SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

**MARCH 15, 2018**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Richter, Kapnick, Kahn, Gesmer, JJ.

5982 The People of the State of New York, Respondent, SCI 1660/12

-against-

Thomasina Thomas,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

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Appeal from judgment, Supreme Court, New York County (Renee A. White, J. at plea; Melissa C. Jackson, J. at sentencing), rendered August 18, 2016, convicting defendant of grand larceny in the third degree and petit larceny, and sentencing her to concurrent terms of six months, held in abeyance, and the matter remanded for further proceedings in accordance herewith.

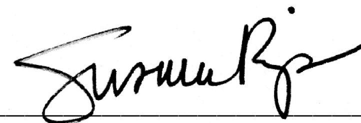
Defendant, who was sentenced to a six-month jail term after she failed to fully comply with the restitution conditions of her plea agreement, claims that she was unconstitutionally imprisoned

for her indigency (*see Bearden v Georgia*, 461 US 660 [1983]). We remand the matter for a hearing in accordance with *Bearden* to determine whether defendant's failure to pay was willful and, if not, to consider whether there are adequate alternatives to imprisonment (*id.* at 672-673). The sentencing court did not make a ruling on defendant's claim of inability to pay. Unlike the situation in *People v Vasquez* (74 AD3d 462 [1st Dept 2010]), it is unclear on the present record whether defendant's failure to pay was willful, and whether there exists an adequate alternative to imprisonment.

At this stage of the appeal, we do not address defendant's remaining contentions.

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

ENTERED: MARCH 15, 2018



CLERK

Acosta, P.J., Richter, Kapnick, Kahn, Gesmer, JJ.

5983 Ebony Flores, Index 21212/15E
Plaintiff-Appellant,

-against-

Robert Fraser, M.D., et al.,
Defendants-Respondents.

_________________________

Krentsel & Guzman, LLP, New York (Steven E. Krentsel of counsel), for appellant.

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

_________________________

Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered December 16, 2016, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff commenced this action against defendant New York City Health and Hospital Corporation for medical malpractice allegedly committed by the individually named defendants during the course of their employment as emergency room physicians at Lincoln Medical and Mental Health Center (collectively HHC), in providing plaintiff with medical treatment on April 3, 2014.

The complaint was properly dismissed, because plaintiff cannot establish that a notice of claim was served as required by the October 7, 2014 order granting her leave to file a late notice of claim, and the one-year and 90-day statute of

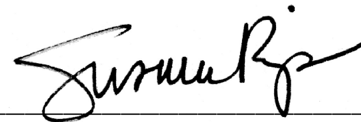
limitations has expired (*see Young v New York City Health & Hosps. Corp.*, 147 AD3d 509 [1st Dept 2017]). The fact that plaintiff served the July 11, 2014 notice on HHC before the statute of limitations expired is of no moment, because she had not obtained leave of the court to serve that untimely notice (*see Yessenia D. v New York City Health & Hosps. Corp.*, 139 AD3d 454 [1st Dept 2016]).

Although a General Municipal Law § 50-h hearing was conducted and HHC litigated the matter, this does not establish that HHC waived the statute of limitations defense (*see Frank v City of New York*, 240 AD2d 198 [1st Dept 1997]; *compare King v City of New York*, 90 AD2d 714 [1st Dept 1982]). Furthermore, there is no basis for estoppel given the clear language of the October 7, 2014 order directing plaintiff to serve a notice of claim upon HHC within 30 days of its entry and her awareness that the July 11, 2014 late notice of claim was a nullity (*see Zayed v*

*NYC Dept of Design & Construction*, __AD3d__, 66 NYS3d 124 [1st Dept 2018]; *Cabreaja v New York City Health & Hosps. Corp.*, 201 AD2d 319, 321-322 [1st Dept 1994]).

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

ENTERED: MARCH 15, 2018



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CLERK

Acosta, P.J., Richter, Kapnick, Kahn, Gesmer, JJ.

5984-
5985 In re Jayden S.,

A Child Under Eighteen Years of Age, etc.,

Shalea S.,
Respondent-Appellant,

Administration for Children's Services
of the City of New York,
Petitioner-Respondent.

_________________________

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

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

Dawne A. Mitchell, Jr., The Legal Aid Society, New York (John A. Newbery of counsel), attorney for the child.

_________________________

Order of disposition, Family Court, New York County (Emily M. Olshansky, J.), entered on or about September 20, 2016, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about November 17, 2015, which found that respondent's mental illness put the subject child at imminent risk of neglect, unanimously affirmed, without costs. Appeal from fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

A preponderance of the evidence supported the court's

finding that the subject child's physical, mental or emotional condition was in imminent danger of becoming impaired as a result of the mother's long-standing history of mental illness, lack of insight into her condition, and resistance to treatment (*see Matter of Cerenithy Ecksthine B. [Christian B.]*, 92 AD3d 417 [1st Dept 2012]; *see also* Family Court Act § 1012[f][i][B]); *Matter of Caress S.*, 250 AD2d 490 [1st Dept 1998]). The record showed that the mother had been diagnosed with schizophrenia by two different hospitals, and hospitalized several times over the years for her psychiatric condition, yet she remained in denial about her condition and refused medication. The court also properly considered testimony from witnesses who observed the mother interacting with the subject child shortly after he was born, and expressed concern about her ability to feed and care for a newborn, as she was easily flustered, exhibited erratic behavior, and was disorganized in her thinking (*see Caress S.* at 490).

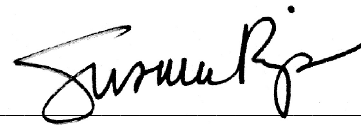
There is no reason to disturb the court's denial of the mother's pro se motion, made after the fact-finding hearing had concluded, which sought review of various medical records and diagnoses. It appears the mother's intention in making the motion was to challenge her diagnosis of schizophrenia. However, the court did not base its neglect finding on any formal

diagnosis, but rather properly relied on evidence of the mother’s ability to care for the child and her general history of mental illness, as documented in the voluminous medical records entered into evidence (*see Matter of Zariyasta S.*, 158 AD2d 45, 48 [1st Dept 1990]).

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: MARCH 15, 2018



CLERK

Acosta, P.J., Richter, Kapnick, Kahn, Gesmer, JJ.

5986 The People of the State of New York, Ind. 5284/12
Respondent,

-against-

Gwendolyn Russell,
Defendant-Appellant.

_________________________

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

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

_________________________

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bruce Allen, J.), rendered May 12, 2014,

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: MARCH 15, 2018

CLERK

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

Acosta, P.J., Richter, Kapnick, Kahn, Gesmer, JJ.

5987 Alexandros Demetriades, Index 156478/12
Plaintiff-Respondent,

-against-

Royal Abstract Deferred, LLC,
Defendant-Appellant.

_________________________

Pryor Cashman LLP, New York (Todd B. Marcus of counsel), for appellant.

Law Offices of Mario Biaggi, Jr., New York (Mario Biaggi, Jr. of counsel), for respondent.

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Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered on or about May 5, 2017, which, to the extent appealed from as limited by the briefs, denied defendant's motion for summary judgment dismissing plaintiff's breach of contract claim, unanimously reversed, on the law, without costs, and the claim dismissed. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

In 2009, plaintiff real estate investor sought to sell a property while taking advantage of Section 1031 of the Internal Revenue Code, which allows a seller to defer capital gains taxes on the sale of investment property if that seller uses the sale proceeds to purchase a like-kind replacement property within certain time periods. Plaintiff entered into an "exchange

agreement" with defendant, a "qualified intermediary" charged with holding the proceeds until such time that plaintiff located replacement properties and instructed defendant to acquire the ownership interest in the replacement properties.

After the net proceeds from the property sale were deposited with defendant in plaintiff's 1031 account, plaintiff personally faxed defendant documentation, including a schedule identifying certain replacement properties and wiring instructions to be used by defendant in sending the money from plaintiff's 1031 account to purchase a replacement property.

Shortly thereafter, defendant received another set of documents, including a schedule signed by plaintiff, identifying replacement properties, as well as wiring instructions. These documents were sent by one of plaintiff's lawyers, James Kalpakis. Defendant followed the wiring instructions and released funds from plaintiff's 1031 account for the purchase of replacement properties.

In November 2010, plaintiff discovered that the funds released by defendant were not used to purchase the replacement properties, but were paid to entities owned and controlled by Kalpakis, who was later convicted for stealing the money.

Plaintiff filed this action against defendant, as relevant

to this appeal, alleging that defendant breached the exchange agreement by transferring the funds from plaintiff's 1031 account upon the instructions of Kalpakis. Plaintiff argued that either the contract, or a subsequent oral instruction, provided that only he (or his daughter-in-law) could direct the release of funds.

While the court correctly found that the contract empowered plaintiff to give instructions to defendant as to who was authorized to initiate wire transfers on his behalf, the contract itself did not, on its face, provide that only plaintiff, and not his attorney, could direct wire transfers. The court erred in finding that issues of fact exist as to whether defendant breached the contract by failing to follow plaintiff's purported orally communicated limiting instructions. The record, at most, includes plaintiff's claim that he communicated such a limitation in connection with a prior exchange agreement. Even if there was credible evidence with respect to the earlier oral limiting instruction, plaintiff admits that he never renewed that instruction with respect to the subsequent exchange agreement, which specifically states any prior oral agreements between the parties were superseded by the written terms of the agreement.

In the absence of any evidence of limiting instructions,

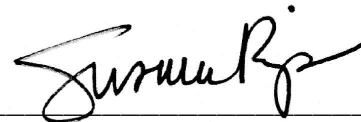
written or oral, providing that defendant was not to transfer funds unless expressly authorized directly by plaintiff (or his daughter-in-law), and not through any attorney or agent who had apparent authority to direct transfers on plaintiff's behalf, that was in effect with respect to the relevant exchange agreement, there is no basis for a breach of contract claim here based on defendant's conduct of transferring the funds upon the instructions of Kalpakis.

Nor can plaintiff sustain a breach of contract claim based on allegations that defendant breached various other provisions of the exchange agreement. The additional breach claims were improperly pled only in opposition to defendant's summary judgment motion, and not in any pleading or amended pleading (*see Ostrov v Rozbruch*, 91 AD3d 147, 154 [1st Dept 2012]). In addition, at least in the absence of a well-pled cause of action setting forth the relevant breach allegations that are the proximate cause of the damages sought, defendant cannot be held liable in breach of contract for the damages due to a criminal fraud based on the speculation that it might have been able to discover and prevent the fraud had it completed ministerial tasks provided for in the exchange agreement (*see Frydman & Co. v Credit Suisse First Boston Corp.*, 1 AD3d 274 [1st Dept 2003]).

Although defendant purports to appeal the denial of the motion for summary judgment with respect to its counterclaim for attorneys' fees, it failed to make any substantive argument in its appellate briefs on that issue and we decline to consider it.

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

ENTERED: MARCH 15, 2018



CLERK

Acosta, P.J., Richter, Kapnick, Kahn, Gesmer, JJ.

5988- Index 350177/09
5989 S. H., an Infant Under the Age of
Fourteen Years, etc.,
Plaintiff-Appellant,

-against-

Neighborhood Partnership Housing
Development Fund Company, Inc.,
et al.,
Defendants-Respondents,

Joseph Rodney,
Defendant.
- - - - -
[And a Third-Party Action]

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The Fitzgerald Law Firm, P.C., Yonkers (Mitchell Gittin of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Julie Steiner of counsel), for Neighborhood Partnership Housing Development Fund Company, Inc., respondent.

Cozen O'Connor, New York (Amanda L. Nelson of counsel), for the Odessa Apartments LLC, respondent.

_________________________

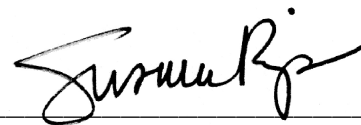
Judgments, Supreme Court, Bronx County (Elizabeth A. Taylor, J.), entered May 26, 2015 and on or about June 14, 2016, dismissing the complaint as against defendant Neighborhood Partnership Housing Development Fund Company, Inc. (NPH) and defendant the Odessa Apartments, LLC (Odessa), pursuant to an order, same court and Justice, entered April 7, 2015, which,

inter alia, granted the motions of NPH and Odessa for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Dismissal of the complaint as against NPH and Odessa was proper because there is a lack of evidence to support an inference that they had notice that a child under seven resided in the apartment (*see generally Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 646-647 [1996]). The fact that the building superintendent may have observed infant plaintiff present on a single occasion, or even occasionally, without more, is insufficient to confer knowledge that infant plaintiff resided there (*see Worthy v New York City Hous. Auth.*, 18 AD3d 352 [1st Dept 2005]; *Duarte v Community Realty Corp.*, 42 AD3d 480 [2d Dept 2007]).

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

ENTERED: MARCH 15, 2018



CLERK

Acosta, P.J., Richter, Kapnick, Kahn, Gesmer, JJ.

5990 The People of the State of New York, Ind. 3733/10
Respondent,

-against-

Kermitt Smith,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Robert C. McIver of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (John W. Carter, J.), rendered September 22, 2014, convicting defendant, after a jury trial, of sexual abuse in the first degree, course of sexual conduct in the second degree and endangering the welfare of a child, and sentencing him, as a second felony offender, to an aggregate term of seven years, unanimously affirmed.

Defendant did not preserve any of his arguments concerning evidence of uncharged crimes he committed against the victim's siblings, and we decline to review them in the interest of justice.

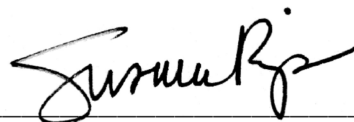
Defendant did not preserve his claim that, at sentencing, the prosecutor improperly commented on defendant's exercise of his right to a trial, and we do not find that any exception to

the preservation requirement applies (*see People v Autry*, 75 NY2d 836 [1990]; *see also People v Hurley*, 75 NY2d 887 [1990]). We decline to review this unpreserved claim in the interest of justice. As an alternative holding, we reject it on the merits. Nothing in the record suggests that the court's sentence was influenced by an isolated remark by the prosecutor, even if the remark could have been understood to suggest that defendant should be penalized for exercising his right to a trial.

We have considered and rejected defendant's ineffective assistance of counsel claims relating to lack of preservation (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Accordingly, we do not find that any lack of preservation may be excused on the ground of ineffective assistance.

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

ENTERED: MARCH 15, 2018



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Acosta, P.J., Richter, Kapnick, Kahn, Gesmer, JJ.

5991 Dr. Douglas Simon, Index 655678/17
Plaintiff-Appellant,

-against-

Industry City Distillery, Inc.,
Defendant-Respondent.

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Kennedy Berg LLP, New York (Gabriel Berg of counsel), for appellant.

Mitchell Silberberg & Knupp, LLP, New York (David B. Gordon of counsel), for respondent.

_________________________

Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered October 31, 2017, which denied plaintiff's motion for summary judgment in lieu of complaint, unanimously reversed, on the law, with costs, and the motion granted, and the matter is remanded for further proceedings in accordance herewith.

Plaintiff's affidavit, to which was attached the fully executed note with a maturity date of August 31, 2017, his demand letter, and defendant's response, established prima facie his entitlement to summary judgment in lieu of complaint (*see Seaman-Andwall Corp. v Wright Mach. Corp.*, 31 AD2d 136 [1st Dept 1968], *affd* 29 NY2d 617 [1971]). In opposition, defendant failed to submit evidentiary proof sufficient to raise an issue as to any defenses to the note (*see Interman Indus. Prods. v R.S.M.*

*Electron Power*, 37 NY2d 151, 155 [1975]).

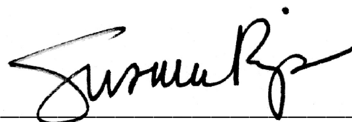
The conversion option contained in the note does not alter the fact that the note is "an instrument for the payment of money only" and a proper subject of a motion pursuant to CPLR 3213 (*Kornfeld v NRX Tech.*, 93 AD2d 772, 773 [1st Dept 1983], *affd* 62 NY2d 686 [1984]). By virtue of an affidavit by one of its founders and shareholders, defendant is precluded from asserting that plaintiff exercised his right to convert the note into common stock, a position inconsistent with that taken in the 2014 litigation, i.e., that plaintiff was "merely a creditor of [defendant]" (*see Madden v Corey*, 251 AD2d 257 [1st Dept 1998]). Defendant also failed to provide proof that the note was converted into its common stock (*see Seaman-Andwall Corp.*, 31 AD2d at 137-138). Defendant's allegations of breach of fiduciary duty and the implied covenant of good faith and fair dealing are unsupported (*Kornfeld*, 93 AD2d at 773).

Pursuant to paragraph 11 of the note, which provides, "If any action or proceeding is commenced to enforce this Note . . .,

the prevailing party . . . shall be entitled to recover from the other party the reasonable attorney's fees, costs and expenses incurred by such prevailing party," the matter is remanded for a determination of attorney's fees, costs, and expenses.

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

ENTERED: MARCH 15, 2018



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Acosta, P.J., Richter, Kapnick, Kahn, Gesmer, JJ.

5994 HSBC Bank USA, etc., Index 850258/15
Plaintiff-Appellant,

-against-

Joshua Kirschenbaum,
Defendant-Respondent,

Board of Managers of the 400
Central Park West Condominium,
et al.,
Defendants.

_________________________

Blank Rome LLP, New York (Timothy W. Salter of counsel), for appellant.

Richland & Falkowski, PLLC, Washingtonville (Daniel H. Richland of counsel), for respondent.

_________________________

Order and judgment (one paper), Supreme Court, New York County (Shlomo S. Hagler, J.), entered November 29, 2016, which granted defendant Joshua Kirschenbaum’s motion to dismiss the complaint in this mortgage foreclosure proceeding, unanimously affirmed, with costs.

Defendant borrower Kirschenbaum made a prima facie showing that this action was untimely. The mortgage was accelerated on August 3, 2009 when plaintiff commenced the first foreclosure action, the statute of limitations expired on August 3, 2015 (*see* CPLR 213[4]), and plaintiff did not file this action until August

27, 2015.

In opposition, plaintiff failed to raise a question of fact as to whether the statute of limitations had been tolled (*Quinn v McCabe, Collins, McGeough & Fowler, LLP*, 138 AD3d 1085, 1085-1086 [2d Dept 2016]). We reject plaintiff's argument that the 90-day notice under Real Property Actions and Proceedings Law (RPAPL) § 1304 tolled the statute of limitations for 90 days. CPLR 204(a) authorizes tolling of a statute of limitations and provides that "[w]here the commencement of an action has been stayed by a court or by a statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced." Proper service of the RPAPL 1304 notice is a condition precedent to the commencement of a foreclosure action (*HSBC Bank USA v Rice*, 155 AD3d 443, 443 [1st Dept 2017]). A statutory prohibition and a condition precedent are separate concepts, and a plaintiff has complete control over the acts necessary to effectuate compliance with a condition precedent (*Barchet v New York City Tr. Auth.*, 20 NY2d 1, 6 [1967]).

Here, plaintiff had complete control over when to serve the RPAPL 1304 notice, and could have done so at least 90 days prior to the expiration of the statute of limitations. Plaintiff did not serve the notice until May 26, 2015, less than 90 days before

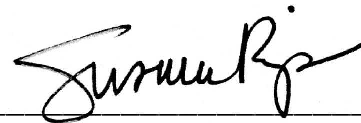
the expiration of the statute of limitations. In addition, there is nothing in RPAPL 1302 or 1304 that proscribes the prosecution of the action.

*Andersen v Long Is. R.R.* (59 NY2d 657 [1983]) and *Burgess v Long Is. R.R. Auth.* (79 NY2d 777 [1991]), cases upon which plaintiff relies, do not involve RPAPL 1304.

Plaintiff's argument that the mortgage loan was de-accelerated when it moved to discontinue the first mortgage foreclosure proceeding is improperly raised for the first time on appeal (*see Lutin v SAP V/A Atlas 845 WEA Assoc. NF LLC*, __AD3d__, 2018 NY Slip Op 00103 [1st Dept 2018]). In any event, the argument is unavailing (*see EMC Mtge. Corp. v Patella*, 279 AD2d 604, 606 [2d Dept 2001]; *Federal Natl. Mtge. Assn. v Mebane*, 208 AD2d 892, 894 [2d Dept 1994]).

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

ENTERED: MARCH 15, 2018



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Acosta, P.J., Richter, Kapnick, Kahn, Gesmer, JJ.

5995 Champion Auto Sales, LLC, et al., Index 158692/16
Plaintiffs-Appellants,

-against-

Pearl Beta Funding, LLC,
Defendant-Respondent.

_________________________

Amos Weinberg, Great Neck, for appellants.

DLA Piper, LLP, Baltimore, MD (Michael Bakhama of the bar of the State of Maryland, admitted pro hac vice, of counsel), for respondent.

_________________________

Order, Supreme Court, New York County (Erika M. Edwards, J.), entered June 16, 2017, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

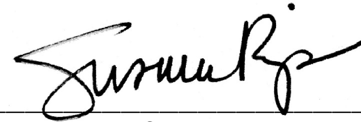
The court properly dismissed the complaint seeking to vacate the judgment by confession. The evidence demonstrates that the underlying agreement leading to the judgment by confession was not a usurious transaction (*see generally Giventer v Arnow*, 37

NY2d 305, 309 [1975]; *see Feld v Apple Bank for Sav.*, 116 AD3d 549, 553 [1st Dept 2014], *lv denied* 23 NY3d 908 [2014]).

We have considered plaintiffs' other challenges to the judgment by confession and find them unavailing.

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

ENTERED: MARCH 15, 2018



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Acosta, P.J., Richter, Kapnick, Kahn, Gesmer, JJ.

5996 The People of the State of New York, Ind. 1607/14
Respondent,

-against-

Edgar Sanchez,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Robert C. McIver of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Margaret L. Clancy, J.), rendered May 6, 2016, unanimously affirmed.

Although we find that defendant did not make a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: MARCH 15, 2018

CLERK

Acosta, P.J., Richter, Kapnick, Kahn, Gesmer, JJ.

5997 The People of the State of New York, Ind. 2670N/13
Respondent,

-against-

Juel Roundtree,
Defendant-Appellant.

_________________________

Galluzzo & Johnson LLP, New York (Zachary H. Johnson of counsel), for appellant.

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

_________________________

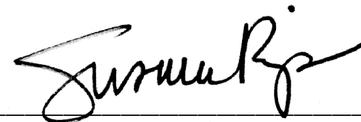
Judgment, Supreme Court, New York County (Melissa C. Jackson, J.), rendered February 24, 2014, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the fourth degree, and sentencing him, as a second felony drug offender, to a term of one year, unanimously affirmed.

Defendant's challenge to the voluntariness of his plea does not come within the narrow exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 665-666 [1988]), and we decline to review this unpreserved claim in the interest of justice. As an alternative holding, we reject it on the merits. The plea allocution establishes the voluntariness of the plea and contains nothing that casts any doubt on defendant's

guilt (*see People v Toxey*, 86 NY2d 725 [1995]). When defendant made a remark that could be viewed as negating an element of the crime, the court asked a clarifying question, and defendant's response established the validity of the plea.

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

ENTERED: MARCH 15, 2018



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Acosta, P.J., Richter, Kapnick, Kahn, Gesmer, JJ.

5998-<br>5999-<br>6000-<br>6001 Index 654309/13<br>650705/14

Intrepid Investments, LLC,
Plaintiff-Appellant,

NA Technology Support, LLC,
Plaintiff,

-against-

Selling Source, LLC,
Defendant-Respondent,

Clickgen, LLC, et al.,
Defendants.

\- - - - -

In re Intrepid Investments, LLC,
Petitioner-Appellant,

-against-

Selling Source, LLC,
Respondent-Respondent.

_________________________

McCarter & English, LLP, New York (Frank E. Ferruggia of counsel), for appellant.

Susman Godfrey L.L.P., New York (Edgar G. Sargent of the bar of the State of Washington, admitted pro hac vice, of counsel), for respondent.

_________________________

Judgment, Supreme Court, New York County (Jeffrey K. Oing, J.), entered April 13, 2015, in favor of defendant/respondent Selling Source, LLC, against plaintiff/petitioner Intrepid Investments, LLC, and awarding Selling Source arbitrators' fees

and expenses, unanimously affirmed, with costs. Order, same court and Justice, entered September 10, 2015, which granted Selling Source's motion for partial summary judgment dismissing the first and second causes of action to the extent they were based on certain disputed issues raised in the arbitration, unanimously affirmed, with costs. Appeals from orders, same court and Justice, entered February 19, 2015 and April 13, 2015, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Intrepid failed to carry its heavy burden of establishing by clear and convincing evidence a ground for vacating the arbitration award (CPLR 7511[b]; *see Matter of Greenky v Aytes*, 138 AD3d 460 [1st Dept 2016]). It did not establish that the arbitrator's decision was irrational or exceeded a specifically enumerated limitation on his powers (*see Matter of Geo-Group Communications, Inc. v Jaina Sys. Network, Inc.*, 144 AD3d 598 [1st Dept 2016]).

The parties agreed, in their Transaction and Purchase Agreement, to arbitrate disputes relating to the calculation of certain contingent values ("CVC"). Contrary to Intrepid's contention, the record demonstrates that the arbitrator disposed of all disputed items submitted by Intrepid, including the 14

items it claims were not resolved. These 14 items all relate to the CVC and were submitted to the arbitrator, and, in his July 17, 2004 letter clarifying the November 25, 2013 award in response to the parties' questions, the arbitrator confirmed that he had decided all of them on the merits.

We reject Intrepid's contention that arbitration is not its exclusive remedy with respect to CVC-related claims. The Transaction and Purchase Agreement provides for no other remedy (*see Timberline Dev. v Kronman*, 263 AD2d 175, 180 [1st Dept 2000]).

The court correctly dismissed the claim for breach of the implied covenant of good faith and fair dealing on the basis of the Delaware forum selection clause in Selling Source's operating agreement (*see generally Boss v American Express Fin. Advisors, Inc.*, 6 NY3d 242, 247 [2006]). In the complaint, Intrepid alleged that certain disputed issues were based on violations of the operating agreement.

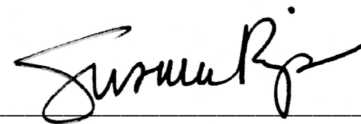
Intrepid's contention that the working capital shortfall payment must be passed through to the acquired businesses is not supported by the plain language of sections 6.7 and 2.5(b)(ii) of the Transaction and Purchase Agreement (*see generally Beardslee v Inflection Energy, LLC*, 25 NY3d 150, 157 [2015]).

The court properly awarded Selling Source arbitrators’ fees and expenses in accordance with the award, pursuant to CPLR 7513 and 7514 and the terms of the Transaction and Purchase Agreement. The court was not required to consider all the claims for payment between the parties, because Intrepid did not establish that all the claims were “inseparable from or are inextricably intertwined with” the arbitrators’ fees and expenses (*see City of New York v Zuckerman*, 234 AD2d 160, 161 [1st Dept 1996], *lv dismissed* 90 NY2d 845 [1997]).

We have considered Intrepid’s remaining contentions and find them unavailing.

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

ENTERED: MARCH 15, 2018



CLERK

Acosta, P.J., Richter, Kapnick, Kahn, Gesmer, JJ.

6002- Ind. 390/15
6003 The People of the State of New York,
Appellant,

-against-

Christopher Knupp, et al.,
Defendant-Respondent.
- - - - -
The People of the State of New York,
Appellant,

-against-

Sean McCants,
Defendant-Respondent.

_________________________

Darcel D. Clark, District Attorney, Bronx (Paul A. Andersen of counsel), for appellant.

Christina Swarns, Office of the Appellate Defender, New York (Kami Lizarraga of counsel), for Christopher Knupp, respondent.

Robert S. Dean, Center for Appellate Litigation, New York (Rachel T. Goldberg of counsel), and Arnold & Porter Kaye Scholer LLP, New York (Jesse Feitel of counsel), for Sean McCants, respondent.

_________________________

Order, Supreme Court, Bronx County (April A. Newbauer, J.), entered July 27, 2016, which granted both defendants' motions to suppress physical evidence and defendant Christopher Knupp's motion to suppress his written statement, unanimously affirmed.

There is no basis for disturbing the suppression court's credibility determinations, which are accorded great deference

(*see People v Prochilo*, 41 NY2d 759, 761 [1977]). The record supports the court's finding that the officer's conclusory and sometimes contradictory testimony failed to establish that he stopped the car defendant McCants was driving, in which defendant Knupps was a passenger, because the officer reasonably believed that McCants was guilty of reckless driving (*see* Vehicle and Traffic Law § 1212; *People v Guthrie*, 25 NY3d 130 [2015]; *People v Robinson*, 97 NY2d 341, 348-349 [2001]; *see also Whren v United States*, 517 US 806, 809-810 [1996]).

Reckless driving is defined as "driving or using any motor vehicle . . . in a manner which unreasonably interferes with the free and proper use of the public highway, or unreasonably endangers users of the public highway" (Vehicle and Traffic Law § 1212). It "calls for evidence showing something more than mere negligence" (*People v Grogan*, 260 NY 138, 143 [1932]), that is, "operation of an automobile under such circumstances as to show a reckless disregard of the consequences" (*id.* at 144). Here, the officer testified that the car made a left turn across double yellow lines, but that conduct was undisputedly lawful. The officer was unable to provide details of the car's danger to other users of the public highway.

Moreover, the officer's testimony gave the court reason to

suspect that the car was actually stopped because of an encounter on the street 20 minutes earlier between the car's occupants and the same officer.

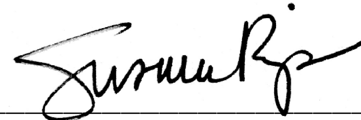
The People failed to preserve their arguments suggesting that McCants committed other violations of the Vehicle and Traffic Law. In any event, the officer did not testify that such violations were the basis for his stop of the car.

Since the People did not meet their initial burden of coming forward with credible evidence to establish the legality of the stop, the court properly granted the motions to suppress its fruits, including physical evidence and statements. The record also supports the court's suppression of Knupp's written statement on the additional ground that the People failed to meet their burden of proving beyond a reasonable doubt that it was voluntarily made. While the People need not produce all the officers who interacted with a defendant before a challenged

statement was elicited (*People v Witherspoon*, 66 NY2d 973, 974 [1985]), under the circumstances presented here, the arresting officer's testimony was insufficient to establish the voluntariness of Knupp's statement to a nontestifying detective.

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

ENTERED: MARCH 15, 2018



CLERK

Acosta, P.J., Richter, Kapnick, Kahn, Gesmer, JJ.

6004N David Hickey, Index 150139/10
Plaintiff-Appellant,

-against-

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

_________________________

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

Fabiani Cohen & Hall, LLP, New York (John V. Fabiani, Jr. of counsel), for respondents.

_________________________

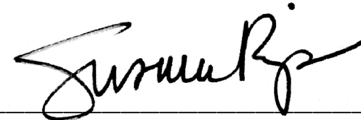
Order, Supreme Court, New York County (George J. Silver, J.), entered July 1, 2016, which granted defendants' motion to vacate the note of issue to the extent of directing plaintiff to appear for independent medical examinations (IMEs) before defendants' three previously designated physicians within 90 days, unanimously affirmed, without costs.

The motion court providently exercised its discretion by permitting defendants to conduct further IMEs post-note of issue, while leaving the case on the trial calendar. The record supports the court's findings that defendants would be prejudiced by an inability to gain discovery into the effects of a 2014 car accident on plaintiff's preexisting injuries, and that, conversely, the post-note of issue discovery would not prejudice

plaintiff (*see Cabrera v Abaev*, 150 AD3d 588 [1st Dept 2017]; *Cuprill v Citywide Towing & Auto Repair Servs.*, 149 AD3d 442 [1st Dept 2017]; 22 NYCRR 202.21[d]). Nor did defendants engage in the kind of willful and contumacious dilatory tactics that would warrant denial of the motion (*see Cespedes v Mike & Jac Trucking Corp.*, 305 AD2d 222 [1st Dept 2003]).

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

ENTERED: MARCH 15, 2018



CLERK

Acosta, P.J., Richter, Kapnick, Kahn, Gesmer, JJ.

6005-6006N In re 91 Street Crane Collapse Litigation

Index 110069/08 590943/08 590956/08

- - - - -

Giuseppe Calabro,
Plaintiff-Respondent,

-against-

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

1765 Associates, LLC, et al.,
Defendants-Appellants.

- - - - -

[And Other Actions]

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Nicoletti Hornig & Sweeney, New York (Barbara A. Sheehan of counsel), for 1765 First Associates, LLC, appellant.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Marcia K. Raicus of counsel), for DeMatteis Construction and Leon D. DeMatteis Construction Corporation, appellants.

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

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered April 19, 2017, which to the extent appealed from, denied defendants-appellants' motions pursuant to CPLR 3119 for permission to conduct depositions of plaintiff's out-of-state treating doctors and health care providers, unanimously affirmed, without costs.

In this Labor Law action, plaintiff alleges he was injured

when he tripped and fell while running to avoid being struck by a collapsing tower crane. The moving defendants have obtained medical records from plaintiff's doctors and health care providers in Kentucky, Illinois and Indiana, or authorizations for such records, but seek to depose the doctors as well.

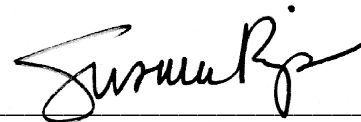
CPLR 3119, which adopted the Uniform Interstate Deposition and Discovery Act, provides a mechanism for disclosure in New York for use in an action that is pending in another state or territory within the United States (*Matter of Kapon v Koch*, 23 NY3d 32 [2014]), not the other way around. Thus, it is not applicable in this case, in which parties to an action pending in New York seek discovery from out-of-state witnesses. In any event, the court providently exercised its discretion in denying the relief sought since the moving defendants failed to show that the testimony they seek is unrelated to diagnosis and treatment and is the only avenue of discovering the information sought (*see Tuzzolino v Consolidated Edison Co. of N.Y.*, 135 AD3d 447 [1st

Dept 2016]; *Ramsey v New York Univ. Hosp. Ctr.*, 14 AD3d 349, 350 [1st Dept 2005]).

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

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

ENTERED: MARCH 15, 2018



CLERK

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

4834-4835 Index 650097/09

UBS Securities LLC, et al.,
Plaintiffs-Respondents-Appellants,

-against-

Highland Capital Management, L.P., et al.,
Defendants-Appellants-Respondents,

Highland Security Opportunities Holding Company, et al.,
Defendants-Appellants.

_________________________

Lackey Hershman, L.L.P., New York (Kieran M. Corcoran of counsel), for appellants and appellants-respondents.

Kirkland & Ellis LLP, New York (Andrew B. Clubok of counsel), for respondents-appellants.

_________________________

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered on or about March 27, 2017, which granted the motions for summary judgment of defendants Highland CDO Opportunity Master Fund, L.P., Highland Special Opportunities Holding Company, Highland Capital Management, L.P., Highland Financial Partners, L.P., Highland Credit Opportunities CDO, L.P., and Strand Advisors, Inc. to the extent of dismissing the claim for breach of implied covenant against defendant Highland Capital, and otherwise denied the motions, unanimously affirmed, without costs.

In a prior order in this case, we dismissed, on res judicata grounds, the fraudulent conveyance and breach of implied covenant causes of action, as against one defendant, solely to the extent that they relied on conduct pre-dating the February 24, 2009 commencement of the prior action (86 AD3d 469, 469 [1st Dept 2011]. However, we also held that "to the extent that [those] causes of action . . . rely on conduct alleged to have occurred *after* the commencement of the prior action, such claims should be allowed" (*id*. at 476 [emphasis added]). We reiterated this point in a subsequent order, wherein we dismissed the fraudulent conveyance claim, as against several other defendants, only "with respect to claims arising before February 2009" (93 AD3d 489, 490 [1st Dept 2012]).

In this appeal, the conduct underlying the fraudulent conveyance and breach of implied covenant claims took place after the February 24, 2009 commencement of the prior action. In view of this Court's prior decisions, which explicitly contemplated the survival of such post-February 24, 2009 claims, there is no merit to defendants' contention that res judicata applies. This result is consistent with the legal principles underlying res judicata. "Under the doctrine of res judicata, a party may not litigate a claim where a judgment on the merits exists from a

prior action between the same parties involving the same subject matter. The rule applies not only to claims actually litigated but also to claims that *could have been raised* in the prior litigation" (*Matter of Hunter*, 4 NY3d 260, 269 [2005] [emphasis added]).

In contrast, where a claim could not have been raised in the prior litigation because it had not yet matured, res judicata does not apply (*1050 Tenants Corp. v Lapidus*, 118 AD3d 560, 560-561 [1st Dept 2014]; *Sannon-Stamm Assoc., Inc. v Keefe, Bruyette & Woods, Inc.*, 68 AD3d 678 [1st Dept 2009]; *Indosuez Intl. Fin. v National Reserve Bank*, 304 AD2d 429 [1st Dept 2003]; *see Lawlor v National Screen Serv. Corp.*, 349 US 322, 328 [1955]). Because the conduct at issue here took place after the commencement of the prior action, there is no res judicata bar to the fraudulent conveyance and breach of implied covenant claims arising from that post-commencement conduct (*see TechnoMarine SA v Giftports, Inc.*, 758 F3d 493, 499 [2d Cir 2014] ["a claim arising *subsequent* to a prior action . . . (is) not barred by res judicata even if the new claim is premised on facts representing a continuance of the same course of conduct"] [emphasis added] [internal quotation marks omitted]).

We agree with the motion court's reasons for denying

dismissal of the cause of action asserting liability based on an alter ego theory. There is no dispute that plaintiffs are precluded from pursuing fraudulent conveyance and breach of implied covenant claims that arose prior to February 24, 2009. However, neither our prior decisions nor the doctrine of res judicata bars plaintiffs from introducing evidence of pre-February 24, 2009 conduct to the extent necessary to prove, with respect to post-February 24, 2009 conduct, their alter ego, fraudulent conveyance and breach of implied covenant claims.

The court correctly rejected defendants' arguments in support of dismissal of the remaining claims at issue. Issues of fact exist with respect to whether UBS suffered any recoverable contract damages, and as to whether it can establish justifiable reliance to support its claims that defendants committed fraud by misrepresenting their creditworthiness or the assets they owned prior to entering the transaction.

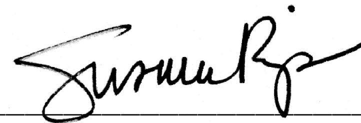
We take judicial notice of the decision of the trial court, dated September 19, 2017, which granted plaintiffs leave to reargue the dismissal of the claim for breach of implied covenant against defendant Highland Capital, and upon reargument, held that the claim should be reinstated. To the extent this decision has rendered moot plaintiffs' cross appeal of that part of the

order on appeal, we exercise our broad discretionary authority to reach beyond the scope of defendants' notices of appeal to review the merits of that order, as the same issues have been briefed on the cross appeal, and we find that the trial court properly reinstated this claim.

The Decision and Order of this Court entered herein on October 31, 2017 (154 AD3d 631 [1st Dept 2017]) is hereby recalled and vacated (*see* M-6096 and M-6347, decided simultaneously herewith).

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

ENTERED: MARCH 15, 2018



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Friedman, J.P., Mazzarelli, Kapnick, Webber, Moulton, JJ.

5470N Suttongate Holdings Limited, Index 652393/15
Plaintiff-Respondent,

-against-

Laconm Management N.V., et al.,
Defendants-Appellants.

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Gallagher Law Offices, PLLC, New York (John C. Gallagher of counsel), for Laconmmanagement N.V., Kashmire Investments, Ltd., Immo Kashmire Development Inc., Sedna Group Ltd., Kuiper Group Ltd., and Ourista N.V., appellant.

Franzino & Scher, LLC, New York (Frank J. Franzino, Jr. of counsel), for Samir Andrawos, appellant.

Tannenbaum Helpern Syracuse & Hirschtritt LLP, New York (David D. Holahan of counsel), for Virginia Iglesias, appellant.

Olshan Frome Wolosky LLP, New York (Thomas J. Fleming of counsel), for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about April 27, 2017, which granted plaintiff’s motion for a preliminary injunction, inter alia, requiring defendants to take all actions that are necessary to establish and register a mortgage in plaintiff’s name on certain designated properties located in St. Maarten, and ordered that a prior undertaking shall apply, unanimously modified, on the law, to the extent of ordering plaintiff to post an additional undertaking in the amount of $50,000, and otherwise affirmed,

without costs.

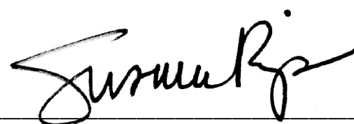
It is undisputed that defendants have failed to deliver mortgages on 18 of the 23 properties that are the subject of a 2014 transaction entered into with plaintiff (*see generally Ficus Invs., Inc. v Private Capital Mgt., LLC*, 61 AD3d 1, 11-12 [1st Dept 2009]). Contrary to defendants' contention, the individual and corporate defendants who executed the March 7, 2014 purchase agreement and the July 15, 2014 loan agreement are the sole necessary parties to this action. The alleged irreparable harm to plaintiff absent an injunction is not speculative, given that defendants have already failed to deliver the mortgages, which were "a unique, bargained-for contractual remedy" (*see Oracle Real Estate Holdings I LLC v Adrian Holdings Co. I, LLC*, 582 F Supp 2d 616, 625 [SD NY 2008]). For this reason, the "balancing of the equities," which requires the court "to look to the relative prejudice to each party accruing from a grant or a denial of the requested relief" (*Sau Thi Ma v Xuan T. Lien*, 198 AD2d 186, 186-187 [1st Dept 1993], *lv dismissed* 83 NY2d 847 [1994]), favors plaintiff. Defendants complain that they have no assets to pay off existing mortgages in order to deliver these mortgages to plaintiff. However, these are contractually bargained-for rights guaranteed by both the individual and the

corporate defendants.

The motion court should, however, have ordered plaintiff to post an additional undertaking, rather than applying the undertaking posted in connection with the prior preliminary injunction order. CPLR 6312(b) requires that "prior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court." Moreover, the undertaking must be "rationally related to defendants' potential damages should the preliminary injunction later prove to have been unwarranted" (*Peyton v PWV Acquisition LLC*, 101 AD3d 446, 447 [1st Dept 2012]). According to defendants' own affidavit, the cost of obtaining mortgages on the 18 properties would be $31,000. Thus, an additional undertaking in the amount of $50,000 is appropriate.

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

ENTERED: MARCH 15, 2018



CLERK

Manzanet-Daniels, J.P., Tom, Mazzarelli, Webber, Kern, JJ.

6009-
6009A In re Anissa Jaquanna Aishah H.,
and Another,

Dependent Children Under the Age
of Eighteen, etc.,

Gregory C. (Anonymous),
Respondent-Appellant,

Catholic Guardian Services,
Petitioner-Respondent.

_________________________

Geoffrey P. Berman, Larchmont, for appellant.

MaGovern & Sclafani, Mineola (Joanna M. Roberson of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Marianne Allegro of counsel), attorney for the children.

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Orders, Family Court, Bronx County (Valerie Pels, J.), entered on or about November 1, 2016, which granted petitioner’s motion for summary judgment awarding it custody and guardianship of the subject children, unanimously affirmed, without costs.

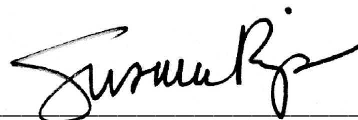
Family Court’s finding that respondent father violated the terms of a March 2014 suspended judgment is supported by a preponderance of the evidence (*see Matter of Kendra C.R. [Charles R.]*, 68 AD3d 467 [1st Dept 2009], *lv dismissed in part, denied in part* 14 NY3d 870 [2010]). Respondent repeatedly failed to submit

to drug screens and, when he submitted, tested positive for phencyclidine (PCP), among other things.

The court's determination that the children's best interests would be served by terminating respondent's parental rights is supported by a preponderance of the evidence (*see e.g. Matter of Mykle Andrew P.*, 55 AD3d 305 [1st Dept 2008]). The children have resided for several years in a stable foster home, where their physical and emotional needs have been cared for and they are happy and well adjusted, and their foster mother wishes to adopt them. Respondent failed to demonstrate that exceptional circumstances exist warranting an extension of the suspended judgment or that yet another attempt to reunite the family is in the best interests of the children (*see e.g. Matter of Justin S. [Nereida V.]*, 121 AD3d 405 [1st Dept 2014]; *Matter of Sjuqwan Anthony Zion Perry M. [Charnise Antonia M.]*, 111 AD3d 473, 474 [1st Dept 2014], *lv denied* 22 NY3d 864 [2014]).

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

ENTERED: MARCH 15, 2018



CLERK

Manzanet-Daniels, J.P., Tom, Mazzarelli, Webber, Kern, JJ.

6010 Bonnie Eden, etc., Index 805223/12
Plaintiff-Respondent,

-against-

Ruth C. Johnson, M.D., et al.,
Defendants-Appellants,

Kirk Garratt, M.D., et al.,
Defendants.

_________________________

Kutner Friedrich, LLP, New York (Michael D. Kutner of counsel), for Ruth C. Johnson, M.D. and Hercules Medical, P.C, appellants.

Gordon & Silber, P.C., New York (Frederick Sung of counsel), for Monique Girard, M.D., appellant.

William Schwitzer & Associates, P.C., New York (Clifford S. Argintar of counsel), for respondent.

_________________________

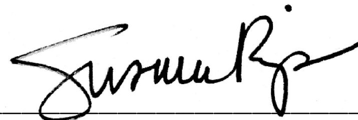
Order, Supreme Court, New York County (Joan B. Lobis, J.), entered December 30, 2016, which, insofar as appealed from, denied the motions of defendants Monique Girard, M.D., Ruth C. Johnson, M.D., and Hercules Medical, P.C. (defendants) for summary judgment dismissing plaintiff's claims based on the discontinuation of aspirin, unanimously reversed, on the law, without costs, and the motions granted. The Clerk is directed to enter judgment dismissing the complaint in its entirety.

Plaintiff alleges that decedent's heart attack was caused by defendants' discontinuation of his aspirin regimen. Although the

record supports a finding that decedent stopped taking aspirin, there is no basis to conclude that defendants advised him to do so. “Speculation is not a substitute for competent evidence even in an action for wrongful death” (*Waters v Mount Sinai School of Medicine-Mount Sinai Hosp.*, 38 AD3d 257, 257 [1st Dept 2007]).

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

ENTERED: MARCH 15, 2018



CLERK

Manzanet-Daniels, J.P., Tom, Mazzarelli, Webber, Kern, JJ.

6011 The People of the State of New York, 1247/08
Respondent,

-against-

Anibal Vazquez,
Defendant-Appellant.

---

Christina A. Swarns, Office of the Appellate Defender, New York (Stephen R. Strother of counsel), for appellant.

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

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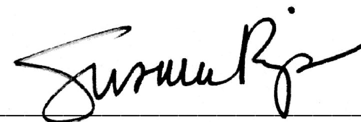
Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered January 21, 2009, convicting defendant, after a jury trial, of sexual abuse in the first degree (six counts), and endangering the welfare of a child, and sentencing him to an aggregate term of seven years, unanimously affirmed.

The court properly denied defendant's motion to suppress photographs obtained from his cell phone, which was initially searched without a warrant upon defendant's arrest, and then searched pursuant to a warrant. The police already had probable cause to search defendant's cell phone based on an independent source, in that the victim told the police that defendant had shown her sexually explicit photographs in the course of his sexual abuse, and this was the basis for the warrant. The

evidence does not support a conclusion that the police conducted an "unlawful confirmatory search" (*People v Burr*, 70 NY2d 354, 362 [1987], *cert denied* 485 US 989 [1988]) to confirm the victim's information before applying for a warrant. Under these circumstances, it cannot be said that the "the prosecution has somehow exploited or benefited from its illegal conduct" so as to taint the evidence retrieved pursuant to the warrant (*Burr*, 70 NY2d at 362; *see also People v Arnau*, 58 NY2d 27, 32 [1982]). Furthermore, defendant gave written permission to the police to search his phone before they applied for the warrant.

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

ENTERED: MARCH 15, 2018



CLERK

Manzanet-Daniels, J.P., Tom, Mazzarelli, Webber, Kern, JJ.

6012 The People of the State of New York, Ind. 2598/13
Respondent,

-against-

Antoine Lindsay,
Defendant-Appellant.

_________________________

Christina A. Swarns, Office of the Appellate Defender, New York (Joseph M. Nursey), for appellant.

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

_________________________

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Richard Carruthers, J.), rendered January 22, 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: MARCH 15, 2018

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CLERK

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

Manzanet-Daniels, J.P., Tom, Mazzarelli, Webber, Kern, JJ.

6013 Leida Jimenez, Index 104105/06
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Appellant.

_________________________

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

Sullivan Papain Block McGrath & Cannavo P.C., New York (Brian J. Shoot of counsel), for respondent.

_________________________

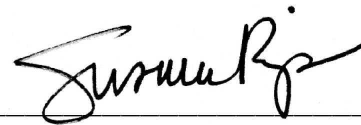
Judgment, Supreme Court, New York County (Doris Ling-Cohan, J.), entered March 23, 2016, upon a jury verdict, in favor of plaintiff and against defendant (the City), unanimously affirmed, without costs.

Plaintiff established prima facie that the City received prior written notice of the defective tree well that she tripped over by submitting a Big Apple map containing a notation of a defect in the area where she fell (see *Katz v City of New York*, 87 NY2d 241 [1995]). According to the key to the Big Apple map symbols submitted into evidence, the symbol "V" at issue here denotes "tree wells without a 'fence' or in place barrier." There was testimony by a City employee that the cobblestones are considered a buffer or barrier around the tree and that they need

to be flush with the sidewalk so as not to constitute a tripping hazard. We see no basis for disturbing the jury's determination that the notation was sufficient to bring the defective condition of an out of place barrier to the City's attention (*compare O'Donoghue v City of New York,* 100 AD3d 402 [1st Dept 2012]; *see generally Sondervan v City of New York*, 84 AD3d 625, 625 [1st Dept 2011]).

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

ENTERED: MARCH 15, 2018



CLERK

Manzanet-Daniels, J.P., Tom, Mazzarelli, Webber, Kern, JJ.

6014 In re the Application of the Metropolitan Transportation Authority, etc. Index 400321/12

- - - - -

S.H. Knight, LLC,
Claimant-Appellant,

-against-

Metropolitan Transportation Authority,
Condemnor-Respondent.

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Goldstein, Rikon, Rikon & Houghton, P.C., New York (Michael Rikon of counsel), for appellant.

Berger & Webb, LLP, New York (Adam H. Brodsky of counsel), for respondent.

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Order, Supreme Court, New York County (Martin Shulman, J.), entered June 13, 2017, which granted condemnor's motion to strike claimant's appraisal report, and dismissed the proceeding, unanimously affirmed, without costs.

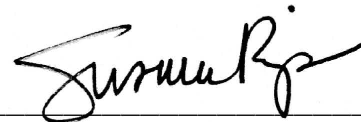
Claimant's appraisal report failed to show that the damage

to its property was caused by condemnor’s temporary easements (*see* 22 NYCRR 202.61[e]).

In view of the foregoing, we do not reach claimant’s remaining arguments.

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

ENTERED: MARCH 15, 2018



CLERK

Manzanet-Daniels, J.P., Tom, Mazzarelli, Webber, Kern, JJ.

6015 In re SCE Group Inc., Petitioner, Index 100620/17

-against-

New York State Liquor Authority, Respondent.

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Mehler & Buscemi, New York (Martin P. Mehler of counsel), for petitioner.

Christopher R. Riano, New York, for respondent.

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Determination of respondent, dated May 10, 2017, sustaining charges of violations of Alcoholic Beverage Control Law § 111, 9 NYCRR 48.2, and 9 NYCRR 53.1, revoking petitioner's liquor license, and directing forfeiture of its $1,000 bond, unanimously confirmed, without costs, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order, Supreme Court,[Arlene P. Bluth, J.], entered on or about May 23, 2017) dismissed.

The findings of the administrative law judges (ALJs) following the hearings in the two separate administrative proceedings against petitioner were supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 179-182 [1978]). The charge that

Konstantine Drakopoulus, who had been convicted of a federal felony, impermissibly availed himself of petitioner's liquor license without respondent's authorization, in violation of Alcoholic Beverage Control Law § 111, was established by, among other things, banking and tax documents designating him as petitioner's President, Vice President, Secretary, Chairman, or Chief Executive Officer, and the testimony that he essentially ran the business and acted as "boss" (*see Matter of Dumbarton Oaks Rest. & Bar v New York State Liq. Auth.*, 58 NY2d 89, 93 [1983]). The charges that petitioner's premises became a focal point of police attention, and that petitioner failed to exercise adequate supervision over the premises, in violation of 9 NYCRR 48.2 and 9 NYCRR 53.1, respectively, were established by, among other things, testimony by seven members of the New York City Police Department who had patrolled the area, police reports, and video surveillance footage (*see Matter of Home Run KTV Inc. v New York State Liq. Auth.*, 142 AD3d 451 [1st Dept 2016]; *MJS Sports Bar & Grill, Inc. v New York State Liq. Auth.*, 129 AD3d 1368 [3d Dept 2015]). There is no basis to disturb the ALJs' credibility determinations or weighing of the evidence (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]).

Petitioner preserved its contention that the ALJ improperly

admitted certain documentary evidence in support of the availing charge, on the grounds that an adequate foundation was not laid and the evidence was not authenticated. However, we reject these arguments on the merits. In general, an administrative agency "need not observe the rules of evidence observed by courts" (State Administrative Procedure Act § 306[1]), and the documents at issue here, including banking and tax forms, appear sufficiently reliable to have been properly considered by the ALJ (*see Matter of Gilmartin v Tax Appeals Trib.*, 31 AD3d 1008, 1009-1010 [3d Dept 2006]; *see also* 9 NYCRR 52.8[a]). Petitioner's remaining evidentiary arguments are unpreserved, and this Court has "no discretionary authority" to "reach[] an unpreserved issue 'in the interest of justice'" in an article 78 proceeding challenging an administrative determination (*Matter of Khan v New York State Dept. of Health*, 96 NY2d 879, 880 [2001]). This includes petitioner's due process arguments (*see Green v New York City Police Dept.*, 34 AD3d 262 [1st Dept 2006]).

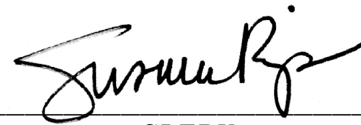
Petitioner's claims that 9 NYCRR 48.2 and 53.1(q) are ultra vires as applied are without merit (*see MJS Sports Bar & Grill*, 129 AD3d at 1370; *see also 47 Ave. B.E. Inc. v New York State Liq. Auth.*, 13 NY3d 820 [2009], *revg* 65 AD3d 33 [1st Dept 2009]). Petitioner's claims that those regulations are unconstitutionally

vague are conclusory.

The penalty was not shockingly disproportionate to the offenses, in light of the seriousness of the offenses and petitioner's prior history of violations (*see e.g. Matter of Le Cave LLC v New York State Liq. Auth.*, 107 AD3d 447 [1st Dept 2013]; *Matter of MGN, LLC, v New York State Liq. Auth.*, 81 AD3d 492 [1st Dept 2011]; *Matter of Carthage Palace, Inc. v New York State Liq. Auth.*, 55 AD3d 504 [1st Dept 2008]).

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

ENTERED: MARCH 15, 2018



CLERK

Manzanet-Daniels, J.P., Tom, Mazzarelli, Webber, Kern, JJ.

6016 The People of the State of New York, Ind. 3763/14
Respondent,

-against-

Jesse Molina,
Defendant-Appellant.

_________________________

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

Darcel D. Clark, District Attorney, Bronx (Nicole Neckles of counsel), for respondent.

_________________________

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Denis Boyle, J.), rendered January 9, 2017,

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

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

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

ENTERED: MARCH 15, 2018

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CLERK

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

Manzanet-Daniels, J.P., Tom, Mazzarelli, Webber, Kern, JJ.

6017 W. & M. Operating, L.L.C., Index 651200/15
Plaintiff-Appellant,

-against-

Jon Bakhshi, et al.,
Defendants-Respondents,

John Best,
Defendant.

_________________________

Goldberg Weprin Finkel Goldstein LLP, New York (Matthew Hearle of counsel), for appellant.

Nesenoff & Miltenberg LLP, New York (Philip A. Byler of counsel), for respondents.

_________________________

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered June 22, 2016, which denied plaintiff's motion for summary judgment, unanimously modified, on the law, to grant the motion as against defendants Frank Porco and Timothy Rugisford, and otherwise affirmed, without costs. The Clerk is directed to enter judgment as against said defendants in the amount of $521,294.59, plus interest.

Plaintiff met its prima facie burden on its claim for payment under a guaranty of its tenant's rent by submitting (1) the guaranty and Porco and Rugisford's and defendant Jon Bakhshi's (together, defendants) verified answers, which admitted

the existence of the lease modification agreement of which the guaranty was a part; (2) the judgment against the tenant, i.e., the underlying debt; and (3) the complaint, which was verified by plaintiff's managing member based on its books and records and correspondence (*see e.g. Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch v Navarro*, 25 NY3d 485, 492 [2015]; *Woori Am. Bank v Global Universal Group Ltd.,* 134 AD3d 699, 700 [2d Dept 2015]; CPLR 105[u]).

Defendants' argument that their guaranty lacks consideration is unavailing. The fact that the guaranty does not recite consideration is not determinative (*see Sun Oil Co. v Heller*, 248 NY 28 [1928]; *Erie County Sav. Bank v Coit*, 104 NY 532, 537 [1887]). Defendants admit that the lease modification agreement of which their guaranty was a part was supported by consideration (*id.*; *see also Beacon Hotel Corp. v Springer*, 256 App Div 606 [1st Dept 1939]).

Defendants failed to raise an issue of fact whether Porco and Rugisford were fraudulently induced to sign the guaranty. This argument was permissible in opposition to plaintiff's summary judgment motion even though Porco and Rugisford failed to include it as a defense in their answer (*see Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 182 [1982]).

Moreover, on this summary judgment motion, defendants' affidavits recounting their conversations with Richard Maltz, who was then plaintiff's managing member but who has since died, are not barred by the Dead Man's Statute (CPLR 4519) (*see e.g. Phillips v Kantor & Co.*, 31 NY2d 307, 310, 313 [1972]). However, the fraudulent inducement defense is not viable, because the guaranty is unconditional, and because the lease of which it is a part contains a no-oral-modification clause (*see e.g. Rabobank*, 25 NY3d at 494; *BNY Fin. Corp. v Clare,* 172 AD2d 203, 205 [1st Dept 1991]).

The fact that Porco and Rugisford sold their interests in 150 RFT Varick Corp. (the tenant) does not relieve them of liability under their guaranty (*see e.g. Franklin Natl. Bank of Long Is. v S. & L. Constr. Corp.*, 16 AD2d 682 [2d Dept 1962]). Unlike the guaranty in *150 Broadway NY Assoc., L.P. v Shandell* (27 Misc 3d 1234[A] [Sup Ct, NY County 2010], *affd* 90 AD3d 498 [1st Dept 2011]), the guaranty in the instant action does not contain provisions allowing a withdrawing partner to be discharged from his or her obligations.

The fact that plaintiff failed to give defendants notice of its lawsuit against the tenant does not bar recovery but is relevant to whether the judgment against the tenant is binding on

defendants (*see Bridgeport Fire & Mar. Ins. Co. v Wilson*, 34 NY 275, 279 [1866]).

Defendants failed to support their argument that the need for further discovery precludes summary judgment by showing either a likelihood that plaintiff has exclusive knowledge of relevant evidence or that further discovery might reveal the existence of such evidence (*see Atomergic Chemetals Corp. v Hartford Acc. & Indem. Co.*, 193 AD2d 551 [1st Dept 1993]), at least as to liability. Rugisford's and Porco's affidavits merely said that they believed that codefendant John Best would have (unspecified) facts and information in defense of plaintiff's claim (*see Lewis v Safety Disposal Sys. of Pa., Inc.*, 12 AD3d 324, 325 [1st Dept 2004]).

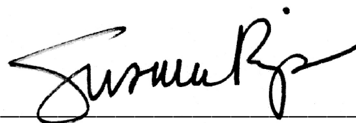
By contrast, Bakhshi raised a triable issue of fact whether plaintiff released him from his guaranty. He submitted an affirmation by his former attorney – "the person who last had custody of the original [release]" (*Schozer v William Penn Life Ins. Co. of N.Y.*, 84 NY2d 639, 644 [1994]) – saying that the original release had been lost due to damage caused to his office by Hurricane Sandy. Bakhshi's affidavit and his former attorney's affirmation both said that plaintiff had released Bakhshi from his guaranty. In reply, plaintiff submitted an

affirmation by its former attorney, saying that Bakhshi and his former attorney were lying.

Finally, contrary to defendants' contention, they are bound by the judgment that was entered in Civil Court as guarantors of the tenant's obligation (*see APF 286 Mad LLC v Chittur & Assoc. P.C.* (132 AD3d 610 [1st Dept 2015], *lv dismissed* 27 NY3d 952 [2016]; *Moon 170 Mercer, Inc. v Vella*, 146 AD3d 537, 538 [1st Dept 2017]).

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

ENTERED: MARCH 15, 2018



CLERK

Manzanet-Daniels, J.P., Tom, Mazzarelli, Webber, Kern, JJ.

6018-
6019-
6020 Index 153854/16

Howard Leader, et al.,
Plaintiffs-Respondents,

-against-

Parkside Group, et al.,
Defendants-Appellants.

_________________________

Law Offices of Steven S. Sieratzki, New York (Steven S. Sieratzki of counsel), for appellants.

Santamarina & Associates, New York (Kacy Popyer of counsel), for respondents.

_________________________

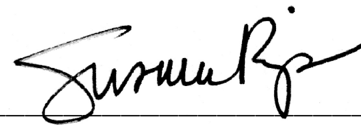
Appeal from order and judgment (one paper), Supreme Court, New York County (Erika M. Edwards, J.), entered June 12, 2017, inter alia, declaring that plaintiffs' apartment is subject to the Rent Stabilization Law and Rent Stabilization Code, setting the legal regulated rent and directing defendants to issue to plaintiffs a rent stabilized lease, and awarding plaintiffs a sum of money representing rent overcharge, unanimously dismissed, without costs. Appeal from order, same court (Joan M. Kenney, J.), entered April 24, 2017, unanimously dismissed, without costs, as subsumed in the appeal from the order and judgment. Appeal from order, same court (Erika M. Edwards, J.), entered August 4, 2017, which denied defendants' motion for reargument,

unanimously dismissed, without costs, as taken from a nonappealable order.

Because defendants did not oppose plaintiffs' motion for summary judgment, they are not aggrieved by the grant of the motion and may not appeal from it (CPLR 5511; *see e.g. Moore v Federated Dept. Stores, Inc.*, 94 AD3d 638 [1st Dept 2012], *appeal dismissed* 19 NY3d 1065 [2012]).

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

ENTERED: MARCH 15, 2018



CLERK

Manzanet-Daniels, J.P., Tom, Mazzarelli, Webber, Kern, JJ.

6021 Dawid Milek, Index 154227/12
Plaintiff,

-against-

Jane Rappeport, etc., et al.,
Defendants-Appellants,

Stuart Serota, et al.,
Defendants.
\- - - - -
[And a Third-Party Action]
_________________________

An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Nancy M. Bannon, J.), entered on or about July 22, 2016,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto entered February 27, 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: MARCH 15, 2018

_______________________
CLERK

Manzanet-Daniels, J.P., Tom, Mazzarelli, Webber, Kern, JJ.

6022 The People of the State of New York, Ind. 1125/15
Respondent,

-against-

Nicholas Padilla,
Defendant-Appellant.

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

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Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered November 2, 2015, unanimously affirmed.

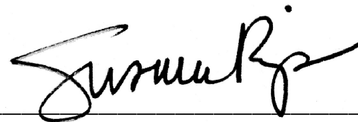
Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: MARCH 15, 2018



CLERK

Manzanet-Daniels, J.P., Tom, Mazzarelli, Webber, Kern, JJ.

6023 The People of the State of New York, Respondent, — Ind.3544/13, 2601/14

-against-

Alex Hernandez,
Defendant-Appellant.

_________________________

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

Darcel D. Clark, District Attorney, Bronx (Dmitriy Povazhuk of counsel), for respondent.

_________________________

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Ralph A. Fabrizio, J.), rendered June 20, 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: MARCH 15, 2018

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CLERK

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

Manzanet-Daniels, J.P., Tom, Mazzarelli, Webber, Kern, JJ.

6024 The People of the State of New York, Ind. 3116/13
Respondent,

-against-

Sherman Maitland,
Defendant-Appellant.

_________________________

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

Darcel D. Clark, District Attorney, Bronx (Ramandeep Singh of counsel), for respondent.

_________________________

Judgment, Supreme Court, Bronx County (Margaret L. Clancy, J.), rendered June 9, 2015, as amended June 23, 2015, convicting defendant, after a nonjury trial, of rape in the third degree (four counts), criminal sexual act in the third degree (two counts) and endangering the welfare of a child, and sentencing him to an aggregate term of three years, unanimously affirmed.

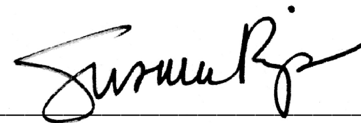
Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, because defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claim 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 both the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]), particularly in the context of a nonjury trial. Defendant has not established that his counsel's cross-examination of a forensic examiner was either unreasonable or prejudicial, or that he was entitled to a missing witness charge.

Defendant's contention that certain counts were multiplicitous is unpreserved and we decline to review it in the interests of justice. Alternatively, we find that the challenged counts were not multiplicitous, and that no corrective action need be taken in any event because the court sentenced defendant to concurrent terms of imprisonment.

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

ENTERED: MARCH 15, 2018



CLERK

Manzanet-Daniels, J.P., Tom, Mazzarelli, Webber, Kern, JJ.

6025 In re Noah Berkley, Index 650648/16
Petitioner-Appellant,

-against-

New York City Department of Education,
Respondent-Respondent.

_________________________

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

Zachary W. Carter, Corporation Counsel, New York (Jane L. Gordon of counsel), for respondent.

_________________________

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered June 27, 2016, which granted respondent's motion to confirm a hearing officer's award terminating petitioner's employment as a school teacher with respondent, denied the petition, and dismissed the proceeding, unanimously affirmed, without costs.

The standard of review mandated by Education Law § 3020-a(5)(a) is that of CPLR article 75, which provides that an arbitration award may be vacated only on a showing of "misconduct, bias, excess of power or procedural defects" (*City School Dist. of the City of N.Y. v McGraham*, 75 AD3d 445, 449 [1st Dept 2010], *affd* 17 NY3d 917 [2011]; *see* CPLR 7511[b]). This Court has applied a "hybrid" standard which incorporates the

arbitrary and capricious test in CPLR article 78 as well (*id.*).

Where the arbitration is compulsory, as here, judicial scrutiny is stricter than for a determination rendered in voluntary arbitration proceedings, and the determination must be in accord with due process, supported by adequate evidence, and rational (*Matter of Gongora v New York City Dept. of Educ.*, 98 AD3d 888, 889-890 [1st Dept 2012]).

Petitioner argues that his due process rights were violated because the corporal punishment specification did not allege the specific date of the misconduct and the hearing officer improperly relied on hearsay evidence, consisting of out of court statements by students.

Due process in the context of administrative hearings requires that the charges be "reasonably specific, in light of all the relevant circumstances, to apprise the party whose rights are being determined of the charges against him . . . and to allow for the preparation of an adequate defense" (*Matter of Block v Ambach*, 73 NY2d 323, 333 [1989] [internal citation omitted]).

The court properly found that petitioner's due process rights were not violated by the failure to specify the date he was alleged to have inflicted corporal punishment on a named

student, in that he was provided with enough information to mount an adequate defense. Moreover, at the hearing, he did not indicate any vagueness with regard to the incident, since he knew the name of the student who made the complaint and had received statements by other students in the room at the time.

Petitioner's due process rights were not violated by the hearing officer's partial reliance on hearsay evidence in that such evidence may be the basis of an administrative determination, as petitioner acknowledged (*Matter of Colon v City of N.Y. Dept. of Educ.*, 94 AD3d 568 [1st Dept 2012]). Moreover, the hearsay evidence was supported by the testimony of various school administrators and aides, who were subject to cross-examination by petitioner.

The court correctly concluded that the hearing officer's decision was supported by the record, in that ample evidence, including petitioner's admissions, supported the finding that he exposed himself to students in the boys' bathroom, improperly touched a student's knee, used his foot to push another student, and was frequently late. The hearing officer was entitled to reject petitioner's explanations based on an assessment of his credibility.

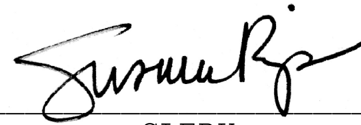
The penalty does not shock the conscience in light of the

seriousness of the misconduct and petitioner’s failure to heed warnings (*see Matter of Bolt v New York City Dept. Of Educ.*, ___ NY3d __, 2018 NY Slip Op 00090, *2 [2018]; *Lackow v Department of Educ [or “Board”] of the City of New York*, 51 AD3d 563, 569 [1st Dept 2008]).

We have considered petitioner’s remaining arguments and find them unavailing.

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

ENTERED: MARCH 15, 2018



CLERK

Manzanet-Daniels, J.P., Tom, Mazzarelli, Webber, Kern, JJ.

6026-
6026A The People of the State of New York, Ind. 3656/14
Respondent, 4609/14

-against-

Philip Jijanu,
Defendant-Appellant.

_________________________

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

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

_________________________

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Patricia Nuñez, J.), rendered January 28, 2016,

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

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

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

ENTERED: MARCH 15, 2018

CLERK

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

Manzanet-Daniels, J.P., Tom, Mazzarelli, Webber, Kern, JJ.

6027N Lampros Nikolas Antiohos by Estelle Reynolds, as Guardian of the Person and Property of Lampros Nikolas Antiohos,
Plaintiff-Appellant,

Index 25894/14E

-against-

Arthur Morrison,
Defendant-Respondent,

The Law Firm of Daniel M. O'Hara, PLLC, et al.,
Defendants.

_________________________

Law Offices of Ira M. Perlman, P.C., Great Neck (Robert D. Rosen of counsel), for appellant.

Arthur Morrison, New York, for respondent.

_________________________

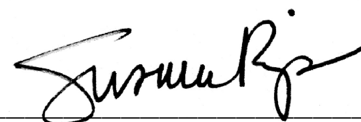
Order, Supreme Court, Bronx County (Donna M. Mills, J.), entered November 23, 2016, which denied plaintiff's motion for leave to renew his motion for a default judgment against defendant Morrison, unanimously reversed, on the facts, without costs, and, upon renewal, the motion for a default judgment granted. The Clerk is directed to enter judgment accordingly.

Plaintiff's original motion for a default judgment was denied not because plaintiff failed to show defendant Morrison's default but because he failed to submit an affidavit detailing the underlying personal injury action by "a party with personal

knowledge of the merits of the claim" (*Beltre v Babu*, 32 AD3d 722, 723 [1st Dept 2006]). In support of his renewal motion, plaintiff submitted his own affidavit as well as a reasonable justification for his failure to submit one with the original motion papers, namely, his cognitive deficits and his inability to read (*see* CPLR 2221[e]; *see generally Brown v Rosedale Nurseries*, 259 AD2d 256, 257 [1st Dept 1999] [granting leave to renew motion for a default judgment "upon proper papers"]; *Joosten v Gale*, 129 AD2d 531, 531 [1st Dept 1987] [same]; *see also generally Wattson v TMC Holdings Corp.*, 135 AD2d 375, 376-377 [1st Dept 1987] [motion to renew motion for leave to amend granted where submission of affidavits by parties with personal knowledge cured procedural deficiency]). As this Court observed in *Wattson*, "[C]ases should be decided on the merits, wherever possible, and not on the basis of technical procedural requirements" (135 AD2d at 378).

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

ENTERED: MARCH 15, 2018



CLERK

Manzanet-Daniels, J.P., Tom, Mazzarelli, Webber, Kern, JJ.

6028N Steven Lam, Index 152573/16
Plaintiff-Appellant,

-against-

2 West Nightlife, Inc. doing business as Krush Sports Bar,
Defendant-Respondent.

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Law Offices of David P. Fallon, PLLC, Sayville (David P. Fallon of counsel), for appellant.

Farber Brocks & Zane L.L.P., Garden City (Tracy L. Frankel of counsel), for respondent.

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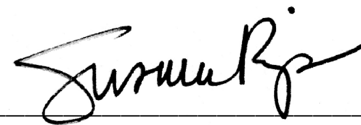
Order, Supreme Court, New York County (Erika M. Edwards, J.), entered July 31, 2017, which denied plaintiff's motion to compel defendant to produce a witness with knowledge of the maintenance of its security surveillance video for a deposition, unanimously affirmed, without costs.

Plaintiff was injured when he slipped and fell while playing a game in defendant's bar. In an affidavit, defendant's owner explained that, upon learning of the accident, she preserved video surveillance footage from the scene, commencing from approximately 8 minutes before the accident until about 20 minutes afterward, and that after 10 days, the rest of the video was automatically erased by the system.

The court providently exercised its discretion in denying the motion as plaintiff failed to establish that defendant's owner's deposition was material and necessary to the prosecution of the action, given, inter alia, plaintiff's own observations during his presence in the bar in the hours before the accident and the preserved surveillance footage (*see* CPLR 3101[a]). Moreover, there is no indication of any impropriety in connection with the destruction of the earlier footage (*see Boyle v City of New York*, 291 AD2d 315 [1st Dept 2002]), which defendant had no independent obligation to preserve (*see Jackson v Whitson's Food Corp.*, 130 AD3d 461 [1st Dept 2015]; *Duluc v AC & L Food Corp.*, 119 AD3d 450 [1st Dept 2014], *lv denied* 24 NY3d 908 [2014]).

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

ENTERED: MARCH 15, 2018



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**THE FOLLOWING DECISION WAS RELEASED ON DECEMBER 14, 2017:**

Friedman, J.P., Kahn, Gesmer, Kern, Moulton, JJ.

5211 In re Harry T.,
Petitioner-Respondent,

-against-

Lana K.,
Respondent-Appellant.

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Law Office of Jennifer B. Ettenger, LLC, Dix Hills (Jennifer B. Ettenger of counsel), for appellant.

Harry T., respondent pro se.

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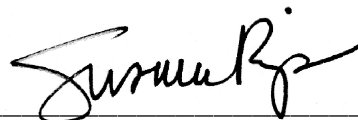
Order, Family Court, New York County (Adetokunbo Fasanya, J.), entered on or about April 21, 2017, which, to the extent appealed from as limited by the briefs, denied respondent mother's affirmative defense of alienation after excluding the testimony and written report of a neutral forensic psychologist appointed during prior custody proceedings in Queens Family Court insofar as they related to that proceeding, and granted the father's support petition, unanimously affirmed, without costs.

In her brief and pre-argument statement on appeal, respondent states that she appeals from the trial court's failure to admit into evidence the forensic report prepared in connection

with an earlier custody proceeding between the parties. However, since respondent never offered it into evidence at trial, this is not a proper basis for her appeal. To the extent that respondent appeals from the trial court's refusal to permit the forensic to testify as to his conclusions contained in the report, the trial court properly sustained objections to such testimony, given respondent's attorney's failure to make an offer of proof as to how those conclusions, contained in a report completed more than two years before trial and prior to the parties' stipulation changing primary physical custody from respondent to petitioner, would be relevant in the current child support proceeding. A suspension of respondent's child support obligation was not warranted, since she failed to show "deliberate frustration of and active interference with [her] visitation rights" (*Rodman v Friedman*, 112 AD3d 537 at 537 [1st Dept 2013] [internal quotation marks omitted]).

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

ENTERED: DECEMBER 14, 2017



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