SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 31, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

6600 Eleonora Ingrao, Index 152020/13
Plaintiff-Appellant,

-against-

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

[And Third-Party Actions]

_____

Frekhtman & Associates, Brooklyn (Eileen Kaplan of counsel), for appellant.

Lawrence Heisler, Brooklyn (Timothy J. O'Shaughnessy of counsel), for New York City Transit Authority, respondent.

Eustace, Marquez, Epstein, Prezioso & Yapchanyk, New York (Christopher M. Yapchanyk of counsel), for No 5. Times Square Development LLC, respondent.

_____

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered April 17, 2017, which granted the motion of defendant/third-party plaintiff No. 5 Times Square Development LLC (No. 5) and the cross motion of defendant New York City Transit Authority (NYCTA) for summary judgment dismissing the complaint, unanimously modified, on the law, to deny NYCTA's

cross motion, and otherwise affirmed, without costs.

By submitting, among other things, documents establishing that it had alienated the subject premises in 2007, four years before plaintiff's accident, and the affidavit of its general counsel, averring that, as of the date of plaintiff's accident in December 2011, No. 5 neither owned, operated, nor maintained the subject premises, No. 5 demonstrated a prima facie entitlement to summary judgment, on the ground that, since it did not own, occupy, or otherwise control the premises, it had no duty towards plaintiff (*see Sewesky v City of New York*, 140 AD3d 666 [1st Dept 2016]; *Vohra v Queen Anne Co., L.L.C.*, 90 AD3d 519, 520 [1st Dept 2011]).

Plaintiff's opposition failed to raise any triable issues of fact that No. 5 retained some control over the space, or other source of duty, at the time of her accident. The documents to which she points establish only NYCTA's erroneous belief that No. 5 still controlled the site at the time of her accident. Notably, plaintiff never sought to obtain any evidence from third-party defendant AVR Crossroads LLC, the party to which No. 5 conveyed the premises and which was in a position to authoritatively contest No. 5's claim that it no longer had any interest in the property.

Plaintiff's notice of claim and 50-h hearing provided NYCTA with sufficient notice. "The test of the sufficiency of a Notice of Claim is merely whether it includes information sufficient to enable the city to investigate" (*Brown v City of New York*, 95 NY2d 389, 393 [2000] [internal quotation marks omitted]). In making this determination, we may look, inter alia, at the evidence adduced at the section 50-h hearing (*see D'Alessandro v New York City Tr. Auth.*, 83 NY2d 891, 893 [1994]).

Here, according to the notice of claim and section 50-h hearing, plaintiff intended to take the train to Brooklyn. Plaintiff states that while she was on an escalator inside the Port Authority train station, she slipped and fell on a slippery condition. Plaintiff alleges that the escalator was within the control of the NYCTA and that it failed to maintain the escalator. Accordingly, NYCTA was on notice of plaintiff's theory of liability that it has a duty to use reasonable care to

maintain the escalator in a safe condition (*Bingham v New York City Tr. Auth.*, 8 NY3d 176, 181 [2007]).

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

ENTERED: MAY 31, 2018

CLERK

Renwick, J.P., Andrias, Kapnick, Gesmer, Moulton, JJ.

5693-
5694 Index 107111/05

Ted A. Kirchner, etc., et al.,
Plaintiffs-Respondents,

-against-

L. Raul Bernard also known as
Luis R. Bernard, etc., et al.,
Defendants,

Michael Schneider, et al.,
Defendants-Appellants.

_____

José Luis Torres, White Plains, for appellants.

Daniel Cobrinik P.C., New York (Daniela Cobrinik of counsel), for respondents.

_____

Order (denominated a judgment), Supreme Court, New York County (Milton A. Tingling, J.), entered August 14, 2014, which, after a hearing, granted judgment in favor of plaintiffs on their claims of fraudulent conveyance under the Debtor and Creditor Law, unanimously reversed, on the law, without costs, plaintiffs' motion for summary judgment denied and defendants Michael Schneider and Sandra Bernard Schneider's cross motion for summary judgment dismissing the complaint as against them granted. The Clerk is directed to enter judgment accordingly. Appeal from order, same court (Richard F. Braun, J.), entered February 1, 2016, to the extent it denied defendants' motion to dismiss the

action as abandoned pursuant to 22 NYCRR 202.48, unanimously dismissed, without costs, as academic.

In 1999, defendant Dolores Vera commenced an action for a declaratory judgment against the sponsor and the cooperative board to enforce her contract to purchase shares of a cooperative apartment, located in a building on the Upper West Side of Manhattan, at a significantly reduced insider's price.[1] The cooperative objected to the sale to Vera on the ground that she had failed to provide adequate information as to her financial stability. The parties eventually entered into a settlement agreement in March 2002, pursuant to which Vera assigned "all of her right, title and interest" in the contract to defendant Michael Schneider, her niece's husband who currently occupies the apartment, along with his wife and child and other extended family members. A few months later, in a separate lawsuit, entry of a judgment was ordered in favor of plaintiff Rafael Diaz

[1] Vera previously resided in the apartment, which was in a rent-controlled building that was converted to a cooperative in 1981. At the time of the conversion none of the defendants in this action, all prior or current apartment occupants, purchased the apartment, and the shares allocable to the apartment were owned by the sponsor.

Gutierrez[2] and against Vera in an amount exceeding $400,000, which to date has not been satisfied. Plaintiffs allege that Vera's assignment to Schneider of her contract to purchase the shares of the cooperative apartment at an insider's price was a fraudulent conveyance under the Debtor and Creditor Law. On the last appeal in this action, we remanded the matter for a hearing to determine "whether the contract was, indeed, of no value to Vera because of the cooperative's refusal to sell the shares to her, or whether the assignment of the contract was nothing more than a means of enabling the conveyance of the shares to someone other than Vera while extinguishing her claims, and whether such conveyance was fraudulent under the Debtor and Creditor Law" (*Gutierrez v Bernard*, 55 AD3d 384, 385 [1st Dept 2008]).

After a hearing, the court granted judgment in favor of plaintiffs, on the ground that Vera was bound by the position she had taken in her prior lawsuit against the cooperative to enforce her right to purchase the apartment. Upon our review of the hearing testimony and evidence, we conclude that plaintiffs did not meet their burden to show that the assignment of the contract

[2] Mr. Gutierrez has since passed away and his interests are represented in this case by plaintiff Ted A. Kirchner, in his capacity as executor for Mr. Gutierrez's estate.

was fraudulent under the Debtor and Creditor Law. At the hearing, plaintiffs put forth only one witness, an attorney, who opined as to the meaning of certain paragraphs in the amended complaint and answer, a probable outcome of Vera's action against the cooperative had it continued, and his interpretation of case law. The testimony of defendants' witnesses concerning the events leading to the assignment of the contract supported their position that the assignment was nothing more than a means of enabling the conveyance of the shares to Schneider while extinguishing Vera's claims in her action against the cooperative. Plaintiffs submitted no proof rebutting this testimony and their contention that Vera would have prevailed in the action against the cooperative is speculative.

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

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

ENTERED: MAY 31, 2018

CLERK

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

6518- Index 310243/12
6518A Claire Bernard,
Plaintiff,

-against-

Collin De Rham,
Defendant-Appellant,

Cohen Clair Lans Greifer
Thorpe & Rottenstreich LLP,
Nonparty Respondent.

_____

Dobrish Michaels Gross LLP, New York (David Elbaum of counsel), for appellant.

Cohen Clair Lans Greifer Thorpe & Rottenstreich LLP, New York (Bernard E. Clair of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Leticia M. Ramirez, J.), entered June 16, 2017, awarding a sum of money to nonparty respondent (the law firm) against defendant, and order, same court and Justice, entered June 7, 2017, which, inter alia, granted the law firm's motion for a charging lien, unanimously modified, on the law, the judgment and lien vacated as to all invoices, a hearing ordered as to the invoices dated February 2 and March 3,2017, the matter remanded for further proceedings, and, as so modified, affirmed.

The law firm is not entitled to a money judgment against

defendant, its former client, on a motion pursuant to Judiciary Law § 475. Such a motion seeks a lien upon the client's cause of action, which does not provide for an immediately enforceable judgment against all his assets, but is a security interest against a single asset, i.e., a judgment or settlement in his favor (*Butler, Fitzgerald & Potter v Gelmin*, 235 AD2d 218, 219 [1st Dept 1997]). To obtain a money judgment, the law firm must commence a plenary action (*id.* at 218-219; *see Jaffe v Brown-Jaffe*, 98 AD3d 898 [1st Dept 2012]; *Wasserman v Wasserman*, 119 AD3d 932, 934-935 [2d Dept 2014]).

We agree with the motion court that on an account stated theory, defendant cannot challenge the amounts in the invoices prior to February 2, 2017. However, the law firm failed to demonstrate its right to a charging lien on its unpaid invoices dated February 2, 2017 and March 3, 2017, since defendant timely objected to specific items in those invoices (*see Bartning v Bartning*, 16 AD3d 249 [1st Dept 2005]). Among the items defendant objected to were charges for time allegedly spent discussing fee issues, which he said were expressly excepted from billing.

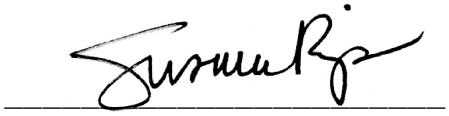
Contrary to defendant's contention, Judiciary Law § 475 does not preclude the attachment and enforcement of a charging lien on

an award in his favor, which may include an award of legal fees from his ex-wife (*see Cohen v Cohen*, 160 AD2d 571, 572 [1st Dept 1990] [holding that "[a]lthough a charging lien does not attach to an award of alimony and maintenance, section 475 does not preclude the enforcement of such lien upon any other award made in the action"] [internal citation omitted]; *see Rosen v Rosen*, 97 AD2d 837 [2nd Dept 1983] [holding that "(w)hile a charging lien does not attach to an award of alimony and maintenance, section 475 of the Judiciary Law does not preclude the enforcement of such a lien upon another award made in the action, such as an award of counsel fees to either the client or subsequent counsel"]). However, based on the record before us, it is unclear whether the court awarded any proceeds to which such a lien could attach (*see Expo Elecs. v 46 Estates* Corp., 222 AD2d 288 [1st Dept 1995]), since the matter was not concluded until after the entry of the judgment that is the subject of this appeal.

Accordingly, the matter is remanded for the court to address the disputed invoices and the enforcement of the charging lien as to all the invoices.

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

ENTERED: MAY 31, 2018



CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Kapnick, Kahn, JJ.

6669 The People of the State of New York, Ind. 201/14
Respondent,

-against-

Kevin Hurley,
Defendant-Appellant.

_____

Boies, Schiller & Flexner, LLP, New York (Nicholas A. Gravante, Jr. of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Lee M. Pollack of counsel), respondent.

_____

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered June 17, 2016, convicting defendant, after a jury trial, of grand larceny in the second degree, and sentencing him to a term of 2½ to 7½ years and a fine of $400,000, unanimously affirmed. The matter is remitted to Supreme Court for further proceedings pursuant to CPL 460.50(5).

Venue in New York County was proper, because the reliance element of grand larceny by false pretenses was established by evidence that a government agency located in Manhattan ultimately relied on defendant's false statement when it finally granted him benefits (*see* CPL 20.40[1][a]), notwithstanding that there had been preliminary reliance by another branch of that agency located elsewhere, and notwithstanding that the element of

reliance necessarily involved conduct by a nonparticipant in the crime, resulting from defendant's conduct. Moreover, defendant's submission of a follow-up form containing false statements years after filing his initial application for benefits, which may be deemed to have been made in Manhattan, where a government agency received the form (*see* CPL 20.60[1]), established his ongoing intent to obtain the benefits by false pretenses, which is also an element. We have considered and rejected defendant's remaining arguments on the venue issue.

The court properly charged the jury on larceny by false pretenses. The standard charge contained in the Criminal Jury Instructions, including its reference to the element of reliance, was sufficient, in the context of the type of benefit at issue, to convey the requirement that defendant obtained a public benefit to which he was not entitled, and the court was not obligated to include additional language requested by defendant. In any event, any error was harmless in light of the overwhelming evidence that defendant was not entitled to the benefit at issue, and that he only received it because of his false statements (*see People v Crimmins*, 36 NY2d 230, 242 [1975]).

Defendant's contention that the People and/or the court constructively amended the indictment is unpreserved (*see People*

v Whitecloud, 110 AD3d 626 [1st Dept 2013], *lv denied* 22 NY3d 1142 [2014]), and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits (*see People v Treuber*, 64 NY2d 817 [1985]).

The court provided meaningful responses to two notes from the deliberating jury on the subject of fraudulent intent. The responses accurately stated the law, did not suggest that the court believed defendant to be guilty, and were not otherwise unduly prejudicial. Moreover, we find that any error in the court's responses to the notes was harmless (*see Crimmins*, *supra*). To the extent defendant is challenging the court's response to a third note, containing a hypothetical reference to signing a blank form, that claim is unpreserved and without merit.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 31, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Gesmer, Oing, JJ.

6711 The People of the State of New York, Respondent, Ind. 3005/13 161/15

-against-

Sean Christianson, Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Emma L. Shreefter of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes of counsel), for respondent.

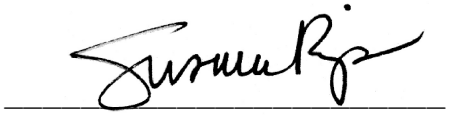
_____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered September 28, 2015, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree and criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to concurrent terms of eight years, with three years postrelease supervision, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the prison sentence to concurrent terms of six years, and otherwise affirmed.

We do not find that defendant made a valid waiver of his right to appeal, and we find the sentence excessive to the extent indicated

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

ENTERED: MAY 31, 2018



CLERK

Renwick, J.P., Mazzarelli, Gesmer, Oing, JJ.

6712 Eugenia Cortijo, Index 303825/15
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Respondent-Appellant.

_____

Herzfeld & Rubin, P.C., New York (Linda M. Brown of counsel), for appellant.

Pena & Kahn, PLLC, Bronx (Diane Welch Bando of counsel), for respondent.

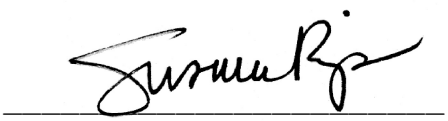
_____

Order, Supreme Court, Bronx County (Llinet M. Rosado, J.), entered on or about August 14, 2017, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendant established its entitlement to judgment as a matter of law. In opposition, plaintiff failed to raise a triable issue of fact.

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

ENTERED: MAY 31, 2018



CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Gesmer, Oing, JJ.

6713 In re Ezequiel L.-V.
Petitioner-Appellant,

-against-

Inez M.,
Respondent-Respondent,

Pablo A.,
Respondent.

_____

Larry S. Bachner, Jamaica, for appellant.

New York Legal Assistance Group, New York (Beth E. Goldman of counsel), for respondent.

Kenneth M. Tuccillo, Hastings on Hudson, attorney for the child.

_____

Order, Family Court, New York County (Jane Pearl, J.), entered on or about June 27, 2016, which dismissed the paternity petition, unanimously reversed, without costs, and the matter remanded for further proceedings pursuant to this order.

The Family Court should not have denied and dismissed the paternity petition without a hearing. The stated reason for the dismissal was the existence of a valid acknowledgment of paternity executed by respondents. The statute only permits the parties to such an acknowledgment to challenge it (Family Court Act § 516-a[b][iv]). However, the existence of a valid acknowledgment of paternity does not bar a claim of paternity by

one who is not a party to it (*Thomas T. V Luba R.*, 121 AD3d 800 [2d Dept 2014]; *see also Tyrone G. V Fifi N.*, 189 AD2d 8, 14 [1st Dept 1993] [order of filiation not a bar to claim of paternity by stranger to that proceeding]). Therefore, petitioner is entitled to a hearing, and we remand to the Family Court for further proceedings, including, as appropriate, an estoppel hearing and/or a DNA test.[1]

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

ENTERED: MAY 31, 2018

CLERK

[1]In an earlier proceeding in this case, the support magistrate who referred the matter for a hearing on equitable estoppel opined that the February 17, 2011 divorce judgment based on abandonment (DRL § 170[2]) constituted a finding that petitioner had not had sexual relations with the mother for a year. However, the judgment does not state when the mother alleged that petitioner abandoned her or the facts alleged to have constituted the abandonment. Furthermore, although refusal to engage in sexual relations without justification may constitute constructive abandonment, an attempt at reconciliation, including sexual relations, during the period of abandonment, does not preclude entry of a judgment of divorce (*Haymes v Haymes*, 252 AD2d 439, 440 [1st Dept 1998]). Accordingly, the divorce judgment does not necessarily bar this petition.

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Gesmer, Oing, JJ.

6714 Pauline Crisafulli, Index 160450/16
Plaintiff-Appellant,

-against-

Southbridge Towers, Inc.,
Defendant-Respondent.

_____

O'Sullivan & Zacchea, PLLC, Kew Gardens (Kevin M. O'Sullivan of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Erika M. Edwards, J.), entered May 9, 2017, which, insofar as appealed from, granted defendant's cross motion to dismiss the complaint pursuant to CPLR 3211(a)(7), unanimously affirmed, without costs.

On the record before us, all of plaintiff's causes of action depend on the validity of a participation agreement and a proprietary lease between the parties. The complaint alleges that the participation agreement was executed on February 6, 2015. In that contract, plaintiff agreed to exchange her occupancy agreement for a proprietary lease. However, in October 2014, the Civil Court of the City of New York had issued a judgment of possession in defendant's favor and had ordered a warrant to issue forthwith. The court issued a warrant for

plaintiff's eviction at some point before January 21, 2015. "The issuing of a warrant for the removal of a tenant cancels the agreement under which the person removed held the premises" (RPAPL 749[3]). On or about November 9, 2016, defendant served plaintiff with a Notice of Eviction. Plaintiff then moved in the Housing Court to vacate the judgment against her, on the grounds, inter alia, that defendant had issued her a proprietary lease and stock certificate. Housing Court denied the motion to vacate, holding that the stock certificate and proprietary lease were invalid because they were issued in error. Plaintiff did not appeal from that determination. Consequently, plaintiff is collaterally estopped from relitigating the issue of the validity of the proprietary lease and stock certificate, and the motion court properly granted defendant's motion to dismiss the complaint.

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

ENTERED: MAY 31, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Gesmer, Oing, JJ.

6715 Angel Jarama, Index 403580/10
Plaintiff-Respondent,

-against-

902 Liberty Avenue Housing Development Fund Corp., et al.,
Defendants-Appellants,

Bowery Residents' Committee, Inc., et al.,
Defendants.

_____

Hannum Feretic Prendergast & Merlino, LLC, New York (Steven R. Dyki of counsel), for appellants.

Gorayeb & Associates, P.C., New York (John M. Shaw of counsel), for respondent.

_____

Order, Supreme Court, New York County (Robert D. Kalish, J.), entered January 6, 2017, which granted plaintiff's motion for partial summary judgment as to liability on his Labor Law § 240(1) claim, and denied defendants' cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff, Angel Jarama, was involved in an accident while performing external masonry work at a construction site. He was standing on a pipe scaffold when a large masonry stone fell onto the scaffold, damaging its "bicycle," which was holding up the

wooden planks and causing the planks to collapse from under plaintiff's feet. Plaintiff fell 35 feet to the ground below and suffered numerous personal injuries.

This Court may consider the merits of defendants' untimely cross motion for summary judgment dismissing the complaint to the extent it sought dismissal of the Labor Law § 240(1) claim, because it is based on the same issues raised in plaintiff's motion (*Palomo v 175th St. Realty Corp.*, 101 AD3d 579, 581 [1st Dept 2012]). However, the remainder of the motion, seeking dismissal of Labor Law § 241(6), Labor Law § 200 and common law negligence claims cannot be considered because it does not address issues nearly identical to those raised in the timely motion and defendants did not demonstrate good cause for the delay (*see Vitale v Astoria Energy II, LLC*, 138 AD3d 981, 984 [2d Dept 2016]; *Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280 [1st Dept 2006], *appeal dismissed* 9 NY3d 862 [2007]; CPLR 3212[a]).

Plaintiff is entitled to summary judgment as to liability on his Labor Law § 240(1) claim. He established, prima facie, that he was engaged in an activity falling within the statute, and that defendants failed to provide him proper safety equipment, either in the form of a scaffold that could withstand the force

of a falling masonry stone (*Salvidar v Lawrence Dev. Realty, LLC*, 95 AD3d 1101, 1102 [2d Dept 2012] [scaffold that collapsed when struck with falling piece of façade failed to afford proper protection]), a hoist to aid in safely lifting and maneuvering the heavy stones (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599 [2009]), something to which plaintiff could safely hook his harness in order to avoid falling (*Hoffman v SJP TS, LLC*, 111 AD3d 467 [1st Dept 2013]), or any other appropriate safety device. Plaintiff further demonstrated that defendants' failure to provide an appropriate safety device was the proximate cause of the accident, and defendants have failed to raise an issue of fact.

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

ENTERED: MAY 31, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Gesmer, Oing, JJ.

6716 The People of the State of New York, Respondent, Ind. 3402/11 2078/11

-against-

Dwight Perry, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered January 24, 2012, as amended February 9, 2012, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a term of 2½ to 5 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence, including the statements of two subway passengers, admitted under the excited utterance exception to the hearsay rule, that defendant had been

threatening to "cut somebody up with a knife," supported the inference that he intended to use his knife unlawfully.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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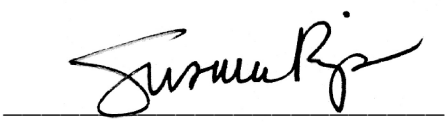


CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Gesmer, Oing, JJ.

6717 Martha Schwartz, Index 102124/15
Plaintiff-Appellant,

-against-

170 West End Owners Corp.,
Defendant,

ACP Realty Group Inc.,
Defendant-Respondent.

_____

Don Savatta, P.C., New York (Don Savatta of counsel), for, appellant.

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

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered April 3, 2017, which, insofar as appealed from as limited by the briefs, granted the motion of defendant ACP Realty Group Inc. (ACP) for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

ACP demonstrated its entitlement to judgment as a matter of law in this action where plaintiff alleges, inter alia, breach of the warranty of habitability. ACP submitted the affidavit of its employee, who noted that all the conditions cited in the complaint were remedied, apart from those requiring access to plaintiff's apartment, which she denied.

In opposition, plaintiff failed to raise a triable issue of fact. Based on the affirmation of plaintiff's attorney, it appears that the only remaining condition that was not remedied was the excessive mechanical noise from the fans on the roof, due to the alleged failure to install vibration isolators. However, the attorney's affirmation was insufficient to raise a triable issue of fact, as he lacked personal knowledge of the operative facts (*see W.W. Norton & Co. v Roslyn Targ Literary Agency*, 81 AD2d 798 [1st Dept 1981]). Although a verified complaint which sets forth evidentiary facts may be sufficient, here, the Housing Court previously made a finding that plaintiff's allegations that the problems on the roof were not addressed were incorrect.

Plaintiff asserts that her claim for damages due to personal injuries should not have been dismissed. However, she failed to present evidence sufficient to raise a triable issue of fact as to whether her medical problems and those of her daughter were caused by the conditions in the apartment. The medical records attached to the complaint contain only their allegations of a link between their medical issues and the conditions in the apartment (*see Kent v 534 E. 11th St.*, 80 AD3d 106, 114 [1st Dept 2010]).

Plaintiff contends that there were issues of fact concerning

whether ACP violated the stipulation of settlement of the Housing Court proceeding, based on the noise code violations found by her expert. However, the stipulation of settlement at paragraphs 1-3 made the owners of the building responsible to correct conditions on the roof that may have caused the noise violations. Plaintiff's assertion that paragraph 4 of the stipulation made ACP also responsible to correct violations is erroneous, since that paragraph stated that ACP's responsibility was limited by the provisions of the proprietary lease, which made the owners solely responsible for roof repairs.

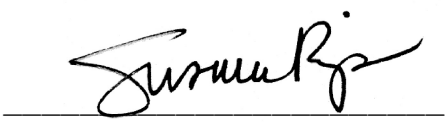
With respect to dismissal of plaintiff's claim for a permanent injunction, such relief is inappropriate unless a clear right to such relief is shown (*see Second on Second Café, Inc. v Hing Sing Trading, Inc.*, 66 AD3d 255, 265 [1st Dept 2009]). Here, the court properly determined that plaintiff presented no evidence of a clear right to such relief.

Plaintiff's claim for punitive damages was also properly dismissed in that she failed to present evidence concerning ACP's malicious, fraudulent or evil motive and the conduct alleged in the complaint was not sufficiently egregious (*see Marinaccio v Town of Clarence*, 20 NY3d 506, 512 [2013]*; Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 614 [1994]).

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 31, 2018



CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Gesmer, Oing, JJ.

6718 In re Hallie Sammartino, etc., Index 500173/14

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Senior Quarters Operating Corp.,
doing business as Atria Forest Hills,
Interested Party-Appellant,

-against-

United Guardianship Services,
Appointed Guardian-Respondent.

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Lewis Brisbois Bisgaard & Smith LLP, New York (Peter T. Shapiro of counsel), for appellant.

_____

Order, Supreme Court, New York County (Laura Visitacion-Lewis, J.), entered June 6, 2017, which prohibited interested party-appellant (Atria) from discharging or transferring its resident, Daniel John DiSchino, a person in need of a guardian, without prior consent of the court, unanimously reversed, on the law and the facts, without costs, and the motion granted to the extent of remanding for proceedings consistent with this decision.

Atria, which previously terminated Mr. DiSchino's lease on grounds of nonpayment of living expenses, properly sought permission from the guardianship court before commencing a Social Services Law § 461-h proceeding against Mr. DiSchino, for whom a guardian, United Guardianship Services (UGS), had been appointed

(*see Wright v Rickards*, 94 AD3d 874, 875 [2d Dept 2012]).

The order cautioned Atria not to discharge or transfer Mr. DiSchino without its permission, yet such permission was precisely what Atria sought with the motion. The order effectively denies permission, but because it does not explain why, it leaves Atria, which states it is suffering financial harm due to the escalating unpaid amounts, ostensibly without further recourse.

Court intervention is necessary, as UGS appears to have no incentive at this point to disturb the status quo, as its ward, Mr. DiSchino, is living without cost to him in a full-service facility. It has acknowledged the escalating debt owed to Atria, yet offers no viable solution to the problem nor seems to be exploring such solutions of its own accord. It advocates suing Ms. Sammartino, the guarantor of Mr. DiSchino's obligations under the lease with Atria, but Atria already did so, obtained a default judgment against her, and states that further proceedings have been stayed by her bankruptcy filing. Any remedies involving Ms. Sammartino, moreover, would not enable Atria to recover the premises.

In its papers below, UGS, which has not filed a brief on this appeal, did identify viable concerns should summary

proceedings be commenced and resolved in Atria's favor, given the complexities associated with finding Mr. DiSchino alternative residential arrangements. However, the merits of its assertions cannot be adequately assessed on the record before us. A hearing should be held to determine their merits, as well as the accuracy of UGS's Initial Guardian Report and its description of Mr. DiSchino's assets, and to determine whether Atria may appropriately commence special proceedings under Social Services Law § 461-h.

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

ENTERED: MAY 31, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Gesmer, Oing, JJ.

6719 Christopher Giancola, Index 153082/13
Plaintiff-Appellant,

Natalia Giancola,
Plaintiff,

-against-

The Yale Club of New York City,
Defendant-Respondent.

- - - - - -

The Yale Club of New York City,
Third-Party Plaintiff,

-against-

P.S. Marcato Elevator Co., Inc.,
Third-Party Defendant-Respondent.

Scottsdale Insurance Co.,
Third-Party Defendant.

_____

Block O'Toole & Murphy, LLP, New York (David L. Scher of counsel), for appellant.

Baxter Smith & Shapiro, P.C., White Plains (Sim R. Shapiro of counsel), for the Yale Club of New York City, respondent.

Gottlieb Siegel & Schwartz, LLP, New York (Michele Rosenblatt of counsel), for P.S. Marcato Elevator Co., Inc., respondent.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered July 11, 2017, which, insofar as appealed from as limited by the briefs, denied plaintiff Christopher Giancola's cross motion for partial summary judgment on the common-law negligence

and Labor Law § 200 and § 240(1) claims, and granted defendant's motion for summary judgment dismissing the Labor Law § 240(1) claim, unanimously modified, on the law, without costs, to deny defendant's motion, and to grant plaintiff's cross motion for partial summary judgment on the issue of liability on the Labor Law § 240(1) claim, and otherwise affirmed, without costs.

Plaintiff's cross motion for partial summary judgment on the Labor Law § 240(1) claim should have been granted. There is no issue of fact as to whether it was foreseeable that the particle board covering an escape hatch on top of the elevator car where plaintiff was required to work would collapse when traversed by him (*see Restrepo v Yonkers Racing Corp., Inc.*, 105 AD3d 540 [1st Dept 2013]; *see also Kircher v City of New York*, 122 AD3d 486 [1st Dept 2014]). It is not dispositive that the escape hatch covering was not intended to serve as a safety device protecting workers from elevation-related risks. Rather, since plaintiff's work exposed him to such risks, he was required to be provided with adequate safety devices in compliance with Labor Law § 240(1) (*see Jones v 414 Equities LLC*, 57 AD3d 65, 78-79 [1st Dept 2008]). Insofar as *Bonura v KWK Assoc.* (2 AD3d 207 [1st Dept 2003]) holds to the contrary, the reason in that case was rejected by the court in *Jones*.

The court properly denied plaintiff's cross motion on the common-law negligence and Labor Law § 200 claims. The record presents triable issues as to whether defendant had notice that the escape hatch cover, which was comprised of particle board, posed a hazard and whether it was defendant's employees that caused this hazardous condition (*see Debellis v NYU Hosps. Ctr.*, 12 AD3d 320 [1st Dept 2004]).

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

ENTERED: MAY 31, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Gesmer, Oing, JJ.

6721-
6722 Index 653651/16

Jason R. Mischel,
Plaintiff-Appellant,

-against-

Safe Haven Enterprises, LLC,
et al.,
Defendants-Respondents.

_____

Jason R. Mischel, appellant pro se.

David B. Smith, PLLC, New York (Nicholas D. Smith of counsel), for respondents.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered August 3, 2017, to the extent it denied plaintiff's motion to renew defendants' motion to dismiss the amended complaint for lack of personal jurisdiction, unanimously reversed, on the law and the facts, with costs, plaintiff's motion granted, and, upon renewal, defendants' motion denied, and appeal therefrom otherwise dismissed, without costs, as taken from a nonappealable order. Appeal from order, same court and Justice, entered April 18, 2017, which granted defendants' motion, unanimously dismissed, with costs, as academic.

In opposition to defendants' motion to dismiss, plaintiff made a "sufficient start" in establishing that New York courts

have jurisdiction over defendants to warrant jurisdictional disclosure and a hearing (*see e.g. Robins v Procure Treatment Ctrs., Inc.*, 157 AD3d 606, 607 [1st Dept 2018]; *Stardust Dance Prods., Ltd. v Cruise Groups Intl., Inc.*, 63 AD3d 1262, 1265 [3d Dept 2009]). On his motion to renew, plaintiff submitted sufficient evidence to warrant a finding of jurisdiction on the papers alone (*see Fischbarg v Doucet*, 9 NY3d 375 [2007]; CPLR 2221[e], [f]). The evidence shows that plaintiff was hired by defendants, a corporation and two individuals, all residents of Louisiana, after an in-person meeting in New York and that defendants engaged in extensive communications with him by telephone, email, in-person meetings, and document exchanges for two years while he was in New York representing them in various matters.

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

ENTERED: MAY 31, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Gesmer, Oing, JJ.

6723 The People of the State of New York, Ind. 3123/14
Respondent,

-against-

Kevin Qu,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Ross D. Mazer of counsel), respondent.

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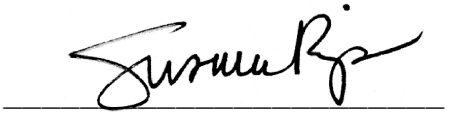
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Melissa C. Jackson, J.), rendered October 15, 2015,

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

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

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

ENTERED: MAY 31, 2018



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

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Gesmer, Oing, JJ.

6727 Remigiusz Nawrocki, Index 303192/07
Plaintiff-Appellant, 84001/08

-against-

Huron Street Development LLC, et al.,
Defendants-Respondents.
- - - - -
[And a Third-Party Action]

_____

Melcer Newman PLLC, New York (Jeffrey B. Melcer of counsel), for appellant.

_____

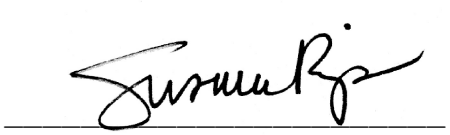
Order, Supreme Court, Bronx County (Ruben Franco, J.), entered January 14, 2016, which, after an inquest, inter alia, awarded plaintiff $25,000 for past pain and suffering and $25,000 for future pain and suffering, unanimously modified, on the facts, to increase the awards to $250,000 for past pain and suffering, and $250,000 for future pain and suffering, and otherwise affirmed, without costs.

Plaintiff, a 28-year-old plumber, fell from a ladder while working, and sustained two fractures in his jaw and an impacted tooth, requiring internal fixation surgery and plastic surgery. He could not eat without using a straw for eight weeks, then not without pain for six to eight months, and was left with scarring. Under these circumstances, the amounts awarded for plaintiff's

injuries deviate materially from what is reasonable compensation, and we modify to the extent indicated (CPLR 5501[c]; *see e.g. Garber v Lynn*, *79 AD3d 401* [1st Dept 2010]; *Atkinson v Buch*, 17 AD3d 222 [1st Dept 2005]).

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

ENTERED: MAY 31, 2018



CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Gesmer, Oing, JJ.

6728 The People of the State of New York, Ind. 5015/13
Respondent,

-against-

Manuela Lopez,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (David Crow of counsel), and Goodwin Procter LLP, New York (Danielle Bart of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered February 24, 2016, as amended, March 24, 2016, convicting defendant, after a jury trial, of criminally negligent homicide, and sentencing her to a term of 1⅓ to 3 years, unanimously affirmed.

The suppression court properly concluded that the People established the voluntariness of defendant's written and videotaped statements beyond a reasonable doubt. The circumstances of the interrogation, when viewed in totality, were not coercive (*People v Anderson*, 42 NY2d 35, 38-39 [1977]). The fact that defendant made an inculpatory statement "upon being confronted with the untruthfulness" (*People v White*, 10 NY3d 286,

292 [2008]) of her prior exculpatory statement did not render the inculpatory statement involuntary. The detectives never suggested that defendant's "silence" would be held against her; there was no "silence," because defendant spoke freely with the detectives at all times and never invoked her right to cut off questioning or become silent. Instead, the police essentially told her that persisting in a false denial might be damaging, and this warning was not misleading. There was also nothing coercive about accurately informing defendant that the victim (who ultimately died) was in bad condition and might not survive.

The court's single-word response to a juror's oral, in-court inquiry about whether certain testimony given through an interpreter had been transcribed in English did not violate the requirements of *People v O'Rama* (78 NY2d 270 [1991]). During a readback of this testimony, a juror interjected the question, "The Spanish was not put in the transcript, correct?," and the court immediately replied, "Correct." Defendant had notice of the juror's inquiry, and thus there was no mode of proceedings error (*see People v Nealon*, 26 NY3d 152, 156 [2015]; *People v Williams*, 21 NY3d 932, 934-935 [2013). Although defendant objected on *O'Rama* grounds, she only requested the inappropriate remedy of a mistrial and declined the court's offer to deliver an

additional instruction. Furthermore, the juror's unambiguous question about whether the witness's words in Spanish had been transcribed was plainly ministerial and nonsubstantive (*see People v Mays*, 20 NY3d 969, 971 [2012]; *People v Ochoa*, 14 NY3d 180, 188 [2010]). The court gave the only suitable answer, and there was no need for input from the parties. Moreover, earlier in the trial the court had already told the jury several times that the official record was the English translation and that the Spanish version was not recorded.

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

ENTERED: MAY 31, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Gesmer, Oing, JJ.

6729N & M-258 Index 350045/15

Ashley Kozel,
Plaintiff-Respondent,

-against-

Todd Kozel,
Defendant.

- - - - -

Inga Kozel,
Nonparty Appellant.

_____

Cinque & Cinque, P.C., New York (James P. Cinque of counsel), for appellant.

Meister Seelig & Fein LLP, New York (Kevin Fritz of counsel), for respondent.

_____

Appeal from order, Supreme Court, New York County (Lucy Billings, J.), entered July 6, 2016, which granted plaintiff's motion to hold nonparty witness Inga Kozel in contempt of an order, same court and Justice, dated April 22, 2016, and imposed a civil contempt fine of $250 per day commencing June 29, 2016, for her continued contempt of that order, and to compel her compliance with plaintiff's subpoena dated April 28, 2016, unanimously dismissed, without costs.

Nonparty witness Inga Kozel filed her notice of appeal after she initiated a removal proceeding to federal court. As such, the notice was filed at a time when the IAS court lacked

jurisdiction, and thus the notice was void ab initio (*see* 28 USC § 1446[d]; *Holmes v AC & S, Inc.*, 388 F Supp 2d 663, 667 [ED Va 2004]). After the matter was remanded, Inga had sufficient time to file a notice of appeal, which she failed to do (*see Strasser v KLM Royal Dutch Airlines*, 631 F Supp 1254, 1257 [CD Cal 1986] [period to appeal tolled upon the filing for removal]). Contrary to Inga's contention, her rights are not compromised by our holding, as she would have had recourse to challenge the order if the federal court had retained jurisdiction (*see Holmes*, 388 F Supp 2d at 667; *see generally Breedlove v Cabou*, 296 F Supp 2d 253, 263-266 [ND NY 2003]).

Also, Inga failed to appeal from a judgment entered subsequent to the order purportedly appealed from, which fined her for her continued contempt of that order. Accordingly, Inga's appeal is also dismissed on the ground that the order terminated with entry of the judgment (*see generally Matter of Aho*, 39 NY2d 241, 248 [1976]), and we decline to exercise our discretion under CPLR 5520(c), which applies to defects in form, because the notice of appeal was jurisdictionally defective under CPLR 5513 when filed.

In any event, even if we were to consider the appeal, Inga's arguments are without merit. Contrary to her contention, she was

properly served with plaintiff's order to show cause. The order to show cause directed plaintiff to serve Inga under CPLR 308 and her counsel by overnight mail on or before June 20, 2016. Inga's claim that her counsel was untimely served because he did not receive papers until June 21, 2016 is without merit (*see* CPLR 2103[b][6] [service is complete upon deposit into the custody of the overnight delivery service]). Likewise, the record supports that Inga was personally served at the New York City apartment she and defendant owned, which constituted her "dwelling place or usual place of abode within the state" for the purposes of CPLR 308 (*see Krechmer v Boulakh*, 277 AD2d 288, 289 [2d Dept 2000]). Given that Inga averred in an affidavit sworn to in March 2016 that she could not return to her home country of Lithuania, and had relocated to New York, service under the Hague Convention was inapplicable (*see generally Volkswagenwerk Aktiengesellschaft v Schlunk*, 486 US 694, 698 [1988]). Since Inga was properly served with the contempt motion, and had knowledge of the terms of the subject order of which she was in violation, the court was empowered to find her in contempt without plaintiff commencing a special proceeding (*see Citibank v Anthony Lincoln-Mercury*, 86 AD2d 828, 829 [1st Dept 1982]). Finally, the court properly

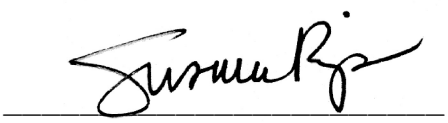
imposed a daily civil contempt fine of $250 to compel Inga's compliance (*see Ruesch v Ruesch*, 106 AD3d 976, 977 [2d Dept 2013]).

M-258 - *Ashley D. Kozel v Todd Kozel*

Motion to dismiss appeal on the ground that notice of appeal, filed when the federal court had exclusive jurisdiction, was void ab initio, denied as academic.

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

ENTERED: MAY 31, 2018



CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Gesmer, Oing, JJ.

6730-
6731N Index 350045/15

Ashley Kozel,
Plaintiff-Respondent,

-against-

Todd Kozel,
Defendant.

- - - - -

Inga Kozel,
Nonparty Appellant.

_____

Cinque & Cinque, P.C., New York (James P. Cinque of counsel), for appellant.

Miester Seelig Fein LLP, New York (Kevin Fritz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lucy Billings, J.), entered October 13, 2016, which granted plaintiff's motion to hold nonparty witness Inga Kozel in further contempt of an order, same court and Justice, dated April 22, 2016, and imposed a criminal contempt fine of $1,000 per day for her continued noncompliance commencing October 5, 2016, and holding her in contempt of plaintiff's subpoena, dated April 28, 2016, and order, same court and Justice, entered July 6, 2016, which imposed a civil contempt fine of $250 per day commencing October 5, 2016, unanimously modified, on the law, to the extent of vacating the daily criminal contempt fine of $1,000, imposing

instead a one-time criminal contempt fine of $1,000, made payable to the County Treasurer, and otherwise affirmed, without costs.

Contrary to the contention of the nonparty witness (Inga), she was properly served via email with plaintiff's order to show cause. While a criminal contempt proceeding requires personal service on the contemnor (*see Matter of Grand Jury Subpoena Duces Tecum*, 144 AD2d 252, 255-256 [1st Dept 1988]), CPLR 308(5) permits a court to direct another manner of service if the methods set forth in the statute prove impracticable. Here, Inga left the jurisdiction after the same court and Justice found her in contempt, and offers no evidence that she was at either her residence in London or Lithuania. Under these circumstances, the court properly directed that she be served via email (*see Alfred E. Mann Living Trust v ETIRC Aviation S.A.R.L.*, 78 AD3d 137, 141-142 [1st Dept 2010]). Since Inga was properly served with the contempt motion, and had knowledge of the terms of the subject orders of which she was in violation, the court was empowered to find her in contempt without plaintiff commencing a special proceeding (*see Citibank v Anthony Lincoln-Mercury*, 86 AD2d 828, 829 [1st Dept 1982]).

While the court properly found Inga in contempt, it erred in imposing a daily criminal contempt fine of $1,000 (*see* Judiciary

Law § 751). Further, the order fails to set forth the payee of such fine. Accordingly, we modify to impose a one-time criminal contempt fine of $1,000, and to direct that these payments are made payable to the County Treasurer (*see* Judiciary Law § 791).

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

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

ENTERED: MAY 31, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Gesmer, Oing, JJ.

6732N In re Bechir Louati, Index 150888/16
Petitioner-Appellant,

-against-

State Farm Fire and Casualty Company,
Respondent-Respondent.
- - - - -
[And a Third Party Action]

_____

Wilkofsky, Friedman, Karel & Cummins, New York (Jonathan Wilkofsky of counsel), for appellant.

Rivkin Radler LLP, Uniondale (Henry Mascia of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Manuel J. Mendez, J.), entered September 7, 2016, denying the petition to compel respondent to proceed with an appraisal, and dismissing the proceeding without prejudice to the commencement of a new proceeding after resolution of coverage issues in a plenary action, unanimously affirmed, without costs.

Petitioner seeks to compel respondent, which insured his home at all relevant times, to proceed with an appraisal to ascertain the amount of damages arising from petitioner's claimed covered loss to the property. The court correctly found that policy coverage issues exist that must be resolved before an appraisal can proceed (*see* Insurance Law § 3408[c]).

An issue exists as to whether the water damage on the floor of the first-floor bathroom was caused by a burst pipe (a covered cause of loss) or by another, excluded cause (*see Matter of Pottenburgh v Dryden Mut. Ins. Co.*, 55 Misc 3d 775, 778 [Sup Ct, Tompkins County 2017] [citing *Kawa v Nationwide Mut. Fire Ins. Co.*, 174 Misc 2d 407, 408-409 [Sup Ct, Erie County 1997]). An issue also exists as to whether petitioner's failure to retain the floor tiles for inspection is a basis to deny coverage (*see Fuchs v Sun Ins. Off., Ltd.*, 149 Misc 600, 600-01 [Mun Ct, NY County 1933], citing *Johnson v Hartford Fire Ins. Co.*, 94 Misc 163, 167 [App Term, 1st Dept 1916]).

However, to the extent the parties dispute whether it was necessary to re-tile the entire first floor when the covered loss directly affected the bathroom only, or whether it was necessary to replace any floor tiles given respondent's failure, upon inspection, to observe any damage to the floor, these disputes present factual questions that are properly decided in an appraisal (*see Pottenburgh*, 55 Misc 3d at 777-778; *Quick Response*

Commercial Div., LLC v Cincinnati Ins. Co., 2015 WL 5306093, *3-4, 2015 US Dist LEXIS 120415, *6-9 [ND NY Sept. 10, 2015]).

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

ENTERED: MAY 31, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Gesmer, Oing, JJ.

6733N Win-Vent Architectural Windows, a Division of Extrusions, Inc., etc., Plaintiff-Appellant, Index 652570/16

-against-

NGU, Inc., doing business as Champion Architectural Window and Door, et. al., Defendants-Respondents.

- - - - -

[And a Third-Party Action]

_____

Constantine T. Tzifas, PLLC, White Plains (Albert A. Hatem of counsel), for appellant.

Morrison Cohen LLP, New York (David J. Kanfer of counsel), for respondents.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about August 4, 2017, which denied plaintiff's motion for class certification pursuant to Lien Law article 3-A and CPLR 901 on its causes of action alleging diversion of trust funds, unanimously affirmed, with costs.

The court properly denied class certification on the ground that the prerequisites to a class action (CPLR 901) were not met (*see Matros Automated Elec. Const. Corp. v Libman*, 37 AD3d 313 [1st Dept 2007]). The court correctly discerned the nature of plaintiff's claim under Lien Law article 3-A and that, rather than seeking class certification with regard to a single trust

fund pursuant to Lien Law § 77, plaintiff sought to bring a single class action to enforce its claims to payment from 15 distinct trust funds created from 15 different projects. As the court observed, plaintiff failed to show how the 15 different trust diversion claims on 15 unrelated contracts and projects, owned by 15 different owners, meet the requirements of commonality, typicality, and superiority of CPLR 901(a)(2), (3), and (5). While the named parties were involved in all 15 projects, each is factually different and raises, at the very least, different defenses, and possibly different counterclaims, depending on the other parties that are involved, and on the nature, quality, and timing of the window manufacturing and installation services provided. Plaintiff acknowledges there are "John Doe" defendants yet to be identified and named with regard to one or all of those projects.

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

ENTERED: MAY 31, 2018

CLERK

Sweeny, J.P., Richter, Andrias, Kahn, Moulton, JJ.

6736-
6737 The People of the State of New York,
Respondent,

-against-

Elvis McKenzie,
Defendant-Appellant.

Ind. 2257/12
2312/12

_____

Rosemary Herbert, Office of the Appellate Defender, New York (Daniel R. Lambright of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered January 20, 2015, as amended March 31, 2015, convicting defendant, after a jury trial, of assault in the first degree, robbery in the first degree (two counts), robbery in the second degree and attempted robbery in the third degree, and sentencing him, as a second felony offender, to an aggregate term of 15 years, unanimously affirmed.

We reject defendant's challenge to the sufficiency of the evidence supporting the serious physical injury element of the convictions relating to a robbery victim who was stabbed. The evidence, including expert medical testimony, established serious physical injury under the theory of creating a substantial risk

of death (Penal Law § 10.00[10]). The attending physician testified that the three-inch cut behind the victim's ear, even though not deep, posed a substantial risk of death because of its very close proximity to the victim's carotid artery and jugular vein (*see People v Jones*, 38 AD3d 352 [1st Dept 2007], *lv denied* 9 NY3d 846 [2007]).

The court providently exercised its discretion in permitting the People to impeach one of the victims with his grand jury testimony that he had previously identified defendant at a lineup (*see* CPL 60.35[1]; *People v Duncan*, 46 NY2d 74, 80 [1978]). The victim testified at trial that he had seen the tall, slim robber who attacked him a thousand times in the neighborhood, but did not see his attacker in court, and he specifically testified that this was not due to his inability to recall defendant's appearance, but because he did not see "anybody [he] recognize[d]." This testimony, viewed in the context of his "flippant attitude" throughout his direct testimony, as noted by the court, and his apparent efforts to undermine the People's case, caused the kind of affirmative damage that permits impeachment of one's own witness (*see People v De Jesus*, 101 AD2d 111, 113-14 [1st Dept 1984], *affd* 64 NY2d 1126 [1985]; *see also People v Bynum*, 275 AD2d 251 [1st Dept 2000], *lv denied* 95 NY2d

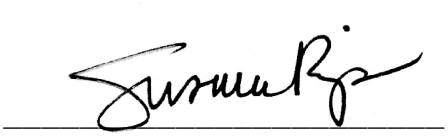
961 [2000]).

The court also providently exercised its discretion in permitting the People to introduce two recorded phone calls defendant made while in custody awaiting trial. Neither call could be interpreted as referring to any uncharged bad acts, and any ambiguity as to whether they constituted admissions to the charged crimes went to the weight to be given the recordings, not their admissibility (*People v Moore*, 118 AD3d 916, 918 [2d Dept 2014], *lv denied* 24 NY3d 1086 [2014]; *People v Frias*, 250 AD2d 495, 496 [1st Dept 1998], *lv denied* 92 NY2d 982 [1998]). To the extent defendant is claiming that the calls contained hearsay, that claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

In any event, any error either in permitting the impeachment of the prosecution's own witness or in receiving the recorded calls was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

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

ENTERED: MAY 31, 2018



CLERK

Sweeny, J.P., Richter, Andrias, Kahn, Moulton, JJ.

6738 William E. Mack, Jr., Index 309347/10
Plaintiff-Appellant, 83768/12

-against-

Ronald Seabrook,
Defendant-Respondent.
- - - - -
[And a Third Party Action]

_____

Laffan & Laffan, LLP, Mineola (Maura V. Laffan of counsel), for appellant.

Law Offices of Tobias & Kuhn, New York Michael V. DiMartini of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Barry Salman, J.), entered on or about November 18, 2016, which, insofar as appealed from as limited by the briefs, granted the motion of defendant/third-party plaintiff Ronald Seabrook for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Seabrook established entitlement to judgment as a matter of law in this action for personal injuries sustained in a motor vehicle accident. Plaintiff alleges that he was a front-seat passenger in a vehicle owned by third-party defendant Transit Authority and operated by third-party defendant Raul Andrade when it collided with a vehicle owned and operated by Seabrook after

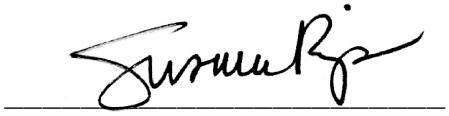
Andrade made a U-turn. The parties' deposition testimony demonstrates that Seabrook may not be held liable for plaintiff's injuries because he was confronted with an emergency situation that was not of his own making when the accident happened (*see Caban v Vega*, 226 AD2d 109, 111 [1st Dept 1996]). The parties' testimony showed that Andrade violated Vehicle and Traffic Law § 1126(a) by unexpectedly crossing his vehicle over the double yellow line while making a U-turn and that his vehicle was struck by Seabrook's vehicle the moment it entered into the path of oncoming traffic (*see Pena v Slater*, 100 AD3d 488, 489 [1st Dept 2012]). In view of this testimony, the court properly determined that the emergency doctrine applied and that Seabrook had acted reasonably and prudently under the circumstances (*see Dattilo v Best Transp. Inc.*, 79 AD3d 432, 433 [1st Dept 2010]; *Coleman v Maclas*, 61 AD3d 569 [1st Dept 2009]).

In opposition, plaintiff failed to raise an issue of fact as to how Seabrook's negligence contributed to the occurrence of the accident (*see e.g. Stewart v Ellison*, 28 AD3d 252, 253-254 [1st Dept 2006]). Plaintiff's argument that Seabrook contributed to the accident by failing to maintain a proper lookout and not using due care while operating his vehicle is speculative in light of plaintiff's testimony that he did not witness the

traffic conditions or Seabrook's vehicle before the accident and the fact that he did not submit an affidavit from someone who did (*see Zapata v Sutton*, 84 AD3d 521 [1st Dept 2011]).

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

ENTERED: MAY 31, 2018



CLERK

Sweeny, J.P., Richter, Andrias, Kahn, Moulton, JJ.

6739 In re Oscar Alejandro C.L.,

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

Nicauris L.,
Respondent-Appellant,

The Administration for Children's Services,
Petitioner-Respondent.

_____

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

Zachary W. Carter, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for respondent.

Dawne A. Mitchell, The Legal Aid Society, New York (Claire V. Merkine of counsel), attorney for the child.

_____

Order, Family Court, New York County (Jane Pearl, J.), entered on or about May 22, 2017, which, after a fact-finding hearing, determined that respondent mother neglected the subject child, unanimously affirmed, without costs.

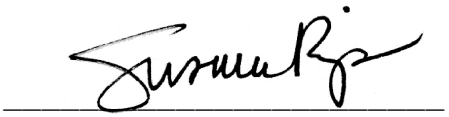
The finding of neglect was established by a preponderance of the evidence (*see* Family Ct Act § 1012[f][i][B]; § 1046[b][1]). The mother's long-standing history of cocaine use, the prior neglect proceeding brought against her based on such use, which culminated in her losing custody of her older child, and her repeated failure to cooperate with drug treatment were

inconsistent with her claim that she had not used cocaine for two years prior to the October 2016 positive toxicology while pregnant with the subject child (*see Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 80 [1995]). The evidence presented was "sufficient to prove that if the child were released to the mother there would be a substantial probability of neglect that places the child at risk" (*Matter of Jayvien E. [Marisol T.]*, 70 AD3d 430, 436 [2010] [internal quotation marks and brackets omitted]).

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

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

ENTERED: MAY 31, 2018



CLERK

Sweeny, J.P., Richter, Andrias, Kahn, Moulton, JJ.

6740 Magali Ramos, Index 305698/12
Plaintiff-Appellant,

-against-

Daniel Hamelburg,
Defendant-Respondent.

_____

Cascione, Purcigliotti & Galluzzi, P.C., New York (Thomas G. Cascione of counsel), for appellant.

Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York (Mohammad M. Haque of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about July 17, 2017, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

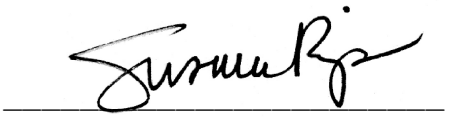
The record demonstrates conclusively that defendant cannot be held liable under Pennsylvania law for the injuries that plaintiff alleges she sustained while a guest at his Pennsylvania home when another guest jumping on a trampoline lost control and fell on her. A property owner may be held liable to "social guests," as opposed to "business visitors" (*see Davies v McDowell Natl. Bank*, 407 Pa 209, 213 [1962]), only if he "knows or has reason to know of the [dangerous] condition and should realize that it involves an unreasonable risk of harm" and "fails to

exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved," and the guests "do not know or have reason to know of the condition and the risk involved" (*Sharp v Luksa*, 440 Pa 125, 129 [1970]). Plaintiff's deposition testimony and affidavit demonstrate that she understood the risks involved in using the trampoline, including the risks of using it with multiple jumpers.

To the extent the court failed to consider plaintiff's expert affidavit, we find that the affidavit could properly have been considered, but, in any event, it would not change the result.

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

ENTERED: MAY 31, 2018



CLERK

Sweeny, J.P., Richter, Andrias, Kahn, Moulton, JJ.

6742 U.S. Bank NA, etc., Index 850235/15
Plaintiff-Respondent,

-against-

Howard Warshaw, et al.,
Defendants.
- - - - -
Arusa Trade & Finance,
Nonparty Appellant.

_____

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

Eckert Seamans Cherin & Mellott, LLC, White Plains (Geraldine A. Cheverko of counsel), for respondent.

_____

Order, Supreme Court, New York County (Anthony Cannataro, J.), entered March 13, 2017, which granted plaintiff's motion to vacate an order directing that this mortgage foreclosure action be discontinued and the lis pendens vacated, and restored the action, unanimously affirmed, with costs.

The court providently exercised its discretion in granting plaintiff's motion to vacate the dismissal order (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]). Plaintiff demonstrated a sufficient excuse in the form of a mistake of fact that the mortgage was satisfied upon the sale of the property. Plaintiff also moved within approximately six months of the

court's order, which is a reasonable time under the circumstances (*see e.g. Carrillo v New York City Tr. Auth.*, 39 AD3d 296 [1st Dept 2007]; *compare Bank of N.Y. v Stradford*, 55 AD3d 765 [2d Dept 2008]). Appellant's argument that restoring the action violates Real Property Actions and Proceedings Law § 1301(3) is unavailing. The trial court, in restoring this action, gave leave of court for this action to coexist with a separate action to foreclose on the mortgage, both of which are pending before the same Justice.

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

ENTERED: MAY 31, 2018

CLERK

Sweeny, J.P., Richter, Andrias, Kahn, Moulton, JJ.

6745-
6745A Index 380356/13

JPMC Specialty Mortgage LLC formerly known as WM Specialty Mortgage, LLC,
Plaintiff-Respondent,

-against-

Gary Khan,
Defendant-Appellant,

Howard Brandstein, et al.,
Defendants.

_____

Gary Khan, appellant pro se.

Parker Ibrahim & Berg LLC, New York (Anthony Del Guercio of counsel), for respondent.

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Orders, Supreme Court, Bronx County (Lucindo Suarez, J.), entered April 10, 2015, June 9, 2015, and on or about December 29, 2015, which, to the extent appealed from, denied defendant Khan's (defendant) motion to dismiss the complaint as against him as abandoned, and granted plaintiff's motion for a default judgment against him, denied defendant's motion to vacate the default judgment, without prejudice to renewal upon proper notice to all parties, and denied defendant's motion to renew plaintiff's motion for a default judgment and his motion to vacate the default, unanimously affirmed, without costs.

Plaintiff's diligence in prosecuting the action and engaging

in discovery demonstrated an intent not to abandon the matter, and plaintiff offered a reasonable excuse for the delay in seeking a default judgment against defendant (*see Brooks v Somerset Surgical Assoc.*, 106 AD3d 624, 625 [1st Dept 2013]). Defendant never claimed that he was prejudiced by the delay (*see Atlantic Mut. Ins. Co. v Joyce Intl., Inc.*, 31 AD3d 352, 353 [1st Dept 2006]). Plaintiff established the merits of its action by producing the mortgage, the unpaid note, ownership of the note, and evidence of default (*see Witelson v Jamaica Estates Holding Corp. I*, 40 AD3d 284 [1st Dept 2007]).

Defendant failed to demonstrate a meritorious defense in support of vacatur of the default judgment (*see Pena v Mittleman*, 179 AD2d 607, 609 [1st Dept 1992]).

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

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

ENTERED: MAY 31, 2018

CLERK

Sweeny, J.P., Richter, Andrias, Kahn, Moulton, JJ.

6746 The People of the State of New York Ind. 3191/13
Respondent,

-against-

Tyrell Cook,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Shera Knight of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Joseph Dawson, J.), rendered September 24, 2015, convicting defendant, after a jury trial, of attempted robbery in the first degree and assault in the second degree, and sentencing him, as a second felony offender, to an aggregate term of six years, unanimously affirmed.

The court providently exercised its discretion in reopening a suppression hearing, before rendering a decision, in order to permit the People to call an officer with additional information tending to establish reasonable suspicion for defendant's detention (*see People v Gnesin*, 127 AD3d 652 [1st Dept 2015], *lv denied* 29 NY3d 948 [2015], *lv denied* 25 NY3d 1164 [2015]; *People v McCorkle*, 111 AD3d 557 [1st Dept 2013], *lv denied* 24 NY3d 963

[2014]; *see also People v Lee*, 143 AD3d 643 [1st Dept 2016]). The court had not made any ruling, and the circumstances did not pose a risk of tailored testimony.

The court properly denied defendant's suppression motion. Although the People did not meet their burden of going forward during the initial hearing, on the reopened hearing they sufficiently demonstrated reasonable suspicion to justify defendant's detention. The victim's description of his assailant was too general to provide reasonable suspicion by itself. However, it did so when combined with the very close spatial proximity between the crime and the detention, the fact that defendant was found in a subway station that was a likely escape route, that defendant reasonably appeared to be hiding because he was sitting on the platform behind a barrier, and that defendant was the only person who met the description in this nearly empty station at around midnight (*see People v Brujan*, 104 AD3d 481 [1st Dept 2013], *lv denied* 21 NY3d 1014 [2013]; *People v William*, 81 AD3d 453 [1st Dept 2011], *affd* 19 NY3d 891 [2012]). There was a satisfactory explanation of a discrepancy between the victim's description of a garment his attacker was wearing and the garment defendant wore.

The verdict was based on legally sufficient evidence and was

not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning identification and credibility. The physical injury element of the assault conviction was established by evidence supporting an inference that the victim's injury resulted in substantial pain (*see generally People v Chiddick*, 8 NY3d 445, 447-448 [2007]).

The court correctly denied the portion of defendant's CPL 330,.30 motion to set aside the verdict that alleged misconduct by a juror. The issues raised in defendant's motion were referred to during defendant's cross-examination of a police witness, and did not involve specialized training or expertise (*see People v Arnold*, 96 NY2d 358, 364-368 [2001]; *People v Maragh*, 94 NY2d 569, 573-574 [2000]).

The court also correctly denied the part of the motion alleging that certain questions by the prosecutor improperly shifted the burden of proof. Defendant failed to preserve this claim, because he did not request any further relief after the court sustained objections to these questions and gave curative instructions (*see People v Santiago*, 52 NY2d 865 [1981]; *see also People v Whalen*, 59 NY2d 273, 280 [1983]). An unpreserved trial error is not cognizable under CPL 330.30(1), which is limited to

matters of law. Although this Court may review unpreserved claims in the interest of justice, we decline to do so here. As an alternative holding, we find that the line of questioning was not so pervasive and flagrant as to warrant a new trial (*see e.g. People v Whaley*, 70 AD3d 570, 571 [1st Dept 2010], *lv denied* 14 NY3d 894 [2010]).

Defendant's challenge to the court's identification charge is also unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits (*see People v Vaughn*, 132 AD3d 456 [1st Dept 2015], *lv denied* 26 NY3d 1151 [2016]).

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 31, 2018

CLERK

Sweeny, J.P., Richter, Andrias, Kahn, Moulton, JJ.

6747 M.H. Davidson & Co., et al., Index 652571/16
Plaintiffs-Appellants,

-against-

C-III Asset Management, LLC,
Defendant-Respondent,

Commercial Mortgage Pass-Through
Certificates Series 2007-C5 Trust,
Nominal Defendant.

_____

Kazowitz Benson Torres LLP, New York (Michael A. Hanin of counsel), for appellants.

Venable LLP, New York (Gregory A. Cross of counsel), for respondent.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered August 2, 2017, which granted defendants' motion to dismiss the complaint, unanimously affirmed.

Plaintiffs held commercial mortgage pass-through certificates in a trust, and alleged that defendant, the Special Servicer for the trust, breached the pooling and services agreement (PSA) by manufacturing a default for one of the largest mortgages held by the trust, the Gulf Coast loan, and orchestrating the sale of another defaulted mortgage loan, the Jericho loan, for an artificially low price in exchange for the purchase option for the Gulf Coast loan.

In bringing this action, plaintiffs were required to comply with the PSA's no-action clause (*see Greene v New York United Hotels, Inc.*, 236 AD 647, 648 [1st Dept 1932], *affd* 261 NY 698 [1933]; *see also Alden Global Value Recovery Master Fund, L.P. v KeyBank N.A.*, 159 AD3d 618, 627 [1st Dept Mar. 29, 2018]). Plaintiffs failed to comply with this clause.

The PSA in section 11.03(c) provides, in relevant part, that "[n]o Certificateholder . . . shall have any right by virtue of any provision of this Agreement to institute any suit . . . upon or under or with respect to this Agreement or any Mortgage Loan, unless, in the case of a Certificateholder . . . such Holder previously shall have given to the Trustee a written notice of default hereunder, and of the continuance thereof, as herein before provided." Similar to *Alden Global Value Recovery Master Fund* (159 AD3d at 628), plaintiffs did not provide the trustee with written notice of an actionable Event of Default under the PSA prior to instituting this action and therefore do not have standing to assert this claim. Accordingly, the action was properly dismissed.

Given this determination, we need not reach any of plaintiffs' remaining arguments.

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

ENTERED: MAY 31, 2018

CLERK

Sweeny, J.P. Richter, Andrias, Moulton, JJ.

6748 The People of the State of New York, Ind. 189/15
Respondent,

-against-

Geovanny Cruz,
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 (Michael J. Yetter of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Ann M. Donnelly, J. at plea; Ellen N. Biben, J. at sentencing), rendered January 29, 2016, as amended April 15, 2016, convicting defendant of robbery in the third degree and criminal possession of stolen property in the fifth degree, and sentencing him, as a second felony offender, to an aggregate term of two to four years, unanimously affirmed.

Defendant's claim that the sentencing court deprived him of due process when it imposed a prison sentence rather than giving him a further opportunity to complete drug treatment is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find it unavailing. Defendant was given an opportunity to contest the evidence

against him, and the record shows that there was a legitimate basis for defendant's dismissal from the treatment program.

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

ENTERED: MAY 31, 2018

CLERK

Sweeny, J.P., Richter, Andrias, Kahn, Moulton, JJ.

6749 Angel Hernandez, Index 157770/12
Plaintiff,

-against-

Seadyck Realty Co., LLC, et al.,
Defendants.
- - - - -
Seadyck Realty Co., LLC,
Third-Party Plaintiff-Appellant,

-against-

P.A. Painting and Decorating, Corp.,
Third-Party Defendant-Respondent.

_____

Cozen O'Connor, New York (Edward Hayum of counsel), for appellant.

Churbuck Calabria Jones & Materazo, P.C., Hicksville (Nicholas P. Calabria of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered October 30, 2017, which granted the motion of third-party defendant P.A. Painting and Decorating, Corp. (PA Painting) for summary judgment dismissing the causes of action of the third-party complaint for common-law contribution and indemnification, unanimously affirmed, without costs.

Plaintiff injured his right hand while using a power saw or grinding machine while he was employed by PA Painting. Plaintiff underwent four surgeries and collected Workers' Compensation

benefits. The expert reports of plaintiff's occupational therapist and defendant Seadyck's orthopedic specialist concluded that, even after the surgeries and physical therapy, plaintiff still had severe limitations in use of his right hand, including severely decreased grip strength, significant limitations in range of motion in the fingers and wrist, and severely impaired fine and medium coordination. However, plaintiff testified that he can close his fingers enough to grasp a door handle or a cup, and Seadyck's expert found he had effective grasp between his thumb and index finger. Plaintiff's expert found that plaintiff had mild to severe difficulty performing various tasks, and had switched to his nondominant left hand for writing, eating and dressing. As none of the experts found that plaintiff had suffered a total loss of use, or that he was limited to just "passive use," of his right hand, and Seadyck failed to submit any other evidence to raise a triable issue of fact, PA Painting was entitled to summary judgment on the ground that plaintiff did

not suffer a "grave injury" as defined in Workers' Compensation Law § 11 (*see Kraker v Consolidated Edison Co., Inc.*, 23 AD3d 531 [2d Dept 2005]; *Trimble v Hawker Dayton Corp.*, 307 AD2d 452 [3d Dept 2003]).

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

ENTERED: MAY 31, 2018

CLERK

Sweeny, J.P., Richter, Andrias, Kahn, Moulton, JJ.

6750 The People of the State of New York, Ind. 3674/14
Respondent,

-against-

Daniel Ruiz,
Defendant-Appellant.

_____

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

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

_____

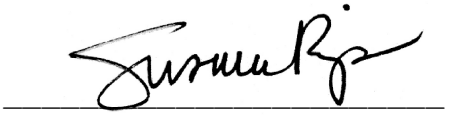
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald A. Zweibel, J.), rendered April 17, 2015,

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

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

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

ENTERED: MAY 31, 2018



CLERK

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

Sweeny, J.P., Richter, Andrias, Kahn, Moulton, JJ.

6751 In re the Will of Louise Este Bruce, Deceased File 2579A/13

- - - - - -

Richard J. Bowler,
Petitioner-Respondent,

-against-

Ellen T. Benoit, et al.,
Respondents-Appellants,

PNC Bank, et al.,
Respondents,

Eric T. Schneiderman, etc.,
Respondent-Respondent.

_____

Farrell Fritz, P.C., New York (Hillary A. Frommer of counsel), for appellants.

McCarthy Fingar LLP, White Plains (Frank W. Streng of counsel), for Richard J. Bowler, respondent.

Eric T. Schneiderman, Attorney General, New York (Mark S. Grube of counsel), for Eric T. Schneiderman, respondent.

_____

Decree, Surrogate's Court, New York County (Nora S. Anderson, S.), entered June 22, 2017, upon a decision which granted petitioner's motion for summary judgment and denied respondents' motion for summary judgment, adjudging that decedent validly and effectively exercised her powers of appointment under her Last Will and Testament, and directing the trustees under the trust created under the Ellen Kaiser Bruce Will f/b/o decedent

and the trustees of the 1969 trust, to distribute and deliver the remaining assets of such trusts to the legal representative of the Louise Este Bruce Foundation, unanimously affirmed, without costs.

A testator's intent is to be gleaned from "a sympathetic reading of the will as an entirety and in view of all the facts and circumstances under which the provisions of the will were framed" (*Matter of Fabbri*, 2 NY2d 236, 240 [1957]). If a dominant plan of distribution is evident, the various provisions must be interpreted in light of that purpose (*see Matter of Larkin*, 9 NY2d 88, 91 [1961]).

The parties agree that if read literally, the bequest of the appointive property to decedent's residuary estate was ineffective because it exceeded the powers granted to her in the 1969 trust agreement and in her mother's will. However, the court properly gave effect to decedent's clear intent to provide the appointive property to a charitable foundation. As the court noted, it makes no sense for decedent to have made a disposition of the appointive property that she knew would be ineffective. Moreover, Article Seventh of her will demonstrated her intention to have her residuary estate go to a charitable foundation. She also made separate bequests to respondents individually in

Article Fourth of the will.

Respondents contend that the court improperly considered extrinsic evidence, when the Will was unambiguous. However, the court expressly stated that it was not considering extrinsic evidence and was focused on decedent's intent as manifested in the will, in its entirety.

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

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

ENTERED: MAY 31, 2018

CLERK

Sweeny, J.P., Richter, Andrias, Kahn, Moulton, JJ.

6752 Ian Frank, Index 26099/02
Plaintiff-Appellant,

-against-

City of New York,
Defendant-Respondent.

_____

John De Maio, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jason Anton of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered January 14, 2016, which denied plaintiff's motion pursuant to CPLR 4401 and 4404(a) to set aside the jury verdict and enter judgment for plaintiff on his cause of action for false arrest, or, alternatively, for a new trial, unanimously affirmed, without costs.

Since plaintiff appealed only from the order denying his CPLR 4404 motion to set aside the verdict (rather than from a judgment), he has irretrievably waived arguments not raised therein, including his arguments that the jury verdict was inconsistent, and that the trial court erred in barring plaintiff from seeing to recover lost earnings (*see* CPLR 5515[1]; *City of Mount Vernon v Mount Vernon Hous. Auth.*, 235 AD2d 516, 516-517

[2d Dept 1997]; *Beauchamp v Riverbay Corp.*, 156 AD2d 172, 172 [1st Dept 1989]).

As to those issues which we have jurisdiction to entertain, we find that Supreme Court properly denied plaintiff's posttrial motion as defective, on account of his failure to annex the trial transcript, or relevant portions thereof. Given especially that plaintiff primarily seeks to set aside the verdict as against the weight of the evidence, "the absence of a transcript, or relevant portions thereof, precluded a meaningful review" (*Gorbea v DeCohen*, 118 AD3d 548, 549 [1st Dept 2014]).

Were we to consider plaintiff's remaining arguments not to be jurisdictionally foreclosed, we would find them to be without merit.

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

ENTERED: MAY 31, 2018

CLERK

Sweeny, J.P., Richter, Andrias, Kahn, Moulton, JJ.

6753 Lantau Holdings Ltd., Index 653920/16
Plaintiff-Appellant,

-against-

Orient Equal International Group Limited et al.,
Defendants,

Haitong International Securities Company Limited,
Defendant-Respondent.

_____

CKR Law LLP, New York (Michael J. Maloney of counsel), for appellant.

Crowell & Moring LLP, New York (Alan B. Howard of counsel), for respondent.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered March 8, 2017, which, insofar as appealed from, granted defendant Haitong International Securities Company Limited's motion to dismiss the complaint as against it for lack of personal jurisdiction and failure to state a cause of action, and denied plaintiff's cross motion for jurisdictional discovery, unanimously affirmed, with costs.

While codefendants Orient Equal International Group Limited (OEI) and Huang Dongpo consented to New York jurisdiction in the contracts they signed, Haitong did not consent to such

jurisdiction, and none of the exceptions to the general rule that a forum selection clause may not be enforced against a nonsignatory applies to it (*see Tate & Lyle Ingredients Ams., Inc. v Whitefox Tech. USA, Inc.*, 98 AD3d 401 [1st Dept 2012]).

Haitong is not subject to New York jurisdiction pursuant to CPLR 302(a)(3). Among other things, the statute requires the defendant to have committed a tort outside the state. However, the complaint, which asserts claims of negligent misrepresentation and fraud against Haitong, fails to state a cause of action for either. The special relationship required for negligent misrepresentation (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180 [2011]) is not present in the "ordinary arm's length business transaction" between plaintiff and Haitong (*US Express Leasing, Inc. v Elite Tech. [NY], Inc.*, 87 AD3d 494, 497 [1st Dept 2011]). Even if, arguendo, Haitong had superior knowledge that the shares pledged by OEI and Dongpo to plaintiff were subject to a lock-up, plaintiff's failure to ask if the shares were subject to the lock-up negates the reasonable reliance element of negligent misrepresentation (*see e.g. Mandarin*, 16 NY3d at 180; *Hudson Riv. Club v Consolidated Edison Co. of N.Y.*, 275 AD2d 218, 220-221 [1st Dept 2000]).

For the same reasons, plaintiff has no cause of action for

fraudulent concealment (*see e.g. Gomez-Jimenez v New York Law Sch.*, 103 AD3d 13, 18 [1st Dept 2012] [special relationship], *lv denied* 20 NY3d 1093 [2013]; *Mandarin*, 16 NY3d at 178 [reasonable reliance]; *Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 99-100 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]).

Because the court correctly granted Haitong's motion to dismiss for lack of personal jurisdiction, it correctly denied plaintiff's cross motion for jurisdictional discovery (*see Murdock v Arenson Intl. USA*, 157 AD2d 110, 115 [1st Dept 1990]).

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

ENTERED: MAY 31, 2018

CLERK

Sweeny, J.P., Richter, Andrias, Kahn, Moulton, JJ.

6756N Michael Broderick, et al., Index 302512/12
Plaintiffs-Appellants,

-against-

Edgewater Park Owners Cooperative, Inc., et al.,
Defendants,

Edgewater Park Athletic Assoc., Inc., et al.,
Defendants-Respondents.

_____

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

Faust Goetz Schenker & Blee, LLP, New York (Lisa De Lindsay of cousnel), for respondents.

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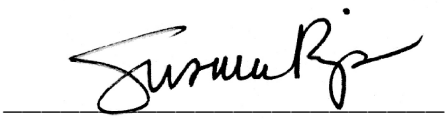
Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered October 11, 2017, which, inter alia, denied plaintiffs' motion to compel the depositions of Justin Kuhl, Jim Garvey, and Michael McArdle, unanimously affirmed, without costs.

Plaintiffs' motion to compel the depositions of certain witnesses was properly denied for failure to demonstrate that the witnesses already deposed had insufficient knowledge, and the substantial likelihood that those witnesses they sought to depose possessed information material and necessary to the prosecution of the case (*see Colicchio v City of New York*, 181 AD2d 528, 529

[1st Dept 1992]). Injured plaintiff's one-page supporting affidavit contradicted his prior deposition testimony and was properly disregarded by the court. Moreover, the affidavit did not address the testimony of the witnesses already deposed, and contained only vague assertions as to the relevant information the named witnesses might likely provide. Accordingly, there is no basis to disturb the court's determination (*see generally Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406-407 [1968])

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

ENTERED: MAY 31, 2018



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Sweeny, J.P., Richter, Andreas, Kahn, Moulton, JJ.

6757N One Westbank FSB, Index 35153/12
Plaintiff-Appellant,

-against-

George A. Rodriguez, et al.,
Defendants-Respondents,

Mortgage Electronic Registration
System Inc., etc., et al.,
Defendants.

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Ras Boriskin, LLC, Westbury (Joseph F. Battista of counsel), for appellant.

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Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered on or about May 27, 2016, which denied plaintiff's motion for summary judgment and transferred the matter to the foreclosure settlement part, unanimously affirmed, with costs.

Supreme Court properly held that summary judgment was precluded by a triable issue as to whether plaintiff was holder of the note and mortgage at the time it commenced foreclosure proceedings, and hence whether it had standing to bring this action (*see Bank of N.Y. Mellon Trust Co. NA v Sachar*, 95 AD3d 695 [1st Dept 2012]). The indorsement which plaintiff purports effected a transfer of the note to it was not written on the note itself; rather, it was written on a separate sheet of paper, was

written in blank, was undated, and does not reference the note. Further, there is no indication in the record that the blank indorsement was ever attached to the note, much less "so firmly affixed thereto as to become a part thereof," as required under NY UCC § 3-202(2). Accordingly, there is a triable issue as to whether the purported indorsement constituted a valid transfer of the underlying note to plaintiff (*see HSBC Bank USA N.A. v Roumiantseva*, 130 AD3d 983 [2d Dept 2015]).

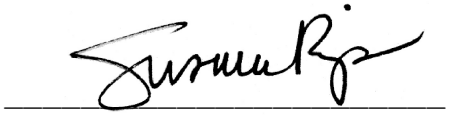
Plaintiff's argument that its standing is established by its physical possession of the note is unpreserved; before Supreme Court, it only claimed to be a valid holder due to the note's assignment.

Under the circumstances here, Supreme Court providently exercised discretion by relying upon its interest of justice jurisdiction to treat defendants' opposition papers as a cross motion, and refer the matter to the settlement conference part.

Plaintiff cannot claim surprise, as both defendants' answer and their opposition papers asked that the case be transferred for settlement conference.

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

ENTERED: MAY 31, 2018



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