SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 14, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Tom, Mazzarelli, Moulton, JJ.

6859 In re Jacob Alpert, Index 651728/16
Petitioner-Respondent,

-against-

M.R. Beal & Company, et al.,
Respondents-Appellants.

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Law Offices of John P. DeMaio, New York (John P. DeMaio of counsel), for appellants.

Liddle & Robinson, L.L.P., New York (Matthew McCann of counsel), for respondent.

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Order and judgment, Supreme Court, New York County (Eileen Bransten, J.), entered August 12, 2016, which granted the petition to confirm an arbitration award, denied respondents' cross petition to vacate the award, and awarded judgment in favor of petitioner in the total sum of $642,153.52, unanimously affirmed, with costs.

The arbitration award was not in manifest disregard of the law, based on petitioner's undisputed claim, amended claim, and testimony that he was promised bonuses in 2011 and 2012, which he

did not receive (*Sawtelle v Waddell & Reed*, 304 AD2d 103, 108 [1st Dept 2003]). "[T]o the extent the FAA permits vacatur of an arbitration award on the ground that it is irrational" (*Morgan Stanley DW Inc. v Afridi*, 13 AD3d 248, 250 [1st Dept 2004]), the motion court correctly found that respondents, at best, demonstrated disagreement with the award, which was not a basis to conclude the award was irrational.

Respondents' contention that any promise to pay a bonus was an unenforceable agreement to agree is unpreserved and unavailing. In any event, "[a]n arbitrator's paramount responsibility is to reach an equitable result" (*Matter of Sprinzen [Nomberg]*, 46 NY2d 623, 629 [1979]). The elements of a claim for unjust enrichment are that plaintiff conferred a benefit upon the defendant, and the defendant obtained such benefit without adequately compensating plaintiff (*see Nakamura v Fujii*, 253 AD2d 387, 390 [1st Dept 1998]). These elements were met, based on petitioner's undisputed claim that he rebuilt a municipal bond department "decimated" by the 2008 financial crisis, and that he brought significant new clients to the firm, for which he received no incentive compensation in 2011 and 2012.

The arbitration panel's finding that respondents were jointly and severally liable for petitioner's bonuses pursuant to

Debtor and Creditor Law §§ 273 and 276 was not in manifest disregard of the law or irrational based either on the individual respondent's 100% ownership of M.R. Beal as a limited partner or his ownership of the general partner corporation (*see Gonzalez v Chalpin*, 77 NY2d 74, 77 [1990]; *D'Mel & Assoc. v Athco, Inc.*, 105 AD3d 451, 452 [1st Dept 2013]). Nor was it irrational to find that the Debtor and Creditor Law was applicable, based on petitioner's claim that there was ample money in the firm to pay his promised compensation, notwithstanding transfers of assets made by the individual respondent.

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

ENTERED: JUNE 14, 2018

CLERK

Acosta, P.J., Manzanet-Daniels, Tom, Mazzarelli, Moulton, JJ.

6860 In re Leonidez A.,
Petitioner-Respondent,

-against-

Sira L.R.,
Respondent-Appellant.

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Steven N. Feinman, White Plains, for appellant.

Joseph R. Daniels, New York, for respondent.

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

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Order, Family Court, Bronx County (Tracey A. Bing, J.), entered on or about August 7, 2017, which, after a hearing, awarded sole legal and physical custody of the parties' child to petitioner father, and parenting time to respondent mother, unanimously affirmed, without costs.

The Family Court's determination has a sound and substantial basis in the record (*Matter of Xiomara M. v Robert M.*, 102 AD3d 581, 582 [1st Dept 2013]). The court considered the relevant factors, and properly determined that the child's welfare and happiness would be best served in the father's care (*Eschbach v Eschbach*, 56 NY2d 167, 172-173 [1982]), particularly given that the father has provided the child with unwavering stability (*see*

Matter of Michael B. [Lillian B.], 145 AD3d 425, 430 [1st Dept 2016]). Since the child was very young, he has spent the entirety of every weekend with the father and the paternal extended family, whereas, when with the mother during the week, in New York, the child spent much of his time with a babysitter, even when the mother was not working. By contrast, the father has been more of a hands-on parent, who spent as much time as he could with the child, and relied on family or caregivers as little as possible (*see id.* at 428; *see also John A. v Bridget M.*, 16 AD3d 324, 335 [1st Dept 2005], *lv denied* 5 NY3d 710 [2005]). The father has been active in the child's education, as well as in enriching him with extracurricular activities and excursions (*see Louise E.S. v W. Stephen S.*, 64 NY2d 946, 947 [1985]; *see also Michael B.*, 145 AD3d at 428). Moreover, the father has greater financial stability, and the child has thrived in his care (*see e.g. Williams v Williams*, 78 AD3d 1256, 1258 [3d Dept 2010]; *see also Ricardo S. v Carron C.*, 91 AD3d 556 [1st Dept 2012]). Further, the father recognized and supported the child's need to maintain a relationship with the mother and his half-siblings and ensured that the child spent holidays with them while the child was in his care in New York and also visited them in Florida (*see e.g. Matter of Winslow v Lott*, 272 AD2d 406 [2d

Dept 2000]). The mother, on the other hand, has shown a disregard for the child's relationship with the father (*see Matter of Matthew W. v Meagan R.*, 68 AD3d 468 [1st Dept 2009], having, among other things, absconded with the child to Florida without the father's knowledge or consent (*see Matter of Goodman v Jones*, 146 AD3d 884, 885 [2d Dept 2017]).

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

ENTERED: JUNE 14, 2018

CLERK

Acosta, P.J., Manzanet-Daniels, Tom, Mazzarelli, Moulton, JJ.

6861 Benjamin Concepcion, Index 156922/15
Plaintiff-Respondent,

-against-

333 Seventh LLC,
Defendant-Appellant.

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Cartafalsa, Turpin & Lenoff, New York (Carolyn Comparato 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, New York County (Cynthia S. Kern, J.), entered March 27, 2017, which, inter alia, granted plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim, and denied defendant's cross motion for summary judgment dismissing the Labor Law § 240(1) claim, unanimously affirmed, with costs.

Partial summary judgment on the issue of liability was properly granted in favor of plaintiff in this action where plaintiff was injured when he fell from a six-foot A-frame ladder while performing work on the sprinkler system in defendant's building (*see e.g. Plywacz v 85 Broad St. LLC*, 159 AD3d 543 [1s Dept 2018]). According to plaintiff, as he was tightening a bolt, the ladder moved and he fell to the floor. Contrary to

defendant's contention, the record shows that the work that plaintiff was engaged in at the time of his accident constituted an alteration within the meaning of section 240(1). Such work included reconfiguring the premises' sprinkler system to comply with the fire code and entailed, inter alia, cutting and removing pipes, relocating pipes and valves, and installing components (*see Joblon v Solow*, 91 NY2d 457, 465 [1998]; *Wade v Atlantic Cooling Tower Servs., Inc.*, 56 AD3d 547, 548-549 [2d Dept 2008]; *see also Golubowski v City of New York*, 131 AD3d 900 [1st Dept 2015]).

That plaintiff is the sole witness to the accident does not preclude summary judgment in his favor where nothing in the record contradicts his account or raises an issue of fact as to his credibility (*see Ortiz v Burke Ave. Realty, Inc.*, 126 AD3d 577, 578 [1st Dept 2015]). Furthermore, any failure on plaintiff's part to ensure that his coworker had properly set up

the ladder would, at most, constitute comparative negligence, a defense inapplicable to a Labor Law § 240(1) cause of action (*see Nacewicz v Roman Catholic Church of the Holy Cross*, 105 AD3d 402, 403 [1st Dept 2013]).

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

ENTERED: JUNE 14, 2018

CLERK

Acosta, P.J., Manzanet-Daniels, Tom, Mazzarelli, Moulton, JJ.

6862 The People of the State of New York, Ind. 3089/13
Respondent,

-against-

Anthony Smith,
Defendant-Appellant.

_____

Edith Blumberg, New Berlin, for appellant.

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

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Judgment, Supreme Court, New York County (Juan Merchan, J.), rendered January 16, 2014, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of six years, unanimously affirmed.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record, relating to counsel's strategic choices (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal.

In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that any of counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or had a reasonable probability of affecting the outcome of the case. On the unexpanded record before us, we conclude that counsel made an objectively reasonable strategic choice to focus on a claim that defendant engaged in an innocent encounter with another person, which an observing officer misunderstood to be a drug transaction, and not to contest any other elements such as identity. Viewed in this light, the conduct of counsel that defendant challenges on appeal was likewise reasonable, and in any event did not cause any prejudice.

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

ENTERED: JUNE 14, 2018

CLERK

Acosta, P.J., Manzanet-Daniels, Tom, Mazzarelli, Moulton, JJ.

6863-
6864 Index 603071/02

Gramercy Park Residence Corp.,
Plaintiff-Respondent,

-against-

Elaine Ellman,
Defendant-Appellant.

_____

Collins, Dobkin & Miller LLP, New York (Timothy L. Collins of counsel), for appellant.

Randall T. Sims, New York, for respondent.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered July 14, 2014, which granted plaintiff's motion for summary judgment dismissing defendant's first counterclaim seeking to have plaintiff restore the sunshade on defendant's terrace, unanimously affirmed, without costs. Order, same court (Nancy M. Bannon, J.), entered October 16, 2015, which, upon reargument, inter alia, granted plaintiff's motion for summary judgment to the extent of awarding it attorneys' fees and costs, and referring the matter to a judicial hearing officer or a special referee to hear and report, unanimously affirmed, without costs.

In this action, defendant, Elaine Ellman, had a sunshade on the terrace of her cooperative apartment, and enclosed it to

create another room without obtaining the permission of plaintiff Coop. The Coop sued for the cost of removing the enclosed structure, and Ellman asserted a counterclaim against the Coop seeking to have them reimburse her for the cost of restoring the sunshade. Protracted litigation ensued, and in 2005, Supreme Court granted Ellman summary judgment on her counterclaim and awarded her legal fees. In 2006, Ellman signed a broad release of all claims against the Coop incurred prior to June 29, 2006. The Coop subsequently appealed from the 2005 order, and this Court modified to deny Ellman's motion for summary judgment and remanded the case for further proceedings "to resolve the issue of who built the [sunshade]" (96 AD3d 423, 424 [1st Dept 2012]). The release was not part of the record on appeal for the 2005 summary judgment order, and was not considered by this Court. Following this Court's order determining that appeal, the Coop moved for summary judgment dismissing the counterclaim based upon the release, and Supreme Court granted that motion and awarded the Coop attorneys' fees and disbursements.

While Supreme Court is powerless to change a remittitur from this Court, "nevertheless, in order to avoid an obviously unjust result it may mold its procedure and adapt its relief to the exigencies of any new facts or conditions which were not before

the [appellate court] when it made its original determination and entered its remittitur" (*Matter of Altimari v Meisser*, 23 AD2d 672, 675 [2d Dept 1965]; *see Matter of Natural Resources Defense Council v New York City Dept. of Sanitation*, 214 AD2d 41, 43 [1st Dept 1995]). Here, the release is a "new fact" that was not considered by this Court, and Supreme Court properly determined that it would be unjust to ignore its existence and proceed with the litigation.

Furthermore, Ellman's lease clearly provides that the Coop is entitled to legal fees and disbursements for defending a counterclaim related to Ellman's default under the lease, namely the erecting of the enclosed structure, and Supreme Court properly referred the matter for a determination of the amount owed.

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

ENTERED: JUNE 14, 2018

CLERK

Acosta, P.J., Manzanet-Daniels, Tom, Mazzarelli, Moulton, JJ.

6865-
6866 In re Wasyl Kinach, et al.,
Petitioners-Appellants,

-against-

The Honorable Bill de Blasio, etc.,
et al.,
Respondents-Respondents.

Index 153833/16

Law Office of Stuart Salles, New York (Gail M. Blasie of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (John Moore of counsel), for respondents.

Judgment, Supreme Court, New York County (James d'Auguste, J.), entered on or about November 21, 2016, which denied the petition challenging Mayor's Personnel Order No. 2016/1, establishing certain paid parental leave and cancelling a planned pay increase and the accrual of two days of annual leave for managers with 15 or more years of experience, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs. Order, same court and Justice, entered on or about January 9, 2018, which denied petitioners' motion to renew, unanimously affirmed, without costs.

On January 7, 2016, the Mayor issued the Mayor Personnel Order [MPO] No. 2016/1, "Paid Parental Leave for Managerial and

Original Jurisdiction Employees." The order provided that, effective December 22, 2015, managers and original jurisdiction employees would be entitled to 30 days paid parental leave (PPL), every 12-month period, for the birth of a child, adoption, or foster care. To finance this benefit, the order modified MPO Nos. 2015/1 and 2015/2, to eliminate a 0.47% wage increase scheduled to go into effect on July 1, 2017, and modified the annual leave schedule for covered titles by eliminating the accrual of the 26th and 27th annual leave days, capping the accrual of annual leave days at 25 days.

Petitioners, five managers, all over the age of forty (40), who work for respondent agencies, challenge MPO No. 2016/1, insofar as it cancelled the planned pay raise and capped annual leave accrual at 25 days, eliminating an additional two days of leave given to managers with at least 15 years of experience. Petitioners did not have a contractual right to the prospective raise or additional annual leave days (*see Dodge v Board of Educ. of City of Chicago*, 302 US 74, 78-80 [1937]; *Cook v City of Binghamton*, 48 NY2d 323, 329-331 [1979]).

Petitioners failed to state a claim of age discrimination, under the New York City Human Rights Law (Administrative Code of City of NY § 8-107) and/or the New York State Human Rights Law

(Executive Law § 296[1][a]). The alleged adverse action did not occur under circumstances giving rise to an inference of discrimination (*see e.g. Ferrante v American Lung Assn.*, 90 NY2d 623, 629 [1997]; *Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 113 [1st Dept 2012]). The claim is based upon the false premise that women over 40 years of age cannot bear children, which ignores the fact that PPL benefits cover biological fathers, and any individual, regardless of age, who becomes a parent through adoption or by fostering, and is undercut by petitioners' submission of data reflecting that members of their age group received PPL benefits. MPO No. 2016/1 is facially neutral and applies equally to all covered employees, regardless of age (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 321 [2004]) and no disparate impact has been shown (*see Mete v New York State Off. of Mental Retardation & Dev. Disabilities*, 21 AD3d 288, 296–297 [1st Dept 2005]).

No claim for a violation of the New York's equal protection clause (NY Const, art 1, § 11) has been stated as MPO No. 2016/1 treats all similarly situated employees alike (*see Matter of Walton v New York State Dept. of Correctional Servs.*, 13 NY3d 475, 492 [2009]).

The state's non-impairment clause (NY Const, art V, § 7) is

not implicated as the challenged action does not involve a change directly related to retirement benefits (*see Matter of Lippman v Board of Educ. of the Sewanhaka Cent. High School Dist.*, 66 NY2d 313, 317 [1985]; *Hoar v City of Yonkers*, 295 NY 274, 279 [1946]).

The cost-cutting measures chosen to pay for the PPL benefit are not arbitrary and capricious (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Petitioners' belief that less extreme cost-cutting measures should have been taken does not render respondents' determination irrational (*see Matter of Saratoga Lake Protection & Improvement Dist. v Department of Pub. Works of City of Saratoga Springs*, 46 AD3d 979, 988 [3d Dept 2007]).

Finally, the court properly denied the renewal motion, as petitioners failed to offer new facts that would change the prior determination (CPLR 2221[e][2]).

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

ENTERED: JUNE 14, 2018

CLERK

Acosta, P.J., Manzanet-Daniels, Tom, Mazzarelli, Moulton, JJ.

6869 Norma Douglas, Index 302851/08
Plaintiff-Respondent, 84047/08

-against-

Sherwood 48 Associates, etc., et al.,
Defendants-Appellants.
- - - - -
[And a Third-Party Action]

_____

Perry, Van Etten, Rozanski & Primavera, LLP, New York (Elizabeth Gelfand Kastner of counsel), for appellants.

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

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Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about July 25, 2017, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the Labor Law § 200 and common-law negligence claims and the Labor Law § 241(6) claim predicated upon Industrial Code (12 NYCRR) § 23-5.18(h), unanimously affirmed, without costs.

Plaintiff was injured while pulling a mobile scaffold with both hands, when she stepped backward and her left heel fell into one of the estimated 12-inch deep trenches in the concrete flooring, and a wheel of the scaffold dropped onto her foot.

Summary dismissal of the Labor Law § 200 and common-law

negligence claims is precluded by testimony and photographic evidence that raises triable issues of fact as to whether defendants were obligated to maintain the safety of the premises (*see Fraser v Pace Plumbing Corp.*, 93 AD3d 616 [1st Dept 2012]), were negligent in doing so, and had actual or constructive knowledge of the uncovered trenches in the concrete flooring where several trades were working at the time of plaintiff's accident (*see Ventura v Ozone Park Holding Corp.*, 84 AD3d 516 [1st Dept 2011]).

Dismissal of the Labor Law § 241(6) claim is precluded by factual issues as to whether the injury to plaintiff's left leg was proximately caused by defendants' violation of 12 NYCRR 23-5.18(h), which provides, inter alia, that "[manually-propelled] [s]caffolds shall be moved only on level floors or equivalent surfaces free from obstructions and openings."

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

ENTERED: JUNE 14, 2018

CLERK

Acosta, P.J., Manzanet-Daniels, Tom, Mazzarelli, Moulton, JJ.

6870 The People of the State of New York, Ind. 126/13
Respondent,

-against-

Joucoo Hamant,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Svetlana M. Kornfeind of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Charles H. Solomon, J. at suppression motion; Eduardo Padró, J. at plea and sentencing), rendered December 17, 2014, convicting defendant of criminal sale of a controlled substance in the third degree, criminal possession of a controlled substance in the seventh degree and criminal sale of marijuana in the fourth degree, and sentencing him to time served, unanimously affirmed.

Defendant entered into a judicial diversion program agreement, and two associated agreements, under which he explicitly agreed to waive his rights to pretrial hearings in the event that he failed to complete the program and was required to proceed to trial. We find that this waiver encompasses his claim that he was entitled to a *Wade* hearing, which the motion court

had previously denied.

In any event, the motion court properly denied defendant's motion to suppress identification testimony, without granting a *Wade* hearing, because the information presented to the court clearly established that the identification was confirmatory under the principles set forth in *People v Wharton* (74 NY2d 921 [1989]).

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

ENTERED: JUNE 14, 2018

CLERK

Acosta, P.J., Manzanet-Daniels, Tom, Mazzarelli, Moulton, JJ.

6871- Index 303542/14
6872 Isam Muqattash, et al., 8407/14
Plaintiffs-Respondents,

-against-

Choice One Pharmacy Corp., et al.,
Defendants-Appellants,

NYC Partnership Housing Development
Fund Company, Inc., et al.,
Defendants.

- - - - -

Choice One Pharmacy Corp., et al.,
Third-Party Plaintiffs-Appellants,

-against-

Macintosh Electric Corporation,
Third-Party Defendant-Respondent.

_____

Morris Duffy Alonso & Faley, New York (Iryna S. Krauchanka of counsel), for Choice One Pharmacy Corp., appellant.

Barry, McTiernan & Moore LLC, New York (David H. Schultz of counsel), for 1550 Realty, LLC, appellant.

Sullivan Papain Block McGrath & Cannavo P.C., New York (Brian J. Shoot of counsel), for Isam Muqattash and Alba Muqattash, respondents.

Linda A. Stark, New York, for Macintosh Electric Corporation, respondent.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about November 28, 2017, which, insofar as appealed from, denied defendant 1550 Realty, LLC's (1550

Realty) cross motion for summary judgment dismissing the common-law negligence and Labor Law § 200 claims, and on its third-party claim for common-law indemnification as against third-party defendant Macintosh Electric Corporation (Macintosh), and denied defendant Choice One Pharmacy Corp.'s (Choice One) cross motions for summary judgment as untimely, unanimously affirmed, with costs.

The court properly declined to consider Choice One's cross motions for summary judgment since they were filed several months after the applicable deadline and Choice One did not provide good cause for its delay (*see Brill v City of New York*, 2 NY3d 648, 652 [2004]). In any event, these motions were not true "cross motions" as they each sought, at least in part, relief against nonmoving parties. Furthermore, Choice One's cross motions did not raise issues that were "nearly identical" to those raised in the timely initial motions (*Maggio v 24 W. 57 APF, LLC*, 134 AD3d 621, 628 [1st Dept 2015] [internal quotation marks omitted]; *Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 87-88 [1st Dept 2013]).

As to 1550 Realty's cross motion on the common-law negligence and Labor Law § 200 claim, the court properly found that there were issues of fact as to whether 1550 Realty was

responsible for creating the dangerous condition, namely the live wire that was responsible for causing harm to the injured plaintiff (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]). The evidence showed that, upon taking ownership of the premises, but before entering into a lease with Choice One, 1550 Realty had the drop ceiling and electrical system where the accident occurred installed, and that no one else performed work in the ceiling until the time of the accident. Accordingly, 1550 Realty failed to establish that it did not create the defective condition that later caused the injured plaintiff's accident (*see Parietti v Wal-Mart Stores, Inc.*, 29 NY3d 1136 [2017]; *A&M E. Broadway LLC v Hong Kong Supermarket, Inc.*, 140 AD3d 535 [1st Dept 2016]).

In light of the issues of fact as to whether 1550 Realty was negligent in causing the accident, its cross motion for summary

judgment on its common-law indemnification claim as against Macintosh was properly denied (*cf. Guaman v 1963 Ryer Realty Corp.*, 127 AD3d 454, 456 [1st Dept 2015]).

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

ENTERED: JUNE 14, 2018

CLERK

Acosta, P.J., Manzanet-Daniels, Tom, Mazzarelli, Moulton, JJ.

6873 The People of the State of New York, Ind. 5164/15
Respondent,

-against-

Daniel McFadden,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Jacqueline A. Meese-Martinez of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Jill Konviser, J. at suppression hearing; Robert M. Mandelbaum, J. at jury trial and sentencing), rendered June 10, 2016, as amended July 6, 2016, convicting defendant of criminal possession of a controlled substance in the third and fifth degrees, and sentencing him, as a second felony drug offender, to an aggregate term of seven years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence for the third-degree possession conviction to five years, and otherwise affirmed.

The hearing court providently exercised its discretion in precluding defendant from impeaching a police officer by way of the underlying facts of civil lawsuits, because defendant failed

to make a showing that cross-examination of the officer regarding the lawsuits would be relevant (*see People v Smith*, 27 NY3d 652, 662 [2016]). In any event, any error was harmless, because there was no significant probability that suppression would have been granted if defendant had been permitted to impeach the officer.

Defendant failed to preserve his similar claims regarding impeachment of the officer at trial, and we decline to review them in the interest of justice. As an alternative holding, we likewise find that there was an inadequate foundation for the impeachment, and that any error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

Defendant did not preserve his claim that the court improperly gave the jurors written copies of its entire charge, and we decline to review it in the interest of justice. Defense counsel clearly gave implied consent, and we reject defendant's argument that the lack of express consent created a mode of proceedings error (*see generally People v Mack*, 27 NY3d 534, 540 [2016]). In *People v Johnson* (81 NY2d 980, 982 [1993]), the "defendant expressly objected to complying with the jury's request to receive the entire charge in writing, which included statutory textual material," and we find nothing in that case, or in the other cases cited by defendant regarding submission of

various materials to juries, that supports his mode of proceedings argument. Furthermore, the court provided careful limiting instructions concerning the use of the written copy of the charge, and there is no showing of prejudice.

We find the sentence excessive to the extent indicated.

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

ENTERED: JUNE 14, 2018

CLERK

Acosta, P.J., Manzanet-Daniels, Tom, Mazzarelli, Moulton, JJ.

6874 The People of the State of New York, Ind. 125/16
Respondent,

-against-

Ricky Harris,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Melissa Jackson, J.), rendered February 24, 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 14, 2018

CLERK

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

Acosta, P.J., Manzanet-Daniels, Tom, Mazzarelli, Moulton, JJ.

6875 The Bank of New York Mellon, formerly known as The Bank of New York as Trustee for the Certificate Holders CWALT, Inc., etc., Plaintiff-Respondent, Index 850163/14

-against-

Adam Pl0tch LLC, Defendant-Appellant,

Board of Managers of Octavia Condominium, et al., Defendants.

_____

Paula A. Miller, P.C., Smithtown (Paula A. Miller of counsel), for appellant.

Day Pitney LLP, New York (Rachel G. Packer of counsel), for respondent.

_____

Order, Supreme Court, New York County (Kelly O'Neill Levy, J.), entered January 13, 2017, which, to the extent appealed from, granted plaintiff's motion for summary judgment on its foreclosure complaint and denied defendant Adam Pl0tch LLC's cross motion to dismiss the complaint or to amend its answer, unanimously affirmed, with costs.

Plaintiff established its standing to foreclose the mortgage by attaching a copy of the blank-endorsed note to the complaint, demonstrating that it had physical possession of the note prior

to the commencement of this action in April 2014 (*see Deutsche Bank Natl. Tr. Co. v Logan*, 146 AD3d 861, 862-863 [2d Dept 2017]). Moreover, plaintiff submitted an affidavit by an assistant vice president for servicing of plaintiff's servicer, which set forth the factual details of the physical delivery of the note and was accompanied by a copy of the note itself (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 359-360 [2015]).

The court properly concluded that, although a foreclosure action commenced in 2009 was pending at the time this action was commenced, under the circumstances, RPAPL 1301(3) did not require that this action be dismissed. The prior foreclosure action had effectively been abandoned, and was formally discontinued shortly after this action was commenced. Allowing plaintiff to maintain this action is not inconsistent with the purpose of the statute, which should be strictly construed (*see Old Republic Natl. Tit. Ins. Co. v Conlin*, 129 AD3d 804, 805 [2d Dept 2015]; *cf. U.S. Bank N.A. v Beymer*, 2018 NY Slip Op 03600 [1st Dept 2018] [noting in dicta that foreclosure action could have been dismissed pursuant to RPAPL 1301[3]).

We reject defendant's argument that plaintiff's mortgage on the property was extinguished by the issuance of a judgment in an earlier foreclosure action brought by defendant Board of Managers

of Octavia Condominium. Defendant's contention that plaintiff "elected its remedy" by agreeing to accept the proceeds of the sale in that action, rather than maintaining the ability to enforce its mortgage independently through this action, is belied by the documents in the record, including the judgment itself, providing that plaintiff's mortgage was to survive the foreclosure and that any sale of the property would be "subject to" that mortgage, and by the fact that plaintiff did not actually receive the proceeds of the sale.

The court properly declined to permit defendant to amend its answer a second time to include palpably insufficient defenses.

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

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

ENTERED: JUNE 14, 2018

CLERK

Acosta, P.J., Manzanet-Daniels, Tom, Mazzarelli, Moulton, JJ.

6879N- Index 650921/12
6880N & M-1565

Adam Brook, M.D., Ph.D., et al.,
Plaintiffs-Appellants,

-against-

Peconic Bay Medical Center, et al.,
Defendants-Respondents,

John Does #1-5,
Defendants.

- - - - -

Arch Insurance Group, Inc.,
Nonparty Respondent.

- - - - -

Adam Brook, M.D., Ph.D., et al.,
Plaintiffs-Appellants,

-against-

Peconic Bay Medical Center, et al.,
Defendants-Respondents,

John Does #1-5,
Defendants.

_____

Adam Brook, appellant pro se.

Pryor Cashman LLP, New York (William Thomashower of counsel), for appellants.

Garfunkel Wild, P.C., Great Neck (Lauren M. Levine of counsel), for Peconic Bay Medical Center, Richard Kubiak, M.D., Daniel Massiah, M.D., Agostino Cervone, M.D., Jay Zuckerman, Joan Hoil, R.N., Daniel Hamou, M.D. and Andrew Mitchell, respondents.

Heidell, Pittoni, Murphy & Bach, LLP, White Plains (Daryl Paxson of counsel), for Arch Insurance Group, Inc., respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered October 26, 2017, which granted nonparty Arch Insurance Group's motion to quash a subpoena served by plaintiffs and denied plaintiff Adam Brook, M.D., Ph.D.'s motion to compel compliance, unanimously affirmed, with costs. Order, same court and Justice, entered August 4, 2017, which, insofar as appealed from as limited by the briefs, denied plaintiffs' request to compel production of documents withheld or redacted on the basis of attorney-client privilege or quality assurance review privilege, unanimously modified, on the law and the facts and in the exercise of discretion, to grant plaintiffs' request to the extent of ordering defendants to un-redact the names and identifying information of participants in the quality assurance review process, and otherwise affirmed, without costs.

Plaintiffs Adam Brook, M.D., Ph.D. (Brook), a cardiothoracic and general surgeon, and Adam Brook, M.D., Ph.D., P.L.L.C., bring suit against Brook's former employer, defendant Peconic Bay Medical Center (PBMC), and its employees, in connection with PBMC's filing of an Adverse Action Report (AAR) with the National Practitioner Data Bank. Nonparty Arch Insurance Group is PBMC's excess liability insurer.

Arch's motion to quash the subpoena served by plaintiffs was

properly granted, because the documents sought are not relevant (*see generally Forman v Henkin*, 30 NY3d 656, 661 [2018]).

On appeal, plaintiffs narrow their request to PBMC's June 2014 and most recent loss runs, as well as all documents concerning Brook. However, even as so narrowed, the subpoena is impermissibly overbroad. It is undisputed that no malpractice claim was ever filed against Brook. Thus, it is unlikely that Arch would be in possession of any documents regarding him, apart from the loss runs, which primarily contain irrelevant information about malpractice incidents involving other doctors, extending back more than 10 years.

Plaintiffs contend that the loss runs will show that Brook was treated differently from other doctors employed by PBMC who were suspected of malpractice. However, PBMC's treatment of doctors suspected of malpractice is immaterial. Plaintiffs' claims in this suit are based on PBMC's alleged misrepresentations about the existence of an investigation and the filing of an AAR, and the AAR did not report plaintiff for malpractice but for resigning during an ongoing investigation (*see* 42 USC § 11133[a][1][B][i]; 45 CFR 60.12[a][1][ii][A]).

Because we find that the documents sought by the subpoena are not relevant, we need not reach the issue of whether they may

properly be withheld as privileged or confidential.

We also find that the motion to quash was timely (*see* CPLR 3120[3]; CPLR 3122[a][1]; *Matter of Brunswick Hosp. Ctr. v Hynes*, 52 NY2d 333, 339 [1981]).

Plaintiffs' request to compel defendants to produce certain documents withheld on the basis of attorney-client privilege was properly denied, because plaintiffs failed to make the requisite evidentiary showing to warrant either application of the crime-fraud exception or in camera review by this Court (*see Matter of New York City Asbestos Litig.*, 109 AD3d 7, 10-11 [1st Dept 2013], *lv dismissed* 22 NY3d 1016 [2013]; *Horizon Asset Mgt., Inc. v Duffy*, 82 AD3d 442, 443 [1st Dept 2011]).

Plaintiffs' request to compel defendants to un-redact quality assurance information related to incidents involving other doctors was properly denied, because this information is irrelevant to plaintiffs' claims.

However, plaintiffs' request to compel defendants to un-redact the identities of nonparty participants in the quality assurance review process should be granted. Education Law § 6527(3) and Public Health Law § 2805-m protect documents "prepared by or at the behest of" a quality assurance committee (*see Clement v Kateri Residence*, 60 AD3d 527, 527 [1st Dept

2009]), as well as testimony regarding the proceedings of such a committee (*see Chardavoyne v Cohen*, 56 AD3d 508, 509 [2d Dept 2008]). However, they do not protect the mere identities of participants.

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

Defendants' request that we impose sanctions on plaintiffs was improperly based primarily on conduct subsequent to the issuance of the orders on appeal.

M-1565 - *Adam Brook, M.D., Ph.D. v Peconic Bay Medical Center*

Motion to supplement the record denied.

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

ENTERED: JUNE 14, 2018

CLERK

Friedman, J.P., Tom, Kapnick, Kahn, Kern, JJ.

6538 Phyllis Pierce, Index 23258/13
Plaintiff-Appellant,

-against-

Lucille Roberts Womens Fitness,
doing business as Lucille Roberts,
Defendant-Respondent.

_____

Appell & Parrinelli, New York (John J. Appell of counsel), for appellant.

Marshall, Conway & Bradley, P.C., New York (Lauren Turkel of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered on or about October 27, 2017, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The negligence claim is barred as a matter of law by the doctrine of primary assumption of the risk (*see Morgan v State of New York*, 90 NY2d 471, 484 [1997]; *see also Ingram v Life Fitness*, 140 AD3d 628, 628-29 [1st Dept 2016]). The record establishes that plaintiff assumed the obvious and inherent risks attendant to the use of treadmills, and she failed to raise a triable issue of fact as to whether defendant "concealed or unreasonably increased [those] risks" (*Morgan*, 90 NY2d at 485).

Further, the record establishes that the sole proximate cause of the accident was plaintiff, who decided to suddenly stop walking and attempt to turn on her iPod and connect her headphones while she was on the moving treadmill.

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

ENTERED: JUNE 14, 2018

CLERK

Renwick, J.P., Gische, Andrias, Kapnick, Singh, JJ.

6881 The People of the State of New York, Ind. 618/17
Respondent,

-against-

Ronald De Los Santos,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes of counsel), for respondent.

_____

Appeal from judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered June 12, 2017, convicting defendant, upon his plea of guilty, of attempted robbery in the third degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, held in abeyance, and the matter remitted for further proceedings in accordance herewith.

During the plea proceeding, the court asked defense counsel, "I'm assuming based on his criminal history there we have no immigration issues?" to which counsel stated that he "discussed all of the immigration consequences, and he is well aware of all of the consequences that may result from this." The court thus failed to advise defendant that if he was not a United States citizen, he could be deported as a result of his plea, as

required under *People v Peque* (22 NY3d 168 [2013], *cert denied sub nom. Thomas v New York*, 574 US __, 135 S Ct 90 [2014]). The People do not dispute that there was a *Peque* defect, and that preservation is not required here. However, their claim that the absence of prejudice may be determined on the present record is unavailing. Therefore, defendant should be afforded the opportunity to move to vacate his plea upon a showing that there is a "reasonable probability" that he would not have pleaded guilty had the court advised him of the possibility of deportation (*Peque*, 22 NY3d at 198). Accordingly, we remit for the remedy set forth in *Peque* (22 NY3d at 200-201), and we hold the appeal in abeyance for that purpose.

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

ENTERED: JUNE 14, 2018

CLERK

Renwick, J.P., Gische, Andrias, Kapnick, Singh, JJ.

6882 NZM Retirement Plan, Index 157013/15
Plaintiff-Appellant,

-against-

Jacob Adoni,
Defendant-Respondent.

_____

David H. Singer & Associates, LLP, New York (Christopher S. McCann of counsel), for appellant.

Gary J. Wachtel, New York, for respondent.

_____

Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered on or about May 11, 2017, which, to the extent appealed from as limited by the briefs, after a nonjury trial, awarded plaintiff the sum of $107,000 plus prejudgment interest at the statutory rate from January 7, 2015 to date against defendant, unanimously affirmed, with costs.

This action seeks to enforce a $300,000 promissory note entered into between family members. In June 2004, defendant asked his uncle Moshe Mousserie for a loan. Mousserie asked his two other nephews, Zvi Mosery and Nathaniel Mosery, the owners of plaintiff NZM Retirement Plan, to extend defendant the loan.

It is undisputed that defendant received a check for $270,000, and that he paid one year of interest ($30,000) in

advance. After defendant signed the promissory note, Mousserie assigned the loan to plaintiff.

Supreme Court did not improvidently exercise its discretion in determining that prejudgment interest would be calculated from Mousserie's January 7, 2015 admission that he received $193,000 from defendant as payment towards the loan and/or the interest as of that date and awarding plaintiff $107,00 for the remainder of the loan (*see* CPLR 5004*; NML Capital v Republic of Argentina*, 17 NY3d 250, 261 [2011]). It is undisputed that Mousserie was the person plaintiff designated to receive payments towards the loan it had with defendant and that the promissory note in evidence is silent as to the rate of interest that would apply beyond the date of maturity.

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

ENTERED: JUNE 14, 2018

CLERK

Renwick, J.P., Gische, Andrias, Kapnick, Singh, JJ.

6883 In re Thamel J.,

A Dependent Child Under Eighteen
Years of Age, etc.,

Deryck T.J.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Andrew J. Baer, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Daniel Matza-Brown of counsel), for respondent.

Dawne A. Mitchell, The Legal Aid Society, New York (Judith Stern of counsel), attorney for the child.

_____

Order of fact-finding, Family Court, New York County (Clark V. Richardson, J.), entered on or about March 9, 2017, which, inter alia, determined, after a hearing, that respondent father neglected the subject child, unanimously affirmed, without costs.

A preponderance of the evidence established that the father neglected the child in that he knew or should have known that the mother was smoking marijuana while she was pregnant with the child, but failed to take any steps to stop her drug use (*see Matter of Ja'Vaughn Kiaymonie S. [Nathaniel S.]* , 146 AD3d 422, 423 [1st Dept 2017]). Evidence of the child's positive

toxicology, as well as his low birth weight and one-week stay in the neonatal intensive care unit following his birth, was sufficient to support a finding of neglect (*see Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73 [1995]).

Furthermore, the father ignored his own failure to exercise a minimum degree of care with respect to his parenting responsibilities. The record shows that he smoked marijuana with the mother while she was pregnant, including the day before the child's birth, failed to comply with his service plan relating to another child, and failed to submit to drug testing (*see Matter of Baby B.W. [Tracy B.H.]*, 148 AD3d 1786 [4th Dept 2017], *lv denied* 29 NY3d 912 [2017]). There exists no basis to disturb the court's credibility determinations (*see generally Matter of Irene O.*, 38 NY2d 776, 777 [1975].

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

ENTERED: JUNE 14, 2018

CLERK

Renwick, J.P., Gische, Andrias, Kapnick, Singh, JJ.

6884 M.T. Packaging, Inc., Index 652579/14
Plaintiff-Respondent,

-against-

Fung Kai Hoo, etc., et al.,
Defendants-Appellants.

_____

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Paul Seidenstock of counsel), for appellants.

Balestriere Fariello, New York (Jillian L. McNeil of counsel), for respondent.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered March 10, 2017, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The complaint alleges that defendants fraudulently induced plaintiff to purchase plastic bags from them by providing a "Certificate of Compliance" in which defendant Fung falsely represented that "all packaging and packaging components sold to [plaintiff] or its subsidiaries in the State(s) of USA comply with the requirements of the toxics in packaging law(s)," that "the sum of the incidental concentration levels of [regulated metals] present in any package or package component does not exceed 100 parts per million by weight," and that defendants

would maintain adequate documentation of the certified compliance. The complaint alleges that plaintiff entered into the transactions in reliance on the Certificate, and that, in May 2009, one of plaintiff's customers tested defendants' bags and found that they contained lead and toxic metals in excess of the certified standards. It also alleges that defendants did not maintain documentation.

Defendants failed to establish prima facie that plaintiff was unreasonable in relying on the Certificate (*see DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 NY3d 147, 156 [2010]). The Certificate contains express misrepresentations concerning present compliance that form the basis for an implied promise that products provided in the future would comply with the specified standards for toxins (*see GoSmile, Inc. v Levine*, 81 AD3d 77, 81 [1st Dept 2010], *lv dismissed* 17 NY3d 782 [2011]).

Defendants failed to establish prima facie that the complaint should be dismissed as against Fung individually on the ground that he signed the Certificate in his capacity as managing

director, not individually, since he can be held individually liable if he participated in or knew of the fraud (*Polonetsky v Better Homes Depot*, 97 NY2d 46, 55 [2001]).

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

ENTERED: JUNE 14, 2018

CLERK

Renwick, J.P., Gische, Andrias, Kapnick, Singh, JJ.

6885-
6885A Index 652451/17

Caring People Management Services, LLC, as a successor in interest to Homestar, LLC,
Plaintiff-Respondent,

-against-

Assistcare Home Health Services LLC, doing business as Preferred Home Care of New York, et al.,
Defendants-Appellants.

_____

Nixon Peabody LLP, Albany (William E. Reynolds of counsel), for Assistcare Home Health Services LLC, appellant.

Peckar & Abramson, P.C., New York (Gregory R. Begg of counsel), for Ariela Finkiel, appellant.

Locke Lord LLP, New York (John Viskocil of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Eileen Bransten, J.), entered December 11, 2017, which denied defendants' motions to dismiss the complaint, unanimously reversed, on the law, with costs, and the motions granted. The Clerk is directed to enter judgment accordingly.

Plaintiff, as the assignee of contract rights of nonparty Homestar LLC, commenced this action against defendants to enforce its rights. It is undisputed that Homestar, a New Jersey limited liability company, did not obtain a certificate of authority to

do business in New York State and thereby was barred from maintaining an action in New York courts (*see* Limited Liability Company Law § 808[a]). Although plaintiff obtained a certificate of authority prior to commencing this action, it nonetheless lacks capacity to sue, as it has no greater rights than Homestar (*see Halsey v Jewett Dramatic Co.*, 190 NY 231, 234-235 [1907]; *Manufacturers' Commercial Co. v Blitz*, 131 App Div 17, 20 [1st Dept 1909]; *Kinney v Reid Ice Cream Co.*, 57 App Div 206, 209 [2d Dept 1901]).

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

ENTERED: JUNE 14, 2018

CLERK

Renwick, J.P., Gische, Andrias, Kapnick, Singh, JJ.

6886 The People of the State of New York, Respondent, Ind. 1559/11 3209/11

-against-

Paul Hewett, Defendant-Appellant.

_____

Cardi & Edgar LLP, New York (Dawn M. Cardi of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered June 4, 2012, convicting defendant, upon his plea of guilty, of conspiracy in the second degree, criminal possession of a controlled substance in the first degree and two counts of criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 22 ½ years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentences on the conspiracy conviction to 5 to 15 years and on the controlled

substance conviction to 15 years, and directing that all sentences be served concurrently, resulting in a new aggregate term of 15 years, and otherwise affirmed.

We find the sentence excessive to the extent indicated.

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

ENTERED: JUNE 14, 2018

CLERK

Renwick, J.P., Gische, Andrias, Kapnick, Singh, JJ.

6888-
6889-
6890 Index 653275/14

Gold Bar Refinery Corp., et al.,
Plaintiffs-Respondents,

-against-

So Accurate Group, Inc.,
Defendant-Appellant.

_____

Law Offices of Alan J. Wohlberg, Brooklyn (Samuel A. Gunsberg of counsel), for appellant.

Piddoubny & Pelekh, P.C., Astoria (Oksana Pelekh of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Barry R. Ostrager, J.), entered July 17, 2017, after a nonjury trial, awarding plaintiffs the principal sum of $229,091.41, plus interest, costs and disbursements, unanimously modified, on the facts, to reduce the principal sum to $35,445.72, on condition that defendant returns the slag, platinum and jewelry at issue, the matter remanded for recalculation of interest, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered May 15, 2017, to the extent it dismissed defendant's counterclaims with prejudice, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The trial court's dismissal of defendant's counterclaims is

not supported by a fair interpretation of the evidence (*see Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992]). Plaintiffs' witnesses testified consistent with the second amended complaint that they had reached an agreement with defendant as to a locked-in price of $1,565.00 per troy ounce of gold for 1370.48 troy ounces. Defendant's witnesses testified that the $1,565.00 price in the contract was a mistake and was corrected prior to plaintiffs' principal signing the agreement. Defendant states that the parties agreed to a price of $1,365.00 per troy ounce. Even if the court found defendants' witnesses not credible and its records not reliable, the court should not have disregarded plaintiffs' allegations in the second amended complaint and testimony at trial that the parties agreed to lock in at $1,565.00. In addition, the parties did not dispute that defendant paid plaintiffs an advance of $2,325,000 upon receipt of the gold lots in issue. Thus, plaintiffs were entitled to a credit of $2,144,801.20 (1370.48 x $1,565) against the advance.

Defendant is correct that the stipulated amount ($229,091.41) should be reduced by the value of the slag, platinum and diamonds that it agreed to return to plaintiffs, which the parties stipulated was $13,446.89 ($9,800, $1,996.89, and $1,650, respectively, for the slag, platinum and diamonds).

Thus, plaintiffs are entitled to a further credit of $215,644.52, conditioned upon defendant's return of the slag, platinum and jewelry at issue. The result is that defendant owes plaintiffs $35,445.72.

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

ENTERED: JUNE 14, 2018

CLERK

Renwick, J.P., Gische, Andrias, Kapnick, Singh, JJ.

6891 Joan Reveyosos, Index 157500/12
Plaintiff-Appellant,

-against-

Town Sports International, LLC,
doing business as New York
Sports Club,
Defendant-Respondent.

_____

Bergstein & Ullrich, LLP, New Paltz (Stephen Bergstein of counsel), for appellant.

Gordon Rees Scully Mansukhani, LLP, Harrison (Allyson A. Avila of counsel), for respondent.

_____

Order, Supreme Court, New York County (W. Franc Perry, J.), entered November 13, 2017, which, to the extent appealed from as limited by the briefs, following a jury verdict in plaintiff's favor on her claim for disability discrimination in violation of the New York City Human Rights Law (City HRL), granted that portion of defendant's cross motion seeking to set aside the jury verdict as against the weight of the evidence pursuant to CPLR 4404 and ordered a new trial, unanimously reversed, on the law and the facts, defendant's cross motion denied, and the matter remanded for consideration of plaintiff's motion for attorneys' fees.

The jury verdict was not against the weight of the evidence

(*see McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [1st Dept 2004]). A fair interpretation of the trial evidence shows that plaintiff, a sightless 66-year-old woman, asked for, and received, from defendant, owner of a commercial gymnasium open to the public, an accommodation for her disability in the form of an employee escort from the gym entrance downstairs to her preferred exercise machine. The employee would then program the machine to plaintiff's preferred settings and would be available to escort plaintiff back upstairs when she was finished exercising. This accommodation functioned, with a minimum of disruption for either party, over the next six months, during which period plaintiff visited the gym a half-dozen times. Notably, there is no evidence in the record that the accommodation cost defendant any money at all, or otherwise represented any sort of undue hardship on defendant as that term is defined in the statute (*see* Administrative Code of City of NY § 8-102[18][a]-[d]; *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 835 [2014]). While plaintiff typically had to wait a few minutes for defendant to find an employee to assist her, she did not mind the short wait.

Since the parties had already reached a reasonable accommodation, in the form of the employee escort, there was no

legally cognizable reason for defendant to ask plaintiff to have Medicare provide her with a trainer. Indeed, in so doing, defendant would have been abdicating its legal obligation to provide a reasonable accommodation altogether, by shifting the burden entirely to another party. Defendant's witnesses testified that it also proposed an alternative accommodation — in the form of asking plaintiff to call in advance of her visits to permit defendant to arrange assistance for her. Plaintiff testified that this did not occur and that she was told by the gym's employees that she would no longer be assisted to and from the exercise machine. The jury resolved this credibility determination in plaintiff's favor (*see Laham v Bin Chambi*, 34 AD3d 374, 375 [1st Dept 2006]).

Based on our review of the record, defendant's request for a reduction of the compensatory damages award is without merit. Plaintiff did not object to the trial court's refusal to charge punitive damages, and therefore did not preserve the issue for review (*see* CPLR 4110-b; *Washington v Ateno*, 103 AD3d 529, 529 [1st Dept 2013]).

Since the trial court, in light of its decision, did not consider plaintiff's motion for attorneys' fees it should consider this matter upon remand.

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

ENTERED: JUNE 14, 2018

CLERK

Renwick, J.P., Gische, Andrias, Kapnick, Singh, JJ.

6892-
6893-
6894 In re Nathan Davidovich, et al.,
Petitioners-Respondents,

-against-

Cheryl Lynne Hoppenstein, et al.,
Respondents-Appellants.

File 2918/15A

Andrew M. La Bella, Scarsdale, for appellants.

Law Offices of Jason J. Smith, New York, (Jason J. Smith of counsel) for respondents.

Decree, Surrogate's Court, New York County (Rita Mella, S.), entered on or about January 9, 2018, approving petitioners' account, unanimously affirmed, without costs. Appeals from order, same court and Surrogate, entered on or about March 31, 2017, which, insofar appealed from as limited by the briefs, denied objectants' motion for partial summary judgment and sua sponte granted summary judgment to petitioners, and from order, same court and Surrogate, entered on or about October 10, 2017, which denied objectants' motion for leave to renew and granted their motion for leave to reargue but adhered to the prior determination, unanimously dismissed, without costs, as subsumed in the appeal from the decree.

Estates, Powers and Trusts Law § 10-6.6(k) states, "This section shall not be construed to abridge the right of any trustee to appoint property in further trust that arises . . . under common law." Under the common law, a trustee with an absolute power to invade principal was "able to exercise that power by appointing in further trust" unless the creator of the trust indicated otherwise (*Matter of Mayer*, 176 Misc 2d 562, 564 [Sur Ct, NY County 1998]). The trustees of the Reuben Hoppenstein 2004 Insurance Trust (2004 Trust) had the absolute power to invade principal, as evidenced by Article 2(c) of the 2004 trust instrument. Article 9(f) gave the trustees the power to create further trusts. Thus, the transfer of the life insurance policy at issue from the 2004 Trust to the Hoppenstein 2012 Insurance Trust was valid.

Having found that the transfer was valid, the Surrogate properly denied objectants' motion for summary judgment on their first three prayers for relief and sua sponte granted summary judgment to petitioners on those demands (*see* CPLR 3212[b]). Since all of the objections depended on the invalidity of the transfer, the Surrogate correctly granted petitioners summary judgment dismissing the objections in their entirety. Because objectants were objecting to petitioners' account, the Surrogate

properly granted petitioners summary judgment on their account after dismissing the objections. This is not a situation like *Dunham v Hilco Constr. Co.* (89 NY2d 425 [1996]), where summary judgment was granted to a nonmovant on an issue (the negligence of an employee) that was completely different from that on which summary judgment was granted to the movants (the duty to maintain a safe workplace).

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

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

ENTERED: JUNE 14, 2018

CLERK

Renwick, J.P., Gische, Andrias, Kapnick, Singh, JJ.

6895 Dr. Richard (Ricardo) Cordero, Esq., Index 25026/15E
Plaintiff-Appellant,

-against-

Viviana Barreiro-Cordero, etc., et al.,
Defendants-Respondents.

_____

Dr. Richard Cordero, Bronx, appellant pro se.

Abislaiman Law Offices P.S.C., New York (Isabel Abislaiman of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered January 25, 2016, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the complaint for lack of personal jurisdiction, unanimously affirmed, without costs.

Plaintiff failed to carry his burden in pleading activities sufficient to establish long-arm jurisdiction pursuant to CPLR 302(a)(3) (*see generally Fischbarg v Doucet*, 9 NY3d 375, 381 n 5 [2007]; *Coast to Coast Energy, Inc. v Gasarch*, 149 AD3d 485, 486 [1st Dept 2017]), since this action sounds essentially in breach of contract, and not in tort (*see e.g. Warck-Meister v Diana Lowenstein Fine Arts*, 7 AD3d 351, 352 [1st Dept 2004]). In any event, even if the out-of-state defendants' contacts with New

York fell within New York's long-arm statute, the exercise of such jurisdiction would violate due process (*see Copp v Ramirez*, 62 AD3d 23, 31 [1st Dept 2009], *lv denied* 12 NY3d 711 [2009]).

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

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

ENTERED: JUNE 14, 2018

CLERK

Renwick, J.P., Gische, Andrias, Kapnick, Singh, JJ.

6896 The People of the State of New York, Ind. 3415/15
Respondent,

-against-

Jonathan Rodriguez,
Defendant-Appellant.

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Feldman and Feldman, Uniondale (Steven A. Feldman of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes of counsel), for respondent.

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Judgment, Supreme Court, New York County (Melissa C. Jackson, J.), rendered January 21, 2016, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a term of two to four years, unanimously affirmed.

Defendant was sentenced in accordance with CPL 390.20(1), which requires a presentence report. When viewed in light of the presumption of regularity, the record, including the presentence report itself and the sentence and commitment sheet, supports the conclusion that the court received the report before it pronounced sentence (*see People v Nazario*, 253 AD2d 726 [1st Dept 1998]).

By asking the court to convert his mandatory surcharges into a civil judgment, defendant expressly waived his claim that this action by the court was unauthorized. Furthermore, the court's ruling on defendant's request, even if erroneous (*see People v Jones*, 26 NY3d 730 [2016]), was in defendant's favor (*see* CPL 470.15[1]).

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

ENTERED: JUNE 14, 2018

CLERK

Renwick, J.P., Gische, Andrias, Kapnick, Singh, JJ.

6897 Metropolitan Fine Arts & Antiques, Inc., Plaintiff-Respondent, Index 153386/17

-against-

10 West 57th Street Realty LLC, Defendant-Appellant.

Rosenberg & Estis, P.C., New York (Norman Flitt of counsel), for appellant.

David Rozenholc & Associates, New York (David Rozenholc of counsel), for respondent.

Order, Supreme Court, New York County (Robert R. Reed, J.), entered January 19, 2018, which, insofar as appealed from as limited by the briefs, denied defendant's motion for summary judgment dismissing plaintiff's third, fourth and fifth causes of action (seeking injunctive and declaratory relief), unanimously reversed, on the law, without costs, the motion granted, and it is declared that plaintiff's leasehold interest is void pursuant to Real Property Law § 231 and that the landlord is entitled to immediate possession of the premises, and the matter remanded for further proceedings.

New York Real Property Law § 231(1) provides as follows:

"Whenever the lessee or occupant other than the owner of any building or premises, shall use or occupy the

> same, or any part thereof, for any illegal trade, manufacture or other business, the lease or agreement for the letting or occupancy of such building or premises, or any part thereof shall thereupon become void, and the landlord of such lessee or occupant may enter upon the premises so let or occupied."

Here, plaintiff Metropolitan Fine Arts pleaded guilty, along with two of its principals, to violating New York Environmental Conservation Law §§ 11-0535-a, 71-0924(3), and 71-0924(4) — which forbid the sale, purchase, trade, barter, or distribution of elephant ivory without a license or permit. At their plea allocution, both principals acknowledged that plaintiff did not have a current license and permit from the DEC to sell ivory from the premises.

These plea allocutions were sufficient to fulfill the requirement under Real Property Law § 231(1) that plaintiff was using the premises for an illegal trade or business. Plaintiff's sale of ivory continued four to five months after its previous license expired. A commercial enterprise operating and using a

particular premises as an illegal business subjects the lessees of those premises to eviction proceedings under Real Property Law § 231(1) (*see 1165 Broadway Corp. v Dayana of N.Y. Sportswear*, 166 Misc 2d 939 [Civ Ct, NY County 1995]).

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

ENTERED: JUNE 14, 2018

CLERK

Renwick, J.P., Gische, Andrias, Kapnick, Singh, JJ.

6898 Betty Cohen, et al., Index 154650/13
Plaintiffs-Respondents,

-against-

Sive, Paget & Riesel, P.C.,
Defendant-Appellant,

Steven Barshov,
Defendant.

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Kritzer Law Group, Smithtown (Karl Zamurs of counsel), for appellant.

Goldberg Cohen, LLP, New York (Morris E. Cohen of counsel), for respondents.

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Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered October 30, 2017, which, to the extent appealed from, denied defendant Sive, Paget & Riesel, P.C.'s motion for summary judgment dismissing the cause of action for legal malpractice as against it, unanimously affirmed, without costs.

Defendant argues that its failure to advise plaintiffs of the condition in their insurance policy requiring them to provide the insurance company with prompt notice of their claim was not the proximate cause of plaintiffs' damages. Defendant contends that, by the time plaintiffs retained it as counsel, more than a month had passed since they had learned of the damage implicating

the policy, and thus the insurance company would have declined coverage anyway, based on plaintiffs' unreasonably delayed notice (*see Young Israel Co-Op City v Guideone Mut. Ins. Co.*, 52 AD3d 245 [1st Dept 2008]; *Pandora Indus. v St. Paul Surplus Lines Ins. Co.*, 188 AD2d 277 [1st Dept 1992]). However, the record does not conclusively demonstrate a delay of that length; issues of fact exist as to when the notification obligation was triggered.

Defendant's contention that the legal malpractice claim should be dismissed as speculative is without merit.

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

ENTERED: JUNE 14, 2018

CLERK

Renwick, J.P., Gische, Andrias, Kapnick, Singh, JJ.

6899 The People of the State of New York, Ind 2841/15
Respondent,

-against-

David Medina,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered June 16, 2016, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing him to a term of three years' probation, unanimously affirmed.

Defendant validly waived his right to appeal, which forecloses review of his suppression claim.

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

ENTERED: JUNE 14, 2018

CLERK

Renwick, J.P., Gische, Andrias, Kapnick, Singh, JJ.

6900 Marilyn Powell, as Administrator of the Estate of Akiah Powell,
Plaintiff-Appellant,

-against-

John Kim, M.D., et al.,
Defendants-Respondents.

Index 307030/10

Profeta & Eisenstein, New York (Fred R. Profeta, Jr. of counsel), for appellant.

Ekblom & Partners, LLP, New York (Hillary C. Agins of counsel), for respondents.

Order, Supreme Court, Bronx County (Stanley Green, J.), entered November 3, 2016, which, to the extent appealed from as limited by the briefs, granted defendant John Kim, M.D.'s motion for summary judgment dismissing the complaint as against him, unanimously affirmed, without costs.

Defendant established prima facie that he did not depart from accepted medical practice by failing to diagnose herpes simple virus (HSV) keratitis in the decedent's right eye, through expert affirmations by an ophthalmologist and two pathologists showing that there was no HSV in the decedent's eye (*see Rivera v Greenstein*, 79 AD3d 564, 568-569 [1st Dept 2010]). The ophthalmologist reviewed the medical records and opined that

defendant obtained an appropriate medical history, formed an appropriate differential diagnosis, and provided proper treatment for the decedent's condition. The pathologists reviewed the eye pathology slides and specimens and opined that the decedent did not have HSV during or after the time defendant treated her.

In opposition, plaintiff submitted an expert report by an ophthalmologist whose opinions failed to raise an issue of fact because they lacked record support (*see Roques v Noble*, 73 AD3d 204, 207 [1st Dept 2010]). Plaintiff's expert asserted that "HSV is not always apparent in a pathological specimen taken months to years after initiation of therapy." This is mere speculation that there may have been herpes in the decedent's eye.

Plaintiff argues that issues of fact as to the presence of ocular herpes are presented by various indications in the medical record that the decedent may have had a viral infection, including a notation in her primary care physician's records. However, these arguments are insufficient to refute the opinions of defendants' experts, which are based on detailed reviews of

all the medical records, as well as testing of the slides and specimens.

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

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

ENTERED: JUNE 14, 2018

CLERK

Renwick, J.P., Gische, Andrias, Kapnick, Singh, JJ.

6901 The People of the State of New York, Ind. 427/14
Respondent,

-against-

Kenneth Henderson,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Anita Aboagye-Agyeman of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered June 24, 2015, convicting defendant, upon his plea of guilty, of two counts of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to concurrent terms of four years, unanimously affirmed.

The court properly denied defendant's suppression motion. When the police handcuffed defendant upon entering an apartment to execute a search warrant, this did not constitute an arrest, and it did not require particularized suspicion because it was justified by the officers' reasonable interest in ensuring their safety and preventing any occupants from interfering with the search (*see Bailey v United States*, 568 US 186, 192-195 [2013];

Muehler v Mena, 544 US 93, 98-99 [2005]; *People v Jackson*, 88 AD3d 451 [1st Dept 2011], *lv denied* 18 NY3d 884 [2012]).

Shortly after detaining defendant, the police acquired probable cause to search and arrest him based on their reasonable belief, given the totality of the circumstances, that defendant had committed a narcotics-related crime (*see People v Bigelow*, 66 NY2d 417, 423 [1985]). The officers saw part of a plastic bag protruding from defendant's waistband. The officers knew this type of bag was commonly used as drug packaging, and it appeared to have been hurriedly stuffed into defendant's underwear in an effort to conceal contraband. Although defendant was not named in the search warrant, these observations, along with the common sense inferences to be drawn from his occupancy of a place of drug trafficking (*see People v Bundy*, 90 NY2d 918, 920 [1997]; *People v Jackson*, 44 AD3d 364 [1st Dept 2007], *lv denied* 9 NY3d 991 [2007]), provided probable cause to believe that defendant was a participant in the drug operation conducted out of the apartment.

Defendant's challenge to the voluntariness of his guilty plea is unpreserved, and we decline to review it in the interest of justice. Because "defendant said nothing at the plea colloquy or sentencing proceeding that negated an element of the crime,"

the narrow exception to the preservation rule does not apply (*see People v Pastor*, 28 NY3d 1090-1091 [2016]; *People v Lopez*, 71 NY2d 662, 665 [1988]). Statements made during a presentence interview are not part of the actual sentencing proceeding and do not implicate *Lopez* (*see e.g. People v Rojas*, 159 AD3d 468 [1st Dept 2018]). As an alternative holding, we find that there is no basis to vacate the plea, insofar as the court had no obligation to inquire about the statement in the presentence report, and, in any event, the allegedly exculpatory statement did not directly contradict, or cast doubt on, defendant's guilt.

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

ENTERED: JUNE 14, 2018

CLERK

Renwick, J.P., Gische, Andrias, Kapnick, Singh, JJ.

6902N Lara S. Trafelet, Index 312168/15
Plaintiff-Respondent,

-against-

Remy W. Trafelet,
Defendant-Appellant.

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Buchanan Ingersoll & Rooney PC,
Nonparty Respondent.

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Stein Riso Mantel McDonough, LLP, New York (Kevin M. McDonough of counsel), for appellant.

The McPherson Firm P.C., New York (Laurie J. McPherson of counsel), for Lara S. Trafelet, respondent.

Buchanan Ingersoll & Ronney PC, New York (Natalie Peled of counsel), for Buchanan Ingersoll & Rooney PC, respondent.

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Order, Supreme Court, New York County (Frank P. Nervo, J.), entered June 16, 2017, as supplemented by order entered July 21, 2017, which, to the extent appealed from as limited by the briefs, granted plaintiff wife's motion for interim counsel and expert fees in the amount of $3,500,000, unanimously affirmed, without costs.

Contrary to defendant's contention, the court set forth in the order the reasons for its decision, in accordance with Uniform Rules for Trial Courts (22 NYCRR) § 202.16(k)(7). The court explained that the case involves "expansive issues," which

include the validity of a $150 million trust and the alleged commingling of marital and non-marital assets within the trust, as well as equitable distribution issues that, given the scope and size of the assets in the marital estate, will necessarily entail legal, accounting, and property valuation expertise. With respect to the last point, the court showed that it had the ability to assess the value of the legal services rendered (*see Smith v Smith*, 277 AD2d 531 [3d Dept 2000]). Moreover, the court had presided over a seven-day pendente lite hearing, and its conclusions reflect its understanding of "the circumstances of the case and of the respective parties" (*see* Domestic Relations Law § 237[a]).

The record contains an exhaustive affidavit by plaintiff's forensic accountant addressing the complexity of the financial issues and indicating that a significant portion of plaintiff's fees were incurred in responding to or defending against litigation initiated by defendant, including the litigation over trust issues addressed on a prior appeal (*Trafelet v Trafelet*, 150 AD3d 483 [1st Dept 2017]). There is no basis in this record for finding those fees excessive or duplicative (*see Van Dusen v Van Dusen*, 13 AD3d 182 [1st Dept 2004]; *Kniffen v Kniffen*, 179 AD2d 416 [1st Dept 1992], *lv denied* 80 NY2d 760 [1992]). The

record also fails to substantiate defendant's contention that the award will only reward plaintiff for extreme litigiousness. Rather, it establishes that he has initiated at least as much of the litigation as she has initiated. In addition, because the fees are subject to reallocation at trial, there is little incentive for either party to engage in frivolous litigation. Nor has defendant shown that the award covered fees incurred in furtherance of any "meritless" litigation strategy on plaintiff's part.

The court properly included Sullivan & Cromwell's fees in the interim award. While defendant tries to minimize the relevance of the firm's trust-related legal work, it was he who placed trust-related issues at the front and center of this litigation by means of his motion for partial summary judgment at the outset. Moreover, nothing in the record substantiates defendant's contention that the fee award covered fees for out-of-state lawyers engaged in the unauthorized practice of law (*see* Judiciary Law § 478).

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

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

ENTERED: JUNE 14, 2018

CLERK

Richter, J.P., Gische, Andrias, Kapnick, Singh, JJ.

6903N- Index 381387/08
6903NA Countrywide Home Loans, Inc.,
Plaintiff-Respondent,

-against-

Darek J. Harris, et al.,
Defendants,

Gonzalo Dunia,
Intervenor Defendant-Appellant.

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Law Office of Carl E. Person, New York (Giancarlo Malinconico of counsel), for appellant.

Mavrides, Moyal, Packman & Sadkin, LLP, Lake Success (Erick R. Vallely of counsel), for respondent.

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Orders, Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about May 24, 2017, which, to the extent appealed from as limited by the briefs, denied intervenor defendant Gonzalo Dunia's motion to dismiss the complaint, and granted plaintiff's motion for summary judgment, striking Dunia's answer, unanimously affirmed, with costs.

The affidavit of the original plaintiff's (Countrywide Home Loans, Inc.) Assistant Secretary, asserting that she had reviewed the loan file, which was kept in the ordinary course of its business, and that Countrywide was the assignee of the note and mortgage from the original lender, Hogar Mortgage and Financial

Services, Inc., and that Countrywide possessed the note and mortgage prior to commencement of the action, sufficiently established the admissibility of the note, and Countrywide's standing to commence the action. This, coupled with the documented assignments from the original lender to the instant plaintiff-assignee Solo Group LLC Series 9, and the affidavit of Solo Group's Managing Member, Matthew Solof, averring that he had reviewed the loan files for the borrower, which were kept in the ordinary course of its business, and that Solo Group is in possession of the original note since the commencement of the action, either directly or through its assignors, established the plaintiff's standing and legal capacity to sue upon the note and mortgage (*see Landmark Capital Invs., Inc. v Li-Shan Wang*, 94 AD3d 418, 419 [1st Dept 2012]; *Bank of Am., N.A. v Brannon*, 156 AD3d 1, 8 [1st Dept 2017]; CPLR 4518[a]).

We have examined Dunia's remaining arguments, and find them unavailing.

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

ENTERED: JUNE 14, 2018

CLERK