant.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Charles E. Ramos, J.), entered November 20, 2017, dismissing the complaint, unanimously affirmed, with costs.

The documentary evidence establishes a defense to plaintiff's claims as a matter of law (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]; CPLR 3211[a][1]). The complaint alleges that plaintiff worked diligently and in good faith to close title to the property that was the subject of the parties' contract of sale and that defendant breached the contract and the covenant of good faith and fair dealing by its unreasonable conduct. These allegations are utterly refuted by the contract of sale, the amendment to the contract, defendant's "Time Is of the Essence"

letter, and plaintiff's conduct in failing to close by any of the time of the essence dates.

Although the October 29, 2015 contract of sale did not contain a time is of the essence provision, the November 14, 2016 amendment, executed by both parties, set a new closing date of December 30, 2016, and gave plaintiff the right to adjourn the scheduled closing date to January 31, 2017; it provided that time was of the essence as to either the scheduled or the adjourned date (*see Miller v Almquist*, 241 AD2d 181, 185 [1st Dept 1998]). Plaintiff failed to close. On February 14, 2017, defendant issued the time of essence letter with a closing date of March 1, 2017, which was reasonable in light of the absence of a contingency clause in the contract of sale (*see Beth Equities v Silgo Greenwich Assoc.*, 223 AD2d 367 [1st Dept 1996], *lv denied* 88 NY2d 802 [1996]; *2626 Bway LLC v Broadway Metro Assoc., LP*, 85 AD3d 456 [1st Dept 2011]; *cf. Miller v Almquist*, 241 AD2d at 185 [finding time to close not reasonable where delay was merely to finalize documentation of approved financing and buyers were not experienced in purchase of real estate]).

The acknowledged existence of unresolved issues with adjacent neighbors, upon which funding was purportedly based, notwithstanding the no-contingency contract of sale, demonstrates that plaintiff was not "ready, willing, and able" to close on any

of the time is of the essence dates, including the court-ordered date of April 13, 2017, and the date specified in its own complaint (*see Donerail Corp. N.V. v 405 Park LLC*, 100 AD3d 131, 138 [1st Dept 2012]).

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

ENTERED: JUNE 7, 2018

CLERK