SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 17, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Tom, Mazzarelli, Kern, Singh, JJ.

6599-
6599A The People of the State of New York, Ind. 46/14
Respondent, 2295/14

-against-

Malik Ellis,
Defendant-Appellant.

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

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

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Judgments, Supreme Court, Bronx County (Michael A. Gross, J. at hearing; Robert E. Torres, J. at pleas; Alvin Yearwood, J. at sentencing), rendered June 9, 2016, convicting defendant of robbery in the third degree and attempted promoting prison contraband in the first degree, and sentencing him, as a second felony offender, to an aggregate term of 2½ to 5 years, unanimously affirmed.

Defendant made a valid waiver of his right to appeal. The court's oral colloquy with defendant concerning the waiver was

sufficient (*see People v Bryant*, 28 NY3d 1094 [2016]), and the written waiver did not contain any of the language that this Court has previously cited as automatically rendering a waiver invalid (*see People v Thomas*, 158 AD3d 434 [1st Dept 2018]). The waiver forecloses review of defendant's suppression and excessive sentence claims.

In the alternative, we find that the court properly denied defendant's suppression motion. Notwithstanding the deficiencies in the evidence explaining how defendant came to be arrested by a nontestifying officer, the record is clear that by the time defendant made statements and was identified in a lineup, he was in the custody of officers who had undisputedly acquired probable cause more than a week before the arrest (*see People v Colon*, 39 AD3d 233, 234 [1st Dept 2007], *lv denied* 9 NY3d 874 [2007]), and the hearing court's ruling may be read as encompassing this theory. We also perceive no basis for reducing the sentence.

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

ENTERED: MAY 17, 2018

CLERK

Acosta, P.J., Tom, Mazzarelli, Kern, Singh, JJ.

6601-
6602 In re Melody Marie A. (Anonymous),

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

Dana B.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

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

Zachary W. Carter, Corporation Counsel, New York (Ellen Ravitch of counsel), for respondent.

Larry S Bachner, New York, attorney for the child.

_____

Order of disposition, Family Court, Bronx County (Carol R. Sherman, J.), entered on or about May 24, 2016, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about March 14, 2016, finding, after a hearing, that respondent mother neglected the subject child, unanimously affirmed, without costs. Appeal from the fact-finding order unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

Petitioner made a prima facie showing of neglect by submitting evidence demonstrating that the injuries sustained by

the child would not ordinarily have been sustained except by reason of the acts or omissions of the mother or the child's uncle, who were both responsible for the child's care (*see* Family Ct Act § 1046[b][ii]; *Matter of Philip M.*, 82 NY2d 238, 243 [1993]; *Matter of Nyheem E. [Jamila G.]*, 134 AD3d 517, 518 [1st Dept 2015]). Petitioner presented the testimony of an expert in pediatric abuse, who testified that the child's injuries -- including hematomas on her head and under her eye, bleeding inside the ear, and bleeding under the scalp from hair pulling -- would ordinarily not have been sustained except by reason of a caretaker's acts or omissions (Family Court Act § 1046[a][ii]). Since both the mother and uncle were caretakers, petitioner was not required to establish whether the mother or the uncle inflicted the injuries, or whether they did so together (*see Nyheem E.* at 518; *Matter of Radames S. [Maria I.]*, 112 AD3d 433, 434 [1st Dept 2013]).

The burden having shifted to the mother, she failed to rebut petitioner's showing, and her denial of fault was insufficient to rebut the agency's prima facie case (*Nyheem E.* at 518). Family Court's determination that the mother's account, which was replete with inconsistencies, was not credible is entitled to great deference (*see Matter of Jared S. [Monet S.]*, 78 AD3d 536 [1st Dept 2010], *lv denied* 16 NY3d 705 [2011]).

The agency's evidence also showed that the mother medically neglected the child by failing to obtain prompt medical attention for her, even though she knew that the child was bleeding and badly bruised (*see* Family Court Act 1012[f][i][A]; *Nyheem E.* at 518).

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

ENTERED: MAY 17, 2018

CLERK

Acosta, P.J., Tom, Mazzarelli, Kern, Singh, JJ.

6603 Theresa A. Cerio, Index 123431/02
Plaintiff-Appellant, 591294/03

-against-

Jonathan Carrington, et al.,
Defendants,

The City of New York,
Defendant-Respondent.

- - - - -

[And a Third-Party Action]

_____

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

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

_____

Order, Supreme Court, New York County (James E. d'Auguste, J.), entered November 23, 2015, which, insofar as appealed from as limited by the briefs, granted the motion of defendant City of New York for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Plaintiff was injured when defendant Carrington, an intoxicated driver, attempted to make an illegal u-turn and collided with a taxicab. Carrington's vehicle then careened onto the sidewalk and struck plaintiff.

The City established its prima facie burden of demonstrating that the intersection where the accident occurred was reasonably

safe, and that it did not have any prior complaints about motorists making illegal u-turns. The City was not required to continually reevaluate the signs at the intersection absent proof that it had become unsafe (*see Chunhye Kang-Kim v City of New York*, 29 AD3d 57, 59 [1st Dept 2006]).

In opposition, plaintiff failed to raise an issue of fact. Given the absence of any history of similar accidents at the subject location, plaintiff's expert's conclusory opinion that a "no u-turn" sign should have been installed lacked probative value (*see Diakite v City of New York*, 42 AD3d 338, 339 [1st Dept 2007] *lv denied* 9 NY3d 811 [2007]).

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 17, 2018

CLERK

Acosta, P.J., Tom, Mazzarelli, Kern, Singh, JJ.

6604 Anna Lvovsky, Index 300055/14
Plaintiff-Respondent,

-against-

Gennady Lvovsky,
Defendant-Appellant.

_____

Sol Kodsi, New York, for appellant.

The Wallack Firm, P.C., New York (Michael Belmont of counsel), for respondent.

_____

Order, Supreme Court, New York County (Tandra L. Dawson, J.), entered November 18, 2016, which, insofar as appealed from as limited by the briefs, granted plaintiff wife's motion for arrears on a pendente lite order to the extent of directing defendant husband to pay arrears in the amount of $58,071.90, unanimously affirmed, without costs.

Contrary to the husband's contention, the release of disputed funds from escrow to the wife by Queens County Supreme Court did not absolve him of his financial obligations under the pendente lite order. "[C]ourts may not reduce or cancel any [child support] arrears that have accrued" (*Matter of Dox v Tynon*, 90 NY2d 166, 168 [1997]), and may only modify or annul pendente lite maintenance upon a show of good cause by the defaulting party (*id.* at 173). Furthermore, pendente lite

payments should be paid from the payor's income, not marital funds (*see e.g. Azizo v Azizo*, 51 AD3d 438, 440 [1st Dept 2008]). Accordingly, the husband's claim that the escrow funds in the wife's possession are his separate property is properly resolved in the determination of the parties' financial issues ancillary to the divorce, and any restitution can be made at that juncture.

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

ENTERED: MAY 17, 2018

CLERK

Acosta, P.J., Tom, Mazzarelli, Kern, Singh, JJ.

6605 The People of the State of New York, Respondent, Ind. 1496/11

-against-

Victor Mena, Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (T. Charles Won of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Troy K. Webber, J.), rendered November 16, 2015, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him to a term of 22 years, unanimously modified, on the law, to the extent of vacating the sentence and remanding the matter for a youthful offender determination, and otherwise affirmed.

The court properly denied defendant's motion to suppress statements. The record supports the court's factual determination that defendant's comprehension of English was sufficient to enable him to understand his *Miranda* rights, and that his confession was otherwise voluntary (*see People v Jin Cheng Lin*, 26 NY3d 701, 725-727 [2016]; *People v Williams*, 62 NY2d 285, 289 [1984]). Although defendant's first language was Spanish, a bilingual detective asked him, in Spanish, if he was

comfortable speaking in English, and he replied that he was. Throughout the interview, defendant gave no indication that he did not understand the detectives' questions or needed any assistance from the bilingual detective. Defendant also conversed with the detectives in English at various other times, before and after this interview.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Evidence that defendant stabbed the victim in the side, after his codefendants had inflicted stab wounds that ultimately proved fatal, and grabbed the victim by throat, demanding to know whether the victim was a member of a rival gang, supported the conclusion that he shared his codefendants' intent to cause, at least, serious physical injury (*see People v Allah*, 71 NY2d 830, 832 [1988]).

The People concede that defendant is entitled to an express youthful offender determination, even though defense counsel

stated that he was not asking for such treatment.

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

ENTERED: MAY 17, 2018

CLERK

Acosta, P.J., Tom, Mazzarelli, Kern, Singh, JJ.

6606-
6606A

Index 850236/13

U.S. Bank National Association,
as Trustee for J.P. Morgan Mortgage
Trust 2006-A6,
Plaintiff-Appellant,

-against-

John M. Beymer, also known as
John Beymer, et al.,
Defendants-Respondents,

Board of Managers of 50 Pine Street
Condominium-50 Pine Street Associates,
LLC, et al.,
Defendants.

Parker Ibrahim & Berg LLC, New York (Ben Z. Raindorf of counsel), for appellant.

Sanders, Gutman & Brodie, P.C., Brooklyn (D. Michael Roberts of counsel), for respondents.

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered February 1, 2017, which, to the extent appealed from as limited by the briefs, denied the motion for summary judgment of plaintiff U.S. Bank National Association, as Trustee for J.P. Morgan Mortgage Trust 2006-A against defendants John M. Beymer (Beymer) and Barbara Bruno (Bruno) (together, the individual defendants), and granted the individual defendants' cross motion to dismiss the complaint without prejudice, unanimously affirmed, with costs. Appeal from order, entered on or about August 18,

2016, unanimously dismissed, without costs, as abandoned.

The complaint was properly dismissed because plaintiff failed to establish that it gave proper notice of the foreclosure action to the individual defendants under RPAPL § 1304 as the notice of default was not mailed to the individual defendants' correct address.

Plaintiff's main argument – that RPAPL § 1304 is inapplicable because the loan at issue was not a "home loan" – is not reviewable because it has been raised for the first time on appeal (*Nexbank, SSB v Soffer*, 144 AD3d 457, 460 [1st Dept 2016]; *compare HSBC Bank USA, N.A. v Ozcan*, 154 AD3d 822 [2d Dept 2017]).

Regardless, even assuming the inapplicability of RPAPL § 1304, the order would still be affirmed because plaintiff also failed to establish that it provided notice of default to the individual defendants prior to bringing the 2013 foreclosure action in the manner required by the loan documents (*Westchester Fed. Sav. & Loan Assn. v Secor Lake Camp*, 37 AD2d 615, 616 [2d Dept 1971]). It is undisputed that plaintiff did not send the notices related to this action to the individual defendants at their current residence in California, of which plaintiff had actual knowledge.

Further, while the IAS Court did not address the issue,

plaintiff's summary judgment motion could have been properly denied, and the individual defendants' dismissal motion granted, based on the pendency of two simultaneous foreclosure actions in contravention of RPAPL § 1301. As it is undisputed that the 2008 foreclosure action was pending at the time the 2013 foreclosure action was brought, and that plaintiff did not seek leave of court before doing so, the complaint was subject to dismissal for this reason alone (*Aurora Loan Servs., LLC v Spearman*, 68 AD3d 796, 796-797 [2d Dept 2009]). Plaintiff's arguments contesting the applicability of RPAPL § 1301(3) – most notably, because the 2008 foreclosure action was dismissed prior to the relevant motion practice in the 2013 foreclosure action – are not grounded in legal support or authority.

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 17, 2018

CLERK

Acosta, P.J., Tom, Mazzarelli, Kern, Singh, JJ.

6609 The People of the State of New York, Respondent, Ind. 5657/14

-against-

Tyrone Roberson, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Meghan Callagee O'Brien of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered May 26, 2016, convicting defendant, upon his plea of guilty, of attempted robbery in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 12 years to life, unanimously affirmed.

Defendant's plea was knowingly, intelligently, and voluntarily entered. Furthermore, the court providently exercised its discretion in denying defendant's motion to withdraw the plea (*see People v Frederick*, 45 NY2d 520 [1978]).

When, during the thorough plea colloquy, defendant claimed to be under duress, the court refused to accept the plea. Only after defendant insisted that he wanted to plead guilty did the court accept the plea, after further inquiry to ensure that defendant was in fact voluntarily pleading guilty. In response to a question about whether his claim of duress had been an

effort to "dirty" the record, defendant acknowledged that this was true. We also note that defendant had five prior felony convictions and thus was "no novice to the criminal justice system" (*People v Goldstein*, 12 NY3d 295, 301 [2009]).

The record does not support defendant's assertion that his counsel failed to make a sufficient investigation into the facts, including the potential defense set forth in defendant's statements to the police. On the contrary, counsel acknowledged receipt of the discovery materials earlier in the week of the suppression hearing, he conferred with defendant before the hearing, and he reviewed with defendant a videotape of the incident.

Defendant's plea allocution did not negate any elements of the attempted robbery to which he pleaded. At the plea proceeding, defendant did not cite to his out-of-court statements, or to anything else to suggest that he had a viable defense (*see People v Pastor*, 28 NY3d 1089, 1090-1091 [2016]). Unlike the situation in *People v Mox* (20 NY3d 936 [2012]), there was nothing in the actual plea allocution that triggered a duty to inquire into a potential defense.

At sentencing, defendant did not establish any basis for withdrawing the plea. When, in connection with the plea withdrawal motion, defendant sought to obtain a recorded phone call, the court correctly concluded that the call would not be exculpatory given the facts of the case.

Defendant made a valid and enforceable waiver of his right to appeal. The oral colloquy sufficiently ensured that defendant understood that the right to appeal is separate from the other trial rights automatically forfeited by pleading guilty, and it met or exceeded the minimum standards for such a colloquy (*see People v Bryant*, 28 NY3d 1094 [2016]). Defendant also signed an appropriate written waiver, and the court confirmed that defendant had discussed the waiver with defense counsel.

The waiver forecloses review of defendant's challenge to the court's suppression ruling. As an alternative holding, we find that the People established the voluntariness of defendant's statements to the police.

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

ENTERED: MAY 17, 2018

CLERK

Acosta, P.J., Tom, Mazzarelli, Kern, Singh, JJ.

6610 The People of the State of New York, Ind. 3401/14
Respondent,

-against-

Rondell Waring, also known as
Rondel Waring,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Eve Kessler 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 (Melissa Jackson, J.), rendered July 14, 2016,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive, It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

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

ENTERED: MAY 17, 2018

CLERK

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

Acosta, P.J., Tom, Mazzarelli, Kern, Singh, JJ.

6612 PL, etc., et al., Index 14040/04
Plaintiffs-Respondents,

-against-

506-510 Associates, LLC, Proto Realty Management Corp., et al.,
Defendants-Respondents,

Compliance Inspection Service, LLC,
Defendant,

510 W. 150th Street, et al.,
Defendants-Appellants.

_____

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Angela Lurie Milch of counsel), for appellants.

Sullivan Papain Block McGrath & Cannavo P.C., New York (Stephen G. Glasser of counsel), for PL and Lucia G., respondents.

Leahey & Johnson, P.C., New York (Michael G. Dempsey of counsel), for 506-510 Associates, LLC and Proto Realty Management Corp., respondents.

Wood Smith Henning & Berman LLP, New York (David H. Larkin of counsel), for Asbestway Abatement Corp., respondent.

_____

Order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered on or about April 18, 2017, which denied defendants 510 W. 150th Street and Dalan Management Associates, Inc.'s motion for summary judgment dismissing the complaint and all cross claims against them, unanimously affirmed, without costs.

Defendants failed to establish prima facie that they acted

reasonably under the circumstances to, inter alia, timely remediate the lead-based paint condition in plaintiffs' apartment and/or to move the infant plaintiff to another apartment based upon the violations that existed at the time that defendants took control of the building (*see* Administrative Code of City of NY § 27-2056.3; *Ortiz v Gun Hill Mgt., Inc.*, 81 AD3d 512 [1st Dept 2011]).

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

ENTERED: MAY 17, 2018

CLERK

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

6613 Jonathan Bloostein, et al., Index 651242/12
Plaintiffs,

-against-

Morrison Cohen, LLP, et al.,
Defendants.
- - - - -
Morrison Cohen, LLP, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Brown Rudnick LLP,
Third-Party Defendant-Appellant.
- - - - -
[And a Fourth-Party Action]

_____

Lewis Brisbois Bisgaard & Smith LLP, New York (Jamie R. Wozman of counsel), for appellant.

Ingram Yuzek Gainen Carroll & Bertolotti, LLP, New York (David Ebert of counsel), for respondents.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered July 12, 2016, which, to the extent appealed from, denied third-party defendant Brown Rudnick LLP's motion to dismiss the contribution claim against it with respect to its issuance of a tax opinion letter, unanimously affirmed, with costs.

This dispute concerns a tax opinion letter sent by Brown Rudnick to plaintiff investors. The letter allegedly misstated the trigger of a default that would terminate the tax benefits that were a purpose of the underlying transaction. The third-

party complaint sufficiently pleads causation by alleging that the tax opinion letter was a contributing factor in plaintiffs' injury; the alleged misstatement need not be the sole proximate cause of the injury (*see Schauer v Joyce*, 54 NY2d 1, 5 [1981]). We reject Brown Rudnick's argument that the purpose and content of the tax opinion letter were limited to the initial tax consequences of the transaction; plaintiffs' concern was in the continuing viability of the tax benefits. Accorded the benefit of every favorable inference, the allegations that plaintiffs relied on the tax opinion letter and would not have entered into the underlying transaction absent the letter's solitary reference to the wrong default trigger are sufficient to withstand dismissal.

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

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

ENTERED: MAY 17, 2018

CLERK

Acosta, P.J., Tom, Mazzarelli, Kern, Singh, JJ.

6614 The People of the State of New York, Ind. 5411/13
Respondent,

-against-

Latanya Jones,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Alexander Michaels 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 (Ronald A. Zweibel, J. at plea; Daniel P. FitzGerald, J. at sentence), rendered December 18, 2014,

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

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

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

ENTERED: MAY 17, 2018

CLERK

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

Acosta, P.J., Tom, Mazzarelli, Kern, Singh, JJ.

6615 In re Aston Treasure, etc. Index 92234/07

- - - - -

Ben Treasure,
Petitioner-Respondent,

-against-

Thelma Treasure,
Respondent-Appellant.

_____

Tilem & Associates, P.C., White Plains (Peter H. Tilem of counsel), for appellant.

Dealy, Silberstein & Braverman LLP, New York (Laurence J. Lebowitz of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered on or about June 21, 2017, which granted respondent's motion to vacate a settlement agreement, unanimously affirmed, with costs.

The court correctly concluded that appellant, guardian of the incapacitated person (IP) before the IP's death, was authorized, after the IP's death, to pay only reasonably anticipated administrative expenses of the guardianship and that

all other assets passed to the IP's estate (*see Matter of Shannon*, 25 NY3d 345 [2015]). Thus, appellant lacked authority to make payment to respondent from the IP's estate in exchange for his waiver of any claim to further distribution from the estate.

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

ENTERED: MAY 17, 2018

CLERK

Acosta, P.J., Tom, Mazzarelli, Kern, Singh, JJ.

6617-
6618 In re Commodore Construction Corp., Index 653859/16
651969/15
Petitioner-Appellant,

-against-

The Contract Dispute Resolution Board
of the City of New York, et al.,
Respondents-Respondents.

- - - - - -

Commodore Construction Corp.,
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

- - - - - -

[And Third-Party Actions]

_____

Cohen Seglias Pallas Greenhall & Furman, P.C., New York (Carol A. Sigmond of counsel), for appellant.

Tynia Richard, New York, for Contract Dispute Resolution Board of the City of New York, respondent.

Zachary W. Carter, Corporation Counsel, New York (Jeremy W. Shweder of counsel), for the City of New York Department of Parks and Recreation and the City of New York, respondents.

_____

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered November 10, 2016, denying Commodore Construction Corp.'s petition to annul a determination of respondent Contract Dispute Resolution Board (CDRB), dated March 22, 2016, which granted respondent Department of Parks and Recreation's (DPR) motion to dismiss certain claims as time-barred, and dismissing

the proceeding brought pursuant to CPLR article 78, and order, same court and Justice, entered April 20, 2017, which denied Commodore's motion for leave to amend the complaint in the plenary action, unanimously affirmed, without costs.

In the article 78 proceeding, the court correctly found that CDRB's determination that Commodore's claims are time-barred had a rational basis (*see generally Matter of Beck-Nichols v Bianco*, 20 NY3d 540, 559 [2013]). The contract governing the construction project required Commodore to file a notice of dispute within 30 days after nonparty Hill International, Inc. issued a determination related to any of the contractually enumerated subjects, such as additional work, so long as the determination met certain requirements, including being clearly stated in writing. CDRB rationally found that Hill's determinations satisfied those requirements. However, Commodore failed to file notices of dispute within 30 days after receiving the determinations. Any subsequent course of conduct by the parties did not toll the contractual limitations period (*see e.g. Gertler v Goodgold*, 66 NY2d 946 [1985], citing *Matter of Lubin v Board of Educ. of City of N.Y.*, 60 NY2d 974 [1983], *cert denied* 469 US 823 [1984]; *Matter of Pronti v Albany Law School of Union Univ.*, 301 AD2d 841 [3d Dept 2003], *lv denied* 100 NY2d 509

[2003]; *Matter of Cauldwest Realty Corp. v City of New York*, 160 AD2d 489, 491 [1st Dept 1990]).

The court properly denied Commodore's motion for leave to amend the complaint to assert claims similar to those that had already been rejected in the article 78 proceeding (*see Sanders v Grenadier Realty, Inc.*, 102 AD3d 460 [1st Dept 2013]). Moreover, the motion is an improper attempt to evade the contractual requirement that such claims be raised through the contract dispute process (*see Acme Supply Co., Ltd. v City of New York*, 39 AD3d 331 [1st Dept 2007], *lv denied* 12 NY3d 701 [2009]).

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

ENTERED: MAY 17, 2018

CLERK

Acosta, P.J., Tom, Mazzarelli, Kern, Singh, JJ.

6619N Hertz Vehicles, LLC, Index 161499/13
Plaintiff-Appellant,

-against-

Gejo, LLC, Advanced Center for Rehabilitation, et al.,
Defendants,

Metro Pain Specialists, Professional Corporation,
Defendant-Respondent.

_____

Rubin, Fiorella & Friedman LLP, New York (Kyeko M. Stewart of counsel) for appellant.

Gabriel & Shapiro LLC, Wantagh (Steven F. Palumbo of counsel), for respondent.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered December 13, 2016, which granted the motion of defendant Metro Pain Specialists, Professional Corporation (MPS) to vacate the default judgment as against it, unanimously reversed, on the law, without costs, the motion denied, and the default judgment as against MPS reinstated.

"A defendant seeking to vacate a default under [CPLR 5015(a)] must demonstrate a reasonable excuse for its delay in appearing and answering the complaint and a meritorious defense to the action" (*Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]). Here, while MPS's initial excuse of law office failure for failing to timely answer may be

reasonable, MPS was dilatory in asserting its rights (*Hyundai Corp. v Republic of Iraq*, 20 AD3d 56, 62 [1st Dept 2005], *lv dismissed* 5 NY3d 783 [2005]; *see ADL Constr., LLC v Chandler*, 78 AD3d 407 [1st Dept 2010]; *see also Okun v Tanners*, 11 NY3d 762 [2008]). MPS retained new counsel about eight months prior to entry of the default judgment, yet counsel waited until the eve of the expiration of the one-year time limit before moving to vacate. MPS provided no excuse for why its new counsel failed to address the pending default judgment motion during the time period before a decision was rendered, or why it waited almost another year to move to vacate the default judgment.

In any event, MPS failed to demonstrate that it had a meritorious defense. The failure by Jonathan Smart, the driver of the vehicle, to subscribe and return the transcript of his examination under oath violated a condition precedent to coverage and warranted denial of the claims (*see Pioneer Food Stores*

Coop., Inc. V Federal Ins. Co., 169 AD2d 430, 431-432 [1st Dept 1991]; *Pogo Holding Corp. v New York Ins. Underwriting Asoc.*, 73 AD2d 605, 605-06 [2d Dept 1979)].

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

ENTERED: MAY 17, 2018

CLERK

Acosta, P.J., Tom, Mazzarelli, Kern, Singh, JJ.

6620N Hertz Vehicles LLC, Index 161271/14
Plaintiff-Respondent,

-against-

Westchester Radiology & Imaging, PC, et al.,
Defendants,

A.C. Medical, P.C., et al.,
Defendants-Appellants.

_____

Law Offices of Melissa Betancourt, P.C., Brooklyn (Melissa Betancourt of counsel), for appellants.

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

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Order, Supreme Court, New York County (Debra A. James, J.), entered April 20, 2017, which denied defendants A.C. Medical, P.C. and Vital Chiropractic, P.C.'s motion to vacate a default judgment entered against them and to compel acceptance of their answer, unanimously affirmed, without costs.

Although the motion court found that defendants demonstrated a reasonable excuse for their default but failed to demonstrate a potentially meritorious defense to the action (*see* CPLR 5015[a][1]; *Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]), we find that defendants' proffered excuse was not reasonable (*see Gecaj v Gjonaj Realty & Mgt. Corp.*, 149 AD3d 600, 602 [1st Dept 2017]), and therefore need not determine

whether they showed a potentially meritorious defense (*see M.R. v 2526 Valentine LLC*, 58 AD3d 530, 532 [1st Dept 2009]).

Defendants' counsel's perfunctory and unsubstantiated explanation that, due to a computer inputting error by an unspecified person, the law firm believed that an answer had been filed, may explain defendants' failure to answer timely (*see Interboro Ins. Co. v Perez*, 112 AD3d 483 [1st Dept 2013]). However, it fails to explain either their continued failure to answer or to take any other steps to appear after they received notices of default or their failure to move to vacate the default judgment until eight months after they received notices of entry of the judgment (*see CEO Bus. Brokers, Inc. v Alqabili*, 105 AD3d 989 [2d Dept 2013]; *Pichardo-Garcia v Josephine's Spa Corp.*, 91 AD3d 413 [1st Dept 2012]).

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

ENTERED: MAY 17, 2018

CLERK

Sweeny, J.P., Richter, Tom, Kapnick, Webber, JJ.

4120 In re Robert Lowinger, Index 101277/14
Petitioner-Appellant,

-against-

New York State Division of
Housing and Community
Renewal, et al.,
Respondents-Respondents.

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Warshaw Burstein, LLP, New York (Bruce H. Wiener of counsel), for appellant.

Mark F. Palomino, New York (Martin B. Schneider of counsel), for New York State Division of Housing and Community Renewal, respondent.

Rose & Rose, New York (Paul Coppe of counsel), for CS 393 LLC, respondent.

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Order and judgment (one paper), Supreme Court, New York County (Joan B. Lobis, J.), entered January 15, 2016, inter alia, denying the petition to annul the order of respondent New York State Division of Housing and Community Renewal (DHCR), issued September 8, 2014, which upheld the denial of petitioner's rent overcharge complaint, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

DHCR's determination that the deregulation of petitioner's apartment, which preceded his tenancy, was not fraudulent is not arbitrary and capricious and has a rational basis (*see generally Flacke v Onondaga Landfill Sys.*, 69 NY2d 355, 363 [1987]). The determination was based upon the finding that the apartment was

subject to vacancy and individual apartment improvement increases, which was supported by a November 2006 agreement, a counter-signed proposal, canceled checks, an invoice, petitioner's February 2007 punch list of items of work remaining to be performed before the commencement of his tenancy, and petitioner's execution of a lease (*see Matter of Hanjorgiris v Lynch*, 298 AD2d 251 [1st Dept 2002]). Petitioner's vague and conclusory claim that the work was not performed well and cost less than claimed by the former owner is insufficient to compel a contrary finding (*id.*). The allegation of a fraudulent scheme to deregulate, without more, does not trigger a duty to investigate the claim (*see Matter of Boyd v New York State Div. of Hous. & Community Renewal*, 23 NY3d 999 [2014]).

Petitioner's argument that the apartment is subject to rent stabilization due to Rent Stabilization Code [9 NYCRR] § 26-504.2 is not properly before us because it was never raised in the administrative proceeding (*see Matter of Corrigan v New York State Off. of Children & Family Servs.*, 28 NY3d 636, 643 [2017] ["(j)udicial review of administrative determinations pursuant to CPLR article 78 is limited to questions of law, and (u)npreserved issues are not issues of law"] [internal quotation marks omitted]). We have no authority to reach this unpreserved issue

in the interest of justice (*see Green v New York City Police Dept.*, 34 AD3d 262, 263 [1st Dept 2006]).[1]

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

ENTERED: MAY 17, 2018

CLERK

[1] We also note that petitioner's argument is unavailing in light of the Court of Appeals decision in *Altman v 285 W. Fourth, LLC* (__NY3d__, 2018 NY Slip Op 02829 [2018]).

Richter, J.P., Manzanet-Daniels, Andrias, Kapnick, Webber, JJ.

6208-
6209-
6210-
6211-
6212-
6213N

Index 162933/15
654137/15

Maxim, Inc.,
Plaintiff-Respondent,

-against-

Jason Feifer, et al.,
Defendants-Appellants.

- - - - -

Maxim, Inc., et al.,
Plaintiffs-Respondents,

-against-

Wayne Gross,
Defendant,

Jason Feifer,
Defendant-Appellant.

_____

Schoeman Updike Kaufman & Gerber LLP, New York (Beth L. Kaufman of counsel), for appellants.

Sack & Sack, LLP, New York (Eric R. Stern of counsel), for respondents.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered April 24, 2017, in Index No. 654137/15 (the breach of contract action), which granted plaintiffs' motion to quash a subpoena issued to nonparty Christopher Clark, and denied defendant Jason Feifer's motion to remove the confidentiality designation from certain deposition testimony and documents

produced, to deem defendants' notice to admit admitted, to compel certain depositions, and for attorneys' fees and expenses, and, sua sponte, ordered all party discovery to precede nonparty discovery, modified, on the facts and in the exercise of discretion, to grant defendant's motion to the extent of ordering plaintiffs to respond to the notice to admit dated May 26, 2016, in compliance with CPLR 3123(a), within 20 days after entry of this order, to strike the confidentiality designations on documents produced by nonparty Derris & Co. and on the deposition testimony of Julie Halpin, Wayne Gross, and Maxim, Inc. by Robert Price, and to impose monetary sanctions on plaintiffs in the amount of $10,000, and otherwise affirmed, without costs. Order, same court and Justice, entered on or about April 21, 2017, which, to the extent appealed from, granted plaintiffs' motion to quash a subpoena issued to nonparty Hiltzik Strategies, unanimously affirmed, without costs. Order, same court and Justice, entered on or about April 21, 2017, which, to the extent appealed from as limited by the briefs, granted plaintiffs' motion to quash a subpoena issued to Derris & Co., and denied defendants' motion to strike the confidentiality designations on documents produced by Derris & Co. and preclude plaintiffs from placing blanket confidentiality designations on remaining documents to be produced by Derris & Co., unanimously modified,

on the facts and in the exercise of discretion, to grant defendants' motion to the extent of striking plaintiffs' confidentiality designations from documents produced by Derris & Co. and precluding plaintiffs from placing blanket confidentiality designations on the remainder of Derris & Co.'s production, and otherwise affirmed, without costs. Order, same court and Justice, entered May 3, 2016, in Index No. 162933/15 (the declaratory judgment action), which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for a preliminary injunction as against defendant Feifer, unanimously reversed, on the law and facts, without costs, the motion denied, and the preliminary injunction vacated. Appeal from order, same court and Justice, entered April 10, 2017, which, inter alia, denied defendants' motion to vacate the preliminary injunction, unanimously dismissed, without costs, as academic. Order, same court and Justice, entered February 17, 2017, which denied defendants' motion to dismiss the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

In the breach of contract action, plaintiffs, Maxim, Inc. and its sole director, Sardar Biglari, allege breach of a nondisclosure agreement (NDA) and a release prohibiting defendants from, inter alia, divulging any confidential or

proprietary business information regarding plaintiff Maxim, Inc. and its affiliated companies and defamation. Defendant Feifer counterclaimed, alleging that he had been fraudulently induced into accepting employment with Maxim. In the declaratory judgment action, plaintiff Maxim seeks a judgment declaring that the NDA and the release that Feifer executed are valid and enforceable. Maxim also moved for a preliminary injunction enjoining Feifer and his counsel from violating the NDA or the release by divulging, inter alia, confidential information or trade secrets or publicly disparaging Maxim and its affiliated persons and entities.

Maxim failed to establish that it would suffer irreparable harm absent the preliminary injunction it sought (*see Chiagkouris v 201 W. 16 Owners Corp.*, 150 AD3d 442 [1st Dept 2017]). We find no support in the record for Maxim's assertions that Feifer or his counsel threatened to disclose confidential information to third parties.

The declaratory judgment action should be dismissed, because all the issues involved in it will be disposed of when the pending breach of contract action is resolved (*see Reynolds Metals Co. v Speciner*, 6 AD2d 863 [1st Dept 1958]).

Supreme Court acted within its broad discretion in ordering all party discovery in the breach of contract action to precede

nonparty discovery, in an attempt to bring order to a contentious discovery process in an acrimonious litigation (*see generally 148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486 [1st Dept 2009]). Accordingly, the court properly quashed the subpoenas issued to nonparties Christopher Clark, Derris & Co., and Hiltzik Strategies, and denied Feifer's motion to compel depositions of certain nonparties at this time. With regard to the subpoena issued to Clark, we note that, while his communications with plaintiffs about the litigation in which he represented them are protected by the attorney-client privilege, his public communications to the press are not privileged (*see Pecile v Titan Capital Group, LLC*, 119 AD3d 446, 447 [1st Dept 2014]).

Contrary to plaintiffs' contention, the confidentiality agreement that they entered into with Feifer does not allow for blanket designations of document productions and deposition testimony as confidential but limits that designation to "trade secrets, proprietary business information, competitively sensitive information, or other information the disclosure of which would, in the good faith judgment of the party designating the material as confidential . . . be detrimental to the conduct of that party's business or the business of any of that party's customers or clients." Plaintiffs failed to identify any

information in the depositions and documents that they designated as confidential that meets that standard.

Plaintiffs' response to Feifer's May 26, 2016 notice to admit fails to comply with CPLR 3123(a).

Plaintiffs' discovery abuses warrant the imposition of a $10,000 monetary sanction pursuant to CPLR 3126.

A monetary sanction, including costs and counsel fees, may be imposed under the statutory language in CPLR 3126, which permits the court to "make such orders with regard to [a] failure or refusal [to disclose information which the court finds ought to have been disclosed] as *are just*" (emphasis added) (*see* Connors, Practice Commentaries, McKinney's Cons Law of NY, Book 7B, CPLR 3126:1, at 475-476; *Lucas v Stam,* 147 AD3d 921, 926 [2d Dept 2017] ["the imposition of a monetary sanction under CPLR 3126 may be appropriate to compensate counsel or a party for the time expended and costs incurred in connection with an offending party's failure to fully and timely comply with court-ordered disclosure"]). Sanctions under CPLR 3126, including monetary sanctions, do "not depend in any measure on Rule 130 [22 NYCRR Part 130] and, therefore are not subject to its restraints" (*Romero v New York City Hous. Auth.*, 2005 NYLJ LEXIS 1173, *8 [Sup Court, Bronx County 2005]).

Although the nature and degree of the penalty to be imposed pursuant to CPLR 3126 lies within the sound discretion of the Supreme Court, this Court "is vested with its own discretion and corresponding power to substitute its own discretion for that of the trial court, even in the absence of abuse" (*Those Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, 11 NY3d 843, 845 [2008]; *Lucas v Stam,* 147 AD3d at 925–926. Here, a monetary sanction of $10,000 is warranted because plaintiffs, without seeking a protective order, intentionally did not produce documents and did not properly respond to a notice to admit based on an unfounded assertion that they feared defendants would make the documents public (*see Jackson v OpenCommunications Omnimedia, LLC*, 147 AD3d 709 [1st Dept 2017]; *Arbor Realty Funding, LLC v Herrick, Feinstein LLP* 140 AD3d 607, 610 [1st Dept 2016]; *Dean v Usine Campagna*, 44 AD3d 603, 605 [2d Dept 2007]).

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

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

KAPNICK, J. (dissenting in part)

I dissent solely on the issue of the imposition of sanctions and would affirm the portion of the motion court's order that denied defendant's request, pursuant to CPLR 3126, for attorneys' fees and expenses, "at this juncture of the litigation." "Although the determination of an appropriate sanction pursuant to CPLR 3126 lies in the trial court's discretion and should not be set aside absent a clear abuse of discretion" (*De Socio v 136 E. 56th St. Owners, Inc.*, 74 AD3d 606, 607 [1st Dept 2010]), I acknowledge that this Court is "vested with its own discretion and corresponding power to substitute its own discretion for that of the [motion] court" (*Those Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, 11 NY3d 843, 845 [2008]). However, I do not believe that in this instance and on this record we should do so.

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

ENTERED: MAY 17, 2018

CLERK

Sweeny, J.P., Renwick, Mazzarelli, Gesmer, Singh, JJ.

6492-
6493 &
M-1771

Index 650665/15

Springer Science + Business Media LLC,
Plaintiff-Respondent,

-against-

Soho AOA Owner LLC,
Defendant-Appellant.

_____

Kossoff PLLC, New York (Joseph Goldsmith of counsel), for appellant.

Schulte Roth & Zabel LLP, New York (Robert M. Abrahams of counsel), for respondent.

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Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered November 30, 2017, awarding plaintiff injunctive relief and attorneys' fees and dismissing defendant's counterclaims, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered on or about October 23, 2017, which denied defendant's motion to compel compliance with nonparty subpoenas and for discovery sanctions and granted plaintiff's cross motion for summary judgment on its claims for declaratory and injunctive relief and dismissing defendant's counterclaims, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The record demonstrates as a matter of law that plaintiff did not breach the anti-assignment provision of its commercial lease with defendant landlord. The lease restricts "assignments"

by "Tenant" only. "Tenant" is defined as plaintiff (a limited liability company) or its successors, and an "assignment" is defined as the transfer of "a majority of the . . . stock of any corporate tenant" or "a majority of the total interest in any . . . limited liability company . . ., however accomplished, whether in a single transaction or in a series of related or unrelated transactions." We find that there was no transfer of the majority interest in plaintiff, and thus no assignment.

It is undisputed that plaintiff's immediate parent remained the same throughout the relevant period. Contrary to defendant's contention, it is immaterial that there was a change in ownership of the ultimate parent of the corporate conglomerate of which plaintiff is a part - an entity multiple rungs up the corporate ladder from plaintiff. As this Court has observed, "Given the vast web of interlocking ownership between many corporations, it would be unreasonable to read the lease provision as effecting an assignment or transfer whenever some far removed corporate parent is sold, especially when the lease expressly limits the prohibition to capital stock of 'tenant' or other entity which is 'tenant'" (*Cellular Tel. Co. v 210 E. 86th St. Corp.*, 44 AD3d 77, 82 [1st Dept 2007]). Contrary to defendant's claim, the anti-assignment provision at issue in *Cellular Telephone* was not

meaningfully narrower than the provision at issue here (*compare* 44 AD3d at 78).

Moreover, even if the facts of the underlying transactions in this case are not as fully developed as in *Cellular Telephone*, that is immaterial, because the critical fact - that the transactions took place well up the corporate chain - is not in dispute. For this reason, defendant's discovery motion, which sought discovery related to the transactions and sanctions for plaintiff's failure to provide it, was also properly denied.

There is no basis for disqualifying Justice Ramos.

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

M-4771 - *Springer Science + Business Media LLC v Soho AOA Owner LLC*

Motion for stay pending appeal denied as academic.

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

ENTERED: MAY 17, 2018

CLERK

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

6577 The People of the State of New York, Respondent, Ind. 2210/11

-against-

Pedro Espinal, Defendant-Appellant.

_____

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

Pedro Alejandro Espinal, appellant pro se.

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

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Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered March 12, 2012, convicting defendant, after a jury trial, of robbery in the first degree, grand larceny in the second degree and two counts of attempted robbery in the third degree, and sentencing him to an aggregate term of 19 years, unanimously affirmed.

The court properly denied defendant's suppression motion. Defendant contends that he was entitled to suppression of physical evidence because, after lawfully arresting him outside the New Jersey apartment building where he was staying, and lawfully obtaining his key, the police unlawfully used the key to enter the common area of the building through a locked door. Defendant also claims the evidence should be suppressed because

his mother's ensuing consent to enter her apartment was not knowing and voluntary. He argues that both of these police incursions were unconstitutional under New Jersey case law, which he asserts is both controlling under choice of law principles, and is more favorable to him than New York law as to both issues. He also argues that these incursions were unlawful under New York law in any event.

We find it unnecessary to decide any questions of New Jersey search and seizure law, because we find that New York law governs the issues raised here. Suppression issues, including those arising out of a defendant's constitutional rights, are generally governed by the law of the forum, and "New York has a paramount interest in the application of its laws to this case" (*People v Benson*, 88 AD2d 229, 231 [3d Dept 1982]; *see also* Barry Kamins, New York Search and Seizure, § 8.03 [and cases cited therein]).

Under New York law, we find that "defendant has failed to establish a legitimate expectation of privacy in the common [areas] of his building, accessible to all tenants and their invitees" (*People v Bilsky*, 261 AD2d 174, 174 [1st Dept 1999], *affd* 95 NY2d 172 [2000]). The unremarkable fact that access to the building was controlled by a locked outer door does not create an expectation of privacy that would not otherwise exist (*see People v Corley*, 2001 NY Slip Op 40196[U][Sup Ct, NY County

2011]). The basic principle underlying *Bilsky* and the many other cases with similar holdings is that general access to common areas negates a personal expectation of privacy in those areas for an individual resident. This principle applies except in unusual circumstances, such as where common areas are "shared for eating and bathing purposes essential to daily living and facilities for which are commonly found in any home" (*People v Garriga*, 189 AD2d 236, 241 [1st Dept 1993], *lv denied* 82 NY2d 718 [1993]). At least where common areas are used primarily as a means of ingress and egress, to be used by the residents of individual units and their invitees, the presence of a locked outer door does not create a legitimate expectation of privacy. Accordingly, defendant's rights were not violated when the police used his key to enter the building.

Next, we find that the record supports the hearing court's finding that, under the totality of the circumstances, defendant's mother voluntarily consented to the police entry into her apartment (*see e.g. People v Hill*, 153 AD3d 413, 417 [1st Dept 2017]). Among other things, the police specifically asked for her "permission" to enter. We also agree with the court that, even if the entry into the building were found to be unlawful, the mother's valid consent attenuated any initial illegality (*see Matter of Leroy M.*, 16 NY3d 243 [2011]).

In any event, any error in the court's suppression ruling was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). There was overwhelming proof, independent of the physical evidence recovered as the result of the search at issue, that defendant committed the robbery that was the subject of the suppression hearing. That evidence included, among other things, an unequivocal identification by a store employee, an identification by a person to whom defendant sold much of the stolen jewelry, and defendant's admission to his girlfriend that he robbed the store.

We find no basis for reducing the sentence.

We have considered and rejected defendant's pro se arguments.

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

ENTERED: MAY 17, 2018

CLERK

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

6578 Raphael Maman, Index 152441/12
Plaintiff-Respondent,

-against-

Marx Realty & Improvement Co., Inc., et al.,
Defendants-Appellants.
- - - - -
[And Third-Party Actions]
- - - - -

_____

Wood Smith Henning & Berman, LLP, New York (Kevin T. Fitzpatrick of counsel), for Marx Realty & Improvement Co., Inc. and FJ Sciame Construction Corp., appellants.

Melito & Adolfsen P.C., New York (Steven I. Lewbel of counsel), for Weir Welding Company, Inc., appellant.

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

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Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered September 13, 2016, which, in this action for personal injuries sustained when plaintiff ironworker fell through an opening in the floor of a building under construction, granted plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) and on his Labor Law § 241(6) claim insofar as predicated upon Industrial Code (12 NYCRR) § 23-1.7(b)(1), unanimously reversed, on the law, without costs, and the motion denied.

"[A] fall through an unguarded opening in the floor of a construction site constitutes a violation of Labor Law § 240(1) only where a safety device adequate to prevent such a fall was not provided. A safety line and harness may be an adequate safety device for a person working over an open area or near an elevated edge" (*Guaman v City of New York*, 158 AD3d 492, 492-493 [1st Dept 2018] [internal citations omitted]). Here, the record demonstrates that although plaintiff was wearing a harness and lanyard at the time of the accident, triable issues exist as to whether static lines were in place for him to safely tie off.

In view of the foregoing, an issue of fact also exists as to whether any violation of Labor Law § 241(6) based on 12 NYCRR 23-1.7(b)(1) was a proximate cause of plaintiff's accident (*see Guaman* at 493).

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

ENTERED: MAY 17, 2018

CLERK

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

6579 In re Shaun H.,

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

Monique B.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

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

Zachary W. Carter, Corporation Counsel, New York (Jessica Miller of counsel), for respondent.

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

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Order, Family Court, New York County (Jane Pearl, J.), entered on or about January 19, 2017, which, inter alia, found that respondent mother neglected the subject child by failing to provide him with proper supervision or guardianship as alleged in paragraphs 1a, 1b and 2a of the petition, unanimously modified, on the law and the facts, to vacate the finding that respondent neglected the child as alleged in paragraph 1b of the petition by failing to plan for him, and otherwise affirmed, without costs.

A preponderance of the evidence supports the finding of neglect based upon respondent's marijuana use, because the caseworker testified that respondent told her that she was

"smoking marijuana eight to 10 times per week to deal with her stress." Moreover, respondent testified that she told Sanchez that she had used marijuana because she liked it (*see Matter of Christina G. [Vladimir G.]*, 100 AD3d 454, 454-455 [1st Dept 2012], *lv denied* 20 NY3d 859 [2013]). Respondent failed to rebut petitioner's prima facie case of neglect by showing that she was voluntarily and regularly participating in a drug rehabilitation program (*see Matter of Keoni Daquan A. [Brandon W.-April A.]*, 91 AD3d 414, 415 [1st Dept 2012]).

A preponderance of the evidence adduced at the fact-finding hearing also showed that respondent neglected the child by failing to provide him with proper supervision and guardianship by attempting to leave him at a local fire station with people she did not know and who told her that they do not take children. Under these circumstances, the court properly determined that the child was at imminent risk of harm (*see Matter of Lashina P.*, 52 AD3d 293, 294 [1st Dept 2008]).

The finding that respondent failed to plan for the child as alleged in paragraph 1b of the petition is vacated because the caseworker testified that respondent agreed to services.

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

ENTERED: MAY 17, 2018

CLERK

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

6583 Selective Auto Insurance Company of New Jersey as subrogee of Alan Pine, Plaintiff-Respondent, Index 20889/14E

-against-

Kathleen Nesbitt, et al., Defendants-Appellants.

_____

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

Gambeski & Frum, Elmsford (William Ambrose of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered September 7, 2017, which denied defendants' CPLR 3215(c) motion to dismiss the complaint, and granted plaintiff's cross motion to enter a default judgment under CPLR 3215(a), unanimously reversed, on the law, the motion granted, and the cross motion denied. The Clerk is directed to enter judgment dismissing the complaint.

On March 6, 2014, plaintiff served defendants with its complaint alleging liability for damages resulting from a car collision involving plaintiff's subrogee. Defendants did not file an answer. Almost three years later, by notice dated February 1, 2017, defendants moved to dismiss the complaint as abandoned (CPLR 3215[c]). Plaintiff opposed, and by notice dated February 16, 2017, cross-moved for entry of a default judgment,

asking that its failure to seek default within one year of defendants' failure to answer (CPLR 3215[c]) be excused (*see Hoppenfeld v Hoppenfeld*, 220 AD2d 302, 303 [1st Dept 1995]). Supreme Court denied defendants' motion and granted plaintiff's cross motion for a default judgment.

Under CPLR 3215(c), if a plaintiff fails to seek entry of a judgment within one year after default, the court "shall dismiss the complaint as abandoned . . . unless sufficient cause is shown why [it] should not be dismissed." Here, plaintiff failed to show sufficient cause to defeat defendant's dismissal motion because it neither set forth a viable excuse for the delay nor demonstrated a meritorious cause of action (*Hoppenfeld*, 220 AD2d at 303; *Gavalas v Podelson*, 297 AD2d 535 [1st Dept 2002]).

Accordingly, the complaint should be dismissed.

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

ENTERED: MAY 17, 2018

CLERK

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

6584 David E. Gomes, Index 115435/10
Plaintiff-Appellant,

-against-

Boy Scouts of America, et al.,
Defendants-Respondents,

Bergen Council of Boy Scouts of America, Inc., etc., et al.,
Defendants.

_____

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

Connell Foley LLP, New York (Brian P. Morrissey of counsel), for respondents.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered on or about March 11, 2016, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff, at the time a 13-year-old Boy Scout, sustained head injuries while participating in a camping trip at a facility owned and operated by defendants. He alleged that he stumbled and fell at night in the dark, uneven area outside of the camp's shower house, but, although he was wearing a functioning head lamp, had no recollection of what caused his fall. However, some witnesses alleged that plaintiff had been engaged in horseplay in the shower house and fell as he ran from it.

Defendants met their burden to show the negligent supervision claim should be dismissed as a matter of law. Even assuming that plaintiff raises a triable issue of fact as to defendants' violation of 10 NYCRR § 7-2.5(o), given the possible lack of "visual or verbal communications capabilit[y]" while the scouts went to the parking lot and shower house, summary judgment was proper. Those who breach a duty to supervise their charges will only be held liable for foreseeable injuries proximately caused by the absence of adequate supervision (*Harris v Five Point Mission-Camp Olmstedt*, 73 AD3d 1127, 1128 [2d Dept 2010]), and defendant met its burden to show the accident was not foreseeable as a matter of law.

In opposition, plaintiff failed to raise a triable issue of fact as to foreseeability, citing only his expert's statement that because the boys remained "totally unsupervised and unregulated for a lengthy period of time in a potentially dangerous/hazardous environment," the incident was "reasonably foreseeable." That conclusory opinion assumes, without basis, that the "environment" here was "potentially dangerous/ hazardous." The record shows it was in the vicinity of the shower house, and plaintiff was accompanied by fellow scouts from his troop – scouts with no history of misbehavior, discipline issues, or disobedience and, to the contrary, scouts with a

proven record, from their prior week together and the previous camping trips taken by the troop, of walking to bathrooms or showers using the buddy system only, without further adult supervision, and without incident. Defendants were, accordingly, not on notice that an accident was likely to result under the circumstances at issue here (*see Kosok v Young Men's Christian Assn. of Greater N.Y.*, 24 AD2d 113 [1st Dept 1965], *affd* 19 NY2d 935 [1967]; *Osmanzai v Sports & Arts in Schools Found., Inc.*, 116 AD3d 937 [2d Dept 2014]).

Defendants also met their burden to show, as a matter of law, that any allegedly inadequate supervision was not the proximate cause of plaintiff's injuries, given the impulsive nature of plaintiff's own acts which, as even plaintiff concedes on appeal, initiated the injuries here, combined with the short time span that elapsed between those impulsive acts and his injuries (*see Jorge C. v City of New York*, 128 AD3d 410 [1st Dept 2015]; *Harris*, 73 AD3d at 1127; *Gibbud v Camp Shane, Inc.*, 30 AD3d 865 [3d Dept 2006]). Again, in opposition, plaintiff failed to raise a triable issue of fact, as he did not show that, even

with the heightened supervision he claims should have occurred, the accident would have been avoided.

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 17, 2018

CLERK

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

6585 In re Norma Blas, Index 100984/16
Petitioner-Appellant,

-against-

Shola Olatoye, etc., et al.,
Respondents-Respondents.

_____

Urban Justice Center, New York (Michael Grinthal of counsel), for appellant.

Kelly D. MacNeal, New York (Seth E. Kramer of counsel), for respondents.

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Judgment (denominated an order), Supreme Court, New York County (Arthur F. Engoron, J.), entered January 17, 2017, denying the petition seeking to annul a determination of respondent New York City Housing Authority (NYCHA), dated March 22, 2016, which denied petitoner's remaining family member (RFM) grievance on the ground that she did not qualify as an RFM, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

NYCHA's denial of petitioner's grievance has a rational basis, as the evidence adduced at the administrative hearing shows that NYCHA never granted written permission for petitioner to reside in the tenant of record's apartment (*see Matter of Aponte v Olatoye*, 30 NY3d 693, 697 [2018]; *Matter of Ortiz v Rhea*, 127 AD3d 665, 666 [1st Dept 2015]). Petitioner's absence

from any of the affidavits of income provides a further rational basis for denial of RFM status (*see Matter of Carmona v New York City Hous. Auth.*, 134 AD3d 404, 405 [1st Dept 2015], *lv denied* 26 NY3d 1114 [2016]; *Matter of Dancil v New York City Hous. Auth.*, 123 AD3d 442 [1st Dept 2014]).

Petitioner waived her disability discrimination claims (under a theory of failure to reasonably accommodate) by failing to raise them at the administrative hearing (*see Aponte*, 30 NY3d at 698; *Matter of Jenkins v New York City Hous. Auth., Amsterdam Houses*, 129 AD3d 432, 432 [1st Dept 2015]).

Setting aside the lack of preservation, petitioner further lacks standing to challenge the denial of the request for reasonable accommodation made by her late mother, the tenant of record (*see Rosello v Rhea*, 89 AD3d 466, 467 [1st Dept 2011]).

Moreover, were we to consider petitioner's claim for associational discrimination, we would find that the record shows that she effectively received the accommodation to which she would have been entitled had there been an effective request for reasonable accommodation, or had NYCHA formally engaged in an interactive dialogue aimed at reaching a reasonable accommodation (*see Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 836 [2014]; *see also Aponte*, 30 NY3d at 702 [Rivera, J., concurring); that is, she received temporary residency status,

which is the most she would have been entitled to as a live-in caregiver, given that her mother lived in a one-bedroom apartment (*see Aponte*, 30 NY3d at 698; *Matter of Chun Po So v Rhea*, 106 AD3d 487, 488 [1st Dept 2013]).

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

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

ENTERED: MAY 17, 2018

CLERK

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

6586 The People of the State of New York Ind. 4658/14
Respondent,

-against-

Freddy Gordon,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered November 17, 2015, as amended January 8, 2016, convicting defendant, after a jury trial, of criminal mischief in the third degree, criminal contempt in the second degree (three counts) and criminal trespass in the second degree, and sentencing him to an aggregate term of one to three years, unanimously affirmed.

Defendant's legal sufficiency claim relating to the damage element of third-degree criminal mischief is unpreserved (*see People v Hines*, 97 NY2d 56, 61-62 [2001]), and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that 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. The victim's testimony, which included the approximate purchase dates and prices of the furniture destroyed by defendant, viewed in conjunction with the photographs of the furniture, supported the conclusion that the destroyed property was valued in excess of $250 (*see People v Stevens*, 114 AD3d 483 [1st Dept 2014], *lv denied* 23 NY3d 968 [2014]; *People v Garcia*, 29 AD3d 255, 264 [1st Dept 2006], *lv denied* 7 NY3d 789 [2006]).

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

ENTERED: MAY 17, 2018

CLERK

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

6587 Tsai Chung Chao, Index 159292/14
Plaintiff-Respondent,

-against-

James Chao, etc.,
Defendant-Appellant.

_____

Graber PLLC, New York (Daniel Graber of counsel), for appellant.

Melvin B. Berfond, New York (Michael Konopka of counsel), for respondent.

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Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered on or about November 6, 2017, which denied defendant's motion for summary judgment dismissing the complaint and on his counterclaims, and granted plaintiff's motion to extend two notices of pendency, unanimously modified, on the law, to grant defendant's motion as to all claims relating to 330 East 38th Street, #37N, and to deny plaintiff's motion to extend the notice of pendency on that condominium unit, and otherwise affirmed, without costs.

Plaintiff's deposition transcript, which defendant submitted with his initial motion papers, is admissible, because, although it is unsigned, it is certified (*see Franco v Rolling Frito-Lay Sales, Ltd.*, 103 AD3d 543 [1st Dept 2013]; CPLR 3116[a]). In addition, defendant submitted evidence that his lawyer mailed the transcript to plaintiff's counsel more than 60 days before the

date of defendant's motion. The transcript of the deposition of Hsian Fang Chao (not a party to this action) is not admissible, because defendant did not mail it until after the date of his motion (*see Palumbo v Innovative Communications Concepts*, 175 Misc 2d 156, 157-158 [Sup Ct, NY County 1997], *affd* 251 AD2d 246 [1st Dept 1998]).

Defendant (plaintiff's son) demonstrated through plaintiff's own deposition testimony that plaintiff agreed to give 330 East 38th Street, #37N, to defendant without reserving the right to have it reconveyed to him upon request. Hence, defendant made a prima facie case as to all causes of action insofar as 37N is concerned. Even if, arguendo, plaintiff thought he was giving 37N directly to defendant, whereas he actually gave it to a trust benefitting defendant's daughter (his granddaughter), plaintiff can establish no injury, because, either way, he gave up the unit (*see Vandashield Ltd. v Isaacson*, 146 AD3d 552, 553 [1st Dept 2017]).

In opposition, plaintiff submitted an affidavit saying that there was an implicit understanding that defendant would reconvey 37N to him upon his request. However, since it contradicts his deposition testimony, plaintiff's affidavit is insufficient to raise an issue of fact (*see e.g. Perez v Bronx Park S. Assoc.*, 285 AD2d 402, 404 [1st Dept 2001], *lv denied* 97 NY2d 610 [2002]).

Defendant is not entitled to summary judgment dismissing plaintiff's claim concerning the other condominium unit at issue, 330 East 38th Street, #37M. Plaintiff's claim with respect to this unit is that defendant led him to believe that the documentation that defendant presented for his signature (a trust agreement and two deeds) was for the conveyance of 37N only. In fact, the paperwork provided for the conveyance of both 37M and 37N to the trust. Ordinarily a person is bound by the terms of an instrument he or she signs, and may not claim to have justifiably relied on false representations concerning the contents of a document that he or she failed to read without valid excuse (*see e.g. Mendoza v Akerman Senterfitt LLP*, 128 AD3d 480, 482 [1st Dept 2015]; *U.S. Legal Support, Inc. v Eldad Prime, LLC*, 125 AD3d 486, 487 [1st Dept 2015]; *Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 266 [1st Dept 2008]). In this case, however, whether this principle applies to bar plaintiff's fraudulent inducement claim regarding 37M cannot be determined as a matter of law because plaintiff alleges that he and defendant, his son, had a relationship of trust and confidence (*cf. Suttongate Holdings Ltd. v Laconm Mgt. N.V.*, __ AD3d __, 2018 NY Slip Op 02424, *1 [1st Dept 2018] [recognizing the "well settled principle . . . that a party claiming fraudulent inducement cannot be said to have justifiably relied on a representation

negated by the plain terms of a the contract (the parties) signed," but holding the principle inapplicable to pleadings alleging that there had been an attorney-client relationship between the alleged wrongdoer and the claimant]; *Sorenson*, 52 AD3d at 266 [noting that the "general rule" applies "in the absence of a confidential relationship"]).

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

ENTERED: MAY 17, 2018

CLERK

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

6588 Ricardo Rodriguez, Index 300184/15
Plaintiff-Appellant,

-against-

Adame Konate, et al.,
Defendants-Respondents.

_____

Daniel S. Berke, Brooklyn, for appellant.

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

_____

Order, Supreme Court, Bronx County (Joseph E. Capella, J.), entered February 6, 2017, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the claims of serious injury of a permanent nature within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion denied.

Defendants established prima facie that plaintiff did not suffer serious injuries of a permanent nature to his cervical or lumbar spine or his knees by submitting the affirmed report of a radiologist who opined that the MRI films of those body parts showed chronic degenerative conditions that were unrelated to trauma caused by the accident (*see Chaston v Doucoure*, 125 AD3d 500 [1st Dept 2015]; *Rickert v Diaz*, 112 AD3d 451 [1st Dept 2013]). They also submitted the report of an orthopedic surgeon who, although he declined to compare plaintiff's range of motion

values to normal values, found no objective evidence of injury upon recent examination using diagnostic tests.

In opposition, plaintiff raised an issue of fact by submitting affirmations by his radiologist and orthopedic surgeon, who affirmed the contents of their post-accident MRI and operative reports, finding bulging discs in the spine and meniscal tears in both knees. In addition, he submitted a narrative report by his treating physician detailing her post-accident findings of limited range of motion and other symptoms of injury and opining that the injuries were caused by the accident (*see Perl v Meher*, 18 NY3d 208, 217-218 [2011]). Plaintiff also submitted a report from another physician, who conducted a recent examination, found continuing range of motion deficits, and attributed all of plaintiff's injuries to the accident (*see Mejia v Ramos*, 124 AD3d 449 [1st Dept 2015]; *James v Perez*, 95 AD3d 788, 789 [1st Dept 2012]; *Yuen v Arka Memory Cab Corp.*, 80 AD3d 481, 482 [1st Dept 2011]). Since defendants did not present any evidence of preexisting bulging discs or torn

menisci in plaintiff's own medical records, nothing further was required of plaintiff in opposition to their motion (*Sanchez v Oxcin*, 157 AD3d 561, 563 [1st Dept 2018]; *see Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]).

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

ENTERED: MAY 17, 2018

CLERK

Friedman, J.P., Sweeny, Kapnick, Kahn, JJ.

6589-
6590 Index 157031/15

William T. West, et al.,
Plaintiffs-Respondents-Appellants,

-against-

B.C.R.E - 90 West Street, LLC,
Defendant-Appellant-Respondent,

Lee Rosen,
Defendant.

_____

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

Himmelstein, McConnell, Gribben, Donoghue & Joseph LLP, New York (Serge Joseph of counsel), for respondents-appellants.

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Amended order, Supreme Court, New York County (Robert R. Reed, J.), entered on or about February 1, 2018, which, insofar as appealed from, denied defendant B.C.R.E. 90 West Street, LLC's motion for summary judgment declaring that plaintiffs' apartments are deregulated and not subject to rent stabilization, and granted plaintiffs' cross motion for summary judgment declaring that plaintiffs' leases are subject to rent stabilization, and so declared, unanimously reversed, on the law, without costs, and it is declared that plaintiffs' apartments were properly deregulated.

For the reasons stated in *Kuzmich v 50 Murray St. Acquisition LLC* (157 AD3d 556 [1st Dept 2018]), buildings

receiving tax benefits pursuant to Real Property Tax Law § 421-g are subject to the luxury vacancy decontrol provisions of the Rent Stabilization Law of 1969 (Administrative Code of City of NY) § 26-504.2(a).

The fact that the subject building additionally received low-interest mortgage financing from the New York City Housing Development Corporation (HDC) does not bar application of this luxury decontrol scheme. Defendant owner's regulatory agreement with HDC merely requires that all units in the building be "subject to Rent Stabilization . . . *to the extent Rent Stabilization applies* to such Units" (emphasis added). The language of Private Housing Finance Law § 654-d(18) is substantially similar to that of Real Property Take Law § 421-g and should be interpreted consistently therewith.

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

ENTERED: MAY 17, 2018

CLERK

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

6591 R2 Investments LDC, Index 601296/09
Plaintiff-Appellant, 650499/10

-against-

Carl C. Icahn, et al.,
Defendants-Respondents.

- - - - -

Youlu Zheng,
Plaintiff-Appellant,

Donald J. Hillenmeyer,
on behalf of themselves and all
others similarly situated,
Plaintiff,

-against-

Carl C. Icahn, et al.,
Defendants-Respondents.

_____

Zeichner Ellman & Krause LLP, New York (Jeff Ross of counsel), for R2 Investments Ltd., appellant.

Abbey Spanier, LLP, New York (Judith L. Spanier of counsel), for Youlu Zheng, appellant.

Law Office of Robert R. Viducich, New York (Herbert Beigel of counsel), for respondents.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered October 31, 2016, which, after a nonjury trial, directed entry of a judgment dismissing the complaints with prejudice, unanimously affirmed, without costs.

Plaintiffs waived any objections to the admission of defendants' Exhibit D-4, which included deposition transcripts

from the record of a prior appeal before this Court. They stated a cursory objection to the admission of that exhibit before trial, never sought a ruling at trial, and never objected or renewed their objections in response to defendants' citations to Exhibit D-4 in their Proposed Findings of Fact and Conclusions of Law (*see Marine Midland Bank v Russo Produce Co.*, 50 NY2d 31, 41 [1980]). Moreover, to the extent the trial court erred in relying on any of that evidence, the error did not prejudice a substantial right of plaintiffs (CPLR 2002), since it was not dispositive of the court's ruling, which turned on expert valuations and evidence of the activities of the Special Committees that were presented at trial.

A fair interpretation of the trial evidence supports the court's determination that the 2008 Recapitalization and 2011 Merger were "entirely fair" under Delaware law and that there was no breach of fiduciary duty by defendants (*see Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992]; *Americas Min. Corp. v Theriault*, 51 A3d 1213, 1239 [Del 2012] [discussing "entire fairness" standard]; *In re Loral Space & Communications Consol. Litig.*, 2008 WL 4293781, *22, 2008 Del Ch LEXIS 136, *75-76 [Del Ch 2008] [same]). Contrary to plaintiffs' contention, in concluding that plaintiffs received fair consideration, i.e., a fair price, for their shares of nominal defendant XO Holdings

Inc. (XO) in the merger with one of the defendant companies controlled by defendant Carl C. Icahn, who also was the controlling shareholder of XO, the court did not rely "almost exclusively" on the market price of XO's stock. While it considered the market price, the court exhaustively detailed its reasons for finding defendants' valuation expert more credible than plaintiffs' expert. Among other things, no evidence supported plaintiffs' expert's valuation, and the valuation was significantly higher than that of J.P. Morgan, an independent financial advisor to the 2011 Special Committee. J.P. Morgan also had issued a written opinion that the merger was fair to XO's minority shareholders from a financial point of view. The court aptly observed that defendant Icahn was the only buyer who could potentially realize a tax benefit from XO's net operating losses and would therefore be willing to pay as much as $1.40 per share.

A fair interpretation of the trial evidence also supports the court's determination that Icahn did not interfere with the 2008 and 2011 Special Committees' work or impede any market check for potential competing bidders (*Americas Min. Corp.* 51 A3d at 1239-1240 [Del 2012], citing *Kahn v Lynch Communication Sys., Inc.*, 638 A2d 1110, 1117 [Del 1994]). Although a market check is preferred, because it can be a reliable basis for assessing a

company's value and can provide leverage in negotiating a corporate transaction with a controlling shareholder (*see e.g. In re Books-A-Million, Inc. Stockholders Litig.*, 2016 WL 5874974, *15 [Del Ch Oct. 10, 2016], *affd* 164 A3d 56 [Del 2017]), the court correctly concluded, on these facts, that the Special Committees' failure to conduct a market check in 2008 or 2011 does not suggest that Icahn influenced or interfered with their process, including that of their legal and financial advisors, or that defendants breached any fiduciary duties. Moreover, as the court observed, a market check here posed risks to the already financially poor XO. A market check could have resulted in a price substantially below the $1.40 negotiated with Icahn, who, unlike other potential third-party bidders, could benefit from XO's net operating losses. Icahn owned XO affiliates and thus could offset the affiliates' profits, and thus his tax liability, by using the net operating losses on a consolidated tax return. In addition, Robert Knauss, a member of the Special Committees,

testified that XO had been losing customers because "the company was constantly up for sale."

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 17, 2018

CLERK

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

6592 The People of the State of New York, Respondent, Ind. 375/16

-against-

Aldo Lucero,
Defendant-Appellant.

_____

Wilens & Baker, P.C., New York (Jonathan I. Edelstein of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Samuel L. Yellen of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Robert A. Neary, J.), entered on or about May 25, 2017, which adjudicated defendant a level two offender pursuant to the Sex Offender Registration Act (Correction Law Art 6-C), unanimously reversed, as a matter of discretion in the interest of justice, without costs, and the matter remanded for a new risk level determination.

The court's decision indicates that it did not give adequate consideration to defendant's request for a discretionary downward departure. Instead, the court appears to have misconstrued the request as limited to the risk factor for number of victims. However, a downward departure does not affect the calculation of the presumptive risk level; it is a discretionary determination that, despite the total number of points assessed and the

offender's presumptive risk level, a lower risk level would be appropriate (*see generally People v Gillotti*, 23 NY3d 841 [2014]).

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

ENTERED: MAY 17, 2018

CLERK

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

6593 Murlar Equities Partnership, Index 17611/06
Plaintiff-Respondent-Appellant,

-against-

Franklin Jiminez,
Defendant-Appellant-Respondent,

NYC Environmental Control Board,
et al.,
Defendants.

_____

Anderson Shen, P.C., Kew Gardens (Mark Anderson of counsel), for appellant-respondent.

Zisholtz & Zisholtz, LLP, Mineola (Meng M. Cheng of counsel), for respondent-appellant.

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Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered on or about October 17, 2017, which, to the extent appealed from as limited by the briefs, granted plaintiff renewal, and upon renewal, vacated a prior decision, dated on or about September 7, 2016, granting defendant Franklin Jiminez, inter alia, vacatur of a judgment of foreclosure and summary judgment dismissal of the complaint, and remanded the matter to the referee for a recomputation of the amount due under the note and mortgage at the legally permissible rate, unanimously reversed, on the law, with costs, plaintiff's motion denied, and the matter remanded for entry of a final order of dismissal.

Plaintiff's motion should have been denied, since the new evidence that plaintiff submitted in support of renewal, a loan document purporting to reduce the interest rate to the legal rate in the event of a finding of usury, would not change the prior determination that the loan was criminally usurious (*see Bakhash v Winston*, 134 AD3d 468 [1st Dept 2015]; CPLR 2221[e][2]). In any event, plaintiff did not assert additional material facts that existed at the time of the original motion but were unknown to it, and failed to demonstrate a reasonable excuse for not presenting such evidence earlier (CPLR 2221[e][3]).

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

ENTERED: MAY 17, 2018

CLERK

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

6594 In re the Estate of Peggy Wu Maull, Deceased File 3522/12C

- - - - -

Baldwin Maull,
Petitioner-Respondent,

Karen Lee, etc., et al.,
Respondents-Appellants.

_____

Jones, Wolf & Kapasi, LLC, New York (Benjamin J. Wolf of counsel), for Karen Lee, appellant.

Neil B. Hirschfeld, New York, for Michelle Lee, appellant.

Baldwin Maull, respondent pro se.

_____

Order, Surrogate's Court, New York County (Rita Mella, S.), entered on or about March 8, 2017, which denied respondents co-executors' motion for summary judgment disqualifying petitioner as decedent's surviving spouse on grounds of abandonment, unanimously reversed, on the law, with costs, and the motion granted.

A surviving spouse has a right of election under the will of the decedent unless it is satisfactorily established that the spouse abandoned the decedent and that the abandonment continued until the time of death (EPTL 5-1.2[a][5]). To challenge a spouse's right of election, something more than mere departure from the marital abode and living separate and apart is required. The one seeking to impose the forfeiture must demonstrate that

the abandonment was unjustified and that it was without the consent of the other spouse (*see Matter of Riefberg*, 58 NY2d 134, 138 [1983]).

Here, the court properly determined that respondents satisfied their initial burden of demonstrating that petitioner abandoned decedent and that the abandonment was unjustified in that it was the result of orders of protection against him in favor of decedent (first obtained almost seven years before her death) based on his acts of domestic violence. In opposition, petitioner failed to raise a triable issue of fact concerning decedent's consent to his removal from the marital abode given his misconduct (*Matter of Dunn*, 26 Misc 3d 1208[A], 2009 NY Slip Op 52686[U] [Sur Ct, Nassau County 2009]
see also James v James, 13 AD3d 583, 585-587 [2d Dept 2004, Miller, J., concurring]). Furthermore, petitioner's affidavit and deposition testimony demonstrated his resolve not to return

to the marital abode, except to obtain his personal belongings, even after the expiration of the orders of protection.

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

ENTERED: MAY 17, 2018

CLERK

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

6595 The People of the State of New York, Ind. 2776N/15
Respondent,

-against-

Ronald Niang,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Abraham Clott, J.), rendered March 9, 2016,

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

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

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

ENTERED: MAY 17, 2018

CLERK

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

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

6596N-
6596A PNC Bank, National Association,
Plaintiff-Appellant,

-against-

Franklin Salcedo, et al.,
Defendants-Respondents,

First Franklin Financial, etc., et al.,
Defendants.

Index 35246/13E

Fein, Such & Crane LLP, Westbury (Andrew M. Grenell of counsel), for appellant.

E. Waters & Associates, P.C., Jamaica (Edward J. Waters of counsel), for respondents.

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered on or about October 8, 2015, which denied plaintiff's motion for summary judgment and for a referee to compute, and order, same court and Justice, entered on or about September 1, 2016, which effectively granted reargument but adhered to the original determination, unanimously reversed, on the law, without costs, the motion for summary judgment granted, and the matter remanded for appointment of a referee to compute and ascertain the amount due plaintiff on the mortgage.

Plaintiff established its prima facie entitlement to judgment of foreclosure as a matter law by providing evidence of the note and mortgage, and proof of defendant's default (*Bank of*

Am., N.A. v Brannon, 156 AD3d 1, 6 [1st Dept 2017]). Plaintiff has met its burden to establish standing to commence a foreclosure action (*Bank of N.Y. Mellon v Alli*, 156 AD3d 597, 598 [2d Dept 2017]). The affidavit of plaintiff's custodian was sufficient to establish possession of the endorsed note prior to the commencement of the foreclosure action (*see HSBC Bank USA, N.A. v Sage*, 112 AD3d 1126, 1127 [3d Dept 2013], *lv dismissed* 23 NY3d 1015 [2014]). Thus, despite any factual issues raised by the undated allonges (*U.S. Bank N.A. v Askew*, 138 AD3d 402 [1st Dept 2016]), and even if the written assignment was deficient as to the note, plaintiff "may nevertheless establish its standing by demonstrating that the note was in its possession or that it was delivered prior to the commencement of this action" (*Wells Fargo Bank, N.A. v Ndiaye*, 146 AD3d 684, 684 [1st Dept 2017]; *see also U.S. Bank N.A. v Brjimohan*, 153 AD3d 1164, 1165 [1st Dept 2017]).

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

ENTERED: MAY 17, 2018

CLERK

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

6597N Avis Rent A Car System, LLC, doing business as PV Holding Corp., Plaintiff-Respondent, Index 160658/15

-against-

Thomas J. Scaramellino, also known as T.J. Scaramellino, Defendant-Appellant.

_____

Kakalec & Schlanger, LLP, New York (Daniel A. Schlanger of counsel), for appellant.

Carman Callahan & Ingram, LLP, Farmingdale (Jami C. Amarasinghe of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered September 6, 2017, which denied defendant's motion to vacate a default judgment pursuant to CPLR 5015(a)(1) and (4), unanimously reversed, on the law, without costs, and the motion granted to the extent of remanding the matter for a traverse hearing.

Defendant allegedly rented a vehicle from plaintiff in California and damaged it while driving under the influence of alcohol. Plaintiff served defendant at the New York address listed on his driver's license and obtained a default judgment against him after he failed to answer.

On his motion to vacate the default judgment, defendant submitted a nonconclusory affidavit denying proper service and

other supporting affidavits and documentary evidence demonstrating that he had moved to Massachusetts and no longer lived at the New York address at the time of service (*see NYCTL 1998-1 Trust & Bank of N.Y. v Rabinowitz*, 7 AD3d 459 [1st Dept 2004]). In opposition, plaintiff submitted its process server's affidavit of service demonstrating proper service pursuant to CPLR 308(2), a second affidavit by the process server averring that the doorman had confirmed that defendant resided in the New York apartment, and documents reflecting that defendant continued to list the New York apartment as his address. In light of this conflicting evidence as to whether the New York address was defendant's dwelling or usual place of abode at the time of service, the issue of whether Supreme Court obtained personal jurisdiction over defendant cannot be resolved without a traverse hearing (*see Rabinowitz*, 7 AD3d at 760; *Wells Fargo Bank, N.A. v Jones*, 139 AD3d 520, 523 [1st Dept 2016]).

Although, as plaintiff argues, a defendant may be estopped from challenging the propriety of service of process based on his failure to notify the Department of Motor Vehicles of a change of address (*see Stillman v City of New York*, 39 AD3d 301, 303 [1st Dept 2007]; Vehicle and Traffic Law § 505[5]), he cannot be estopped on that basis from asserting that he is not subject to the jurisdiction of the courts of a state in which he is not a

resident (*see Keane v Kamin*, 94 NY2d 263, 266 [1999]; *Mitchell v Cunningham*, 281 AD2d 192, 192 [1st Dept 2001]). Thus, on remand, the court should determine the issue of personal jurisdiction before reaching defendant's alternative argument that he had a reasonable excuse for his default based on improper service (*see e.g. Wells Fargo*, 139 AD3d at 523; *Cipriano v Hank*, 197 AD2d 295, 298 [1st Dept 1994]).

After the hearing, if Supreme Court finds that defendant was domiciled outside New York at the time of service and it therefore did not have personal jurisdiction over defendant, then defendant's motion to vacate the default judgment should be granted, the judgment vacated, and the action dismissed for lack of personal jurisdiction. Defendant is not obligated to show a reasonable excuse and meritorious defense if there is a lack of jurisdiction (*see Wells Fargo*, 139 AD3d at 522-23; *Johnson v Deas*, 32 AD3d 253, 254 [1st Dept 2006]; *Ortiz v Santiago*, 303 AD2d 1, 4 [1st Dept 2003]). Thus, the issue of lack of jurisdiction should be considered first (*see Wells Fargo*, 139 AD3d at 522-23; *Cipriano*, 197 AD2d at 298). If, however, Supreme Court finds that defendant was sufficiently domiciled in New York to establish personal jurisdiction, then service was proper. In that case, the court must deny defendant's motion to vacate the

default judgment pursuant to CPLR 5015(a)(1), as defendant has failed to raise a meritorious defense, either before the motion court or on this appeal (*see generally Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]).

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

ENTERED: MAY 17, 2018

CLERK

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

6598N Noah Bank, Index 650212/16
Plaintiff-Appellant,

-against-

Hudson Produce, Inc.,
Defendant-Respondent.

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The Basil Law Group, P.C., New York (Neil Grossman of counsel), for appellant.

Kimm Law Firm, Bayside (Michael S. Kimm of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered July 13, 2017, which, to the extent appealed from, granted defendant's motion to vacate a prior default judgment, same court and Justice, entered November 28, 2016, unanimously reversed, on the law, without costs, and the motion denied to the extent of remanding the matter for a traverse hearing to determine whether the court had jurisdiction to render the default judgment.

Since defendant is a corporation, CPLR 311(a)(1) governs the method of service in this action. It is undisputed that both service of the complaint and of plaintiff's motion papers seeking a default judgment were personally delivered to an employee of defendant, whom the corporate defendant's principal asserts was not authorized to accept service. Thus an issue of fact is

raised as to whether plaintiff validly served defendant pursuant to CPLR 311(a)(1). Accordingly, a traverse hearing should have been held to determine whether defendant was entitled to relief from the judgment pursuant to CPLR 5015(a)(4), before the court ruled on an excusable default and meritorious defense (*see Cipriano v Hank*, 197 AD2d 295, 298 [1st Dept 1994]).

If, after the traverse hearing, the court finds that service was improper, then it must grant defendant's motion to vacate the default judgment pursuant to CPLR 5015(a)(4) and dismiss the action (*cf.* CPLR 317). If, however, the court determines that service was proper under CPLR 311(a)(1), then the motion to vacate the default judgment must be denied pursuant to CPLR 5015(a)(1), as defendant failed to raise a meritorious defense (*see generally Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]).

Defendant's argument that the court erred in denying its motion to stay the action pursuant to CPLR 3211(a)(4) is not properly before this Court because defendant did not appeal from the order (*see Hecht v New York*, 60 NY2d 57, 61 [1983]). In any event, the argument is unavailing. The litigation pending in

another court involves a different corporate entity and a separate transaction.

We have considered the parties' remaining contentions and find them unavailing or academic in light of our determination.

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

ENTERED: MAY 17, 2018

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Tom, J.P., Mazzarelli, Andrias, Kern, JJ.

6616 In re Northwest 5th & 45th Realty Corp., Petitioner-Respondent, Index 150344/13

-against-

Mitchell, Maxwell & Jackson, Inc., et al., Respondents-Appellants,

Jeffrey Jackson etc., et al., Respondents.

Shaw & Binder P.C., New York (Stuart F. Shaw and Daniel S. Lopresti of counsel), for appellants.

Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., New York (Paul N. Gruber of counsel), for respondent.

Judgment, Supreme Court, New York County (Anil C. Singh, J.), entered October 31, 2016, in petitioner's favor against respondent Steven Knobel in the amount of $661,526.64, unanimously reversed, on the law, with costs, and respondents' cross motion to dismiss the petition granted.

In this special proceeding, petitioner seeks to enforce, against Knobel, two judgments that it obtained against respondent Mitchell, Maxwell & Jackson, Inc. (MMJ) in a plenary action. The petition invoked Debtor and Creditor Law § 273, which requires insolvency. The petition also quoted Debtor and Creditor Law § 271(1), which states, "A person is insolvent when the present fair salable value of his assets is less than the amount that

will be required to pay his probable liability on his existing debts as they become absolute and matured." Despite this, the petition made no allegations about the fair salable value of MMJ's assets; thus, it failed to make a prima facie case (*see Kenyon & Kenyon LLP v SightSound Tech., LLC,* 151 AD3d 530, 531 [1st Dept 2017]).

Because a special proceeding is treated like a summary judgment motion (*see* CPLR 409[b]; *Matter of Port of N.Y. Auth. [62 Cortlandt St. Realty Co.],* 18 NY2d 250, 255 [1966], *cert denied sub nom. McInness v Port of N.Y. Auth.,* 385 US 1006 [1967]), petitioner could not cure the deficiency of proof in its petition in reply (*see Henry v Peguero,* 72 AD3d 600, 602 [1st Dept 2010], *appeal dismissed* 15 NY3d 820 [2010]).

In addition to alleging fraudulent conveyance, the petition sought to pierce MMJ's corporate veil to hold Knobel (MMJ's 50% shareholder) liable for the judgment against MMJ. Such veil-

piercing was neither factually nor legally justified in this case (*see e.g. 210 E. 86th St. Corp. v Grasso*, 305 AD2d 156 [1st Dept 2003]).

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

ENTERED: MAY 17, 2018

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