SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 28, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Sweeny, Webber, Kahn, Oing, JJ.

6990 The People of the State of New York, Ind. 392/13
Respondent, 2588/13

-against-

Jerome Holmes,
Defendant-Appellant.

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Christina Swarns, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), and Freshfields Bruckhaus Deringer US LLP, New York (Benjamin A. Gianforti of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Michael J. Obus, J. at motion to preclude recorded call; Daniel P. Conviser, J. at jury trial and sentencing), rendered December 16, 2014, as amended February 18, 2015, convicting defendant of robbery in the first degree, three counts of robbery in the second degree, two counts of criminal possession of a weapon in the third degree, and three counts of perjury in the first degree, and sentencing him, as a second violent felony offender, to an aggregate term of 12 years, unanimously affirmed.

Error, if any, in the receipt of DNA evidence was harmless, under the standard for constitutional error, in light of the overwhelming non-DNA evidence of defendant's guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

The motion court correctly declined to preclude a recorded telephone call that defendant made while detained before trial. Defendant's challenge to the admissibility of the call, made primarily on Fourth Amendment grounds, is unavailing. Defendant impliedly consented to the recording of the call based on his receipt of multiple forms of notice that his calls would be recorded, and he was not entitled to separate notice that the calls might be subpoenaed by prosecutors (*see e.g. People v Goding*, 146 AD3d 642 [1st Dept 2017], *lv denied* 29 NY3d 1079 [2017]; *People v Dickson*, 143 AD3d 494 [1st Dept 2016], *lv denied* 28 NY3d 1183 [2017]). Recordings of detainees' calls are made for security purposes, and not for the purpose of gathering evidence. However, like any other nonprivileged evidence that is possessed by a nonparty and is relevant to a litigation, it may be subject to a lawful subpoena. Accordingly, once defendant consented to the recording of his phone calls, and chose

nevertheless to make a call containing a damaging statement, he had no reasonable expectation that the call would be immune from being subpoenaed by the prosecution.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 28, 2018

CLERK

Acosta, P.J., Sweeny, Webber, Kahn, Oing, JJ.

6991 In re Inuel S., and Another,

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

Eunice F., also known as Eunice M.,
Respondent-Appellant,

Graham Windham Services to Families and Children,
Petitioner-Respondent.

_____

Law Offices of Randall S. Carmel, Jericho (Randall S. Carmel of counsel), for appellant.

Carrieri & Carrieri, P.C., Mineola (Ralph R. Carrieri of counsel), for respondent.

Dawne E. Mitchell, Jr., The Legal Aid Society, New York (Seymour W. James, Jr. of counsel), attorney for the children.

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Order, Family Court, Bronx County (Valerie Pels, J.), entered on or about July 18, 2016, which, upon a fact-finding determination that respondent mother suffers from a mental illness as defined by Social Services § 384-b(6), terminated her parental rights to the subject children and committed custody and guardianship of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The agency established by clear and convincing evidence that the mother is presently and for the foreseeable future unable, by

reason of mental illness, to provide proper and adequate care for the subject children (*see Matter of Thaddueus Jacob C. [Tanya K.M.]*, 104 AD3d 558 [1st Dept 2013]). The evidence included a report and testimony from a court-appointed psychologist who, after examining the mother and reviewing medical and other records, opined that she suffers from a mental illness, schizoaffective disorder, bipolar type, and that, as a result, if the children were returned to her care, they now and in the foreseeable future would be at risk of becoming neglected (*see* Social Services Law § 384-b[6]; *Matter of Savannah Love Joy F. [Andrea D.]*, 110 AD3d 529 [1st Dept 2013], *lv denied* 22 NY3d 858 [2014]). Under the circumstances presented, where the expert's opinion was based on the mother's long history of mental illness, her noncompliance with psychiatric treatment, and the pervasive nature of her deficits and lack of insight, it was not necessary for the psychologist to observe interactions between the mother and children before reaching his conclusions (*see Matter of Brianna Monique F. [Monique F.]*, 129 AD3d 638, 639 [1st Dept 2015]). Furthermore, additional evidence before the court supported the psychologist's opinion, including the testimony of

the mother's older daughter and the mother herself (*see Matter of Abigail Bridget W. [Janice Antoinette W.]*, 112 AD3d 468 [1st Dept 2013]).

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

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

ENTERED: JUNE 28, 2018

CLERK

Acosta, P.J., Sweeny, Webber, Kahn, Oing, JJ.

6992 Ivan D., etc., et al., Index 350015/14
Plaintiffs-Respondents,

-against-

Little Richie Bus Service Inc., et al.,
Defendants,

The City of New York,
Defendant-Appellant.

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Cornell Grace, P.C., New York (Porsha R. Johnson of counsel), for appellant.

Rubenstein & Rynecki, Brooklyn (Harper A. Smith of counsel), for respondents.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about August 9, 2017, which denied the motion of defendant City of New York for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

The City's motion should have been granted in this action where infant plaintiffs Mariah A. D. and Ivan D. were on their way to school and walking within the crosswalk when Ivan was struck by a school bus owned by defendant Little Richie Bus Service Inc. and operated by defendant Evelyn Rivera. Although the City had assigned a school crossing guard to assist children

such as infant plaintiffs to cross the intersection, the person who was ordinarily assigned to the intersection called out sick that morning.

In order to establish that the City voluntarily assumed a duty, plaintiffs have the burden of showing: (1) an assumption by the City's agents, through promises or action, of an affirmative duty to act on behalf of plaintiffs; (2) knowledge on the part of the City's agents that inaction could lead to harm; (3) some form of direct contact between the City's agents and plaintiffs; and (4) justifiable reliance by plaintiffs (*see Valdez v City of New York*, 18 NY3d 69, 80 [2011]; *Cuffy v City of New York*, 69 NY2d 255, 260 [1987]). Here, the record shows that no special duty existed between the City and plaintiffs before the accident. There was no direct contact between the City's agents and plaintiffs, and the facts that the school crossing guard greeted

infant plaintiffs and the children relied upon the crossing guard's instructions when the guard was at the intersection before the accident is insufficient to create a special duty.

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

ENTERED: JUNE 28, 2018

CLERK

Acosta, P.J., Sweeny, Webber, Kahn, Oing, JJ.

6993 John Costacos, as Executor of the Estate of George Costacos Andrews, Plaintiff-Appellant, Index 650718/17

-against-

Southbridge Towers, Inc., Defendant-Respondent.

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Pryor Cashman, LLP, New York (Jamie M. Brickell of counsel), for appellant.

Fleischner Potash Cardali Chernow Coogler Greisman Stark Stewart LLP, New York (Evan A. Richman of counsel), for respondent.

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Order, Supreme Court, New York County (Robert R. Reed, J.), entered on or about June 16, 2017, which granted defendant's motion pursuant to CPLR 3211(a)(7) to dismiss the complaint, unanimously affirmed, without costs.

Defendant is a housing corporation and previously organized and operating as a limited-profit housing company pursuant to the Mitchell-Lama Law (Private Housing Finance Law art II) from 1970 until at least September 10, 2015 when it completed the process of dissolution and reconstitution as a market-rate housing corporation no longer subject to the Mitchell-Lama Law. The offering plan defined shareholders who could exchange their shares in the dissolved limited-profit housing company for shares in the reconstituted corporation as shareholders. Although

decedent, not plaintiff, was a shareholder and a participant of this exchange, his shares were not exchanged but were required to be surrendered upon his death because he died three months before defendant's reconstitution to be a market-rate housing corporation (*see Estate of Sherman v Southbridge Towers, Inc.*, 145 AD3d 575 [1st Dept 2016], *lv dismissed in part and denied in part* 29 NY3d 962 [2017]; *Kay v Southbridge Towers, Inc.*, 145 AD3d 576 [1st Dept 2016], *lv denied* 29 NY3d 904 [2017]; 9 NYCRR 1727-8.3).

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 28, 2018

CLERK

Acosta, P.J., Sweeny, Webber, Kahn, Oing, JJ.

6994 The People of the State of New York, Respondent, Ind. 157/12

-against-

Christian Perez, Defendant-Appellant.

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Stanley Neustadter, Cardozo Appeals Clinic, New York (Bobbi C. Sternheim of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered September 25, 2013, convicting defendant, after a jury trial, of attempted murder in the second degree and two counts of criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 21 years, unanimously affirmed.

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

effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that counsel's choices not to make either an opening statement or a request for a missing witness charge 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.

Defendant failed to preserve his challenges to the court's conduct of the trial (*see People v Charleston*, 56 NY2d 886, 887-888 [1982]), and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. The isolated remarks and questions challenged by defendant on appeal did not deprive him of a fair trial.

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

ENTERED: JUNE 28, 2018

CLERK

Acosta, P.J., Sweeny, Webber, Kahn, Oing, JJ.

6995 Patrick Lynch, etc., et al., Plaintiffs-Respondents, Index 157286/15

-against-

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

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

Rivkin Radler LLP, Uniondale (Cheryl F. Korman of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Margaret A. Chan, J.), entered April 13, 2017, which, to the extent appealed from as limited by the briefs, granted plaintiffs' motion for summary judgment to the extent of declaring that defendants violated Administrative Code of City of NY § 13-218(h), and denied defendants' cross motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion denied, and the cross motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiffs contend that defendants violated Administrative Code of City of NY § 13-218(h) by excluding police officers in tier 3 of the stateretirement system, i.e., officers who joined the system on or after July 1, 2009, from the retirement benefits conferred by the provision. Administrative Code § 13-218(h)

provides that "*any member* who is absent without pay for child care leve [sic] of absence pursuant to regulations of the New York city [sic] police department shall be eligible for credit for such period of child care leave provided [that certain conditions are met]" (emphasis added). This section was added to the Administrative Code in 2000 (*see* L 2000, ch 594). While on its face it does not distinguish between tiers of membership, upon review of the broader statutory scheme (*see Matter of New York County Lawyers' Assn. v Bloomberg*, 19 NY3d 712, 721 [2012]) and legislative history,[1] we conclude that tier 3 police officers are not entitled to service credit for unpaid child care leave. All public employees who join a retirement system do so in tiers. Police officers who joined the system between July 1, 1973 and June 30, 2009 are classified as members of tier 2 of the Police Pension Fund (*see* Retirement and Social Security Law § 440[c]). Their pension benefits are governed by article 11 of the Retirement and Social Security Law (RSSL) and title 13 of the Administrative Code of the City of New York.

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[1]The legislative history of section 13-218(h) does not reflect any intent to distinguish between the tiers in the pension system (*see* Bill Jacket, L 2004, ch 594). However, we note that, at the time of the section's enactment, there were no police officers in tier 3, and the "pension prerogatives" of tier 1 and tier 2 members were "virtually identical" (*Lynch v City of New York*, 23 NY3d at 761).

Tier 3 was established for public employees who joined the system on or after July 1, 1976 (*see* RSSL § 500[a]). However, as a result of a legislative amendment and a series of legislative extensions, police officers who joined the system after July 1, 1976 were assigned tier 2 status, and that situation continued until 2009. Police officers hired after July 1, 2009 became members of tier 3 (*see* RSSL §§ 440[c]; 500[c]; *Lynch v City of New York*, 23 NY3d 757, 765-767 [2014]). Tier 3 police officers' pension benefits are governed by article 14 of the RSSL and title 13 of the Administrative Code. RSSL § 500(a) provides that, "[i]n the event that there is a conflict between the provisions of this article and the provisions of any other law or code, the provisions of this article shall govern." While Administrative Code § 13-218(h) affords the credit to "any member" of the Police Pension Fund, article 14 contains no provision for service credit for unpaid child care leave for tier 3 police officers. In the face of this conflict between the two, article 14 governs.

In 2004, the legislature amended the Administrative Code to extend the unpaid child care leave service credit benefit to tier 1 and 2 correction officers (*see* Administrative Code § 13-107[k], added by L 2004, ch 581). Like section 13-218(h), which grants the benefit to "any member" of the Police Pension Fund, section 13-107(k) grants this benefit to "any correction member."

However, in 2005, the legislature amended RSSL § 513 expressly to make the benefit available to tier 3 correction officers, whom it had intended to include in the 2004 legislation but who were "accidentally omitted from the original bill" (Senate Introducer's Mem in Support, Bill Jacket, L 2005, ch 477 at 3; *see* RSSL § 513[h]). The RSSL had to be amended to accomplish the purpose because article 14, which governs tier 3 employees, contains definitions of the terms "credited service" and "creditable service," and expressly defines those terms by reference to RSSL § 513 ("Credit for Service") (*see* RSSL § 501[3], [4]). Thus, a service credit not included in RSSL § 513 would not be available to tier 3 members. (In contrast, article 11 contains a corresponding provision ["Credit for Service"] for tier 2 members [*see* RSSL § 446 (article 11)], but it defines only a few terms, and none of them are related to service credit.) In recognizing that Administrative Code § 13-107(k) did not apply to tier 3 correction officers and that RSSL § 513 had to be amended to define a service credit for unpaid child care leave, the legislature also evinced its understanding that extending the benefit to tier 3 police officers would require another amendment to RSSL § 513. However, it declined to extend the benefit to tier 3 police officers.

In 2012, the legislature amended Administrative Code § 13-

218(h), not to make the unpaid child care leave service credit benefit available to tier 3 police officers but "to make new NYC Tier 3 uniformed correction members ineligible to obtain service credit for child care leave *in order to equate their benefits with Tier 3 police/fire benefits*" (Senate Introducer's Mem in Support and Division of the Budget Bill Mem, Bill Jacket, L 2012, ch 18 at 10 and 18 [emphasis added]). This legislation is consistent with the legislative intent in the creation of tier 3, "a comprehensive retirement program designed to provid[e] uniform benefits for all public employees and eliminat[e] the costly special treatment of selected groups . . . inherent in the previous program" (*Lynch v City of New York*, 23 NY3d at 765 [internal quotation marks omitted]).

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

ENTERED: JUNE 28, 2018

CLERK

Acosta, P.J., Sweeny, Webber, Kahn, Oing, JJ.

6996 State of New York, City of New York, ex rel. Leonard M. Campagna, Plaintiff-Respondent, Index 100516/14

-against-

Post Integrations, Inc., et al., Defendants-Appellants.

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The City of New York, Amicus Curiae.

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Hodgson Russ LLP, Buffalo (Aaron M. Saykin of counsel), for appellants.

Estes, Thorne & Carr PLLC, Dallas, TX (Luis G. Zambrano of the bar of the State of Texas, admitted pro hac vice, of counsel), and Law Offices of Joshua Parkhurst, New York (Joshua Parkhurst of counsel), for respondent.

Zachary W. Carter, Corporation Counsel, New York (Aaron M. Bloom of counsel), for amicus curiae.

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Order, Supreme Court, New York County (James E. d'Auguste, J.), entered October 12, 2017, which, insofar as appealed from as limited by the briefs, denied defendants' motion to dismiss the claim brought under State Finance Law § 189(1)(g) and the complaint in its entirety as against defendant Ebocom, Inc., unanimously modified, on the law, to grant the motion as to Ebocom, and otherwise affirmed, without costs.

Contrary to defendants' argument, when the legislature amended the New York False Claims Act (NYFCA) in 2010 to apply to

false tax claims (L 2010, ch 379, § 3, codified at State Finance Law § 189[4]; *see People v Sprint Nextel Corp.*, 26 NY3d 98, 107 [2015], *cert denied* ___ US ___, 136 S Ct 2387 [2016]), it did not provide that NYFCA tax cases under section 189(1)(g) could be brought only against those who filed a tax-related document with New York State, and not against non-filers who otherwise made claims, records, or statements under the tax law. Rather, consistent with the statutory interpretation offered by the New York State Attorney General and the City of New York, such a case may be brought against a non-filer who is alleged to have made a "claim[], record[], or statement[] . . . under the tax law" (section 189[4][a][iii]). The instant complaint adequately alleges that defendants made "false record[s] or statement[s]" (section 189[1][g]) under the tax law that were not filed with New York State.

The complaint also adequately alleges that defendants have the requisite "nexus" with New York to be subject to the State's taxing power. The allegations, upon information and belief, that one or more of defendant Post Integrations, Inc.'s employees travel to New York to provide consulting services to clients over the course of multi-year contracts are sufficient, at this stage, to establish the nexus and to require discovery as to whether the "nature, continuity, frequency, and regularity" of their

activities within New York are sufficient to constitute "doing business" within New York (20 NYCRR 1-3.2[b][2][i]; *see Matter of Orvis Co. v Tax Appeals Trib. of State of N.Y.*, 86 NY2d 165, 180 [1995], *cert denied* 516 US 989 [1995]).

The allegations that defendants intentionally structured a scheme to avoid the obligation to pay taxes in New York, knowing that they were required to pay taxes in New York, establish scienter sufficiently to satisfy the pleading requirements for a claim under the NYFCA.

Issues of fact exist as to what amount, if any, of defendants' revenues from credit card processing services or other services would be subject to New York tax under the tax laws and allocation rules applicable during the relevant time frame.

The complaint fails to state a cause of action against defendant Ebocom. As a limited liability corporation, Ebocom is

not subject to the franchise and corporate taxes at issue here, and no other basis is alleged for subjecting it to these taxes, such as that it made an affirmative election to be taxed as a C corporation for federal tax purposes.

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

ENTERED: JUNE 28, 2018

CLERK

Acosta, P.J., Sweeny, Webber, Kahn, Oing, JJ.

6997 Eric Sorenson, Index 158124/15
Plaintiff-Appellant,

-against-

Winston & Strawn, LLP,
Defendant-Appellant.

_____

Lorna B. Goodman, New York, for appellant.

Winston & Strawn LLP, New York (Ian T. Hampton of counsel), for respondent.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered June 10, 2016, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff is not entitled to any compensation for services rendered under the subject contingency fee retainer. It is undisputed that the terms of the retainer violated 22 USC § 1623(f), and, thus, the retainer was "unlawful and void" under federal law. Under these circumstances, plaintiff's argument that the void retainer allowed him to pursue a quasi-contract theory of recovery is unavailing. In light of the illegality of the retainer, the court properly found that plaintiff had "unclean hands" to foreclose any claim of unjust enrichment (*see generally Jossel v Meyers*, 212 AD2d 55, 58 [1st Dept 1995]). Furthermore, plaintiff failed to plead a relationship with

defendant that could have caused reliance or inducement on plaintiff's part sufficient to sustain an unjust enrichment claim (*see Sperry v Crompton Corp.*, 8 NY3d 204, 215-216 [2007]; *Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *affd* 19 NY3d 511 [2012]).

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

ENTERED: JUNE 28, 2018

CLERK

Acosta, P.J., Sweeny, Webber, Kahn, Oing, JJ.

6998 The People of the State of New York, Ind. 1001/16
Respondent,

-against-

Javier Montalvo,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Paul Weiner 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 (Charles Solomon, J.), rendered November 29, 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 28, 2018

CLERK

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

Acosta, P.J., Sweeny, Webber, Kahn, Oing, JJ.

6999 Monica Iken, et al., Index 654614/17
Plaintiffs-Appellants-Respondents,

-against-

Bohemian Brethren Presbyterian Church,
Defendant-Respondent-Appellant.

_____

Law Offices of Jonathan E. Neuman, Fresh Meadows (Jonathan E. Neuman of counsel), for appellants-respondents.

McLaughlin & Stern, LLP, New York (Chester R. Ostrowski of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered January 12, 2018, which granted defendant's motion to dismiss the first cause of action for breach of the lease, except for the portion related to plaintiffs' right of quiet enjoyment of the property, and the second cause of action for fraudulent inducement, both with prejudice, and the third cause of action for prima facie tort without prejudice, unanimously modified, on the law, to reinstate the breach claim as set forth herein, reinstate the fraudulent inducement claim as set forth herein, and to dismiss the breach claim with respect to plaintiffs' right of quiet enjoyment without prejudice, and otherwise affirmed, without costs.

Plaintiff Monica Iken and the preschool that she owns, Ordinary Faces LLC, brought this action against the landlord

defendant Bohemian Brethren Presbyterian Church, alleging breach of the lease, fraudulent inducement for entering into the lease, and prima facie tort.

Regarding the breach of lease claim, plaintiffs alleged that defendant refused to address building code violations preventing them from obtaining a Letter of No Objection and in turn running the preschool, that defendant failed to install a proper fire alarm system, and that defendant violated plaintiffs' right of quiet enjoyment of the property.

With respect to the building code violations, the complaint does not specify whether repairs, as opposed to payment of a penalty or filing paperwork, were required to cure. As such, article 6 of the lease which states that defendant is not responsible for making any repairs cannot be used to defeat a motion to dismiss. Moreover, article 14 states that plaintiffs were taking the leased premises "as-is." However, article 18 explicitly states defendant would "reasonably cooperate" with plaintiffs in obtaining approvals from the NYC Department of Buildings. As this is a motion to dismiss, plaintiffs are accorded the benefit of every favorable inference, and the documentary evidence does not conclusively demonstrate that defendant did not have an obligation to cure the building code violations.

Moreover, plaintiffs properly pled that defendant failed to take any steps to install a proper fire alarm system in violation of the rider to the lease, even though plaintiff Monica Iken was able to secure a donated system.

With respect to the right to quiet enjoyment of the property, plaintiffs have not alleged that they were actually evicted or that they abandoned the premises (*Jackson v Westminister House Owners Inc.*, 24 AD3d 249, 250 [1st Dept 2005], *lv denied* 7 NY3d 704 [2006]; *see also Board of Mgrs. of the Saratoga Condominium v Shuminer*, 148 AD3d 609, 611 [1st Dept 2017]), and therefore, this branch of the breach of contract claim should have been dismissed.

Plaintiffs alleged six different bases for the fraudulent inducement claim. The alleged misrepresentations regarding assistance operating the preschool, the working fire alarm, and use of the stroller area, area near the kitchen, and upstairs gym, are all "'directly related to a specific provision of the contract,'" not collateral to the lease, and cannot be used to sustain a fraudulent inducement claim (*Orix Credit Alliance, Inc. v Hable Co.*, 256 AD2d 114, 115 [1st Dept 1998]; *see also Wyle Inc. v ITT Corp.*, 130 AD3d 438, 446 [1st Dept 2015]). Plaintiffs properly pled a fraudulent inducement claim with respect to defendants materially misrepresenting that a 2004 letter of no

objection was all plaintiffs would need, failing to disclose to plaintiffs that defendant intended to remove oversight over homeless individuals on the property, and fraudulently misrepresenting that homeless individuals were living on the property legally, when they were doing so illegally (*see Wyle*, 130 AD3d at 438-439). Plaintiffs properly pled that, as a result of these statements, which plaintiffs allege were made with the intention to deceive them, they signed the lease and developed the property (*id.*; *White v Davidson*, 150 AD3d 610, 611 [1st Dept 2017]).

Supreme Court properly dismissed the prima facie tort claim as it pled dual motives when making allegations regarding this claim (i.e., that defendant was seeking to take revenge on plaintiffs and that defendant was attempting to force plaintiffs out so it could re-let the premises at a higher rental rate) (*see*

Wigdor v SoulCycle, LLC, 139 AD3d 613, 614 [1st Dept 2016], *lv denied* 28 NY3d 906 [2016]; *AREP Fifty-Seventh, LLC v PMGP Assoc., L.P.*, 115 AD3d 402, 403 [1st Dept 2014][same]).

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

ENTERED: JUNE 28, 2018

CLERK

Acosta, P.J., Sweeny, Webber, Kahn, Oing, JJ.

7000 The People of the State of New York, Respondent, Sci. 9682C/12

-against-

Jesus Alvarez,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Kyle R. Silverstein of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Martin Marcus, J.), rendered July 13, 2012, convicting defendant, after a nonjury trial, of criminal trespass in the third degree, and sentencing him to time served, unanimously affirmed.

The court's verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Evidence that defendant entered a subway platform by jumping over a turnstile, without paying the required fare, was legally sufficient to establish that he entered the premises without being licensed or privileged to do so (*see* Penal Law § 140.00[5]; *People v Thiam*, 16 Misc 3d 136[A], 2007 NY Slip Op 51665[U] [App Term, 1st Dept 2007], *lv denied* 9 NY3d 993 [2007]). Defendant's actions were incompatible

with those of a member of some category of persons having permission to ride the subway without paying, and the evidence supported the conclusion that he had no such permission (*see Matter of Lonique M.*, 93 AD3d 203, 205-206 [1st Dept 2012]).

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

ENTERED: JUNE 28, 2018

CLERK

Acosta, P.J., Sweeny, Kahn, Oing, JJ.

7001- Index 109659/10
7002- 590931/10
7003-
7004 Yvette Acevedo, etc.,
Plaintiff-Appellant,

-against-

Episcopal Social Services of New York, Inc., et al.,
Defendants-Respondents.
- - - - -
[And a Third-Party Action]

_____

Venable LLP, New York (Patrick J. Boyle of counsel), for appellant.

Lewis Brisbois Bisgaard & Smith LLP, New York (Nicholas P. Hurzeler of counsel), for Episcopal Social Services of New York, Inc., respondent.

McAloon & Friedman, P.C., New York (Gina Bernardi DiFolco of counsel), for Federation Employment and Guidance Services, Inc., respondent.

_____

Judgment, Supreme Court, New York County (Richard F. Braun, J.), entered March 15, 2017, dismissing the complaint as against defendant Federation Employment and Guidance Services, Inc. and FEGS Health and Human Services System, and judgment, same court and Justice, March 16, 2017, dismissing the complaint as against defendant Episcopal Social Services of New York, Inc., unanimously affirmed, without costs. Appeals from orders, same court and Justice, February 3, 2017, which granted defendants'

motions for summary judgment dismissing the complaint and all claims against them, unanimously dismissed, without costs, as subsumed in the appeals from the judgments.

Plaintiff is the legal guardian of his daughter, Yvette Acevedo, who is 51 years old, legally blind and only minimally verbal, has an IQ of 22 and the functional level of a two-year-old, and lacks the mental or legal capacity to consent to sexual intercourse. Since 1977, Yvette has resided at a group home operated by defendant Episcopal Social Services of New York, Inc. (ESS). From 1989 to 1993, Yvette also attended a day rehabilitation program operated by defendant Federation Employment and Guidance Services, Inc. sued herein as Federation Employment and Guidance Services Inc., and FEGS Health and Human Services System (FEGS).

Plaintiff alleges that defendants negligently supervised Yvette in connection with three incidents of sexual abuse in the 1990s, as well as a more recent incident of sexual abuse that occurred some time between 2003 and 2008 and as a result of which Yvette contracted human papillomavirus (HPV). Plaintiff further alleges that defendants wrongfully failed to timely disclose these incidents to him.

To the extent the negligence claims are premised on the 1990s incidents, they are time-barred, even applying the 10-year

insanity toll (*see* CPLR 208; CPLR 214[5]). Contrary to plaintiff's claim, the doctrine of equitable estoppel is not available to bar defendants from raising the statute of limitations defense, because defendants had no duty to disclose the 1990s incidents to plaintiff (*see Gold v New York*, 80 AD2d 138, 144 [1st Dept 1981]). Defendants had a fiduciary relationship with Yvette (*see Sharp v Kosmalski*, 40 NY2d 119, 121-122 [1976]), but there was no need to disclose the incidents to her, because she was a party to them. Defendants had no similar fiduciary relationship with plaintiff, who was largely uninvolved in Yvette's life during the period at issue, was not her legal guardian during that time, and had no contact at all with FEGS.

The fraudulent concealment claim fails for the same reason: A duty to disclose is a required element of the claim (*see P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 [1st Dept 2003]).

To the extent the negligence claim against ESS is premised on more recent abuse, it is unduly speculative (*see J.E. v Beth Israel Hosp.*, 295 AD2d 281, 283 [1st Dept 2002], *lv denied* 99 NY2d 507 [2003]). The complaint does not allege when or how the purported abuse occurred. It alleges only that Yvette must have been exposed to some sexual contact between 2003 and 2008 because

she was diagnosed with HPV in 2008 and also exhibited a ruptured hymen, Herpes Simplex 1, and a history of Atypical Squamous Cells of Undetermined Significance. However, it is undisputed that these conditions may be transmitted by means other than sexual contact. Moreover, even if they were transmitted sexually, ESS's expert's opinion that it is not possible to know with certainty when the transmission occurred is unrebutted. Thus, the sexual contact may have occurred outside the limitations period or at a time when Yvette was not in ESS's care.

In view of the dismissal of all of plaintiff's substantive claims, his request for punitive damages also must be dismissed.

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

ENTERED: JUNE 28, 2018

CLERK

Acosta, P.J., Sweeny, Webber, Kahn, Oing, JJ.

7005 In re Anonymous, etc., Index 101578/17
Petitioner,

-against-

Sheila J. Poole, etc., et al.,
Respondents.

_____

Patterson Belknap Webb & Tyler, LLP, New York (Isaac J. Weingram of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, New York (Judith Vale of counsel), for Sheila J. Poole, respondent.

_____

Determination of respondent Office of Children and Family Services (OCFS), dated July 12, 2017, insofar as it found, based on a fair preponderance of the evidence following a hearing, that petitioner mother had maltreated her one-year-old son, and denied her request to amend a report in the Statewide Central Register for Child Abuse (SCR) from "indicated" to "unfounded," unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Carol R. Edmead, J.], entered February 1, 2018), dismissed, without costs.

Substantial evidence supports OCFS's determination that the mother maltreated her one-year-old son when during a domestic dispute she drove down the street with the child, who was being held by the father, on top of her vehicle's hood (*see* Family

Court Act § 1012[f][i][B]; 18 NYCRR § 432.1[b][1][ii]; *Whitten v Martinez*, 24 AD3d 285, 286 [1st Dept 2005]). Generally, an evaluation of the reasonableness of a defendant driver's reaction to an emergency situation will be left to the trier of fact (*Maisonet v Roman*, 139 AD3d 121, 125 [1st Dept 2016], *appeal dismissed* 27 NY3d 1062 [2016]). Taking all the facts and circumstances into account, OCFS properly determined that the mother's conduct and judgment fell short of objectively acceptable standards (*Matter of Afton C. [James C.]*, 17 NY3d 1, 9 [2011]).

Nicholson v Scoppetta (3 NY3d 357, 368 [2004]) has limited applicability here, and the mother's reliance on this case does not change the result. In *Nicholson*, the Court explained that whether a domestic violence victim has failed to exercise a minimum degree of care will always turn on "whether she has met the standard of [a] reasonable and prudent person in similar circumstances" (*id.* at 370-371). OCFS engaged in this analysis, taking into account "the severity and frequency of the violence, and the resources and options available to [the mother]" (*Nicholson*, 3 NY3d at 371). OCFS rationally concluded that the

mother had not acted reasonably in this situation.

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

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

ENTERED: JUNE 28, 2018

CLERK

Acosta, P.J., Sweeny, Webber, Kahn, Oing, JJ.

7006N MSMC Residential Realty LLC, etc., Index 653459/14
Plaintiff-Respondent,

-against-

Akbarali Himani,
Defendant-Appellant.

_____

Law Office of Lee Nuwesra, New York (Lee Nuwesra of counsel), for appellant.

Kestenbaum, Dannenberg & Klein, LLP, New York (Michael H. Klein of counsel), for respondent.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered on or about September 12, 2017, which denied defendant's motion seeking Justice Reed's recusal or disqualification, unanimously affirmed, with costs.

There being no grounds to allege a statutory violation under Judiciary Law § 14, the ruling on defendant's recusal motion was a matter for the motion court's conscience and discretion (*People v Smith*, 63 NY2d 41, 68 [1984], *cert denied* 469 US 1227 [1985]), which the court providently exercised by denying the motion. There is no indication that Justice Reed's comments regarding the merits of this action stemmed from an extrajudicial source and resulted in an opinion "on some basis other than what the judge

learned from his participation in the case" (*United States v Grinnell Corp.*, 384 US 563, 583 [1966]). Further, defendant cannot "point to an actual ruling which demonstrates bias" (*Solow v Wellner*, 157 AD2d 459, 459 [1st Dept 1990]).

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

ENTERED: JUNE 28, 2018

CLERK

Acosta, P.J., Sweeny, Webber, Kahn, Oing, JJ.

7007N In re Andrew Poma, Index 650823/17
Petitioner-Respondent,

-against-

Adem Arici,
Respondent-Appellant.

_____

Law Office of Michael H. Joseph, P.L.L.C., White Plains (Michael H. Joseph of counsel), for appellant.

Woods Lonergan PLLC, New York (Annie E. Causey of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered on or about August 18, 2017, which denied respondent's cross motion to confirm the arbitration award and granted the petition to vacate the award, unanimously affirmed, without costs.

Respondent's notice of arbitration did not contain the requisite language of CPLR 7503(c) and, therefore, petitioner was not precluded from raising threshold arbitration issues before the court (*Matter of Blamowski [Munson Transp.]*, 91 NY2d 190, 195 [1997]; *Cooper v Bruckner*, 21 AD3d 758, 759-760 [1st Dept 2005]). Threshold issues include whether the parties complied with the agreement (*see Matter of CPS 1 Realty LP v R.P. Brennan Gen. Contrs. & Bldrs., Inc.*, 66 AD3d 418, 418 [1st Dept 2009], *lv denied* 13 NY3d 713 [2009]). "Arbitration agreements are

contracts and their meaning is to be determined from the language employed by the parties under accepted rules of contract law" (*Matter of Cowen & Co. v Anderson*, 76 NY2d 318, 321 [1990]). By its plain language, the subject arbitration clause states that "[a]ny dispute arising under the terms of this agreement shall be resolved by the parties voluntarily submitting to binding arbitration," thus, where petitioner did not agree to arbitrate, the petition to vacate the award was correctly granted.

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

ENTERED: JUNE 28, 2018

CLERK

Acosta, P.J., Sweeny, Webber, Kahn, Oing, JJ.

7008N Edward Damelio, et al., Index 80522/15
Plaintiff-Respondent,

-against-

NYU Langone Medical Center,
et al.,
Defendants-Appellants.

An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Joan B. Lobis, J.), entered on or about June 1, 2017,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated May 31, 2018,

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

ENTERED: JUNE 28, 2018

CLERK

Friedman, J.P., Richter, Mazzarelli, Kapnick, Gesmer, JJ.

6036 & M-2255 In re 233 E. 5th St., LLC, Petitioner-Respondent, Index 570253/16

-against-

Craig Smith, et al., Respondents-Appellants.

_____

Hogan Lovells US LLP, New York (David R. Michaeli of counsel), for appellants.

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

_____

Order, Appellate Term of the Supreme Court, First Department, entered December 13, 2016, which reversed an order of Civil Court, New York County (Jack Stoller, J.), entered April 5, 2016, denying petitioner and landlord's motion for summary judgment and granting respondents tenants' cross motion for summary judgment dismissing the petition in a holdover proceeding, reinstated the petition, and granted the petitioner's motion for summary judgment of possession, unanimously affirmed, without costs.

The Appellate Term properly found that the vacancy allowance increase of 20% was added to the prior stabilized tenant's legal rent of $1,836, in order to determine that the subject apartment's rent exceeded $2,000, and thus was deregulated. Here, the vacancy by the prior tenant occurred in 2003, after the

effective date of the Rent Regulation Reform Act of 1997, and Administrative Code of City of NY §§ 26-511(c)(5-a)(i) and 26-504.2(a) clearly state that the legal regulated rent includes any vacancy allowance (*see Altman v 285 W. Fourth LLC*,- NY3d -, 2018 NY Slip Op 02829, 2018 NY LEXIS 810 [2018]).

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

M-2255 - *233 E. 5TH St. LLC v Craig Smith*

Motion for leave to file supplemental brief denied.

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

ENTERED: JUNE 28, 2018

CLERK

Friedman, J.P., Sweeny, Webber, Kahn, Oing, JJ.

6917 & [M-2871] Jose Aguilar, Plaintiff, Index 301790/11 83918/13

-against-

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

- - - - -

[And a Third Party Action]

- - - - -

Conair Corporation, Second Third-Party Plaintiff-Respondent,

-against-

Ashlar Mechanical Corp., Second Third-Party Defendant-Appellant.

_____

Law Office of Gizzo & Rayhill, Elmsford (Jonathan R. Walsh of counsel), for appellant.

Burke, Conway & Dillon, White Plains (Michael G. Conway of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Joseph Capella, J.), entered on or about January 24, 2018, which denied second third-party defendant Ashlar Mechanical Corporation's CPLR 3212 motion for summary judgment dismissing the second third-party action commenced by second third-party plaintiff Conair Corporation, unanimously affirmed, without costs.

It is well settled that summary judgment is a drastic remedy that should be employed only when there is no doubt as to the absence of triable issues (*see Andre v Pomeroy*, 35 NY2d 361, 364

[1974]; *Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). The court should accept as true the evidence submitted by the opposing party and evidence of the movant that favors the opposing party (*see O'Sullivan v Presbyterian Hosp. in City of N.Y. at Columbia Presbyt. Med. Ctr.*, 217 AD2d 98, 101 [1st Dept 1995]).

The record contains no signed written indemnification agreement, but issues of fact still preclude summary judgment in Ashlar's favor, given other evidence of the parties' intent to be bound, including Ashlar's performance of the project at issue, and its receipt of payment therefor in the amount reflected in the agreement alleged by Conair (*see Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 368-369 [2005]). Ashlar did not outright deny the existence of an indemnification agreement in its answer, and although its principal testified that he would have never signed an indemnification/insurance procurement agreement such as that alleged by Conair here, Conair's principal testified, to the contrary, that Ashlar had signed such agreements in the past, and that Conair's subcontractors generally were required to sign such agreements in order to be paid. The record further indicates that, in connection with at least one prior arrangement, Ashlar did procure insurance for Conair's benefit.

On this record, and in the context of conflicting testimony,

summary judgment was properly denied (*see Nevarez v S.R.M. Mgt. Corp.*, 58 AD3d 295 [1st Dept 2008]; *Rosario v Benmergui*, 6 AD3d 311 [1st Dept 2004]; *Sierra v C.C. Controlled Combustion Co.*, 308 AD2d 401 [1st Dept 2003]).

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

M-2871 - Jose Aguilar v The City of New York

Grant motion to the extent of deeming respondent's brief filed, and otherwise denied.

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

ENTERED: JUNE 28, 2018

CLERK

Friedman, J.P., Tom, Mazzarelli, Singh, JJ.

7009 The People of the State of New York, Respondent, Ind. 3277/10

-against-

Derrick Brank, Defendant-Appellant.

_____

Stanley Neustadter, Cardozo Appeals Clinic, New York (Patrick Hill of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Catherine M. Reno of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Troy K. Webber, J.), rendered September 19, 2014, convicting defendant, after a jury trial, of kidnapping in the first degree and manslaughter in the first degree, and sentencing him to consecutive terms of 25 years to life and 25 years, respectively, unanimously affirmed.

The absence of an instruction to the jury to decide whether the lead witness was an accomplice in fact, whose testimony would then require corroboration pursuant to CPL 60.22, was harmless in light of the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230 [1975]). Regardless of whether the witness was an accomplice, her testimony was abundantly corroborated by another witness, who was present during the final hours of the three-day-long crime, and forensic evidence, such as the investigators' observations about the scene of the crime and

injuries found during the autopsy that were consistent with the witness's account. Accordingly, there is no reasonable probability that an accomplice-in-fact charge would have affected the verdict (*see People v Gumbs*, 56 AD3d 345, 347 [1st Dept 2008], *lv denied* 12 NY3d 758 [2009]; *compare People v Sage*, 23 NY3d 16, 27 [2014]). It is not dispositive that the witness at issue provided the only evidence establishing that the kidnapping lasted for at least 12 hours, as required for the first-degree kidnapping conviction (Penal Law § 135.25[2][a]), because CPL 60.22 "requires only enough nonaccomplice evidence to assure that the accomplice[] ha[s] offered credible probative evidence," and the nonaccomplice evidence need not constitute independently sufficient "proof of the elements of the crime to sustain a conviction" (*People v Breland*, 83 NY2d 286, 293 [1994]).

The court properly imposed consecutive sentences for the kidnapping and manslaughter convictions, because the evidence showed that defendant kidnapped the victim and subjected him to

numerous life-threatening attacks over the course of three days, and then caused his death through the separate and distinct act of drowning him in a bathtub (*see People v Brahney*, 29 NY3d 10 [2017]; *see also* Penal Law § 70.25[2]).

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

ENTERED: JUNE 28, 2018

CLERK

Friedman, J.P., Tom, Mazzarelli, Singh, JJ.

7010 Priya Jainsinghani, Index 160545/15
Plaintiff-Appellant,

-against-

One Vanderbilt Owner, LLC, et al.,
Defendants-Respondents.

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Jason Levine, New York, for appellant.

Cornell Grace, PC, New York (Keith D. Grace of counsel), for respondents.

_____

Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered October 31, 2017, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment on liability on the basis of res ipsa loquitur, unanimously affirmed, without costs.

Plaintiff seeks to recover damages for injuries that she allegedly sustained when she was hit in the head by a plexiglass cover from a lighting fixture underneath a sidewalk bridge erected on a construction and demolition project on which defendant Waldorf Exteriors, LLC d/b/a/ Waldorf Demolition (Waldorf) was the general contractor.

Subsequently, on September 25, 2015, the Department of Buildings issued a notice of violation pursuant to Building Code § 3301.2 for failure to safeguard personnel and property noting

that "plexiglass from signage that was attached to the exterior of the building came loose" and struck plaintiff in the head while she walked under the sidewalk bridge. A hearing was thereafter held before the City of New York Environmental Control Board on the violation. Waldorf was found to be in violation of, inter alia, Building Code § 3301.2. A civil penalty was assessed.

The IAS court properly denied plaintiff's motion seeking partial summary judgment on liability. Summary judgment under res ipsa loquitur is appropriate only in "exceptional cases" and not where, as here, there are issues of fact with respect to the exclusivity of control over the instrumentality that allegedly caused the injury (*see Galue v Independence 270 Madison LLC*, 119 AD3d 403 [1st Dept 2014]; *Spearin v Linmar, L.P.*, 137 AD3d 571, 572 [1st Dept 2016]).

It is undisputed that a large red-tile composed of composite material fell and struck plaintiff and her co-worker. A photograph proffered by plaintiff, taken prior to the occurrence of the accident, before work began at the construction site, depicts a MTA fixture surrounded by red tile affixed to 51 East 42nd Street. On this record, plaintiff has not established that the owner, One Vanderbilt, or Waldorf had exclusive control over the MTA fixture (*see Kosakowski v 1372 Broadway Assoc., LLC*, 160

AD3d 567 [1st Dept 2018].

Although Waldorf violated the Building Code, this only constitutes "mere evidence of negligence and not negligence per se" (*Vasquez v Soriano*, 106 AD3d 545, 545 [1st Dept 2013]; *see also Elliot v New York*, 95 NY2d 730 [2001]).

Furthermore, the affidavit of Waldorf's expert createsd issues of fact as to whether "the inference of [Waldorf's] negligence is inescapable" (Morejon v Rais Const. Co., 7 NY3d 203, 209 [2006]). Plaintiff failed to rebut the expert's opinion. Thus, summary judgment was inappropriate (*see Morejon v Rais Const. Co.*, 7 NY3d 203, 207 [2006]).

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

ENTERED: JUNE 28, 2018

CLERK

Friedman, J.P., Tom, Mazzarelli, Singh, JJ.

7011 In re Guadalupe F.,
Petitioner-Appellant,

-against-

Randy S.,
Respondent-Respondent.

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Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for appellant.

_____

Order, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about May 5, 2017, which, after a fact-finding hearing, dismissed the family offense petition, unanimously affirmed, without costs.

Petitioner failed to prove by a fair preponderance of the evidence that respondent's alleged conduct established a family offense. Petitioner's testimony does not support a finding that respondent's actions constituted criminal obstruction of breathing or blood circulation (Penal Law § 121.11).

Furthermore, a fair preponderance of the evidence supports the determination that respondent's actions did not rise to the level of the family offense of harassment in the second degree. Petitioner further failed to adduce evidence that would support a

finding that respondent engaged in a course of conduct or repeatedly committed acts which alarmed or seriously annoyed her and which served no legitimate purpose (*see* Penal Law § 240.26[3]).

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

ENTERED: JUNE 28, 2018

CLERK

Friedman, J.P., Tom, Mazzarelli, Singh, JJ.

7012 Bernstein Liebhard LLP, Index 652726/15
Plaintiff-Respondent,

-against-

Sentinel Insurance Company, Limited,
Defendant-Appellant.

_____

Robinson & Cole LLP, New York (Gerald P. Dwyer, Jr. Of counsel), for appellant.

Lerner, Arnold & Winston, LLP, New York (Jonathan C. Lerner of counsel), for respondent.

_____

Order, Supreme Court, New York County (Andrea Masley, J.), entered January 30, 2018, which granted plaintiff's motion for summary judgment dismissing the seventh affirmative defense, and denied defendant's cross motion for summary judgment dismissing the complaint, unanimously reversed, on the law, with costs, plaintiff's motion denied, and defendant's cross motion granted. The Clerk is directed to enter judgment accordingly.

After a fire damaged plaintiff law firm's office, it commenced this action to recover under the loss of business income provision of an insurance policy issued to it by defendant. Plaintiff sought coverage for contingency fees it claims it would have otherwise received in cases that it did not acquire because of a suspension of advertising allegedly due to

the fire.

The policy broadly covered physical loss and damage to property resulting from covered causes of loss, with certain exclusions and exceptions. The plain language of the lost business income provision at issue additionally provided coverage for any resulting "actual loss" of business income due to the necessary suspension of operations as a result of a covered cause of loss and that would have been "earned" during the 12 months after the fire (*see High Country Arts & Crafts Guild v Hartford Fire Ins. Co.*, 126 F3d 629, 632 [4th Cir 1997]). The parties agree that "earned" means "become entitled to."

The entire fee amounts that eventually result from settlements and judgments in cases foregone by plaintiff would not have been "earned" by plaintiff at the time, within the 12-month cutoff after the fire (*see In re Thelen LLP*, 24 NY3d 16, 28 [2014]; *Matter of Cohen v Grainger, Tesoriero & Bell*, 81 NY2d 655, 658 [1993]; *Shandell v Katz*, 217 AD2d 472, 473 [1st Dept 1995]). Lost fees from prospective clients that plaintiff law firm had to forego, but which would have resulted from work performed after the 12-month cutoff, are not covered by the policy. Rather, the lost business income provision here covers fees that, if not for the suspension of advertising due to the fire, plaintiff law firm would have earned for services actually

performed for such new clients within 12 months of the fire or from such new cases that resolved within 12 months of the fire (*compare National Union Fire Ins. Co. of Pittsburgh, Pa. v TransCanada Energy USA, Inc.*, 52 Misc 3d 455 [Sup Ct, NY County 2016], *affd* 153 AD3d 1153 [1st Dept 2017]). Although plaintiff would have theoretically been entitled to coverage for such fees for services performed within 12 months of the fire or from such cases resolved within 12 months of the fire, plaintiff has acknowledged that the claim was not presented in such a manner and it pursues no such claim in its brief.

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

ENTERED: JUNE 28, 2018

CLERK

Friedman, J.P., Tom, Mazzarelli, Singh, JJ.

7013-
7014 Index 158919/16

Arthur Kevin Berry,
Plaintiff-Appellant,

-against-

The New York State Department
of Taxation and Finance, et al.,
Defendants-Respondents.

- - - - -

Chiraag Bains, Brooklyn Legal Services,
Brooklyn Legal Services, Corp. A,
The Legal Aid Society and
Syracuse University College of Law
Low Income Taxpayer Clinic,
Amici Curiae.

_____

Lincoln Square Legal Services, Inc., New York (Elizabeth A. Maresca of counsel), for appellant.

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

Wilmer Cutler Pickering Hale & Dorr LLP, Washington, DC (Danielle Conley of the bar of the State of Washington, admitted pro hac vice of counsel), for Chiraag Bains, amicus curiae.

Jaclyn Roeing, Washington, DC, for Brooklyn Legal Services, Brooklyn Legal Services, Corp. A, The Legal Aid Society, Syracuse University College of Law Low Income Taxpayer Clinic, amici curiae.

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Judgment, Supreme Court, New York County (Carol Edmead, J.), entered July 6, 2017, dismissing plaintiff's complaint and declaring Tax Law § 171-v constitutional, and bringing up for review an order, same court and Justice, entered June 21, 2017, which granted defendants' motion pursuant to CPLR 3211 to dismiss

the complaint, unanimously affirmed, without costs.

Plaintiff was served with a notice pursuant to Tax Law § 171-v to suspend his license for failure to pay outstanding taxes. Tax Law § 171-v was enacted to require NYS Department of Taxation and Finance and Department of Motor Vehicles to "cooperate in a program to improve tax collection through the suspension of drivers' licenses of taxpayers with past-due tax liabilities equal to or in excess of [$10,000]" (Tax Law § 171-v [1]). The notice informed plaintiff that he had 60 days within which to satisfy his tax liability or prove that he fell within one of the statute's exceptions, such as mistaken identity, being subject to a prior wage garnishment, or being the holder of a commercial driver's license, or his license would be suspended (*see* Tax Law § 171-v [5]).

Plaintiff's argument that *Bearden v Georgia* (461 US 660 [1983]) warrants a finding that he has stated a cause of action that Tax Law § 171-v is unconstitutional is without merit (*see Jacobi v Tax Appeals Trib. of the State of N.Y.*, 156 AD3d 1154, 1157 [3d Dept 2017], *lv denied* ___ NY3d ___, 2018 NY Slip Op 71379 [May 3, 2018]). While a "driver's license is a substantial property interest that may not be deprived without due process of law" (*Pringle v Wolfe*, 88 NY2d 426, 435 [1996]; *cert denied* 519 US 1009 [1996]); *see Bell v Burson*, 402 US 535, 539 [1971]). it

is not a fundamental right as to warrant review pursuant to *Bearden* (*compare MLB v SLJ*, 519 US 102 [1996]; *Boddie v Connecticut*, 401 US 371 [1971]).

There is a rational basis to the law, as the government has a legitimate interest in tax collection (*see Big Apple Ice Cream v City of New York*, 7 AD3d 282 [1st Dept 2004]). Further, the notice was reasonably calculated, under all the circumstances, to apprise plaintiff of the pendency of the action and afford him an opportunity to present his objections (*see Bell v Burson*, 402 US 535 [1971]). The prohibition against excessive fines does not apply here, since the condition may be lifted upon action by the plaintiff (*see Matter of Seril v New York State Div. of Hous. & Community Renewal*, 205 AD2d 347 [1st Dept 1994]). Nor can plaintiff press a claim pursuant to 42 USC § 1983, as state law provides an adequate remedy (*see National Private Truck Council, Inc. v Oklahoma Tax Commn.*, 515 US 582, 586, 588 [1995]).

Lastly, the statute is not facially invalid, since plaintiff cannot prove that there is no set of circumstances under which the Act would be valid (*see Amazon.com, LLC v New York State*

Dept. of Taxation & Fin., 81 AD3d 183, 194 [1st Dept 2010], *affd* 20 NY3d 586 [2013], *cert denied* 571 US 1071 [2013]).

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 28, 2018

CLERK

Friedman, J.P., Tom, Mazzarelli, Singh, JJ.

7015 The People of the State of New York, Ind. 5586/14
Respondent,

-against-

Ricco Slade,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Hope Korenstein 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 (Jill Konviser, J.), rendered October 6, 2015,

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

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

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

ENTERED: JUNE 28, 2018

CLERK

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

Friedman, J.P., Tom, Mazzarelli, Singh, JJ.

7016-
7017 Index 100175/13

The State of New York ex rel.
Eric Rasmusen,
Plaintiff-Appellant,

-against-

Citigroup, Inc.,
Defendant-Respondent.

_____

Law Offices of Eugene H. Kim LLC, White Plains (Eugene H. Kim of counsel), for appellant.

Davis Polk & Wardell LLP, New York (Edmund Polubinski III of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Charles E. Ramos, J.), entered May 30 and July 5, 2017, which, respectively, granted defendant's motion to dismiss the complaint and granted defendant's request to direct entry of judgment in its favor, unanimously affirmed, without costs.

The court lacked subject matter jurisdiction over this action because plaintiff's allegations that defendant wrongfully underpaid its New York State taxes are derived from and are substantially similar to allegations that were already in the

public domain (*see* State Finance Law § 190[9][b]; *State of N.Y. ex rel. Jamaica Hosp. Med. Ctr., Inc. v UnitedHealth Group, Inc.*, 84 AD3d 442 [1st Dept 2011]).

In view of the foregoing, we need not reach the issue of whether the complaint states a cause of action.

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

ENTERED: JUNE 28, 2018

CLERK

Friedman, J.P., Tom, Mazzarelli, Singh, JJ.

7018 Kenneth Rosenblum, Index 654177/15
Plaintiff-Appellant,

-against-

Bernice Rosenblum,
Defendant-Respondent.

- - - - -

In re Kenneth Rosenblum, etc.,
Petitioner,

-against-

Bernice Rosenblum
Respondent.

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Schlam Stone & Dolan LLP, New York (Richard H. Dolan of counsel), for appellant.

Stroock & Stroock & Lavan LLP, New York (Kevin L. Smith of counsel), for respondent.

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Order, Supreme Court, New York County (Melissa Crane, J.), entered on or about December 26, 2017, which denied plaintiff's motion for partial summary judgment to enforce a settlement agreement between the parties and to dismiss defendant's counterclaims, unanimously modified, on the law, the motion granted to the extent of dismissing the second through fifth counterclaims only to the extent they are based on alleged conduct that occurred prior to execution of the settlement agreement, and otherwise affirmed, without costs.

Plaintiff Kenneth Rosenblum and his mother, defendant

Bernice Rosenblum, own equal interests in certain entities and real property, including a partnership, Standard Realty Associated (Standard). On October 2, 2013 the parties entered into a settlement agreement (the agreement) intended to resolve Bernice's claims that Kenneth had improperly transferred $14.5 million out of Standard for his personal use and deprived Standard of business opportunities. Under the agreement, Bernice agreed to release Kenneth from those claims in consideration for his payment of $14 million to Standard, "in full payment of the loans and business opportunities he has taken from Standard," and to "fully repay said sum to Standard prior to entering into or funding in any way any other business transaction, but in any event on or before June 1, 2017."

Kenneth subsequently paid approximately $6 million of the total amount due under the agreement and commenced this action seeking to dissolve the parties' joint businesses and partition their properties. In her answer, Bernice asserted counterclaims alleging that Kenneth had breached the agreement by communicating his intent not to make full payment and that he had breached his fiduciary duty to Standard and other entities by diverting business opportunities. Thereafter, but prior to the June 1, 2017 final deadline, Kenneth paid Standard the remaining amount due under the agreement, and moved to enforce the agreement and

dismiss all of Bernice's counterclaims.

Bernice contends that Kenneth is not entitled to enforcement of the agreement because, in violation of its terms, he engaged in other business transactions prior to making the final settlement payment. Moreover, his breach of the agreement excuses her from complying with the release provision of the agreement. Kenneth contends that the timing of the settlement payment was not a material term of the agreement and, in any event, Bernice has accepted the benefit of his payment.

Contrary to Kenneth's position, it cannot be said as a matter of law that the provision of the agreement requiring him to make full payment before entering into any other business transaction was not a material term of the agreement (*see N450JE LLC v Priority 1 Aviation, Inc.*, 102 AD3d 631, 632 [1st Dept 2013]; *Smolev v Carole Hochman Design Group, Inc.*, 79 AD3d 540, 541 [1st Dept 2010]). However, assuming the term were found to be material after trial, any right Bernice had to repudiate the agreement because of Kenneth's untimely payments is vitiated by her retention of the benefit of the agreement (*see Tibbetts Contr. Corp. v O & E Contr. Co.*, 15 NY2d 324, 338 [1965]; *Walker v Arpindo Corp.*, 194 AD2d 503 [1st Dept 1993]; *cf. Netherby Ltd. v G.V. Trademark Invs.*, 261 AD2d 160 [1st Dept 1999]).

Nevertheless, defendant may recover contract damages

resulting from Kenneth's breach of the payment terms of the agreement, which deprived defendant and Standard of the use of the money. Similarly, to the extent defendant's counterclaims for breach of fiduciary duty allege that Kenneth continued to breach his fiduciary duty to defendant and their entities after the execution of the agreement for, inter alia, loss of business opportunities, the counterclaims are not affected by the full payment of the settlement sum.

With respect to the first and sixth counterclaims concerning the property located on West 11th Street, issues of fact remain as to its ownership.

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 28, 2018

CLERK

Friedman, J.P., Tom, Mazzarelli, Singh, JJ.

7019 The People of the State of New York, Respondent, Ind. 4413/12

-against-

Diango Keita, Defendant-Appellant.

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Rosemary Herbert, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Daniel P. McCullough, J. at hearing; Arlene D. Goldberg, J. at jury trial and sentencing), rendered December 18, 2014, convicting defendant of six counts of criminal possession of a forged instrument in the second degree, and sentencing him to concurrent terms of 1½ to 4½ years, unanimously affirmed.

The court properly denied suppression of credit cards found under the hood of defendant's car, the impoundment of which was undisputedly lawful. Police entry into the car and under its hood was reasonable because it was done in compliance with the Police Department Patrol Guide's safeguarding procedure, requiring police to disable all vehicles being safeguarded, in order to prevent theft. The limited entry into the car was done to protect the owner's property, and was not an attempt to search

for incriminating evidence, as shown by the fact that, upon discovering the credit cards in the hood, the police did not search any other part of the vehicle (*see People v Walker*, 20 NY3d 122, 126-127 [2012]; *People v Johnson*, 1 NY3d 252, 256 [2003]). The officers' failure to perform this safeguarding procedure within the 48-hour period allowed by the Patrol Guide, after which a vehicle is to be moved from the precinct to the Property Clerk's storage facility, was a minor deviation from procedure, and did not undermine the reasonableness of the limited search, where the remainder of the procedure was followed and, as noted, there was no indication that the police were using the procedure as a pretext to search for incriminating evidence (*see People v Lee*, 29 NY3d 1119, 1120 [2017]; *People v Padilla*, 21 NY3d 268, 272-273 [2013], *cert denied* 571 US —, 134 S Ct 325 [2013])). The only violation of the Patrol Guide was a delay in moving the car from one place of lawful police custody to another. We reject defendant's argument concerning the scope of our review, because the hearing court's decision may reasonably be interpreted, in context, as accepting this basis for denial of suppression (*see People v Nicholson*, 26 NY3d 813, 825 [2016]; *People v Garrett*, 23 NY3d 878, 885 n 2 [2014]).

The trial court properly received testimony concerning the use of a credit card reader to determine that six of the cards

found in the car were forged. There was an adequate foundation as to the device's reliability and accuracy through testimony demonstrating that the device, similar to the credit card readers used in stores, had been used on many prior occasions. The device plainly did not require any kind of calibration or maintenance (*cf. People v Boscic*, 15 NY3d 494, 499-500 [2010]). Moreover, an officer corroborated the findings of the original card reader by swiping the cards through a similar reader in open court and obtaining identical results (*see People v Knight*, 72 NY2d 481, 488 [1988]; *People v Magri*, 3 NY2d 562, 566-567 [1958]).

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

ENTERED: JUNE 28, 2018

CLERK

Friedman, J.P., Tom, Mazzarelli, Singh, JJ.

7020 Cypress Group Holdings, Inc., Index 653408/15
Plaintiff-Respondent,

-against-

Onex Corporation et al.,
Defendants-Appellants.

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Arnold & Porter Kaye Scholer LLP, New York (Aaron F. Miner of counsel), for appellants.

Fensterstock P.C., New York (Evan S. Fensterstock of counsel), for respondent.

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Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered February 3, 2017, which, insofar as appealed from, denied defendants' motion to dismiss the contract claim based on a software application and a related contract, unanimously modified, on the law, to grant the motion as to the software application, and otherwise affirmed, without costs.

Plaintiff purchased nonparty Cypress Insurance Group, Inc. and its subsidiaries (Cypress) from defendants pursuant to a Stock Purchase Agreement (SPA). In the SPA, defendant Onex Corporation undertook to provide plaintiff with a Closing Date Statement setting forth Cypress's adjusted book value as of the day before the closing, and plaintiff undertook to submit a Buyer's Objection within 90 days if it disagreed with the statement. If plaintiff and Onex could not resolve their dispute

within 14 days, they would submit it to a Neutral Accounting Firm. Cypress also represented and warranted, inter alia, that a software application (the Application) that nonparty Systems Task Group International Ltd., d/b/a MajescoMastek (Majesco), had contracted to develop for it was "in adequate operating condition and repair."

After the SPA was entered into, but before the Closing Date, Cypress entered into the Third Addendum to Services Agreement (Third Addendum) with Majesco, which provided that Majesco would give Cypress a "services credit" every month for the balance of the term of the contract and that any outstanding balance owed by Majesco would be forfeited if the contracted was terminated early.

After receiving the Closing Date Statement, plaintiff submitted a Buyer's Objection arguing, in pertinent part, that the Application was worthless. The Neutral Accounting Firm to which the parties resorted when they were unable to resolve their dispute determined that "[u]nder GAAP [generally accepted accounting principles] and the Balance Sheet rules, the Application must be accounted for at fully amortized cost as of the Closing Date. Accordingly, . . . no change is required to [defendants'] most current calculation of Adjusted Book Value." On other issues, the Neutral Accounting Firm found for plaintiff.

Subsequently, the parties agreed that payment by Onex to plaintiff of $1,559,258 would "be payment in full satisfaction of all claims raised in the Buyer's Objection" (the release).

Plaintiff alleges in its complaint, inter alia, that defendants breached the SPA by misrepresenting that the Application was in adequate operating condition and repair when it was defective and by executing the Third Addendum, which added to its contractual obligations, without its consent.

Insofar as the cause of action is based on the Application, it is barred by the release (*see Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011]; *Herman v Melamed*, 110 AD2d 575, 577 [1st Dept 1985], *appeal withdrawn* 65 NY2d 925 [1985]). The parties agreed that payment by Onex to plaintiff of $1,559,258 fully satisfied all claims raised in the Buyer's Objection. Accordingly, the breach of contract claim based on the Application should be dismissed.

Although the Third Addendum arises out of the same transaction as the Application, res judicata does not apply to the claim based on it, because that claim could not have been brought in the purchase price adjustment procedure (*see e.g. Marinelli*, 265 AD2d at 8). The SPA limited the "scope of the disputes to be resolved by the Neutral Accounting Firm . . . to whether the items in dispute that were included in the Buyer's

Objection were prepared in accordance with this Agreement." The Third Addendum was not included in the Buyer's Objection.

Nor does the doctrine of collateral estoppel bar the claim based on the Third Addendum, because that claim was not decided in the purchase price adjustment procedure (*see Buechel v Bain*, 97 NY2d 295, 303 [2001], *cert denied* 535 US 1096 [2002]). Although during that procedure plaintiff raised many of the same issues as in the case at bar, the only relevant issue that the Neutral Accounting Firm decided was that no change was required to the adjusted book value.

Defendants contend that the Third Addendum did not injure plaintiff because it did not extend the term of Cypress's Services Agreement with Majesco and, even if plaintiff has stopped using Majesco, it might be able to avoid paying an early termination fee. However, the documentary evidence does not establish as a matter of law that the Third Addendum did not

extend the term of the Services Agreement (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]).

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

ENTERED: JUNE 28, 2018

CLERK

Friedman, J.P., Tom, Mazzarelli, Singh, JJ.

7021 Jessie Laguerre-Fuentes, Index 306829/13
Plaintiff-Respondent,

-against-

Jose A. Acevedo,
Defendant-Appellant,

"John Doe,"
Defendant.

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Law Offices of John Trop, Yonkers (David Holmes of counsel), for appellant.

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Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about December 22, 2017, which denied the motion of defendant Jose A. Acevedo for summary judgment dismissing the complaint as against him, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

The motion court erred in considering the uncertified police accident report submitted by plaintiff in opposition to defendant's motion, since it constituted hearsay and there was an absence of admissible, non-hearsay evidence to support the statement therein that plaintiff's car was rear-ended by a car matching the description of the car owned by defendant (*see Rivera v GT Acquisition 1 Corp.*, 72 AD3d 525, 526 [1st Dept 2010]; *Coleman v Maclas*, 61 AD3d 569 [1st Dept 2009]). Indeed

the only admissible evidence proffered by plaintiff, her deposition transcript, indicated that she believed that the vehicle that struck the back of her car was blue, while defendant's vehicle was red.

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

ENTERED: JUNE 28, 2018

CLERK

Friedman, J.P., Tom, Mazzarelli, Singh, JJ.

7022 US Bank National Association, etc., Index 38221/10
Plaintiff-Appellant,

-against-

Anthony Ezugwu,
Defendant-Respondent,

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

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Hogan Lovells US LLP, New York (Ryan Sirianni of counsel), for appellant.

Petroff Amshen LLP, Brooklyn (Christopher Villanti of counsel), for respondent.

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Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about July 7, 2017, which, to the extent appealed from, denied plaintiff's renewed motion for summary judgment on the complaint as against defendant Anthony Ezugwu, and to dismiss Ezugwu's affirmative defenses counterclaims, unanimously reversed, on the law, without costs, and the motion granted.

In this action to foreclose on a note and mortgage, plaintiff, US Bank National Association ("USBNA"), as trustee of a trust consisting of investment instruments (mortgage-backed securities), established standing to commence this foreclosure action and, hence, the legal insufficiency of Ezugwu's affirmative defense of lack of standing. The affidavit of a loan

documentation officer employed by the loan-originating bank ("Wells Fargo") avers that Wells Fargo, while always in possession of Ezugwu's loan documents, ultimately served as a servicer and custodial holder of loan documents under the terms of a 2006 pooling and servicing agreement ("PSA"), and that Wells Fargo transferred the note into the possession of USBNA, as trustee of the PSA, prior to the commencement of the instant foreclosure action, as corroborated by documents including the note, mortgage and PSA that contained, inter alia, a mortgage loan schedule and custodial activity sheet for Ezugwu's loan documents (*see generally Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361 [2015]).

To the extent USBNA also argues that its standing can be separately demonstrated by the terms of the PSA, which indicates an assignment of the "loan" (and its documents) from Wells Fargo to the trust, we agree under the circumstances herein (*see Wilmington Tr. Co. v Walker,* 149 AD3d 409 [1st Dept 2017]).

USBNA is also entitled to dismissal of Ezugwu's remaining affirmative defenses and counterclaims, which, as pleaded, are legally insufficient and not pursued on appeal.

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

ENTERED: JUNE 28, 2018

CLERK

Friedman, J.P., Tom, Mazzarelli, Singh, JJ.

7023-		Ind. 721/16
7024-		2764/16
7024A-		4835/16
7024B-		4836/16
7024C	The People of the State of New York, Respondent,	4995/15
	-against-	
	Martin Paulino, Defendant-Appellant.	

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

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

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An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County, rendered January 28, 2016 (Larry Stephen, J.), and January 23, 2017 (Jill Konviser, J.),

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 judgments so appealed from be and the same are hereby affirmed.

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

ENTERED: JUNE 28, 2018

CLERK

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

Friedman, J.P., Tom, Mazzarelli, Singh, JJ.

7025 Seema Kalia, Index 102076/10
Plaintiff-Respondent,

-against-

David Rutkin,
Defendant-Appellant.

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Anderson Kill P.C., New York (Alan M. Goldberg of counsel), for appellant.

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Order, Supreme Court, New York County (Robert D. Kalish, J.), entered April 10, 2015, which, to the extent appealed from, reduced the amount of attorneys' fees defendant was entitled to recover on his counterclaims from $96,792.95 to $47,143.70 and confirmed the JHO's finding that punitive damages were not recoverable, unanimously modified, on the law, to confirm the award of $96,792.95 attorneys' fees recommended by the JHO on defendant's counterclaims, and otherwise affirmed, without costs.

A fair reading of the order referring the matter to the JHO and the transcript from the June 2014 hearing confirm defendant's contention the JHO was instructed to calculate defendant's damages on all of his counterclaims, which included three causes of action for the recovery of attorneys' fees (including those incurred in this litigation). Thus, the JHO properly considered all relevant legal fees in determining the full amount of

defendant's counterclaims, and the order should be modified accordingly.

With respect to punitive damages, the IAS court correctly confirmed the recommendation that they were not appropriate in this case. Defendant has not alleged conduct in support of his defamation counterclaim that was sufficiently willful, wanton, or reckless (*Home Ins. Co. v American Home Prods. Corp.*, 75 NY2d 196, 204 [1990]). Defendant's other counterclaims – including for breach of the warranty of habitability and constructive eviction – were similarly insufficient to establish his entitlement to punitive relief (*see e.g. Ghadamian v Channing*, 295 AD2d 127 [1st Dept 2002]).

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

ENTERED: JUNE 28, 2018

CLERK

Friedman, J.P., Tom, Mazzarelli, Singh, JJ.

7027N Spectrum Stamford, LLC,
Plaintiff-Appellant,

Index 650635/18
Case 640/18

-against-

400 Atlantic Title, LLC,
Defendant-Respondent.

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Robinson & Cole LLP, New York (Joseph L. Clasen of counsel), for appellant.

Meister Seelig & Fein LLP, New York (Stephen B. Meister of counsel), for respondent.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered March 8, 2018, which denied plaintiff's motion for a preliminary injunction, unanimously affirmed.

Defendant 400 Atlantic Title, LLC entered into a loan agreement whereby it borrowed $235 million from a bank, and subsequently defaulted on the loan at the maturity date. Plaintiff Spectrum Stamford, LLC, the assignee of the loan, now seeks to enforce a contractual right under a loan agreement to replace the current property manager with a property manager of its choosing, CBRE, Inc. The preliminary injunction seeks to enjoin defendant and the current property manager from preventing or interfering with CBRE's takeover as property manager, and seeks to require defendant and the current property manager to assist with the transition process.

Plaintiff has established a likelihood of success on the merits as Spectrum has the right to replace the property manager in the event of a default. However, plaintiff has not demonstrated irreparable harm or that the balance of the equities weighs in its favor.

It is well settled that the ordinary function of a preliminary injunction is not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits (*see Moltisanti v East Riv. Hous. Corp.*, 149 AD3d 530, 531 [1st Dept 2017]; *Residential Bd. of Mgrs. of Columbia Condominium v Alden*, 178 AD2d 121 [1st Dept 1991]). However, if relief is required because of "'imperative, urgent, or grave necessity,'" then a court, acting with "'great caution'" and "'upon clearest evidence,'" i.e., "'where the undisputed facts are such that without an injunction order a trial will be futile'" may grant a preliminary injunction (*Xerox Corp. v Neises*, 31 AD2d 195, 197 [1st Dept 1968], quoting 28 NY Jur, Injunctions, § 19; *see also Sithe Energies, Inc. v 335 Madison Ave., LLC*, 45 AD3d 469, 470 [1st Dept 2007]).

Here, Supreme Court properly exercised its discretion in denying plaintiff's motion for an injunction *(After Six Inc. v 201 East 66th Street Associates*, 87 AD2d 153, 155 [1st Dept 1982]. Defendant should be permitted an opportunity to defend

itself. There is no "imperative, urgent, or grave necessity" that the current property manager be replaced with CBRE at this time (*Xerox* at 197). While plaintiff argues that it sustained irreparable harm because the property continues to be managed by an agent that it does not desire, citing *Rakosi v Sidney Rubell Co., LLC* (155 AD3d 564, 565 [1st Dept 2017]) and *Fieldstone Capital, Inc. v Loeb Partners Realty* (105 AD3d 559, 560 [1st Dept 2013]), plaintiff's interests are different from the plaintiffs in those cases. Plaintiff is merely an assignee of the lender and has solely an economic interest, whereas the plaintiffs in *Rakosi* and *Fieldstone* were owners of the properties with concerns about title and entered directly into property management agreements with the defendants.

Finally, plaintiff's request for relief is primarily mandatory in nature as it requires defendant and the current property manager to assist with the transition to CBRE (whether explicitly to benefit CBRE or implicitly to protect its own proprietary information). A mandatory preliminary injunction by which the movant would receive some form of the ultimate relief sought as a final judgment is granted only in "unusual" situations, "where the granting of the relief is essential to maintain the *status quo* pending trial of the action" (*Second on Second Café, Inc. v Hing Sing Trading, Inc.*, 66 AD3d 255, 264

[1st Dept 2009]). "'A mandatory injunction should not be granted, absent extraordinary circumstances, where the status quo would be disturbed and the plaintiff would receive the ultimate relief sought, pendente lite'" (*St. Paul Fire & Mar. Ins. Co. v York Claims Serv.*, 308 AD2d 347, 349 [1st Dept 2003]; *see also LGC USA Holdings, Inc. v Taly Diamonds, LLC*, 121 AD3d 529, 530 [1st Dept 2014]; *Fieldstone*, 105 AD3d at 560). Here, while plaintiff may have a contractual right to choose the property manager, there has been no showing of extraordinary circumstances requiring CBRE immediately assume management of the property.

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

ENTERED: JUNE 28, 2018

CLERK

Tom, J.P., Mazzarelli, Kapnick, Singh, JJ.

7028N Hertz Vehicles, LLC, Index 156148/16
Plaintiff-Appellant,

-against-

Best Touch PT, P.C., et al.,
Defendants-Respondents,

Daniel Cohen, M.D.,
Defendant.

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Rubin, Fiorella & Friedman LLP, New York (David F. Boucher, Jr. of counsel), for appellant.

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Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered June 6, 2016, which denied, with leave to renew upon proper papers, plaintiff's motion pursuant to CPLR 3215 for a default judgment against all defendants except Daniel Cohen, M.D., declaring that it was not obligated to provide no-fault insurance coverage, unanimously modified, on the law and the facts, to grant the motion as against defendant Jennifer Bellevue, and otherwise affirmed, without costs. The Clerk is directed to enter judgment declaring that plaintiff is not obligated to provide no-fault insurance for defendant Jennifer Bellevue in connection with the July 29, 2015 motor vehicle accident.

Plaintiff failed to meet its burden of filing "proof of the facts constituting the claim" for a default declaratory judgment

(CPLR 3215[f]) against the medical provider defendants, i.e., proof establishing that the notices of examination under oath (EUO) that it served on those defendants complied with the timeliness requirements of 11 NYCRR 65-3.5(b) (*see Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C.*, 147 AD3d 437 [1st Dept 2017]; *Natl. Liab. & Fire Ins. Co. v Tam Med. Supply Corp.*, 131 AD3d 851 [1st Dept 2015]). An insurer must request any "additional verification . . . to establish proof of claim" within 15 business days after receiving the "prescribed verification forms" it forwarded to the parties required to complete them (11 NYCRR 65-3.5[a], [b]). As none of the motion papers, including the affidavit by plaintiff's claims adjuster, annexes or gives the dates of the prescribed verification forms or other proofs of claim submitted by the medical provider defendants, it is not possible to determine whether the EUO notices were sent to them within 15 business days of plaintiff's receipt of the forms. To the extent plaintiff relies on *Mapfre Ins. Co. of N.Y. v Manoo* (140 AD3d 468, 469-470 [1st Dept 2016]) to suggest that the 15 business day-deadline does not apply, its reliance is misplaced since, even as described by the claims adjuster, plaintiff first "received claims" from those defendants, and only then, and after defendant Jennifer Bellevue's EUO was conducted, did it seek those defendants' EUOs.

Plaintiff's argument on appeal that the providers' bills are "prescribed verification forms" and its attempt to relate the deadlines applicable to one defendant's EUO requests to another defendant's submission of claims documentation or appearance for an EUO are unpreserved and, in any event, unsupported.

Plaintiff also failed to provide, for default judgment purposes, sufficient proof of the facts constituting its claim against defendant Joanne Alexis. It offered no evidence of the date of receipt of the no-fault benefit application forms she submitted – the operative event for purposes of starting the 15-business-day period.

The court erred in denying plaintiff's motion for a default judgment against Bellevue on the ground that the motion did not contain any letter reflecting that Bellevue's EUO transcript was sent to her for signature. The motion does contain such a letter, dated March 14, 2016, as well as a follow-up letter, dated April 20, 2016, and accompanying affidavits of service. As the failure to submit to an EUO and "subscribe the same" violates a condition precedent to coverage (*see* 11 NYCRR 65-2.4[c][2]), plaintiff provided adequate proof of its claims against Bellevue (*see DTG Operations, Inc. v Park Radiology, P.C.*, 2011 NY Slip

Op. 32467[U], *5-6 [Sup Ct, NY County 2011]).

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 28, 2018

CLERK