SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 10, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

5068 Shakera Gordon, Index 21378/14E
Plaintiff-Appellant,

-against-

Bayrock Sapir Organization LLC, doing business as Trump Soho, et al.,
Defendants-Respondents.

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Akin Law Group PLLC, New York (Leopold Raic of counsel), for appellant.

Jackson Lewis P.C., New York (Diane Windholz of counsel), for respondents.

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Order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered June 16, 2016, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the claims of employment discrimination, hostile work environment, and retaliation under the New York State and City Human Rights Laws (State and City HRLs), unanimously modified, on the law, to deny the motion as to the discrimination claim under the City HRL and the hostile work environment and retaliation claims under the State and City HRLs, and otherwise affirmed,

without costs.

In opposition to defendants' prima facie showing of their entitlement to summary judgment, plaintiff submitted evidence that, after she complained about an assault by one of defendant Trump Soho's engineering department employees, other members of that department engaged in a campaign of harassment against her, directing deeply offensive race- and gender-based slurs at her and sitting near her in the workplace lunchroom to intimidate her. Plaintiff complained to defendant Dana Sholl, Trump Soho's human resources director, about the name calling, but no corrective action was taken, and, consequently, the name calling and harassment continued. Plaintiff continued to complain, and defendants continued to take no action.

Plaintiff's evidence raises issues of fact as to her claim under the State and City HRLs that she was subjected to a hostile work environment (*see Ferrer v New York State Div. of Human Rights*, 82 AD3d 431, 431 [1st Dept 2011]; *Diggs v Oscar De La Renta, LLC*, 2014 NY Slip Op 33173[U], *4-5 [Sup Ct, Queens County 2014]). Plaintiff's evidence also raises issues of fact as to her claim under both HRLs that defendants retaliated against her (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312-113 [2004]; *Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 [1st Dept 2012]). Plaintiff engaged in the protected activity of

complaining to defendants about other employees' offensive conduct toward her, and defendants allowed the offensive conduct to continue, thereby condoning it (*see Boyce v Gumley-Haft, Inc.*, 82 AD3d 491 [1st Dept 2011]; *Matter of Father Belle Community Ctr. v New York State Div. of Human Rights*, 221 AD2d 44, 53 [4th Dept 1996], *lv denied* 89 NY2d 809 [1997]).

Plaintiff's evidence raises issues of fact as to her discrimination claim under the City HRL by showing that she was "treated differently" or "less well" than other employees (*see Askin v Department of Educ. of the City of N.Y.*, 110 AD3d 621, 622 [1st Dept 2013]). However, it does not raise an issue of fact as to the discrimination claim under the State HRL, because it fails to show an adverse employment action within the meaning of that statute (*see Silvis v City of New York*, 95 AD3d 665 [1st Dept 2012], *lv denied* 20 NY3d 861 [2013]).

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

ENTERED: MAY 10, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Kahn, Oing, JJ.

5719 Citizens Insurance Company of America, Index 652801/15
Plaintiff-Appellant,

-against-

CMS Risk Management Holdings, LLC,
et al.,
Defendants-Respondents.

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Kennedys CMK, New York (Matthew J. Lodge of the bar of the state of New Jersey, admitted pro hac vice of counsel), for appellant.

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

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered November 16, 2016, which denied plaintiff's motion for summary judgment, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment declaring that plaintiff has no coverage obligation.

On June 26, 2015, the New York City Department of Buildings (DOB) issued several violations to defendants, stating, among other things, that their five-story tenement building was "structurally unstable" and directing the tenants to immediately vacate the building as the condition of the building was "immediately perilous to life." On July 1, DOB issued another violation, stating that the building was leaning, that multiple joists had moved out of their pockets and were no longer load

bearing, and that the building facade was cracked, bulging, leaning outwards, and separating from the side walls. The violation further directed defendants to commence "immediate demolition operations."

Defendants filed a claim pursuant to the policy of insurance issued by plaintiff. By letter dated August 3, 2015, plaintiff disclaimed coverage for any damage to the building pursuant to the policy's "Collapse Exclusion." The disclaimer further stated that the damage did not satisfy the terms of the "Additional Coverage" for collapse provisions of the policy, since the building did not suffer an abrupt collapse, as required under those provisions.

Pursuant to the relevant exclusions section of the policy, no payment would be made for any loss resulting from:

> "Collapse, including any of the following conditions of property or any part of the property:
>
> > "(1) An abrupt falling down or caving in;
> >
> > "(2) Loss of structural integrity, including separation of parts of the property or property in danger of falling down or caving in; or
> >
> > "(3) Any cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion as such condition relates to (1) or (2) above."

The policy's "Additional Coverage - Collapse" section provided that payment would be made for an abrupt collapse of a

building caused by several distinct conditions, none of which were applicable to the facts of this case. However, this "Additional Coverage" provision contained its own exclusions as follows:

> "3. This Additional Coverage - Collapse does not apply to:
>
> "a. A building or any part of a building that is in danger or falling down or caving in;
>
> "b. A part of a building that is standing, even if it has separated from another part of the building; or
>
> "c. A building that is standing, or any part of a building that is standing, even if it shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion."

Thereafter, plaintiff commenced this declaratory judgment action seeking a judgment that it has no obligation to pay defendants for the loss to their building.

In their answer, defendants admitted, in relevant part, that the building lost structural integrity, that it was in danger of falling down, that there had been no "abrupt" falling down or caving in, and that, at the time of the answer, the building was standing, albeit under an order directing its demolition.

Significantly, defendants further admitted that "[b]ased on the foregoing, the alleged damage to the Premises does not satisfy the terms of the Additional Coverage for collapse under the Citizen's Policy."

Plaintiff is entitled to a declaration that it is not obligated to pay for damage to defendants' building because there was no collapse within the meaning of the relevant insurance policiy. Even though the building required demolition, the event resulting in the loss was not covered by the provision of the policiy insuring against loss attributable to abrupt collapse (*see Rector St. Food Enters., Ltd. v Fire & Cas. Ins. Co. of Conn.*, 35 AD3d 177 [1st Dept 2006]; *Rapp B. Props., LLC v RLI Ins. Co.*, 65 AD3d 923, 924 [1st Dept 2009], *lv denied* 13 NY3d 914 [2009]; *see also Graffeo v United States Fid. & Guar. Co.*, 20 AD2d 643, 644 [2d Dept 1964], *lv dismissed* 14 NY2d 685 [1964]). The policies were not ambiguous, and no exceptions to the collapse exclusion applied (*see Monteleone v Crow Constr. Co.*, 242 AD2d 135 [1st Dept 1998], *lv denied* 92 NY2d 818 [1998]).

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

ENTERED: MAY 10, 2018

CLERK

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

6499 The People of the State of New York, Ind. 5548/13
Respondent,

-against-

Mark Spencer,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (David Crow of counsel), and Patterson Belknap Webb & Tyler LLP, New York (Andrew L. Kincaid of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

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Judgment, Supreme Court, New York County (Mark Dwyer, J.), rendered October 14, 2015, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him to a term of five years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence supported the inference that defendant intended to cause serious physical injury. Serious physical injury was both the actual, and the "natural and probable consequence[]" of this conduct (*People v Bueno*, 18 NY3d 160, 169 [2011]; *see People v Martinez*, 224 AD2d 254 [1st Dept 1996], *lv denied* 88 NY2d 989 [1996]).

In its charge on the defense of justification, the court correctly submitted to the jury the issue of whether defendant used deadly or nondeadly physical force, and explained the requirements for the use of each type of force. We reject defendant's argument that his conduct did not constitute deadly physical force because he only used his fist to administer the barrage of punches. Even if, in general, punching normally constitutes nondeadly force, here the evidence supported an inference that "under the circumstances in which it [was] used," the force at issue was "readily capable of causing death or other serious physical injury" (Penal Law § 10.00[10]). The fact that defendant's use of force undisputedly caused very serious injuries was naturally relevant to whether it was "readily capable" of causing such injury, and the court properly took the nature of the injuries into consideration.

The court also correctly instructed the jury that a defendant who continues to use force after no longer reasonably believing such force to be necessary for self-defense may be criminally liable for harm caused by the unjustified additional force, and that the jury should separately consider each successive punch in that light (*see People v Del-Debbio*, 244 AD2d 195, 195 [1st Dept 1997], *lv denied* 91 NY2d 925 [1998]). Although *Del-Debbio* and other cases involving this principle

involved the use of deadly force, defendant's suggestion that the principle does not apply to nondeadly force has no logical basis. This rule stems from the general requirement that all use of force under Penal Law § 35.15 be reasonably necessary (*see People v Goetz*, 68 NY2d 96, 106 n 5 [1986]). In this case, the jury could have found that the first punch rendered the victim plainly harmless, so that any additional use of force was unnecessary, and that the additional force caused serious physical injury.

Defendant's remaining challenge to the justification charge is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 10, 2018

CLERK

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

6500 Gloria Encarnacion, Index 304085/15
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

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

The Altman Law Firm, PLLC, Woodmere (Michael T. Altman of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Llinet M. Rosado, J.), entered on or about October 6, 2017, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendant established its entitlement to judgment as a matter of law in this action for personal injuries sustained when plaintiff slipped and fell on snow or ice on the walkway in front of defendant's building. Defendant submitted, inter alia, climatological records and meteorologists' affidavits showing that there was a winter storm in progress at the time of plaintiff's fall (*see Wexler v Ogden Cap Props., LLC*, 154 AD3d 640 [1st Dept 2017]; *Levene v No. 2 W. 67th St., Inc.*, 126 AD3d 541 [1st Dept 2015]).

In opposition, plaintiff failed to raise a triable issue of fact as to whether defendant's snow removal efforts created or exacerbated a hazardous condition. Her claim that she fell on "dirty" snow that could have fallen in the time between defendant's snow removal and the accident, and her conclusory assertion that defendant's snow removal was not adequate, do not raise triable issues of fact (*see e.g. Filius v New York City Hous. Auth.*, 156 AD3d 434 [1st Dept 2017]).

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

ENTERED: MAY 10, 2018

CLERK

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

6501 In re Xiomary L.,

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

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

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

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Order of disposition, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about December 30, 2016, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that she committed acts that, if committed by an adult, would constitute the crimes of robbery in the second degree, grand larceny in the fourth degree, attempted assault in the third degree and criminal possession of stolen property in the fifth degree, and placed her with the Administration for Children's Services for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations regarding credibility and identification. The victim reliably identified appellant as one

of the attackers, and the record supports the court's rejection of appellant's testimony that she was merely an onlooker.

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

ENTERED: MAY 10, 2018

CLERK

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

6502 Kelly Coffey, Index 114073/09
Plaintiff-Respondent,

-against-

CRP/Extell Parcel I. L.P., et al.,
Defendants-Appellants,

Stroock & Stroock & Lavan LLP,
Defendant.

_____

Boies, Schiller & Flexner LLP, Armonk (Jason Cyrulnik of counsel), for appellants.

Held & Hines, L.L.P., New York (Scott B. Richman of counsel), for respondent.

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Order, Supreme Court, New York County (Debra A. James, J.), entered April 12, 2017, which, to the extent appealed from as limited by the briefs, denied defendants' motion, dated January 11, 2017, to vacate the court's prior judgment entered April 2, 2013 and/or order entered August 2, 2013, unanimously affirmed, with costs.

The reversal of the grant of statutory interest in the related case (*CRP/Extell Parcel I, L.P. v Cuomo*, 2012 NY Slip Op 32329(U) [Sup Ct, NY County 2012], *revd* 124 AD3d 560 [1st Dept 2015], *affd* 27 NY3d 1034 [2016]) has no preclusive effect on this plaintiff's entitlement to such interest, as this Court's prior reversal in that case, and the Court of Appeals decision

affirming this Court's determination, were based on the lower court's lack of jurisdiction in that case to entertain a motion for such interest after the proceeding had been dismissed. That factual underpinning is not present here. Moreover, this Court has already affirmed an appeal by these defendants from an order which included postjudgment interest at the statutory rate of 9% (*Coffey v CRP/Extell Parcel I, L.P.*, 122 AD3d 504 [1st Dept 2014]), and there is no basis to disturb that determination now.

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

ENTERED: MAY 10, 2018

CLERK

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

6504 The People of the State of New York, Respondent, Ind. 4257/15

-against-

Mario Villalon, Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Bonnie G. Wittner, J. at omnibus motion; Jill Konviser, J. at jury trial and sentencing), rendered May 17, 2016, convicting defendant of criminal contempt in the first degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years, unanimously reversed, on the law, and the indictment dismissed with leave to re-present any appropriate charges to another grand jury.

The criminal contempt count was duplicitous because defendant's acts of violating an order of protection by regularly but briefly showing up at the victim's apartment, over the course of about a month and 20 days, constituted distinct crimes that were required to be alleged in separate counts (*see People v Keindl*, 68 NY2d 410, 417-421 [1986]).

Defendant preserved this argument by moving to dismiss that

count on the same ground in his omnibus motion, which the court denied (*see People v Mahboubian*, 74 NY2d 174, 188 [1989]), and we find the People's arguments on the issue of preservation unavailing. The defect was in the language of the indictment itself, and it did not depend on the trial evidence or the court's charge.

Since we are reversing and dismissing the indictment as duplicitous, we find it unnecessary to address defendant's remaining arguments, except that we find the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]).

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

ENTERED: MAY 10, 2018

CLERK

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

6505 Samuel Bligen, Index 155442/14
Plaintiff-Appellant,

-against-

New York City Transit Authority,
et al.,
Defendants-Respondents.

_____

Burns & Harris, New York (Judith F. Stempler of counsel), for appellant.

Lawrence Heisler, Brooklyn (Timothy J. O'Shaughnessy of counsel), for respondents.

_____

Order, Supreme Court, New York County (Robert D. Kalish, J.), entered March 7, 2017, which granted defendants' motion to set aside the jury verdict pursuant to CPLR 4404(a), and to dismiss plaintiff's complaint for failure to establish a prima facie case, unanimously affirmed, without costs.

Plaintiff alleges that he was caused to fall on a subway staircase when his heel got caught in a 3½-inch "gap" between the metal tread of one of the steps and the left wall of the staircase. He argues that the trial court's finding that he failed to establish a design defect is not dispositive of whether defendants had discharged their common-law duty to maintain the premises in a reasonably safe condition. He contends that the trial evidence, which showed a 3½ inch gap within the walking

path of elderly and disabled riders using the left handrail, raised an issue of fact as to whether defendants discharged their common-law duty, and that such proof was legally sufficient to support the jury verdict.

Contrary to plaintiff's contention, the trial evidence does not show that the gap was within the walking area of subway riders. Rather, the evidence establishes that the gap was located directly underneath the handrail. The New York City Transit Authority employee who was called as a witness by plaintiff, testified that handrails would be placed "in line with the end of the metal tread," and that the gap was not an intended walking area, but to serve as water drainage. Plaintiff has not submitted any proof disputing the placement of the handrail, or the purpose of the gap. Thus, he did not demonstrate that the stairs constituted a dangerous condition (*see Puma v New York City Tr. Auth.*, 55 AD3d 585 [2d Dept 2008]). Furthermore, plaintiff never explained how his foot ended up flush against the wall, underneath the handrail.

Because "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [individuals] to the conclusion reached by the jury on the basis of the evidence presented at trial," defendants are entitled to having the jury verdict set aside, and judgment granted in their

favor, under CPLR 4404(a) (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]; *see Soto v New York City Tr. Auth.*, 6 NY3d 487, 492 [2006]). Further, since plaintiff did not establish a prima face case for the same reasons stated above, defendants are also entitled to dismissal of the complaint under CPLR 4401 (*Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]).

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

ENTERED: MAY 10, 2018

CLERK

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

6506 In re John Joyce, Index 103515/12
Petitioner-Appellant,

-against-

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

_____

Law Office of Elliott S. Martin, Brooklyn (Elliott S. Martin of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Emma Grunberg of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Manuel J. Mendez, J.), entered September 3, 2013, which, to the extent appealed from as limited by the briefs, denied the petition brought pursuant to CPLR article 78 to annul the determination of respondent New York City Department of Education, dated April 13, 2012, sustaining petitioner's year-end "unsatisfactory" rating for the 2010-2011 academic year, unanimously reversed, on the law, without costs, the judgment vacated, the petition granted, and the determination annulled. The Clerk is directed to enter judgment accordingly.

The record demonstrates deficiencies in the performance review process that resulted in petitioner's unsatisfactory rating for the 2010-2011 academic year that "were not merely technical, but undermined the integrity and fairness of the

process" (*Matter of Gumbs v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 125 AD3d 484, 485 [1st Dept 2015]; *Matter of Richards v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 117 AD3d 605, 606-607 [1st Dept 2014]). Petitioner was a tenured teacher who had received a satisfactory rating for the 2009-2010 academic year. In contravention of its own procedures, respondent failed to place petitioner on notice that he was in danger of receiving an unsatisfactory rating for the 2010-2011 academic year until after April 28, 2011. Moreover, the procedures require that tenured teachers in danger of receiving an unsatisfactory rating have "formal observations including a pre-observation and post-observation conference by the principal ... as part of a prescriptive plan to improve their teaching" (Board of Education Chief Executives' Memorandum #80, dated March 31, 1998, re: "Performance Review and Professional Development Plan for Teachers"). Yet, after April 28, 2011, petitioner received only one formal observation. It took place one week

before the end of the academic year and was not part of a prescriptive plan to improve petitioner's teaching.

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

ENTERED: MAY 10, 2018

CLERK

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

6507 Sasha Lewis, Index 307106/13
Plaintiff-Respondent,

-against-

MBD Silva Taylor Housing Development Fund Company, Inc., et al.,
Defendants-Appellants.

_____

London Fischer LLP, New York (David B. Franklin of counsel), for appellants.

Subin Associates, LLP, New York (Robert J. Eisen of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Elizabeth A. Taylor, J.), entered on or about October 17, 2017, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

The record demonstrates as a matter of law that defendants, the building owners, the project manager and general contractor for a renovation project, and the subcontractor that installed the bi-fold closet door that came apart at the hinges and fell on plaintiff as she tried to open it, did not negligently manufacture or design the closet doors. The evidence is unrefuted that the closet doors were selected by the project architect and fabricated by an outside manufacturer, which pre-

installed the door hinges.

Defendants established prima facie that they did not have actual or constructive notice of any defect in the closet doors after their installation by showing that plaintiff did not notify the building owner or management company of any problems with the doors in her apartment before her accident (*see Briggs v 2244 Morris L.P.*, 30 AD3d 216 [1st Dept 2006]; *Bean v Ruppert Towers Hous. Co.*, 274 AD2d 305, 308 [1st Dept 2000]). Plaintiff failed to raise an issue of fact.

The only defendant that could have created the alleged defective condition was Jasmine Construction and Restoration (sued as Jamie), the subcontractor that installed the doors. Jasmine established prima facie that it properly installed the doors through an affidavit by its owner, Ivan Miller, who averred that he had installed hundreds of these closet doors pursuant to the instruction manual without problem and that he ensured that they were properly secured, correctly sized, and properly adjusted. Miller further averred that after he installed the doors at issue, he tested each one by "repeatedly" opening and closing it to ensure its safety and proper function (*see e.g. Lezama v 34-15 Parsons Blvd., LLC*, 16 AD3d 560 [2d Dept 2005]).

In opposition, plaintiff failed to raise an issue of fact as to whether the bi-fold doors were properly installed. Her

expert's opinion that Jasmine should have further tested the doors was unsupported by reference to any specific, applicable safety standards or practices (*see Buchholz v Trump 767 Fifth Ave., LLC*, 5 NY3d 1, 8-9 [2005]; *Cassidy v Highrise Hoisting & Scaffolding, Inc.*, 89 AD3d 510, 511 [1st Dept 2011]).

Plaintiff's reliance on the doctrine of res ipsa loquitur is unavailing, since defendants were not in "exclusive control" of the closet doors, which were located within plaintiff's apartment (*see Pintor v 122 Water Realty, LLC*, 90 AD3d 449, 451 [1st Dept 2011]; *cf. Pavon v Rudin*, 254 AD2d 143, 146-147 [1st Dept 1998] [landlord not responsible for injury caused by door falling on office cleaner in premises leased to commercial tenant]).

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

ENTERED: MAY 10, 2018

CLERK

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

6508 In re Proceeding for the Construction of the Will of Jean L. Ledoux, Deceased. Index 3324/79A

Fiduciary Trust Company International, Trustee,
Petitioner,

-against-

Estate of Jeanne Nicole Ledoux,
Respondent-Respondent,

Estate of Joan Ledoux,
Respondent,

Renee Sands Tobin, etc.,
Respondent-Appellant.

_____

Genova Burns LLC, New York (Lawrence Bluestone of counsel), for appellant.

Greenfield Stein & Senior, LLP, New York (Gary B. Freidman of counsel), for respondent.

_____

Order, Surrogate's Court, New York County (Rita Mella, S.), entered March 10, 2017, which directed petitioner trustee of the Article Tenth Trust created in decedent's will to pay the remainder to the estate of Jeanne Nicole Ledoux, unanimously affirmed, without costs.

The court correctly concluded that neither the donative language in the will of decedent's son, Louis, nor decedent's will, provided a condition that the remainderman, Jeanne (Louis's daughter), survive the life estates of her parents, either

expressly or by implication. Respondent Tobin, who is decedent's great granddaughter, argues that the decedent's will reflected an intention to limit bequests to survivors in that numerous bequests were conditioned upon survival. However, as the court noted, a limitation on bequests in one section of the will and the failure to include that limitation in others demonstrated decedent's ability to make a limited gift when she had that donative intent (*see Matter of Ashner*, 24 AD2d 595, 596 [2d Dept 1965]). Moreover, the condition of survival in the other sections of the will only referred to surviving decedent.

The direction of decedent's will that Louis appoint a class of persons to receive the remainder also did not imply a condition of survival. Rather, decedent may have wanted to permit Louis to include any future children in the bequest (*see Matter of Sweazey*, 2 AD2d 292, 296 [3d Dept 1956]).

Tobin's argument that decedent would not have wanted her remainder estate to pass to beneficiaries of the will of her daughter-in-law, rather than to her blood relative (Tobin), is unpersuasive. The presumption favoring blood relatives over strangers is not properly invoked unless there is some ambiguity or lack of clarity which requires resolving a doubt introduced by the terms of the will, rather than speculation as to what

decedent might have wanted (*see Ashner*, 24 AD2d at 596]). Here, there was no ambiguity in the will.

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

ENTERED: MAY 10, 2018

CLERK

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

6509 In re Nadine T.
Petitioner-Respondent,

-against-

Lastenia T.,
Respondent-Appellant,

Dejurnette L.N.,
Respondent-Respondent.

_____

Larry S. Bachner, New York, for appellant.

Neal D. Futerfas, White Plains, for Nadine T., respondent.

Kenneth M. Tuccillo, Hasting on Hudson, for Dejurnette L.N., respondent.

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

_____

Order, Family Court, Bronx County (Robert D. Hettleman, J.), entered on or about April 14, 2017, which, after a hearing, granted the petition for modification of custody to award sole custody of the subject child to petitioner, and authorized petitioner to relocate to North Carolina with the child, unanimously affirmed, without costs.

The court properly determined that petitioner sufficiently demonstrated the requisite change in circumstances so as to warrant modification of the 2007 order, which, inter alia, granted joint custody of the child to all three parties (*see*

generally Matter of Wilson v McGlinchey, 2 NY3d 375, 380 [2004]). The record shows it has been petitioner who has solely provided the child with a safe, stable and loving home and tended to all of his educational, medical and therapeutic needs (*see e.g. Matter of Lopez v Robinson*, 25 AD3d 1034, 1036 [3d Dept 2006]). After the relationship between petitioner and respondent Lastenia T. ended, Lastenia made no contact with the child for months at a time and made minimal efforts to participate in his upbringing. The record also shows that Lastenia had issues including medical problems and did not have stable housing.

Regarding respondent birth mother Dejurnette, the record supports the finding that extraordinary circumstances existed so as to award custody to petitioner (*see generally Matter of Jerrina P. [June H.-Shondell N.P.]*, 126 AD3d 980, 981 [2d Dept 2015]). Dejurnette handed over physical custody of the child to petitioner and Lastenia in 2003, when he was three months old, and, thereafter maintained very little contact with him. She has also taken no financial responsibility, or any other role in the child's care, and there is no indication that the child has a relationship with Dejurnette's other four children. Accordingly, there has been such an extended disruption of the birth mother's custody of the now 15-year-old child, that petitioner clearly has standing to litigate with respect to the child's best interests

(*see Matter of Colon v Delgado*, 106 AD3d 414 [1st Dept 2013]; *Matter of Dianne M. v Princess R.F.*, 82 AD3d 481 [1st Dept 2011]).

The court's determination that the best interests of the child dictated an award of custody to petitioner is supported by the fair preponderance of the evidence (*see Matter of Joseph S. v Michelle R.F.*, 3 AD3d 446, 447 [1st Dept 2004]). The now 15-year-old child has resided with petitioner for virtually his entire life, and petitioner has provided him with a loving home, where she has tended to his needs and where he is thriving. The child's need for continued stability greatly weighs in favor of a grant of sole custody to petitioner (*see Friederwitzer v Friederwitzer*, 55 NY2d 89, 94 [1982]; *Matter of Lightbody v Lightbody*, 42 AD3d 537, 538 [2d Dept 2007], *lv denied* 9 NY3d 1017 [2008]), and petitioner is the only party who has demonstrated an ability to care for the child, including his educational and emotional needs, as well as his schooling, activities and therapy (*Matter of Louise E.S. v W. Stephen S.*, 64 NY2d 946 [1985]). She has also indicated a willingness to facilitate relationships between the child and Dejurnette and Lastenia (*see Matter of Matthew W. v Meagan R.*, 68 AD3d 468 [1st Dept 2009]). The court also afforded appropriate weight to the child's expressed preference to remain with petitioner (*see Eschbach v Eschbach*, 56

NY2d 167, 173 [1982]; *Melissa C.D. v Rene I.D.*, 117 AD3d 407, 408 [1st Dept 2014]).

The court's determination to allow petitioner to relocate to North Carolina has a sound and substantial basis in the record (*see Matter of Carmen G. v Rogelio D.*, 100 AD3d 568 [1st Dept 2012]). Petitioner demonstrated that her economic situation would be improved by the move as she would be able to continue to work as a home health aide, earning more per hour, and would also be able to work more hours because her mother and sister would be able to care for the child while she was at work. Petitioner receives no financial support from Lastenia or Dejurnette (*see Nairen McI. v Cindy J.*, 137 AD3d 694, 695 [1st Dept 2016]), and would have a support system in North Carolina, including her mother, brother, sister and extended family.

Notwithstanding Dejurnette's and Lastenia's limited involvement in the child's care, and that their visitation with him has been, alternately, nonexistent and inconsistent, the court granted substantial visitation in New York, with the parties to share the cost. Petitioner also stated that Lastenia and Dejurnette were welcome to visit anytime in North Carolina, and she would encourage telephone contact as well (*see Matter of Tropea v Tropea*, 87 NY2d 727, 740-741 [1996]; *see also Dexter A. v Georgia G.*, 120 AD3d 1106 [1st Dept 2014]).

In light of Lastenia's unpersuasive excuses, as well as the appearance of numerous parties and attorneys and the time-sensitive nature of the proceedings, the court properly denied Lastenia's requests for adjournments. Lastenia's counsel participated in her absence, and she had a full and fair opportunity to participate in the proceedings.

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

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

ENTERED: MAY 10, 2018

CLERK

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

6510 The People of the State of New York, Respondent, Ind. 512/15

-against-

Thomas Vinson,
Defendant-Appellant.

_____

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

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

_____

Appeal from judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered November 22, 2016, convicting defendant, after a jury trial, of tampering with physical evidence and criminal possession of a controlled substance in the seventh degree, and sentencing him, as a second felony offender, to an aggregate term of 1½ to 3 years, held in abeyance, and the matter remanded to Supreme Court for determination, based upon the evidence presented at the suppression hearing, of the issues raised at the hearing but not determined therein.

The court erred in denying defendant's suppression motion on the ground that the police entrance into a single-use restroom located in an adult film and novelty store was not a "search" for purposes of the Fourth Amendment. We conclude that, once he closed the door, defendant had a reasonable expectation of

privacy while using the small, single-use restroom because at that point he was "entitled to assume that while inside he ... will not be viewed by others" (*People v Mercado*, 68 NY2d 874, 876 [1986], *cert denied* 479 US 1095 [1987]; *see People v Milom*, 75 AD2d 68, 70 [1st Dept 1980]; *People v Hemmings*, 35 Misc 3d 298, 300-303 [Sup Ct, NY County 2012]). The closed door of the restroom was comparable to closed bathroom stalls in public restrooms, where a reasonable expectation of privacy exists (*see Milom*, 75 AD2d at 70). This expectation of privacy was not negated by the facts that the restroom was located in a commercial establishment and was unlocked (*see Mercado*, 68 NY2d at 876 ["(o)nce the door is *closed*" a person may have a reasonable expectation of privacy (emphasis added)]; *Milom*, 75 AD2d at 70; *Hemmings*, 35 Misc 3d at 302-303 ["(t)he absence of a lock is not a determinative factor in deciding whether a person has a reasonable expectation of privacy in an area"]).

In the alternative, the People argue, as they did at the hearing, that the police entrance into the restroom was reasonable because it was based on probable cause to suspect that there was drug use occurring inside. However, because "the hearing court did not rule on this issue in denying the suppression motion, and therefore did not rule adversely against defendant on this point, we may not reach it on this appeal"

(*People v Simmons*, 151 AD3d 628, 629 [1st Dept 2017]). Accordingly, we hold the appeal in abeyance and remand for determination, based on the hearing minutes, of the issue raised at the hearing, but not decided (*see id.*). 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: MAY 10, 2018

CLERK

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

6511 Unitrin Advantage Insurance Company, Index 155860/16
Plaintiff-Respondent,

-against-

21st Century Pharmacy, Inc., et al.,
Defendants,

Innovative Health Chiropractic, P.C., et al.,
Defendants-Appellants.

_____

The Law Office of Gregory A. Goodman, P.C., Jericho (Gregory A. Goodman of counsel), for appellants.

Rubin, Fiorella & Friedman LLP, New York (Harlan R. Schreiber of counsel), for respondent.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered March 9, 2017, which, to the extent appealed from, denied defendants Innovative Health Chiropractic, P.C. and Kazu Acupuncture, P.C.'s motion pursuant to CPLR 3211(a)(7) to dismiss the first through fourth causes of action as against them, unanimously affirmed, with costs.

Supreme Court correctly decided the motion brought by defendants, i.e., to dismiss for failure to state a cause of action (CPLR 3211[a][7]; *see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). On appeal, defendants rely on the standard for deciding

a motion for summary judgment (CPLR 3212) and improperly attempt to shift their burden as movants onto plaintiff.

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

ENTERED: MAY 10, 2018

CLERK

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

6512- Index 160153/13
6513 Blanche Hutcherson,
Plaintiff-Appellant,

-against-

Velma Hill, etc., et al.,
Defendants-Respondents.

_____

Law Offices of Andrew J. Spinnell, LLC, New York (Andrew J. Spinnell of counsel), for appellant.

The Kurland Group, New York (Yetta G. Kurland of counsel), for Velma Hill, respondent.

M. Schwartz Law, P.C., New York (Michael Schwartz of counsel), for Mutual Redevelopment Houses, Inc. respondent.

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Orders, Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about December 18, 2015, and June 21, 2017, which granted defendant Velma Hill's decedent's motion for summary judgment dismissing the complaint and cross claims as against him, and defendant Mutual Redevelopment Houses, Inc.'s motion for summary judgment dismissing the complaint as against it, unanimously affirmed, with costs.

The decedent (Glaberman), who died after his motion was decided, established prima facie that he did not cause a nuisance to plaintiff, his upstairs neighbor in a cooperative apartment building (*see Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 568 [1977]; *Brown v Blennerhasset Corp.*, 113 AD3d 454

[1st Dept 2014]; *Carroll v Radoniqi*, 105 AD3d 493 [1st Dept 2013]). The record contains evidence of only two discrete periods of intermittent noise. Glaberman said in an affidavit that he was an 86-year-old man whose health issues throughout the period in which plaintiff claimed he made loud noises rendered it impossible for him to "physically achieve making those noises, even if I wanted." Glaberman submitted evidence that he was in the hospital on occasions reflected on the logs that plaintiff created purporting to document the alleged noise. In addition, plaintiff did not appeal from a prior order in this case finding, after a hearing held before Glaberman's death, that Glaberman was too frail to drag or carry furniture, as the complaint alleges. In opposition to Glaberman's showing, plaintiff failed to raise an issue of fact.

In view of the foregoing, the complaint must be dismissed as against Mutual because all the claims asserted against it are premised upon Glaberman's alleged conduct.

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

ENTERED: MAY 10, 2018

CLERK

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

6515 The People of the State of New York, Ind. 1314/14
Respondent,

-against-

Gary Davis,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Larry Stephen, J.), rendered October 14, 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: MAY 10, 2018

CLERK

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

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

6516-
6517 Margaret Lesley Marshall, et al.,
Plaintiffs-Respondents,

-against-

Francis G. Fleming, et al.,
Defendants-Appellants.

Index 651067/13

_____

Kreindler & Kreindler LLP, New York (Megan W. Benett of counsel), for appellants.

Newhouse & Shey LLP, New York (John Newhouse of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Joan A. Madden, J.), entered September 14, 2015, in favor of plaintiffs in the principal amount of a foreign judgment entered in their favor, unanimously modified, on the law and the facts and in the interest of justice, to stay enforcement of the judgment as indicated below, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered May 8, 2014, which granted plaintiffs' motion for summary judgment in lieu of complaint and denied defendants' cross motion to dismiss the complaint or, alternatively, to stay enforcement of the foreign judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The foreign judgment arises from an award of litigation

costs in an action brought by plaintiffs, the widow and son, respectively, of the late Neil Marshall, in New South Wales, Australia. Defendants are partners in the New York-based law firm that represented Neil Marshall's estate in a wrongful death action in Pennsylvania.

The motion court properly recognized the Australian judgment, which was "final, conclusive and enforceable where rendered" (CPLR 5302). The grounds set forth in CPLR 5304 for non-recognition are inapplicable. Contrary to defendants' contention, the Australian judgment is not repugnant to New York's statute of limitations (*see* CPLR 5304[b][4]). The judgment did not arise from a time-barred claim; it represents the costs associated with defendants' unsuccessful motion to dismiss the Australian action on the ground of forum non conveniens. Recognition here would not be "the approval of a transaction which is inherently vicious, wicked or immoral, and shocking to the prevailing moral sense" (*Intercontinental Hotels Corp. [Puerto Rico] v Golden*, 15 NY2d 9, 13 [1964]; *see also Blacklink Transp. Consultants Pty Ltd. v Von Summer*, 18 Misc 3d 1113[A], 2008 NY Slip Op 50017[U], *5 [Sup Ct, NY County 2008]).

The alleged fraud (CPLR 5304[b][3]) is comprised of subsequent conduct, and therefore could not have been "practiced in the very act of obtaining the judgment" (*Matter of Holden*, 271

NY 212, 218 [1936]). Further, the Australian judgment does not conflict with an order that dismissed the wrongful death action based upon a settlement and that was not a "final and conclusive judgment" (CPLR 5304[b][5]).

We take judicial notice of the subsequent decisions in the Australian action, the contents of which are undisputed (see CPLR 4511[b]; *Matter of Kevin McK. v Elizabeth A.E.*, 111 AD3d 124, 133 [1st Dept 2013]). The decisions reflect that on August 24, 2017, the New South Wales Supreme Court (Payne, J.), issued a posttrial verdict in defendants' favor, dismissed the amended statement of claim, and directed plaintiffs to pay defendants' costs of the proceedings (*see Marshall v Fleming* [2017] NSWSC 1107). By order dated December 5, 2017, Justice Payne, inter alia, directed plaintiffs to pay defendants' costs of the trial, 50% of the costs of defendants' September 7, 2017 motion, and the costs of defendants' October 23, 2017 motion (*see Marshall v Fleming*, [No 2] [2017] NSWSC 1679).

Under the circumstances, a stay of enforcement of the judgment pending the final resolution of the Australian court's assessment of costs is warranted to avoid prejudice to defendants, who have established their entitlement to costs from plaintiffs in an amount that may exceed the recovery awarded to

plaintiffs and that can be used as a set-off (*see* CPLR 2201; *S&D Maintenance Co. v City of New York*, 169 AD2d 417 [1st Dept 1991]).

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

ENTERED: MAY 10, 2018

CLERK

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

6519 The People of the State of New York, Respondent, Ind. 475/16

-against-

Ramon Santana, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Larry Stephen, J.), rendered March 1, 2016, 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: MAY 10, 2018

CLERK

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

6520 Mary Gibbs, etc., et al., Index 23705/15E
Plaintiffs-Appellants,

-against-

Kings Harbor Health Services
LLC, doing business as Kings Harbor
Multicare Center,
Defendant-Respondent.

_____

Finkelstein, Blankinship, Frei-Pearson & Garber, LLP, White Plains (D. Greg Blankinship of counsel), for appellants.

Mauro Lilling NaParty LLP, Woodbury (Seth M. Weinberg of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Stanley Green, J.), entered September 15, 2016, which denied, with prejudice, the motion pursuant to CPLR 901 and 902 by plaintiffs Levonia McCray, as son and administrator of the estate of Belton Ganett, and Mary Gibbs, as daughter and guardian ad litem of Henry Gibbs, an incapacitated adult incapable of adequately prosecuting his rights, to certify this action as a class action, appoint McCray and Gibbs as class representatives, and appoint Finkelstein, Blankinship, Frei-Pearson and Garber, LLP as class counsel, unanimously modified, on the law, to allow pre-class certification discovery and to permit plaintiffs to renew their motion after completion of such discovery, and otherwise affirmed, without costs.

At this juncture, as plaintiffs have failed to satisfy CPLR 901(a)(2), requiring them to show that "there are questions of law or fact common to the class which predominate over any questions affecting only individual members," further pre-class certification discovery is necessary.

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

ENTERED: MAY 10, 2018

CLERK

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

6521N Global Liberty Insurance Company, Index 22585/17
Plaintiff-Appellant,

-against-

New Century Acupuncture, P.C.,
Defendant-Respondent,

Heather Davis, et al.
Defendants.

_____

Law Office of Jason Tenenbaum, P.C., Garden City (Jason Tenenbaum of counsel), for appellant.

Gary Tsirelman, P.C., Brooklyn (Stefan Belinfanti of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Ruben Franco, J.), entered December 8, 2017, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment seeking a declaration of non-coverage for no-fault benefits as against defendant New Century Acupuncture, P.C., as assignor of defendant Heather Davis, unanimously affirmed, without costs.

Plaintiff seeks a declaration of non-coverage based on the failure of defendant Davis, the injured claimant, to appear for two scheduled independent medical examinations (IMEs), which is a condition precedent to coverage (*see Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559 [1st Dept 2011], *lv*

denied 17 NY3d 705 [2011]; 11 NYCRR § 65-1.1[d]). Plaintiff sent an initial IME scheduling letter, and a re-scheduling letter, to both Davis and her attorney. After Davis failed to appear for the re-scheduled IME, plaintiff sent a third letter to the attorney, which indicated on its face that a copy had been sent to Davis. However, it is undisputed that the letter to Davis was sent to the wrong address. Thus, there was no reason for the attorney to know that Davis had not received notice of the re-scheduled IME and to tell her of the new IME date and location. Under these circumstances, the motion court properly found that plaintiff failed to demonstrate that it provided adequate notice, reasonably calculated to apprise Davis that her appearance at an IME at a specified date and location was required (*see generally Congregation Yetev Lev D'Satmar v County of Sullivan*, 59 NY2d 418, 423 [1983]; *cf. American Tr. Ins. Co. v Marte-Rosario,* 111 AD3d 442 [1st Dept 2013]).

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

ENTERED: MAY 10, 2018

CLERK

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

6522N Jessica Kochan, etc., et al., Index 157155/16
Plaintiffs-Appellants,

-against-

Target Corporation, et al.,
Defendants-Respondents,

Keylor LaPorta, et al.,
Defendants.

_____

Gair, Gair, Conason, Rubinowitz, Bloom, Hershenhorn, Steigman & Mackauf, New York (D. Allen Zachary of counsel), for appellants.

Simmons Jannace DeLuca, LLP, Hauppauge, (Allison Leibowitz of counsel), for respondents.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered May 8, 2017, which granted the motion of defendants Target Corporation and Target Enterprise Inc. (collectively Target) to change venue from New York County to Suffolk County, unanimously affirmed, without costs.

Supreme Court did not improvidently exercise its discretion in granting Target's motion to change venue to Suffolk County even though plaintiff properly placed venue in New York County based upon Target's principal place of business at the time the action was commenced (*see* CPLR 503[a], [c]). The motor vehicle accident happened in Suffolk County, plaintiffs and codefendants live in that county, the decedent received her medical treatment

there (*see Lopez v Chaliwit*, 268 AD2d 377 [1st Dept 2000]). Target also submitted the affidavits of two Suffolk County police officers, who averred that they were involved in the investigation including interviewing witnesses at the accident location and that they would be inconvenienced by having to travel to New York County because it would cause them to be absent from their police duties for a full day (*see Kennedy v C.F. Galleria at White Plains*, 2 AD3d 222, 223 [1st Dept 2003]).

That the police officers signed affidavits in favor of the motion to change venue establishes that they were aware of the action and demonstrates that they are willing to testify at trial. It was proper for the motion court to consider the police officers' convenience, because their testimony regarding their investigation as to how the accident happened bears on liability (*see Hoogland v Transport Expressway, Inc.*, 24 AD3d 191 [1st Dept 2005]). Furthermore, the police officers' affidavits are not insufficient because they do not set forth their home addresses, since it is undisputed that they work in Suffolk County (*see*

Gentry v Finnigan, 110 AD3d 568 [1st Dept 2013]; *compare Nolan v Mount Vernon Hosp.*, 172 AD2d 368 [1st Dept 1991]).

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

ENTERED: MAY 10, 2018

CLERK

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

6523 In re Mark Garraway, Ind. 3163/94
[M-1351] Petitioner, OP 137/18

-against-

Hon. Efrain Alvarado, etc., et al.,
Respondents.

_____

Mark Garraway, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Angel M. Guardiola II of counsel), for Hon. Efrain Alvarado, respondent.

_____

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

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

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

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

ENTERED: MAY 10, 2018

CLERK

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

6524 The People of the State of New York, Respondent, Ind. 4621/12

-against-

Lindell Cox, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Michael D. Tarbutton of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J., at severance motion; Daniel P. Conviser, J. at jury trial and sentencing), rendered September 9, 2014, convicting defendant of robbery in the first degree (two counts), robbery in the second degree (four counts) and assault in the second degree, and sentencing him to an aggregate term of five years, unanimously affirmed.

Defendant's severance motion was properly denied. The counts relating to the two incidents were properly joined pursuant to CPL 200.20(2)(b) based on mutually admissible evidence to demonstrate identity, as well as the intent required for accessorial liability (*see e.g. People v Mitchell*, 24 AD3d 103, 104 [1st Dept 2005], *lv denied* 6 NY3d 778 [2006]). The crimes were closely related because they both involved the

continuing animosity between competing gangs, and we have repeatedly held that "a pattern of crimes employing a unique modus operandi is not the exclusive situation in which uncharged crimes may be probative of identity" (*People v Laverpool*, 267 AD2d 93, 94 [1st Dept 1999], *lv denied* 94 NY2d 904 [2000]). Thus, a discretionary severance was not available. In any event, the counts were also properly joined as legally similar pursuant to CPL 200.20(2)(c), and defendant failed to make a sufficient showing for a discretionary severance pursuant to CPL 200.20(3).

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

ENTERED: MAY 10, 2018

CLERK

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

6525 Candida Moreno, Index 155112/15
Plaintiff-Respondent,

-against-

The Trustees of Columbia University
in the City of New York,
Defendant-Appellant.

_____

Rivkin Radler LLP, Uniondale (Stuart M. Bodoff of counsel), for appellant.

Saftler & Bacher, PLLC, New York (James W. Bacher of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered on or about April 25, 2017, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Plaintiff alleges that she slipped and fell on a pathway on defendant Columbia University's campus, which was covered by snow over a layer of ice. Defendant established prima facie entitlement to summary judgment by submitting certified climatological data showing that a storm was in progress at the time of plaintiff's fall so that its duty to take reasonable measures to remedy dangerous conditions caused by the storm was

suspended (*see Valentine v City of New York*, 86 AD2d 381, 383 [1st Dept 1982], *affd* 57 NY2d 932 [1982]; *Kinberg v New York City Tr. Auth.*, 99 AD3d 583 [1st Dept 2012]; *Pippo v City of New York*, 43 AD3d 303, 304 [1st Dept 2007]).

In opposition, plaintiff failed to raise a triable issue of fact. The opinion of plaintiff's expert was too speculative to raise an issue of fact as to whether defendant's snow removal efforts involved insufficient salt or ice melt materials, resulting in the creation of new ice that was covered by the snow (*see Rivas v New York City Hous. Auth.*, 140 AD3d 580, 581 [1st Dept 2016]; *Bi Fang Zhou v 131 Chrystie St. Realty Corp.*, 125 AD3d 429, 430 [1st Dept 2015]).

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

ENTERED: MAY 10, 2018

CLERK

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

6526 In re Doris M.,
Petitioner-Respondent,

-against-

Yarenis P.,
Respondent-Appellant.

_____

Bruce A. Young, New York, for appellant.

Andrew J. Baer, New York, for respondent.

_____

Order of protection, Family Court, New York County (Gail A. Adams, Referee), entered on or about June 30, 2017, which, upon a fact-finding determination that respondent committed the family offenses of harassment in the first and second degree, directed, among other things, that respondent stay away from the apartment the parties shared until June 30, 2018, unanimously modified, on the law, to vacate the finding of harassment in the first degree, and otherwise affirmed, without costs.

The Referee erred in determining that respondent's actions of leaving water to boil over on the stove, burning the pots, allowing the bathtub to overflow on several occasions and screaming in the middle of the night while playing her music in a loud manner, constituted the family offense of harassment in the first degree, because there were no facts alleged in the family offense petition supporting such a finding (*see Matter of Sasha*

R. v Alberto A., 127 AD3d 567, 567 [1st Dept 2015]; *Matter of Salazar v Melendez*, 97 AD3d 754, 755 [2d Dept 2012], *lv denied* 20 NY3d 852 [2012]).

Although the Referee did not set forth the basis for finding that respondent committed the family offense of harassment in the second degree, remand is not required because the record is sufficiently complete to allow this Court to make an independent factual review and draw its own conclusions (*see Matter of Keith H. [Logann M.K.]*, 113 AD3d 555, 555 [1st Dept 2014], *lv denied* 23 NY3d 902 [2014]). Based on that independent review, we find that petitioner demonstrated by a fair preponderance of the evidence that respondent's actions on January 30, 2017 constituted the family offense of second degree harassment as alleged in the petition (Penal Law § 240.26[3]; Family Ct Act §§ 812[1]; 832). Petitioner's testimony that on January 30, 2017, respondent summoned the police to the apartment and attempted to have her arrested about three times that day was sufficient to support a finding that respondent's actions constituted the family offense of harassment in the second degree because they served no legitimate purpose and only alarmed or seriously annoyed petitioner (*see* Penal Law § 240.26[3]).

The issuance of the one-year order of protection in petitioner's favor directing respondent to stay away from

petitioner, her home and employment was appropriate, because it will likely be helpful in eradicating the root of the family disturbance and fully protect petitioner (*see Matter of Oksoon K. v Young K.*, 115 AD3d 486, 487 [1st Dept 2014], *lv denied* 24 NY3d 902 [2014]). Respondent's contention that the Referee should have imposed less drastic remedies at disposition ignores petitioner's dispositional testimony that she was afraid in her own home, because respondent continued leaving the stove on unattended in violation of the May 8, 2017 and June 1, 2017 temporary orders of protection.

Respondent's allegation that the Referee failed to maintain the decorum of the courtroom and was prejudiced against her is unsupported by the record.

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

ENTERED: MAY 10, 2018

CLERK

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

6527 Sharlene Cangelosi, etc., et al., Index 401189/12
Plaintiffs-Appellants,

-against-

New York City Transit Authority, et al.,
Defendants-Respondents,

"John Doe," etc.,
Defendant.

_____

Silverman Shin & Byrne PLLC, New York (Wayne S. Stanton of counsel), for appellants.

Lawrence Heisler, Brooklyn (Timothy J. O'Shaughnessy of counsel), for respondents.

_____

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered December 12, 2016, which granted the motion of defendants New York City Transit Authority and Manhattan and Bronx Surface Transit Operating Authority for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established their entitlement to judgment as a matter of law by demonstrating the applicability of the emergency doctrine in this action where plaintiff was injured when the bus in which she was a passenger stopped suddenly, causing her to fall. Defendants submitted evidence showing that the driver's sudden stop was precipitated by a pedestrian suddenly running in front of the bus. In opposition, plaintiff failed to raise a

triable issue of fact as to defendants' negligence *(see Orsos v Hudson Tr. Corp.*, 111 AD3d 561 [1st Dept 2013]; *Brooks v New York City Tr. Auth.*, 19 AD3d 162 [1st Dept 2005]).

The court also properly declined to entertain plaintiff's claim that her injuries were caused by insufficient handrails, since the allegations in the notice of claim were not sufficient to put defendant on notice of any such claim (*see Thomas v New York City Hous. Auth.*, 25 NY3d 1087 [2015]; *Frankel v New York City Tr. Auth.*, 134 AD3d 440 [1st Dept 2015]).

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

ENTERED: MAY 10, 2018

CLERK

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

6528 Deutsche Bank AG, Index 161257/13
Plaintiff-Appellant,

-against-

Alexander Vik, et al.,
Defendants,

The CSCSNE Trust, et al.,
Defendants-Respondents.

_____

Cahill Gordon & Reindel LLP, New York (Sheila C. Ramesh of counsel), for appellant.

Becker, Glynn, Muffly, Chassin & Hosinski LLP, New York (Robin L. Alperstein of cousnel), for respondents.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered June 9, 2017, which granted the motion of defendants Ivan Gonell Santana (Santana) and the CSCSNE Trust (the Trust) to dismiss the action against them and denied, as moot, the alternative motion of Santana and the Trust to stay the action against them, unanimously modified, on the law, to deny the motion to dismiss, and otherwise affirmed, without costs.

As this Court previously determined that the complaint sufficiently alleges that the Trust was an alter ego of Vik and the other defendant entities, the Trust, upon service of process on its trustee solely in his capacity as such, is subject to the jurisdiction of the New York courts for purposes of determining

the truth of plaintiff's alter ego allegations (*see Transfield ER Cape Ltd. v Indus. Carriers, Inc.*, 571 F3d 221, 224 [2d Cir 2009]; *Delagi v Volkswagenwerk AG of Wolfsburg, Germany* 29 NY2d 426 [1972]; *Hantman & Assoc. v Florida Family Off. LLC*, __ Misc 3d __, 2015 NY Slip Op 30681[U] [Sup Ct, NY County 2015]).

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

ENTERED: MAY 10, 2018

CLERK

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

6529 The People of the State of New York, Respondent, Ind. 2606/12

-against-

Ishri Harripersaud, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, Bronx County (Troy K. Webber, J.), rendered January 22, 2016, convicting defendant, after a jury trial, of 25 counts of criminal sexual act in the second degree, and sentencing him to an aggregate term of eight years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations.

Defendant did not preserve any of his challenges to the actions taken by the court after a poll of the jury failed to establish that its initial verdict was unanimous (*see People v Mercado*, 91 NY2d 960, 963 [1998]), and we decline to review them in the interest of justice. None of defendant's claims implicate the "very narrow category" of mode of proceedings errors exempt

from preservation requirements (*People v Kelly*, 5 NY3d 116, 119 [2005]; *see also People v Hanley*, 20 NY3d 601, 604-605 [2013]; *People v Agramonte*, 87 NY2d 765, 770 [1996]).

As an alternative holding, we find no basis for reversal. The court's actions addressed an unusual situation where statements by a juror and communications from the remainder of the jury raised serious concerns about whether the juror actually disagreed with the other jurors, or was merely reluctant to announce a vote for conviction in open court. Contrary to defendant's argument, the court complied with CPL 310.80 by rejecting the initial verdict and directing the jury to resume deliberations, with an instruction that was correctly limited to the subject of unanimity. Nothing in CPL 310.80 precluded the court from also addressing a note from the jury that sought to explain the situation. After an individual colloquy with the juror at issue, which we find to be appropriate under the

circumstances (*see generally People v Simms*, 13 NY3d 867 [2009]), the court effectively repolled the jury, and accepted a unanimous verdict.

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

ENTERED: MAY 10, 2018

CLERK

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

6530 Ebony Stanford, Index 303750/12
Plaintiff-Appellant,

-against-

Rideway Corp., et al.,
Defendants-Respondents,

Watson Car Service, Inc.,
Defendant,

_____

Bernstone & Grieco, LLP, New York (Peter B. Croly of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about March 9, 2017, which denied plaintiff's posttrial motion to set aside the jury verdict awarding her no damages for past pain and suffering, unanimously affirmed, without costs.

The trial court properly declined to set aside the verdict, giving deference to the jury's credibility findings and assessment of the evidence (*see Reed v City of New York*, 304 AD2d 1, 7 [1st Dept 2003], *lv denied* 100 NY2d 503 [2003]). The court pointed out that its own trial notes indicated that plaintiff's evidence as to her past pain and suffering was "not compelling." The jury was not required to credit plaintiff's description of

the severity of her pain, and could reasonably have found that plaintiff's claims were inconsistent with the objective medical findings. We do not find that the award of no damages for past pain and suffering deviates from what would be reasonable compensation (CPLR 5501[d]; *see Reed*, 304 AD2d at 7).

Plaintiff waived her argument that it was improper for the jury to award her no damages given the court's finding that she had sustained a serious injury under Insurance Law § 5102(d) by failing to object to the jury charge on the ground that it did not instruct the jury that it was required to award damages for past pain and suffering, and failing to object to the verdict sheet, which instructed the jury to insert "NONE" if it did not make an award for pain and suffering based on the 90/180 category of serious injury. Plaintiff also waived her argument that the verdict was inconsistent in awarding damages for lost wages but not for past pain and suffering by failing to raise it before the jury was discharged, thus preventing the court from taking

corrective action (*see Barry v Manglass*, 55 NY2d 803, 806 [1981]; *Ruiz v Summit Appliance Div*, 92 AD3d 429, 430 [1st Dept 2012]).

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

ENTERED: MAY 10, 2018

CLERK

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

6531 The People of the State of New York, Respondent, Ind. 4992/15

-against-

Nicole Shapiro,
Defendant-Appellant.

_____

Hantman & Associates, New York (Robert J. Hantman of counsel), for appellant.

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

_____

Judgment of resentence, Supreme Court, New York County (Larry R.C. Stephen, J.), rendered August 3, 2016, revoking defendant's prior sentence of a conditional discharge, and resentencing her to a term of 6 months, unanimously reversed, on the law and the facts, and the matter remitted to Supreme Court for a new resentencing hearing.

The attorney who appeared on defendant's behalf at her resentencing told the court that he was unprepared to represent her in this matter and requested an adjournment to allow the attorney who had represented her in prior proceedings to appear. On this record, counsel's request should have been granted. Accordingly, we reverse and remit for a new resentencing hearing.

In view of the foregoing, we do not reach defendant's remaining arguments.

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

ENTERED: MAY 10, 2018

CLERK

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

6532 Martin Smith, Index 152449/14
Plaintiff-Appellant,

-against-

Federal Defenders of New York, Inc., et al.,
Defendants-Respondents.

_____

Rasco, Klock, Perez & Nieto LLC, New York (Blaine H. Bortnick of counsel), for appellant.

Seyfarth Shaw LLP, New York (Stacey Bentley of counsel), for respondents.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered March 7, 2017, which granted defendants' motion for summary judgment dismissing the complaint alleging age discrimination and retaliation under the New York City Human Rights Law (City HRL), unanimously affirmed, without costs.

The motion court correctly granted summary judgment dismissing the complaint. Plaintiff, who was 81 years old when terminated, failed to raise an issue of fact whether defendants' reasons for terminating his employment were pretextual (*see Melman* v Montefiore Med. Ctr., 98 AD3d 107,113-114[1st Dept, 2012].

Defendants demonstrated legitimate, nondiscriminatory reasons for their decision. Specifically, in mid-2013, as they

awaited the budget for fiscal year 2014, defendant Federal Defenders of New York, Inc. (FDNY), was facing a fiscal crisis and budget cuts. Having already employed furloughs and layoffs of attorneys and non-attorney staff, but having not yet made cuts in the administrative staff, defendant David Patton, FDNY's Executive Director (who was in his 40's), terminated plaintiff's position. Patton explained that he had chosen plaintiff because other administrators were office managers who were crucial to the operation of branch offices. Patton felt the FDNY could get by with only administrative assistant Mao or administration officer plaintiff, and he chose Mao because she was faster and more efficient at giving him information he needed, and because the Office of Defender Services had, during an assessment of FDNY's operations in 2011, told Patton that it was very impressed" with Mao, and had not said the same of plaintiff.

Reductions in work force for economic reasons are a legitimate nondiscriminatory basis for termination of employment (*Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 516-517 [1st Dept 2016], *lv denied* 28 NY3d 902 [2016]; *Bailey*, 38 AD3d at 124).

Plaintiff argues that he was terminated prematurely, before Patton even knew the 2014 fiscal year budget, but it suffices that defendants had a good faith belief that FDNY's funding would

be reduced, and that personnel action was required (*see Kaiser v Raoul's Rest. Corp.*, 112 AD3d 426 [1st Dept 2013]). It should be noted that one of the other men terminated at about that time was age 41, the junior-most employee in the IT department. However, the approximately 70-employee FDNY opted to retain at least ten other FDNY employees age 60 and older amidst the layoffs and uncertain budget.

Plaintiff did not raise a triable issue, under the City HRL's "mixed motive standard" (*Hudson*, 138 AD3d at 514; *Williams v New York City Hous. Auth.*, 61 AD3d 62 [1st Dept 2009], *lv denied* 13 NY3d 702 [2009]; *see* Administrative Code § 8-130), whether defendants acted with an age discriminatory motive in concluding that Mao was better suited to remain as the sole branch manager or in terminating plaintiff.

Finally, the motion court properly dismissed plaintiff's retaliation claim (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312-313 [2004]; *Fletcher v Dakota, Inc.*, 99 AD3d 43, 51 [1st Dept 2012]; Administrative Code of City of NY § 8-107[7]). One month before plaintiff's departure, after he was told that he was fired, and after he had retained counsel, Patton emailed FDNY staff advising them to preserve any documents relevant to plaintiff's employment because he had alleged age discrimination, a claim Patton described as "entirely without merit."

However, the email was merely in direct response to plaintiff's counsel's request that FDNY place a "litigation hold" on any relevant documents. Moreover, even if Patton commented on the lawsuit, plaintiff failed to raise any triable issue whether such a comment amounts to an adverse employment action, i.e., "a materially adverse change in the terms and conditions of employment" (*Messinger v Girl Scouts of U.S.A.*, 16 AD3d 314, 314-315 [1st Dept 2005]).

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

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

ENTERED: MAY 10, 2018

CLERK

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

6533 Oludamilare Aina, Index 157096/15
Plaintiff-Appellant,

-against-

American University of Antigua,
Defendant-Respondent.

_____

Stewart Lee Karlin Law Group, P.C., New York (Daniel E. Dugan of counsel), for appellant.

Law Offices of Leonard A. Sclafani, New York (Leonard Sclafani of counsel), for respondent.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered April 6, 2017, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

This action, where plaintiff, a former student of defendant's medical school, alleges that he was discriminated against, was properly dismissed on the ground of forum non conveniens (*see* CPLR 327[a]; *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-479 [1984], *cert denied* 469 US 1108 [1985]). Neither party is a New York resident and the underlying conduct took place in Georgia or Antigua, where the vast majority of witnesses and documents are located. Plaintiff does not contend that New York law applies to his claim, or that Georgia or Antigua are not adequate alternative fora. The fact that defendant retains a New York firm to provide administrative

support is not sufficient to render New York an appropriate forum.

Defendant did not waive its right to challenge the New York forum by participating in the instant litigation, as its participation has been minimal. Defendant filed this motion shortly after filing its amended answer, and before plaintiff had replied to its counterclaims. Although defendant served discovery demands and participated in a scheduling conference, no discovery had yet been exchanged and there were no prior motions. It is further noted that defendant made clear in both its answer and amended answer that it intended to assert forum non conveniens as an affirmative defense, and expressly agreed to dismissal of its counterclaims on that basis.

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

ENTERED: MAY 10, 2018

CLERK

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

6534 The People of the State of New York, Respondent, Ind. 3631/14 3751/15

-against-

Antonio Armstrong, Defendant-Appellant.

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

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

Appeals having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Eduardo Padro, J.), rendered December 1, 2015 and a judgment of the same court (Edwina Richardson-Mendelson, J.), rendered December 14, 2016,

Said appeals 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: MAY 10, 2018

CLERK

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

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

6535 Armando Santos, Index 301899/13
Plaintiff-Appellant,

-against-

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

_____

Sim & Record, LLP, Bayside (Sang J. Sim of Counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Max O. McCann of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered January 9, 2017, which granted defendants' motion for summary judgment dismissing the complaint, and denied plaintiff's cross motion for partial summary judgment and for leave to amend the complaint, unanimously affirmed, without costs.

Dismissal of the claims alleging false arrest, false imprisonment, assault and battery was proper since defendants established that the warrantless arrest was based upon probable cause to believe that plaintiff committed the subject burglary. Plaintiff's DNA was discovered on a crowbar left at the crime scene, and the victim stated that she neither knew plaintiff nor authorized him to enter her apartment (*see e.g. People v Ainsley*, 132 AD3d 1007 [2d Dept 2015], *lv denied* 26 NY3d 1142 [2016]). While the Office of the Medical Examiner reported that a mixture

of DNA had been recovered from the crowbar, it determined the most likely DNA profile of the major male contributor, and that profile matched defendant's DNA profile, which was included in this state's data base due to a prior conviction.

The claim for malicious prosecution was also not viable. The grand jury's indictment created a presumption of probable cause, which could be overcome only with a showing that it was produced by fraud, perjury, the suppression of evidence, or other police conduct undertaken in bad faith (*see Colon v City of New York*, 60 NY2d 78, 82-83 [1983]).

Leave to amend the complaint to further allege that probable cause was lacking would have been futile (*see Triad Intl. Corp. v Cameron Indus., Inc.*, 122 AD3d 531, 532 [1st Dept 2014]).

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

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

ENTERED: MAY 10, 2018

CLERK

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

6536 In re Rushane P.,
Petitioner-Appellant,

-against-

Boris L.R.,
Respondent-Respondent.

_____

Sanctuary for Families, New York (Melina Sfakianaki of counsel), and Danielle S. Moore, New York, for appellant.

Heslop & Kalba, LLP, Brooklyn (Garfield A. Heslop of counsel), for respondent.

_____

Order, Family Court, New York County (J. Machelle Sweeting, J.), entered on or about August 16, 2017, which, to the extent appealed from, dismissed the family offense petition with prejudice, unanimously reversed, on the law, without costs, and the petition reinstated.

Family Court erred in dismissing the petition, which alleged family offenses that occurred in New York, Pennsylvania, and Jamaica, on the ground that the only incident alleged to have occurred in New York happened in 2014, three years before the filing of the petition. The court's subject matter jurisdiction was not "limited by geography"; the court could have made findings of fact as to incidents that occurred outside its jurisdiction (*Matter of Opportune N. v Clarence N.*, 110 AD3d 430, 430-31 [1st Dept 2013]; *see Matter of Richardson v Richardson*, 80

AD3d 32, 37-38 [2d Dept 2010]). Moreover, "a court shall not ... dismiss a petition[] solely on the basis that the acts or events alleged are not relatively contemporaneous with the date of the petition" (Family Court Act § 812[1]; *see Matter of Monwara G. v Abdul G.*, 153 AD3d 1174, 1175 [1st Dept 2017]; *Matter of Opray v Fitzharris*, 84 AD3d 1092, 1093 [2d Dept 2011]). We note, moreover, that petitioner contends that the court erroneously found that the most recent incident alleged (February 2017) took place in Jamaica, rather than in New York, where petitioner had been residing since August 2016.

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

ENTERED: MAY 10, 2018

CLERK

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

6539 AXA Equitable Life Insurance Company, Index 600635/10
Plaintiff-Respondent,

-against-

Sara Dobner 2005 Lechaim Irrevocable Life Insurance Trust, et al.,
Defendants-Appellants.

_____

Robinson Brog Leinwand Greene Genovese & Gluck, P.C., New York (Sheldon Eisenberger of counsel), for appellants.

Krantz & Berman LLP, New York (Larry H. Krantz of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Gerald Lebovits, J.), entered January 20, 2017, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment declaring the subject insurance policy void ab initio, on its cause of action for rescission, and dismissing the defendants' counterclaim for breach of contract, unanimously affirmed, with costs.

Plaintiff established prima facie that the financial representations on the application by the settlor of defendant trust (Mrs. Dobner) for life insurance were false and material (*see* Insurance Law § 3105; *Kroski v Long Is. Sav. Bank*, 261 AD2d 136, 137 [1st Dept 1999]). Mrs. Dobner's son testified that his mother's net worth was "substantially less than" $12 million,

that his parents had no interest in real estate partnerships and they did not have $5 million in IRAs, stocks, and annuities. Plaintiff's underwriter testified that she was guided in her underwriting by plaintiff's February 2006 Financial Underwriting Guidelines, in effect when the application was reviewed, and that she relied on the representations in the application in reaching her underwriting decision (*see Ashkenazi v AXA Equid. Life Ins. Co.*, 155 AD3d 583, 584 [1st Dept 2017]).

In opposition, defendants failed to raise an issue of fact. Mrs. Dobner's son's claimed belief that a question about net assets referred to family assets does not controvert the fact that the financial information on the application was false. Nor did defendants raise an issue of fact as to whether plaintiff issued high-value policies that did not comport with its guidelines.

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

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

ENTERED: MAY 10, 2018

CLERK

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

6540 Lyudmilla Tomashevskaya, Index 153705/13
Plaintiff-Appellant,

-against-

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

_____

Law Office of Yuriy Prakhin, P.C., Brooklyn (Yuriy Prakhin of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Susan Paulson of counsel), for respondents.

_____

Order, Supreme Court, New York County (W. Franc Perry, J.), entered October 13, 2017, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff alleges that she tripped over a raised cobblestone in the area near the Charging Bull statue at Bowling Green. The cobblestone area is a "pedestrian walk or path," falling within the definition of "sidewalk" in Administrative Code of City of NY § 7-201(c)(1)(b). Because the City demonstrated that it did not receive prior written notice of the defective condition, it cannot be held liable (*see Katz v City of New York*, 87 NY2d 241, 243 [1995]; Administrative Code § 7-201[c][2]).

Furthermore, plaintiff did not submit any evidence sufficient to raise a triable issue as to whether the City was

affirmatively negligent in creating the uneven condition (*see Yarborough v City of New York*, 10 NY3d 726, 728 [2008]). Plaintiff's expert opined that it looked as if the cobblestone had been imbedded improperly, but plaintiff presented no evidence concerning when the cobblestone area was installed, much less evidence sufficient to demonstrate that the City performed work in the area that immediately resulted in the existence of the alleged uneven condition of the cobblestones (*see Oboler v City of New York*, 8 NY3d 888 [2007]; *Bielecki v City of New York*, 14 AD3d 301 [1st Dept 2005]).

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

ENTERED: MAY 10, 2018

CLERK

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

6541 In re the State of New York, ex rel. Todd Giffen, Petitioner-Appellant, Index 250504/17

-against-

Dr. Amy Hoffman, etc., Respondent-Respondent.

_____

Marvin Bernstein, Mental Hygiene Legal Service, New York (Sadie Z. Ishee of counsel), for appellant.

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

_____

Judgment (denominated an order), Supreme Court, Bronx County (Joseph E. Capella, J.), entered on or about September 12, 2017, to the extent it denied the petition for a writ of habeas corpus, unanimously reversed, on the law, without costs, and the petition granted.

In light of petitioner's release from involuntary confinement pursuant to Mental Hygiene Law (MHL) article 9, this appeal is moot, as petitioner concedes. However, we reach the merits because the appeal raises a substantial and novel issue that is likely to recur yet typically evades review (*see Mental Hygiene Legal Servs. v Ford*, 92 NY2d 500, 505-506 [1998]; *see also People ex rel. DeLia v Munsey*, 26 NY3d 124, 129 n 2 [2015]; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-

715 [1980]). We reject respondent's argument that the issue raised in this proceeding is unlikely to recur (*see e.g. State of N.Y. ex rel. Karur v Carmichael*, 41 AD3d 349, 350 [1st Dept 2007]).

As respondent now concedes, the letter submitted by petitioner on the day he was involuntary admitted to Lincoln Hospital reasonably conveyed that he sought a "hearing on the question of need for involuntary care and treatment" (MHL § 9.31[a]), and should have been forwarded to the appropriate court "forthwith" (*id.* § 9.31[b]. The handwritten letter says, "I am falsely imprisoned and deprived of liberty," in violation of certain United States Supreme Court decisions, "I demand a jury trial immediately," and "I demand my lawyer." To the extent the court found the request in this letter insufficiently clear or formal, because there were other, unrelated complaints raised in the letter or for any other reason, this was error. The letter should have been interpreted reasonably to effectuate the

statute's purpose of allowing patients to challenge their involuntary confinement on an expedited basis, as required by MHL § 9.31.

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

ENTERED: MAY 10, 2018

CLERK

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

6542 The People of the State of New York, Respondent, Ind. 5098/13

-against-

Miguel Rodriguez, Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered November 25, 2015, convicting defendant, upon his plea of guilty, of grand larceny in the third degree, and sentencing him to a term of 2⅓ to 7 years, unanimously affirmed.

The court providently exercised its discretion in denying defendant's request for reassignment of counsel at sentencing, and we find no basis for a new sentencing proceeding. Defendant's allegations about the deterioration of his relationship with counsel were insufficiently specific to require the court to conduct a "minimal inquiry" into the nature of the disagreement (*see People v Porto*, 16 NY3d 93, 101 [2010]; *People v Sides*, 75 NY2d 822, 824-825 [1990]). Defendant's allegations were vague and generalized, and therefore insufficient to show the court that he had a seemingly serious complaint about the

representation (*see e.g. People v Stokes*, 149 AD3d 510 [1st Dept 2017], *lv denied* 29 NY3d 1087 [2017]; *People v Colon*, 145 AD3d 562 [1st Dept 2016], *lv denied* 29 NY3d 947 [2017]). In any event, the court engaged in the requisite inquiry by allowing defendant the opportunity to fully explain his complaints about counsel (*see People v Nelson*, 7 NY3d 833, 834 [2006]; *Colon*, 145 AD3d at 562).

We perceive no basis for reducing the sentence. Defendant's claim that, at the time of the plea, the court misstated the law relating to failure or inability to make restitution is unpreserved, and in any event does not warrant a sentence reduction.

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

ENTERED: MAY 10, 2018

CLERK

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

6543 Brian M. DeLaurentis, Index 114259/11
Plaintiff-Appellant,

-against-

Eric Malley, et al.,
Defendants-Respondents.

_____

Brian M. DeLaurentis, P.C., New York (Brian M. DeLaurentis of counsel), for appellant.

Gordon & Rees, LLP, New York (Jennifer A. Guidea of counsel), for respondents.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered on or about October 12, 2016, which denied plaintiff's motion for summary judgment pursuant to CPLR 3212, and granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

In this action to recover a broker's fee from defendant Malley on account of a lost sale, the IAS court properly determined that plaintiff, a licensed real estate broker, did not qualify as a third-party beneficiary under the RLS Universal Co-Brokerage Agreement/Rules and Regulations (the Co-Brokerage Agreement) according to its plain terms (*State of Cal. Pub. Employee's Retirement Sys. v Shearman & Sterling*, 95 NY2d 427, 434-435 [2000]). Even if plaintiff was entitled to sue defendant (also a licensed real estate broker) under the agreement,

plaintiff's allegations of breach grounded in, among other things, defendants' purported failure to disclose an offer and in making an unauthorized and fraudulent counteroffer, are flatly contradicted by the record. The IAS court properly dismissed plaintiff's breach of the implied covenant claim, which "may not be used as a substitute for a nonviable claim of breach of contract" (*StarVest Partners II v Emportal, Inc.*, 101 AD3d 610, 613 [1st Dept 2012]).

The claim for tortious interference with a business opportunity/prospective advantage also fails in light of plaintiff's unsupported factual allegations. On the law, the claim fails because (1) the conduct complained of was not directed specifically towards a third-party (*Arnon Ltd. [IOM] v Beierwaltes*, 125 AD3d 453, 454 [1st Dept 2015] and because (2) none of the alleged acts fell within the definition of "wrongful means" (*id.*; *Carvel Corp. v Noonan*, 3 NY3d 182, 191 [2004]).

Plaintiff's claim for housing discrimination under Executive Law § 296(5)(c)(1) was also properly dismissed. Plaintiff has failed to make a prima facie showing that either he or his client were discriminated against on account of their sexual orientation (*see McDonnell Douglas Corp. v Green*, 411 US 792, 802 [1973]; *Sayeh v 66 Madison Ave. Apt. Corp.*, 73 AD3d 459, 461 [1st Dept 2010]). There are no facts to support a finding that defendant

denied plaintiff any services to which he was entitled, and plaintiff has failed to successfully raise an inference of discrimination (*id.*; *Berner v Gay Men's Health Crisis*, 295 AD2d 119, 119 [1st Dept 2002]).

The IAS court also correctly determined that there was no vicarious liability on the part of defendant Sotheby's in light of defendant Malley's lack of liability to plaintiff.

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

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

ENTERED: MAY 10, 2018

CLERK

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

6544- Index 651147/14
6545- 651148/14
6546- 651149/14
6547-
6548-
6549N Gerald Rosengarten,
Plaintiff-Respondent,

-against-

Richard Born, et al.,
Defendants-Appellants.

- - - - -

Ruandro LLC,
Plaintiff-Respondent,

-against-

Richard Born, et al.,
Defendants-Appellants.

- - - - -

Gerald Rosengarten, etc.,
Plaintiff-Respondent,

-against-

Richard Born, et al.,
Defendants-Appellants,

Three on Third, LLC,
Nominal Defendant.

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Epstein Becker & Green, P.C., New York (Robert D. Goldstein of counsel), for appellants.

Flemming Zulack Williamson Zauderer LLP, New York (Richard A. Williamson of counsel), for respondents.

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Orders, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 19, 2017, which, inter alia, granted

plaintiffs' motion to strike defendants' pleadings, unanimously affirmed, with costs. Orders, same court and Justice, entered September 6, 2017, which, insofar as appealed from, denied defendants' motion to renew, unanimously affirmed, with costs.

The motion court's decision to strike, based on a finding that defendants' conduct with respect to its discovery obligations was willful and contumacious and without reasonable excuse, was a proper exercise of its discretion (*see e.g. Spira v Antoine 191 Ad2d 219 [1st Dept 1993];* CPLR 3126). The record amply demonstrates that from the start of the discovery process defendants engaged in a pattern of willful and contumacious conduct by, inter alia, disregarding court orders despite being repeatedly warned of the ramifications of doing so, providing discovery responses that were unduly burdensome and without reviewing them, and otherwise failing to meaningfully comply with the discovery requests.

The court also properly denied defendants' motion to renew. Even assuming that defendants asserted new facts that were not offered on the prior motion, the court providently determined that those facts would not change the prior determination (see *Fulton Mkt. Retail Fish Inc. v Todtman, Nachamie, Spizz & Johns, P.C.*, 158 AD3d 502 [1st Dept 2018]; CPLR 2221[e][2]).

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

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

ENTERED: MAY 10, 2018

CLERK

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

6550N June M. Pascocello, Index 156445/14
Plaintiff-Respondent, 153494/14

-against-

Augustine Jibone, et al.,
Defendants-Appellants.

- - - - -

Carole Antouri,
Plaintiff-Respondent,

-against-

Augustine Jibone, et al.,
Defendants-Appellants.

- - - - -

[And a Third-Party Action}

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Picciano & Scahill P.C., Bethpage (Andrea E. Ferrucci of counsel), for appellants.

Roth & Roth LLP, New York (Elliot Shields of counsel), for June Pascocello, respondent.

Abend & Silber, PLLC, New York (Josh Silber of counsel), for Carole Antouri, respondent.

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Order, Supreme Court, New York County (Paul A. Goetz, J.), entered December 5, 2017, which, in these related actions for personal injuries sustained in a motor vehicle accident, granted the joint motion of plaintiffs to preclude the testimony of defendants' biomechanical engineer Dr. Kevin Toosi at trial to the extent that his opinion is based on certain photographic evidence, unanimously affirmed, without costs.

An expert's opinion "must be based on facts in the record or personally known to the witness" (*Hambsch v New York City Tr. Auth.*, 63 NY2d 723, 725 [1984] [internal quotation marks omitted]; *see Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]), and in the absence of such record support, an expert's opinion is without probative force (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]). Here, Supreme Court properly precluded Dr. Toosi from offering an opinion based on photographs for which no proper foundation had been established.

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

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

ENTERED: MAY 10, 2018

CLERK