SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 15, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Friedman, Manzanet-Daniels, Webber, Singh, JJ.

7621 The People of the State of New York, Respondent, Ind. 1868/13

-against-

Jose Rodriguez,
Defendant-Appellant.

____

Christina A. Swarns, Office of the Appellate Defender, New York (Caitlin Glass of counsel), for appellant.

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

____

Judgment, Supreme Court, Bronx County (William I. Mogulescu, J. at hearing; Lester Adler, J. at jury trial and sentencing), rendered March 1, 2016, convicting defendant of assault in the second degree and criminal possession of a weapon in the fourth degree, and sentencing him, as a second violent felony offender, to an aggregate term of six years, unanimously affirmed.

The court providently exercised its discretion in precluding defense counsel from asking certain questions of prospective jurors, such as questions concerning the panelists' feelings rather than their ability to reach a fair and impartial verdict

(*see People v Pepper*, 59 NY2d 353, 358 [1983]; *People v Boulware*, 29 NY2d 135, 141 [1971], *cert denied* 405 US 995 [1972]). Moreover, the court permitted inquiry into the substance of all relevant subjects, and its limitations on voir dire essentially went to the phrasing of some questions. The record fails to support defendant's claim of disparate treatment by the court of the prosecution and defense.

The court properly denied defendant's request to submit third-degree assault as a lesser included offense, because there was no reasonable view of the evidence, viewed most favorably to defendant, that he assaulted his girlfriend negligently or recklessly rather than intentionally (*see generally People v James*, 11 NY3d 886, 888 [2008]). The victim's account of being repeatedly stabbed by defendant with a long knife was abundantly corroborated by bystanders, and there is nothing to support a theory of unintentional conduct. Defendant's contention that such a lesser included offense charge was warranted by his statement after the incident that he was "drunk" is unpreserved, because defense counsel did not raise this argument or request an intoxication charge, and we decline to review it in the interest of justice (*see e.g. People v Doyle*, 3 AD3d 126, 130 [1st Dept 2004], *lv denied* 2 NY3d 739 [2004]). As an alternative holding, we reject it on the merits.

The court providently exercised its discretion in denying defense counsel's request for a missing witness charge as to a man who allegedly intervened during the incident, and later met with the prosecutor but refused to testify. This witness was not under the People's control for purposes of a missing witness charge, because there was no evidence he had any relationship with the victim or anyone else relevant to this case (*see e.g. People v Rawls*, 65 AD3d 978 [1st Dept 2009], *lv denied* 14 NY3d 773 [2010]).

There is no merit to any of defendant's challenges to audio recordings of five 911 calls. The People sufficiently authenticated the recordings through testimony from a technician establishing that the recordings were what they purported to be based on the standard procedures employed by the Police Department (*see e.g. DeLeon v Port Auth. of N.Y. & N.J.*, 306 AD2d 146 [1st Dept 2003]; *see also People v Ely*, 68 NY2d 520, 527 [1986]), as well as by way of the Department's certification of authenticity (*see* CPLR 4518[c]). The court providently admitted the 911 calls under the present sense impression and excited utterance exceptions to the hearsay rule, because the callers described their substantially contemporaneous observations of the incident, and the circumstances and contents of the calls generally showed that the callers made their statements under the

stress of nervous excitement (*see generally People v Johnson*, 1 NY3d 302, 306 [2003]; *People v Vasquez*, 88 NY2d 561, 575 [1996]). Defendant's Confrontation Clause argument is unavailing because the nontestifying declarants' statements were not testimonial, in that they were made for the purpose of responding to an "ongoing emergency" (*Davis v Washington*, 547 US 813, 822 [2006]; *see e.g. People v Villalona*, 145 AD3d 625, 626 [1st Dept 2016], *lv denied* 29 NY3d 953 [2017]).

The hearing court correctly declined to preclude or suppress defendant's statement to a caseworker employed by the New York City Administration for Children's Services. The statement was made during the pendency of the instant assault case, in which the victim was defendant's adult girlfriend. The notice requirement of CPL 710.30(1)(a) did not apply because the caseworker was merely conducting a child protective investigation and was not acting in cooperation with law enforcement (*see People v Batista*, 277 AD2d 141 [1st Dept 2000], *lv denied* 96 NY2d 825 [2001]). Since there was no law enforcement involvement, there was also no violation of defendant's right to counsel.

The court providently exercised its discretion in denying defendant's mistrial motion, made after the court struck testimony by the victim that allegedly suggested that defendant had committed uncharged crimes. The jury is presumed to have

followed the court's instructions to disregard that testimony (*see People v Davis*, 58 NY2d 1102 [1983]). In any event, defendant failed to establish that this testimony actually concerned prior uncharged crimes or bad acts.

Defendant's general objections and belated mistrial motion failed to preserve his challenges to the People's summation (*see* People v Romero, 7 NY3d 911, 912 [2006]), and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal, because any improprieties in the summation were not so pervasive or egregious as to deprive defendant of a fair trial (*see People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

To the extent harmless error analysis applies to the issues raised by defendant on appeal, we find that any errors were harmless in light of the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 15, 2018

CLERK

Acosta, P.J., Friedman, Manzanet-Daniels, Webber, Singh, JJ.

7623 In re Linda D.,
Petitioner-Respondent,

-against-

Theo C.,
Respondent-Appellant.
- - - - -
In re Theo C.,
Petitioner-Appellant,

-against-

Linda D.,
Respondent-Respondent.

Larry S. Bachner, New York, for appellant.

Carol L. Kahn, New York, for respondent.

Order, Family Court, New York County (Emily M. Olshansky, J.), entered on or about September 6, 2017, which granted the petitioner/respondent mother's objections by modifying the order, same court (Karen Kolomechuk, Support Magistrate), entered on or about March 10, 2017, which determined after a hearing that, inter alia, the father was not in willful violation of a child support order and granted his petition for a downward modification, to the extent of vacating the modified order of support, dismissing the father's downward modification petition, and, thereby, reinstating the award of $1,200 in monthly child support, unanimously affirmed, without costs.

The Family Court properly determined that the father failed to rebut the prima facie evidence of his willful violation of the order of support (*see* Family Court Act § 454[3][a]). In finding to the contrary, the Support Magistrate mistakenly relied on letters from the father's health care providers that had not been properly admitted into evidence (*see Matter of Bronstein-Becher v Becher*, 25 AD3d 796, 797 [2d Dept 2006]). Since the father provided no competent evidence that his medical condition rendered him unable to provide support for the subject children, he failed to rebut the mother's prima facie case (*see generally Matter of Powers v Powers*, 86 NY2d 63, 70 [1995]).

The Family Court also properly dismissed the father's petition seeking a downward modification of his child support obligation. The father's receipt of Social Security disability benefits did not preclude a finding that he was capable of work (*see Matter of Marrale v Marrale*, 44 AD3d 773, 775 [2d Dept 2007]). Further, in the absence of competent medical evidence that his reduction in income was not volitional, the receipt of public assistance also did not constitute a substantial change in circumstances to warrant modification of the child support order (*see Matter of Freedman v Horike*, 68 AD3d 1205, 1207 [3d Dept 2009], *lv dismissed in part, denied in part* 14 NY3d 811 [2010]). Notably, at the time of the judgment of divorce, the court

imputed income to the father for the purposes of calculating child support after finding that he ceased looking for freelance work in 2009, contemporaneously with the commencement of the divorce action.

We have considered the remaining arguments, including the father's claim of ineffective assistance of counsel, and find them unavailing.

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

ENTERED: NOVEMBER 15, 2018

CLERK

Acosta, P.J., Friedman, Manzanet-Daniels, Webber, Singh, JJ.

7625 The People of the State of New York, Ind. 1577/16
Respondent,

-against-

Martin Lopez,
Defendant-Appellant.

____

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

Darcel D. Clark, District Attorney, Bronx (David A. Slott of counsel), for respondent.

____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (William Mogulescu, J.), rendered August 26, 2016,

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

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

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

ENTERED: NOVEMBER 15, 2018

____
CLERK

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

Acosta, P.J., Friedman, Manzanet-Daniels, Webber, Singh, JJ.

7626 In re Amanda R.,
Petitioner-Respondent,

-against-

Daniel A.R.,
Respondent-Appellant.

Leslie S. Lowenstein, Woodmere, for appellant.

Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for respondent.

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

Order, Family Court, New York County (Marva A. Burnett, Referee), entered on or about September 26, 2017, which, after a hearing, found that respondent committed the family offenses of menacing in the second degree, assault in the second degree, and attempted assault in the third degree, and granted petitioner an order of protection against him effective until September 25, 2019, unanimously affirmed, without costs.

Petitioner established by a fair preponderance of the evidence that respondent committed the family offenses of menacing in the second degree (Penal Law § 120.14), assault in the second degree (Penal Law § 120.05[1]), and attempted assault in the third degree (Penal Law § 120.00[1]). Petitioner testified that in December 2010, while she was 8½ months

pregnant, the father shoved her down onto a bed during an argument. She testified that in May 2012, during an argument, the father got on top of her and choked her causing her to lose consciousness, and causing her neck to swell and have red marks on it for numerous days (*see People v Suyoung Yun*, 140 AD3d 402, 403 [1st Dept 2016], *lv denied* 28 NY3d 937 [2016]; *People v Abreu*, 283 AD2d 194, 194-195 [1st Dept 2001], *lv denied* 96 NY2d 898 [2001]). She also testified that in early September 2014, the father punched her very hard in the face causing her to fall and knock over a closet. This Court sees no basis to set aside the Family Court's determination that the mother's testimony was credible (*see Matter of Irene O.*, 38 NY2d 776 [1975]; *Matter of Victoria P. [Victor P.]*, 121 AD3d 1006 [2d Dept 2014]).

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

ENTERED: NOVEMBER 15, 2018

CLERK

Acosta, P.J., Friedman, Manzanet-Daniels, Webber, Singh, JJ.

7627 David Hirsch, Index 159117/13
Plaintiff-Respondent,

-against-

Nicolas Solares,
Defendant,

Hill Country New York, LLC doing business as Hill Country Barbeque Market, et al.,
Defendants-Appellants.

Fixler & LaGattuta, LLP, New York (Paul F. LaGattuta III of counsel), for appellants.

Debra S. Reiser, New York, for respondent.

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered March 7, 2018, which denied defendants Hill Country New York, LLC d/b/a Hill Country Barbeque Market and Hill Country New York Catering Company, LLC's (defendants) motion for summary judgment dismissing the complaint as against them, unanimously modified, on the law, to grant the motion as to the causes of action for strict liability, and otherwise affirmed, without costs.

The motion court correctly found that issues of fact exist whether defendants breached a duty to maintain safe premises and protect their patrons from assaultive conduct by third parties and whether reasonable security measures could have thwarted or

minimized the injury plaintiff suffered at the hands of defendant Solares (*see King v Resource Prop. Mgt. Corp.*, 245 AD2d 10 [1st Dept 1997]; *Florman v City of New York*, 293 AD2d 120, 124 [1st Dept 2002]). Plaintiff's expert set forth the standard security measures applicable to defendants' type of establishment, which included a bar, a restaurant seating area, and a music stage. However, the record shows that there were no security measures in place, and, moreover, that the restaurant manager had observed the escalating incident between Solares and plaintiff without responding initially, that the scuffle moved from a table to the prep kitchen, covering a distance of approximately 40 feet, and that the worst of the beating was inflicted upon plaintiff in the prep kitchen.

The strict liability claims alleging violations of Alcoholic Beverage Control Law § 65(2) must be dismissed, because there is no evidence that defendants unlawfully served Solares alcohol

while he was visibly intoxicated (*see Zamore v Bar None Holding Co.*, LLC, 73 AD3d 601 [1st Dept 2010]). Indeed, there is no evidence that defendants served Solares alcohol at all.

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

ENTERED: NOVEMBER 15, 2018

CLERK

Acosta, P.J., Manzanet-Daniels, Webber, Singh, JJ.

7628-
7628A

Index 651096/12

American Home Assurance Company,
Plaintiff-Appellant-Respondent,

-against-

The Port Authority of New York and New Jersey,
Defendant-Respondent,

Alcoa Inc., et al.,
Defendants-Respondents-Appellants,

Mario & DiBono Plastering Co., Inc.,
et al.,
Defendants.

____

Simpson Thacher & Bartlett LLP, New York (Michael J. Garvey of counsel), for appellant-respondent.

K&L Gates LLP, Pittsburgh, PA (Michael J. Lynch of the bar of the State of Pennsylvania, admitted pro hac vice, of counsel), for Alcoa, Inc., respondent-appellant.

Ahmuty, Demers & McManus, New York (Glenn A. Kaminska of counsel), for TTV Realty Holdings, Inc., respondent-appellant.

Anderson Kill, P.C., New York (Robert M. Horkovich of counsel), for respondent.

____

Orders, Supreme Court, New York County (Eileen Bransten, J.), entered November 29, 2017, which, to the extent appealed from, denied plaintiff's motion for summary judgment declaring that certain personal injuries allegedly arising from exposure to asbestos at the World Trade Center site during original construction of the site (WTC asbestos claims) are not covered

under the subject insurance policy because defendants cannot prove that those injuries occurred during the policy periods and that the claims arising from the spray-on asbestos-containing fireproofing on the Twin Towers arose from a single occurrence that exhausted the policy limits, granted defendants Port Authority of New York and New Jersey’s, Alcoa Inc.’s, and TTV Realty Holdings, Inc.’s (defendants) motions for summary judgment declaring that coverage is triggered under the policy for the WTC asbestos claims because the injuries alleged by the underlying claimants arose out of construction of the WTC, that the claims arising from spray-on fireproofing did not arise from a single occurrence, that the policy is not exhausted as a result of the spray-on fireproofing claims, and that plaintiff’s duty to defend under the policy survives exhaustion of the policy’s liability limit, and denied Alcoa’s and TTV Realty Holdings’ motions for summary judgment dismissing the recoupment claim, unanimously modified, on the law, to vacate the declaration that plaintiff’s duty to defend survives exhaustion of the policy’s liability limit, and otherwise affirmed, without costs.

The plain language of the subject insurance policy providing for coverage for injuries arising out of the “Premises - Operations Hazard” means that the policy covers injuries that result from operations that occurred during the policy period.

Plaintiff’s interpretation, which would limit coverage to injuries themselves occuring during the policy period, is not supported by that language and also is inconsistent with the broad “Insuring Agreement[]” that requires plaintiff to pay “all sums” that the insured becomes legally obligated to pay as damages for personal injuries “in connection with the construction of [the WTC project].” The foregoing does not render meaningless or superfluous the coverage that the policy provides for injuries arising out of the “Products - Completed Operations Hazard,” a separate risk.

Supreme Court correctly concluded that, in the absence of a single event or accident, all claims alleging exposure to asbestos from spray-on fireproofing at the site over a three-year period did not arise from a single occurrence under the policy (*see International Flavors & Fragrances, Inc. v Royal Ins. Co. of Am.*, 46 AD3d 224, 229 [1st Dept 2007]; *see generally Appalachian Ins. Co. v General Elec. Co.*, 8 NY3d 162 [2007]).

As plaintiff reserved its right to recoup expenses it incurred that are not covered by the policies, Supreme Court correctly declined to dismiss its recoupment reclaim (*see National Union Fire Ins. Co. of Pittsburgh, Pa. v Turner Constr. Co.*, 119 AD3d 103, 106, 109 [1st Dept 2014]; *BX Third Ave. Partners, LLC v Fidelity Natl. Tit. Ins. Co.*, 112 AD3d 430, 431

[1st Dept 2013]; *American Guar. & Liab. Ins. Co. v CNA Reins. Co.*, 16 AD3d 154, 155-156 [1st Dept 2005]).

The court incorrectly concluded that plaintiff's duty to defend survives exhaustion of the policy's liability limit. The policy explicitly provides that defense costs are subject to that limit.

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

ENTERED: NOVEMBER 15, 2018

CLERK

Acosta, P.J., Friedman, Manzanet-Daniels, Webber, Singh, JJ.

7629 Nicola Gregoretti, Index 157151/14
Plaintiff-Appellant,

-against-

92 Morningside Avenue LLC,
et al.,
Defendants-Respondents.

____

Sokolski & Zekaria, P.C., New York (Daphna Zekaria of counsel), for appellant.

Stern & Stern, Brooklyn (Pamela E. Smith of counsel), for 92 Morningside Avenue LLC, respondent.

Sidrane & Schwartz-Sidrane, LLP, Rockville Centre (Arun Perinbasekar of counsel), for Grossinger Management1 Inc., 92 Morningside, Inc., 92-98 Morningside LLC and Baruch Singer, respondents.

____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered April 7, 2017, which granted defendants' motions for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Plaintiff seeks to be restored, as a rent-stabilized tenant, to occupancy of apartment 71 in defendants' building, in which he had resided until a fire rendered the building uninhabitable in 2002.

The record demonstrates that the building was "effectively demolished" by a second massive fire in 2012 and that therefore there is no longer an apartment 71 to which to restore plaintiff

(*see Quiles v Term Equities*, 22 AD3d 417, 421 [1st Dept 2005]; *Lepore v 65 Whipple LLC*, 2018 NY Slip Op 51319[U] [Civ Ct, Kings County 2018]). Defendants established prima facie that, following the second fire, the building was essentially an empty shell. They submitted evidence that the building had no windows and was completely boarded up, that its interior, including floor joists and the stairwell, had completely collapsed, that it was impossible to make one's way into the building beyond what had been the lobby, and that the building had no boiler, copper piping, or any other functioning systems. Plaintiff submitted no evidence in opposition.

Plaintiff relies on a finding adverse to the building's prior owners that was made in an action brought following the first fire. However, the factual findings of the court in the prior action were rendered irrelevant by the second fire.

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

ENTERED: NOVEMBER 15, 2018

CLERK

Acosta, P.J., Friedman, Manzanet-Daniels, Webber, Singh, JJ.

7630 In re Bianca J.N.,

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

Swevia C.N.,
Respondent-Appellant,

Catholic Guardian Services,
Petitioner-Respondent.

____

Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for appellant.

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

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

____

Order of disposition, Family Court, New York County (Emily M. Olshansky, J.), entered on or about June 16, 2017, which, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject child and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

A preponderance of the evidence supports the finding that termination of the mother's parental rights was in the 13-year-old child's best interests (*see Matter of Star Leslie W.*, 63 NY2d 136, 147 [1984]). Although the child previously expressed that

she opposed adoption, this Court may take into consideration her current wishes to be adopted by her long-term foster mother (*see Matter of Michael B.*, 80 NY2d 299, 318 [1992]; *Matter of Teshana Tracey T. [Janet T.]*, 71 AD3d 1032, 1034 [2d Dept 2010], *lv denied* 14 NY3d 713 [2010]). In any event, notwithstanding the child's previous opposition and the possibility that the foster mother would not be willing to adopt, termination of parental rights to free the child for possible adoption was in the child's best interests, following over 10 years of failed attempts at reunification with the mother while the child was thriving in foster care (*see Matter of Isaac Ansimeon F. [Mark P.]*, 128 AD3d 486 [1st Dept 2015]; *Matter of Kadija Tempie M. [Terry M.]*, 67 AD3d 555 [1st Dept 2009]). The court carefully weighed the child's wishes and the evidence of the mother's failure to complete services intended to address the issues that led to the child's placement and the finding of permanent neglect. The mother had a long history of mental illness, which had resulted in psychiatric hospitalizations partially due to her refusal to take prescribed medication, had threatened to burn down the foster home where the child resides, and demonstrated a lack of understanding of the seriousness of her behavior by ignoring the order of protection against her.

A suspended judgment would not have been appropriate because there is no evidence that further delay would result in a different outcome (*see Matter of Iasha Tameeka McL. [Herbert McL.]*, 135 AD3d 601, 602 [1st Dept 2016]).

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

ENTERED: NOVEMBER 15, 2018

CLERK

Acosta, P.J., Friedman, Manzanet-Daniels, Webber, Singh, JJ.

7631 The People of the State of New York, Ind. 3103/13
Respondent,

-against-

Jose Delacruz,
Defendant-Appellant.

____

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

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

____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Robert E. Torres, J.), rendered July 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: NOVEMBER 15, 2018

____
CLERK

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

Acosta, P.J., Friedman, Manzanet-Daniels, Webber, Singh, JJ.

7632 The People of the State of New York, SCI 8378C/10
Respondent,

-against-

Francisco Nunez,
Defendant-Appellant.

____

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

Darcel D. Clark, District Attorney, Bronx (Waleska Suero Garcia of counsel), for respondent.

____

Judgment, Supreme Court, Bronx County (Richard Lee Price, J.), rendered April 26, 2012, convicting defendant, after a nonjury trial, of disorderly conduct and harassment in the second degree, and sentencing him to a conditional discharge, unanimously affirmed.

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

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

ENTERED: NOVEMBER 15, 2018

____
CLERK

Acosta, P.J., Friedman, Manzanet-Daniels, Webber, Singh, JJ.

7633-
7634 Charter Communications, Inc.,
Plaintiff-Appellant,

Index 159036/17

-against-

Local Union No. 3, et al.,
Defendants-Respondents.

____

Kauff McGuire & Margolis LLP, New York (Kenneth A. Margolis of counsel), for appellant.

Archer, Byington, Glennon & Levine LLP, Melville (John H. Byington III of counsel), for respondents.

____

Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered March 29, 2018, which granted defendants' motion to dismiss the complaint and denied plaintiff's motion to compel expedited discovery, and order, same court and Justice, entered December 27, 2017, which denied plaintiff's motion for a preliminary injunction placing restrictions on defendants' picketing campaign, unanimously affirmed, without costs.

The court properly denied plaintiff's motion for a preliminary injunction under Labor Law § 807 enjoining defendants from, among other things, trespassing, picketing or approaching within 25 feet of any Charter Communications facility, vehicle or property (*see Jou-Jou Designs v International Ladies' Garment Workers' Union, Local 23-25*, 94 AD2d 395, 404-405 [1st Dept

1983], *affd* 60 NY2d 1011 [1983]). The court correctly declined to make the factual findings required for the grant of injunctive relief under section 807, including by declining to find facts sufficient to show that any unlawful picketing acts that had occurred here would continue or recur unless restrained.

The court also correctly dismissed the complaint. The claim for a permanent injunction under section 807 was properly dismissed for the same reasons as stated above, and the common-law tort claims were properly dismissed for failure to plead that each individual union member authorized or ratified the unlawful actions (*see Martin v Curran*, 303 NY 276 [1951]; *Duane Reade, Inc. v Local 338 Retail, Wholesale, Dept. Store Union, UFCW, AFL-CIO*, 17 AD3d 277, 278 [1st Dept 2005], *lv dismissed in part denied in part* 5 NY3d 797 [2005]).

The court did not abuse its discretion in denying plaintiff's motion that sought to obtain expedited discovery prior to the court issuing a decision on the motion to dismiss.

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

ENTERED: NOVEMBER 15, 2018

CLERK

Acosta, P.J., Friedman, Manzanet-Daniels, Webber, Singh, JJ.

7635 FJ Vulis, LLC, Index 151588/14
Plaintiff-Appellant,

-against-

Anna Val, et al.,
Defendants-Respondents.

____

The Law Office of Alexander Paykin, P.C., New York (Alexander A. Paykin of counsel), for appellant.

Law Offices of Victor A. Worms, New York (Victor A. Worms of counsel), for respondents.

____

Order, Supreme Court, New York County (Shlomo Hager, J.), entered December 21, 2017, which, to the extent appealed from, denied plaintiff's motion for summary judgment on the complaint and granted defendants' cross motion for summary judgment dismissing the fraud and breach of fiduciary duty causes of action, unanimously affirmed, with costs.

Plaintiff's contention that defendants' untimely cross motion for summary judgment precluded them from seeking any relief is without merit (*see* CPLR 3212[b]; *see also e.g. Carnegie Hall Corp. v City Univ. of N.Y.*, 286 AD2d 214, 215 [1st Dept 2001]). Plaintiff's argument that the doctrine of law of the case prevents this Court from finding that the fraud claim is duplicative of the contract claim is also without merit (*People v Evans*, 94 NY2d 499, 503 n 3 [2000]).

The contract claim alleges that defendants agreed to refund 50% of a commission that defendant Anna Val (Ms. Val) earned as a real estate broker. The fraud claim alleges that defendants misrepresented that they would refund 50% of the commission, and that this was a misrepresentation because defendants "had no intention[] of paying the agreed-upon refund." The fraud claim does not allege that defendants breached any duty to plaintiff other than the contractual duty but merely restates the contract claim in terms of fraud and misrepresentation. It is therefore duplicative of the contract claim (*see e.g. Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 [1st Dept 1988]; *Tesoro Petroleum Corp. v Holborn Oil Co.*, 108 AD2d 607 [1st Dept 1985], *appeal dismissed* 65 NY2d 637 [1985]). Moreover, the fraud claim seeks the same damages ($42,500) as the contract claim (*see e.g. Tesoro*, 108 AD2d at 607).

Plaintiff – the buyer of a condominium unit – claims Ms. Val breached her fiduciary duty to it as its attorney by also acting as the seller's real estate broker. However, the evidence in the record shows that Ms. Val acted as plaintiff's, not the seller's, broker. Even if, arguendo, there were a triable issue of fact as to whether Ms. Val was the seller's broker, plaintiff failed to show that this conflict of interest caused it either $42,500 or $85,000 in damages (*see Ulico Cas. Co. v Wilson, Elser,*

Moskowitz, Edelman & Dicker, 56 AD3d 1, 10-11 [1st Dept 2008]; *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271-272 [1st Dept 2004]).

In light of the above disposition, we need not reach plaintiff's arguments about the faithless servant doctrine.

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

ENTERED: NOVEMBER 15, 2018

CLERK

Acosta, P.J., Friedman, Manzanet-Daniels, Webber, Singh, JJ.

7636 The People of the State of New York, Ind. 4994/12
Respondent,

-against-

Haytte Brown,
Defendant-Appellant.

____

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

____

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered October 7, 2015, unanimously affirmed.

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

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

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

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

ENTERED: NOVEMBER 15, 2018

CLERK

Acosta, P.J., Friedman, Manzanet-Daniels, Webber, Singh, JJ.

7637 Greenstreet of New York, Inc., Index 655085/16
Plaintiff-Respondent,

-against-

Lorna Davis, et al.,
Defendants,

D.F. Gibson Architects, P.C., et al.,
Defendants-Appellants.

____

Byrne & O'Neill, LLP, New York (Albert Wesley McKee of counsel), for appellants.

Muchmore & Associates PLLC, Brooklyn (Maximillian Travis of counsel), for respondent.

____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered October 2, 2017, which, to the extent appealed from, denied the motion of defendants D.F. Gibson Architects, P.C. (Gibson) and Ysrael A. Seinuk, PC (Seinuk) to dismiss the cause of action alleging negligence, unanimously affirmed, without costs.

Whether characterized as professional malpractice or negligent misrepresentation, the central issue is whether plaintiff has sufficiently alleged a relationship of privity with Gibson and Seinuk, or the functional equivalent of privity, to impose a duty owed on them in relation to plaintiff (*see North Star Contr. Corp. v MTA Capital Constr. Co.*, 120 AD3d 1066, 1069

[1st Dept 2014]; *Bullmore v Ernst & Young Cayman Is.*, 45 AD3d 461, 464 [1st Dept 2007]).

Here, the court properly determined that the amended complaint, as amplified by the affidavit from plaintiff's president (*see Wall St. Assoc. v Brodsky*, 257 AD2d 526, 526-527 [1st Dept 1999]), has adequately asserted such a relationship. Plaintiff alleges that it had direct communications with Gibson and Seinuk during the course of the project; that defendants were aware that the drawings submitted were incorrect insofar as Gibson failed to reference structural insulated panels (SIPs); that Seinuk negligently advised plaintiff to back the SIPs with plywood out of concern for wind shear and failed to advise plaintiff that doing so would violate the New York City Building Code; that Gibson and Seinuk knew that plaintiff would rely on their drawings and representations; and that plaintiff reasonably relied on these representations (*see Ossining Union Free School*

Dist. v Anderson LaRocca Anderson, 73 NY2d 417, 425 [1989]).

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

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

ENTERED: NOVEMBER 15, 2018

CLERK

Acosta, P.J., Friedman, Manzanet-Daniels, Webber, Singh, JJ.

7638 The People of the State of New York, Ind. 1974/14
Respondent,

-against-

Sukur Ullah,
Defendant-Appellant.

____

Seymour W. James, The Legal Aid Society, New York (David Crow of counsel), and Davis Polk & Wardwell LLP, New York, (R. Brendan Mooney of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Samuel Z. Goldfine of counsel), for respondent.

____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J. at suppression hearing; Mark Dwyer, J. at jury trial and sentencing), rendered January 7, 2016, convicting defendant of assault in the second degree, and sentencing him to a term of six months and five years' probation, unanimously affirmed.

The hearing court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations. The hearing evidence, viewed as a whole, supports the court's finding that defendant's wife validly consented to the police entry into the couple's apartment (*see generally People v Gonzalez*, 39 NY2d 122, 128-131 [1976]), that defendant's warrantless arrest in the apartment was therefore

lawful, and that his statements were thus admissible. The factfinder expressly accepted specific testimony that defendant's wife invited the police to enter. In any event, any error in admitting the statements was harmless.

The trial court properly admitted statements by the victim to other witnesses under the excited utterance exception to the hearsay rule (*see People v Johnson*, 1 NY3d 302, 306 [2003]). These statements were made within minutes after the victim was assaulted and while he was crying, vomiting, and bleeding from the nose and mouth. The record supports the inference that he was still under the influence of the stress of the incident despite some passage of time (*see People v Brown*, 70 NY2d 513, 520-522 [1987]), and that his statements were not the product of reflection or possible fabrication. In any event, any prejudice was limited because the victim testified at trial and was subject to cross-examination (*see People v Ludwig*, 24 NY3d 221, 230 [2014]).

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

ENTERED: NOVEMBER 15, 2018

CLERK

Acosta, P.J., Friedman, Manzanet-Daniels, Webber, Singh, JJ.

7639 The People of the State of New York, Ind. 1096/14
Respondent,

-against-

Benjamin Johnson,
Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Steven Barrett, J. at plea; William Mogulescu, J. at sentencing), rendered August 22, 2016,

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

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

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

ENTERED: NOVEMBER 15, 2018

CLERK

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

Acosta, P.J., Friedman, Manzanet-Daniels, Singh, JJ.

7640 The People of the State of New York, Ind. 184/13
Respondent,

-against-

Gerald Boswell,
Defendant-Appellant.

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

Judgment, Supreme Court, Bronx County (Troy K. Webber, J.), rendered March 26, 2014, unanimously affirmed.

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

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

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

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

ENTERED: NOVEMBER 15, 2018

CLERK

Acosta, P.J., Friedman, Manzanet-Daniels, Webber, Singh, JJ.

7641 The People of the State of New York, Ind. 1704/15
Respondent,

-against-

Clifford McClinton,
Defendant-Appellant.

____

Christina A. Swarns, Office of the Appellate Defender, New York (Angie Louie of counsel), for appellant.

____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered August 11, 2015, unanimously affirmed.

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

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

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

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

ENTERED: NOVEMBER 15, 2018

CLERK

Acosta, P.J., Friedman, Manzanet-Daniels, Webber, Singh, JJ.

7642N In re William W. Koeppel, File 4098C/96

The Law Offices of Craig Avedisian, P.C.,
et al.,
Petitioners-Respondents-Appellants,

-against-

William W. Koeppel,
Respondent-Appellant-Respondent.

Brafman & Associates, P.C., New York (Mark M. Baker of counsel),for appellant-respondent.

Law Offices of Craig Avedisian, P.C., New York (Craig Avedisian of counsel), and Jaspan Schlesinger LLP, Garden City (Jessica Baquet of counsel), for respondents-appellants.

Order, Surrogate's Court, New York County (Rita Mella, S.), entered on or about February 20, 2018, which, after an evidentiary hearing, found respondent guilty of criminal contempt in violation of Judiciary Law § 750(A)(3), and sentenced him to imprisonment for a period of 10 days for each order that was violated, for a total of 20 days, and a fine of $1,000 for each order violated, for a total of $2,000, unanimously affirmed, with costs.

Petitioners proved beyond a reasonable doubt that respondent wilfully violated two so-ordered stipulations, entered on or about October 5, 2011 and December 14, 2012, in connection with a 2008 agreement settling the parties' dispute over a contingency

legal fee (*see Matter of Department of Envtl. Protection of City of N.Y. v Department of Envtl. Conservation of State of N.Y.*, 70 NY2d 233, 239-240 [1987]). The record shows that respondent failed to make any of the payments required by the orders, despite his ability to comply, that the orders were clear and specific as to the conduct required of him, and that respondent had the requisite notice of the orders. There was extensive testimony about service of the orders on respondent, and respondent's long-term attorney, who signed the so-ordered stipulations, testified that respondent was aware of the earlier order, which benefitted him by correcting a mistake in an order that required him to make greater payments, and that the later order was also the subject of discussion between him and respondent.

Respondent argues that his attorney was not authorized to enter into the December 2012 stipulation. However, respondent's attorney testified that he had the necessary authority. Even if the attorney lacked authority, respondent was not free to disregard the order (*see Hallock v State of New York*, 64 NY2d 224, 230 [1984]).

Respondent argues that the Surrogate should not have so-ordered the December 2012 stipulation because she knew that he was not in the courtroom when the stipulation was reached and

that it encumbered third parties that were not present. However, the Surrogate had directed respondent to be present on that day, and he failed to comply. In any event, the Surrogate had no reason to doubt the authority of respondent’s counsel to enter into the stipulation.

Respondent argues that he was not on notice that the October 2011 order was still in effect, because the December 2012 order resolved the earlier order. However, the evidence demonstrates that respondent was in violation of the earlier order until the time it was replaced by the later order, which he also violated.

Respondent argues that Surrogate Mella improperly declined to recuse herself from the proceeding despite her presence in the courtroom as a visitor during prior proceedings before another Surrogate (*see generally People v Moreno*, 70 NY2d 403, 405 [1987]). However, there is nothing in Surrogate Mella’s remarks as to the other Surrogate or her observations as a visitor to the other Surrogate’s courtroom that suggests that she was biased against respondent.

Petitioners argue that the penalty imposed by the Surrogate was insufficient because it ignored respondent’s failure to comply with each of the individual provisions of the orders, which constitutes multiple acts of contempt. However, the Surrogate based her determination on respondent’s disobedience of

the two orders and his failure to make the mandated monthly payments. The penalty imposed was sufficient to deter violation of court orders (*see El-Dehdan v El-Dehdan*, 26 NY3d 19, 34 [2015]; *see also State of New York v Unique Ideas*, 44 NY2d 345, 349 [1978]).

We have considered respondent's remaining arguments and find them without merit.

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

ENTERED: NOVEMBER 15, 2018

CLERK

Friedman, J.P., Gische, Kahn, Singh, Moulton, JJ.

7094-
7095-
7096N &
M-2593

Index 153583/15

Christopher Brummer,
Plaintiff-Respondent-Appellant,

-against-

Benjamin Wey, et al.,
Defendants-Appellants-Respondents.

- - - - -

Martin Redish, Steven Shiffrin and
Eugene Volokh,
Amici Curiae.

____

Catafago Fini LLP, New York (Tom M. Fini of counsel), for appellants-respondents.

Vorys, Sater, Seymour & Pease LLP, Pittsburgh, PA (Daren S. Garcia of the bar of the State of Ohio, State of Florida and Commonwealth of Pennsylvania, admitted pro hac vice, of counsel), and Clarick Gueron Reisbaum LLP, New York (Ashleigh Hunt of counsel), for respondent-appellant.

Hartman & Winnicki, P.C., Ridgewood, NJ (Daniel L. Schmutter of counsel), for amici curiae.

____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered June 6, 2017, which granted plaintiff's motion for a preliminary injunction and temporary restraining order enjoining defendants from posting articles about him online for the duration of the action and requiring defendants to remove all articles they had posted about him, unanimously reversed, on the law and the facts, the motion denied, and the injunction vacated, without costs. Orders, same court and Justice, entered on or

about October 13, 2017, and January 10, 2018, which granted plaintiff's motions to hold defendants in civil contempt, unanimously reversed, on the law, the finding of contempt vacated, and it is directed that, upon remand, further proceedings be had upon the contempt motions to determine whether defendants exercised control and authority over the subject website at the times of the alleged contemptuous conduct, without costs.

Prior restraints on speech are "the most serious and the least tolerable infringement on First Amendment rights," and "any imposition of prior restraint, whatever the form, bears a heavy presumption against its constitutional validity" (*Ash v Board of Mgrs. of the 155 Condominium*, 44 AD3d 324, 324-325 [1st Dept 2007] [internal quotation marks omitted], quoting *Nebraska Press Assn. v Stuart*, 427 US 539, 559 [1976], and *Bantam Books, Inc. v Sullivan*, 372 US 58, 70 [1963]; *see also Rosenberg Diamond Dev. Corp. v Appel*, 290 AD2d 239, 239 [1st Dept 2002] [prior restraints are "strongly disfavored"]). "[A] party seeking to obtain such a restraint bears a correspondingly heavy burden of demonstrating justification for its imposition" (*Ash*, 44 AD3d at 325, citing *Organization for a Better Austin v Keefe*, 402 US 415, 419 [1971], and *Near v Minnesota ex rel. Olson*, 283 US 697, 713 [1931]), and, to do so, must show that the speech sought to be

restrained is “likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest” (*Rosenberg*, 290 AD3d at 239 [internal quotation marks omitted], quoting *Terminiello v City of Chicago*, 337 US 1, 4 [1949], *reh denied*, 337 US 934 [1949]). While these principles would permit the restraint of speech that “communicate[s] a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals” (*Virginia v Black*, 538 US 343, 359 [2003]), the speech at issue in this case — although highly offensive, repulsive and inflammatory — does not meet this exacting constitutional standard. Accordingly, the injunction under review must be vacated.

Plaintiff, a law professor, sat on the appellate panel of the Financial Industry Regulatory Authority, Inc. (FINRA) that affirmed the lifetime ban imposed on two stockbrokers, nonparties Talman Harris and William Scholander. Defendants allegedly control a website known as *TheBlot*, a tabloid-style platform that has published a substantial quantity of material attacking FINRA’s ban of Harris and Scholander and the FINRA personnel, including plaintiff, who were involved in adjudicating that case. The attacks on plaintiff have included — in addition to name-calling, ridicule and various scurrilous accusations —

juxtapositions of plaintiff’s likeness to graphic images of the lynching of African Americans, and statements that the banning of Harris, who is African American, constituted a “lynching.”

In this action, plaintiff, who is also African American, seeks, as here relevant, an injunction against the posting on *TheBlot* of material attacking or libeling him. In this regard, he argues that the lynching images posted alongside photographs of him on *TheBlot* should be understood as a threat of violence against himself. In the first order under review, entered June 6, 2017, Supreme Court granted plaintiff’s motion for a preliminary injunction, enjoining defendants “from posting any articles about the Plaintiff to *TheBlot* for the duration of this action” and directing them to “remove from *TheBlot* all the articles they have posted about or concerning Plaintiff[.]” Defendants filed this appeal and then moved this Court for a stay of the preliminary injunction. After an interim stay of the preliminary injunction was granted by order dated June 15, 2017, this Court entered an order, dated August 1, 2017, lifting the stay

> “to the extent of directing defendants to remove all photographs or other images and statements from websites under defendants’ control which depict or encourage lynching; which encourage incitement of violence; or that feature statements regarding plaintiff that, in conjunction with the threatening language and imagery with which these statements are

> associated, continue to incite violence against plaintiff" (2017 NY Slip Op 81412[U]).

This Court's order of August 1 further provided that the interim stay of the preliminary injunction was lifted "so as to prohibit defendants from posting on any traditional or online media site any photographs or other images depicting or encouraging lynching in association with plaintiff (*id*.)."[1]

Initially, we reiterate that, although it may ultimately be determined that defendants have libeled plaintiff, "[p]rior restraints are not permissible . . . merely to enjoin the publication of libel" (*Rosenberg*, 290 AD2d at 239; *see also Giffuni v Feingold*, 299 AD2d 265, 266 [1st Dept 2002]; *cf. Dennis v Napoli*, 148 AD3d 446 [1st Dept 2017] [affirming preliminary injunction against sending unsolicited defamatory communications about the plaintiff, who was not a public figure, directly to her colleagues, friends and family]). Accordingly, as plaintiff appears to recognize, the preliminary injunction can be affirmed only if it enjoins a "true threat" against plaintiff (*Virginia v Black*, 538 US at 359 [internal quotation marks omitted]). We

---

[1]We note that this Court's partial lifting of the interim stay of the preliminary injunction does not constitute law of the case for purposes of our consideration of the merits of this appeal from the order granting the preliminary injunction (*see Thompson v Armstrong*, 134 A3d 305, 310 [DC 2016] ["law of the case is not established by denial of a stay"] [internal quotation marks omitted], *cert denied* __ US __, 137 S Ct 296 [2016]).

find, however, that the speech at issue, as offensive as it is, cannot reasonably be construed as truly threatening or inciting violence against plaintiff. Rather, the lynching imagery at issue was plainly intended to draw a grotesque analogy between lynching and FINRA's banning of Harris, who is an African American (and is identified as such in the posts).[2] While this analogy is incendiary and highly inappropriate, plaintiff has not established that any reasonable viewer would have understood the posts as threatening or calling for violence against him. Moreover, even if the posts could reasonably be construed as advocating unlawful conduct, plaintiff has not established that any "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" (*Brandenburg v Ohio*, 395 US 444, 447 [1969]).

Regardless of the subject injunction's constitutionality, defendants were not free to disobey an order within the jurisdiction of the issuing court, and not void on its face, until they had obtained judicial relief from it.[3] Further,

---

[2]For example, one post includes, alongside a silhouette image of a lynching, and under a photograph of Harris, the following statement: "Talman Harris: 'These MOFOs lynched me . . . .'" Another post states: "AFRICAN AMERICAN BROKER TALMAN HARRIS LYNCHED BY FINRA, BECAUSE HE IS BLACK."

[3]*See Maness v Meyers*, 419 US 449, 458 (1975); *Walker v City of Birmingham*, 388 US 307, 317-318 (1967); *Howat v Kansas*, 258 US

contrary to defendants' contention, the injunction, at least as modified by this Court's partial stay, was not impermissibly vague or ambiguous. Moreover, we are satisfied that, assuming that defendants controlled the website, a substantial part of the posted material forming the basis for the contempt finding violated the terms of the injunction as modified by the partial stay. However, it cannot be determined on the present record whether defendants exercised control and authority over the website, an issue that we find to have been sufficiently preserved by defendants. Accordingly, we vacate the contempt

---

181, 189-190 (1922); *Matter of Balter v Regan*, 63 NY2d 630, 631 (1984), *cert denied* 469 US 934 (1984); *Ketchum v Edwards*, 153 NY 534, 538-539 (1897); *Zafran v Zafran*, 28 AD3d 753, 756 (2d Dept 2006); *People v Harden*, 26 AD3d 887, 888 (4th Dept 2006), *lv denied* 6 NY3d 834 (2006); *Department of Hous. Preserv. & Dev. of City of N.Y. v Mill Riv. Realty*, 169 AD2d 665, 670 (1st Dept 1991), *affd* 82 NY2d 794 (1993).

adjudication and direct that, on remand, an evidentiary hearing be held to determine whether defendants had control of the website at the times of the alleged contemptuous conduct.

M-2593 - *Christopher Brummer v Benjamin Wey*

Motion to file amicus curiae brief granted to the extent of deeming the brief filed.

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

ENTERED: NOVEMBER 15, 2018

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Dianne T. Renwick, J.P.
Judith J. Gische
Angela M. Mazzarelli
Cynthia S. Kern
Peter H. Moulton, JJ.

7154
Index 654187/16

______________________________________x

Beltway 7 & Properties, Ltd.,
Plaintiff-Appellant,

-against-

Blackrock Realty Advisers, Inc., et al.,
Defendants-Respondents.
______________________________________x

Plaintiff appeals from the order of the Supreme Court, New York County (O. Peter Sherwood, J.), entered September 19, 2017, which granted defendants' motion to dismiss the complaint.

Schlam Stone & Dolan LLP, New York (Jeffrey M. Eilender and Seth D. Allen of counsel), for appellant.

Dewey Pegno & Kramarsky LLP, New York (Thomas E.L. Dewey and L. Lars Hulsebus of counsel), for respondents.

MAZZARELLI, J.

Defendants (collectively, Blackrock) are the assignees of a $25 million mezzanine loan originally made by nonparty JP Morgan to plaintiff. The mezzanine loan was secured by plaintiff's interest in an affiliated entity called L Reit Ltd., which in turn owned real property in Texas. Around the time that JP Morgan extended the mezzanine loan to plaintiff, it made a $26 million mortgage loan to L Reit.

Pursuant to the agreement that governed the mezzanine loan, plaintiff was required to make payments on the "Payment Date," defined as "the ninth (9th) day of each calendar month during the term of the Loan," or the nearest previous business day if the ninth day was not a business day. The portion of those monthly payments attributable to interest was to be calculated based on interest accruing between the fifteenth day of the prior calendar month and the fourteenth day of the calendar month during which a "Payment Date" fell. The agreement provided that the maturity date for the loan would be November 9, 2014, at which time plaintiff would be required to pay off the principal balance, including all accrued and unpaid interest. November 9, 2014 was a Sunday, so the actual maturity date pursuant to the agreement was November 7. The agreement also provided for a late payment

penalty, which entitled the lender to demand, upon plaintiff's failure to make any required payment, "the lesser of five percent (5%) of such unpaid sum or the Maximum Legal Rate" (defined in the agreement as the maximum nonusurious interest rate under applicable law).

As the maturity date approached, plaintiff negotiated to refinance the mezzanine loan and the mortgage loan with JP Morgan, and scheduled a closing for November 7, 2014, the maturity date for both loans. However, shortly before that date, plaintiff discovered that an umbrella insurance policy it was required to maintain for the properties securing the mortgage loan had lapsed. Keybank, which JP Morgan had appointed to service the mortgage loan, was responsible for paying the insurance premiums out of plaintiff's monthly loan payments. However, it failed to make the $8,600 payment necessary to renew the umbrella policy. JP Morgan refused to refinance the two loans until the insurance issue was resolved, which was on November 14, when the new loans closed.

Because plaintiff missed the maturity date payment by one week, Blackrock decided to exercise its right under the mezzanine loan agreement to impose a late charge. It calculated the charge as 5% of the unpaid indebtedness, a sum of approximately $1.2

million. Further, it sought an additional interest payment to cover the interest period running from November 15 to December 14. In contrast to Blackrock, JP Morgan did not penalize plaintiff for settling the mortgage loan one week late. It did persuade Blackrock, however, to reduce the late charge to $500,000. Nevertheless, needing to satisfy the mezzanine loan before it could close on the refinance, and facing the imminent loss of its properties to foreclosure, plaintiff paid the approximately $844,000 demanded by Blackrock.

Sometime after these events, plaintiff sued Keybank in Texas. That action was withdrawn, on terms not disclosed in the record. Approximately 1 1/2 years later, plaintiff commenced this action. The first cause of action in the complaint was for breach of contract, asserting that Blackrock misconstrued the loan agreement in charging interest for the contractual period of November 15 to December 14, since interest was intended to accrue only during the term of the mezzanine loan, which expired when plaintiff satisfied it. The second cause of action sought a declaratory judgment that the late charge and additional interest were unenforceable as penalties that were disproportionate to the harm actually suffered by Blackrock. The third cause of action sought restitution of the amounts that plaintiff claims it was

unlawfully forced to pay to Blackrock.

Blackrock moved to dismiss the complaint in its entirety, pursuant to CPLR sections 3211(a)(1) and (7). It argued that it properly applied all relevant contractual provisions, and that, in any event, plaintiff’s claims were barred by the voluntary payment doctrine. In response, plaintiff submitted an amended complaint, which added a cause of action seeking a declaratory judgment that plaintiff made the payment under economic duress and under protest, and upon a mistake of law and fact, such that the voluntary payment doctrine did not apply. Plaintiff also submitted the affidavit of its president, Mohammad Nasr, in which he reiterated the allegations in the amended complaint, including that plaintiff protested the charges after Blackrock announced its intention to impose them, but determined that it had no choice but to pay.

Blackrock agreed to treat its motion as if directed to the amended complaint. It argued that there was no allegation of a written protest, as required, that plaintiff’s allegations of duress were substantively insufficient and in any event waived by the passage of time, and that there was no cognizable mistake of law or fact. Blackrock also argued that the charges were all proper under the mezzanine loan agreement.

The court granted the motion in its entirety and dismissed the amended complaint. It rejected plaintiff’s allegation that it made the payment under protest, since it had stated no facts concerning the manner in which such protest was lodged. Regarding plaintiff’s argument that it made the payment under a mistake of fact or law, the court observed that this was not possible since Blackrock had explained the basis for the charges. Moreover, the court held, plaintiff failed to allege that it made a reasonable effort to learn what its actual legal obligations to Blackrock were. Finally, the court, acknowledging that a threatened loss of property could form the basis of a claim of economic duress, and intimating that plaintiff had sufficiently alleged duress, rejected the defense. This, the court stated, was because plaintiff sat on its rights, having waited 1 1/2 years to commence this action.

In seeking to avoid application of the voluntary payment doctrine, plaintiff first contends on appeal that it made clear to Blackrock that its payment was not voluntary at all. The doctrine

> “bars recovery of payments voluntarily made with full knowledge of the facts, in the absence of fraud or mistake of material fact or law (*Dillon v U-A Columbia Cablevision of Westchester*, 100 NY2d 525 [2003]). The onus is on a party that receives what it perceives as

> an improper demand for money to 'take its position at the time of the demand, and litigate the issue before, rather than after, payment is made' (*Gimbel Bros. v Brook Shopping Ctrs.* (118 AD2d 532, 535 [2d Dept 1986])" (*DRMAK Realty LLC v Progressive Credit Union*, 133 AD3d 401, 403 [1st Dept 2015]).

In *DRMAK Realty*, we suggested that the effects of the doctrine can be overcome by a timely protest. However, the party that made the payment must give some indication that it "took steps to indicate that [it] was reserving [its] rights" (133 AD3d at 405). Here, plaintiff points to nothing more than conclusory statements in its amended complaint and in Nasr's affidavit that it protested. It does not state in what medium it communicated the protest, the person to whom it conveyed the protest, or any details of what the protest specifically consisted of. To be sure, there is an email chain in the record in which Nasr says to, inter alia, JP Morgan's agent, "Am I paying Dec. interest no matter what, this is not right?" and then is advised by the agent that "it is in your best interest to close the loan and then after this loan in [sic] securitized take up your claims with them at that time." However, assuming, without deciding, that JP Morgan acted as Blackrock's agent, there is no indication that plaintiff actually placed JP Morgan on notice that it intended to dispute the payment after it paid. Furthermore, the email chain

makes no reference to the late charge. Under even the most liberal pleading standards, the allegation of protest is insufficient.

Plaintiff asserts that, even if it did not lodge a proper protest at the time of the payment, it can still recover the payment if it can establish that it was made under economic duress or as the result of a mistake. We dispose of the latter theory fairly easily. First, any argument that plaintiff was mistaken in believing that the late charge and additional interest payment were permitted by the mezzanine loan agreement logically conflicts with Nasr's claim that he protested the payment. Further, to the extent that plaintiff argues that the mistake was its belief that it would be able to pay the charges and then challenge them at a later date, we find that plaintiff has not alleged sufficient facts to support that position. Moreover, we note that plaintiff is a sophisticated party that either understood its rights or had the wherewithal to learn them in relatively short order.

The relative sophistication of the parties is not a factor to be considered in assessing a claim of economic duress (*see DRMAK Realty*, 133 AD3d at 404). Economic duress exists where a party is compelled to agree to terms set by another party because

of a wrongful threat by the other party that prevents it from exercising its free will (*see 805 Third Ave. Co. v M.W. Realty Assoc.* 58 NY2d 447, 451 [1983]). Accordingly, our analysis consists of two prongs: first, whether Blackrock's decision to demand the late charge and extra interest payment was lawful, that is, based on rights enumerated in the agreement; and second, if it was not, whether the demand placed plaintiff in a position such that it had no other choice but to accede. With respect to the first prong, Blackrock relies on *M.W. Realty* in arguing that, because the mezzanine loan agreement is part of the record, we can decide, even at this procedural posture, that, as a matter of law, the charges were not wrongful. In that case, plaintiff, a developer, claimed duress when the defendant, from which the plaintiff had contracted to purchase air rights so it could build a 31-story building, sought to extract more favorable terms from the plaintiff after the plaintiff had begun construction. The Court rejected the duress claim because after reviewing the contract, which was annexed to the complaint, it concluded that the defendant's obligation to transfer the air rights had not yet been triggered when it sought the modification. The Court affirmed dismissal of the complaint because "a party cannot be guilty of economic duress for refusing to do that which it is not

legally required to do" (58 NY2d at 453). Defendant argues that, here too, the agreement plainly establishes that it had the right to make the demand it did. Plaintiff, in contrast, asserts that the late charge provision is, at the very least, ambiguous with respect to how Blackrock was to calculate the charge, and that, even if the calculation was correct, it constitutes an unenforceable penalty.

We agree that the relevant contractual provisions are ambiguous, as they are each susceptible to more than one reasonable interpretation (*see Ellington v EMI Music, Inc.*, 24 NY3d 239, 244 [2014]). As plaintiff notes, the 5% rate is expressly stated to apply to the "unpaid sum." However, whether the "Maximum Legal Rate" is to be applied to the unpaid sum or something else is unclear. Plaintiff suggests that it was intended to apply to the length of time that payment was outstanding, which was seven days. Blackrock counters by, inter alia, characterizing the "Maximum Legal Rate" as a standard savings provision designed to ensure that it not be deprived of any recourse at all if payment is tardy. Each of these arguments has merit, and neither is susceptible of resolution at the pleading stage (*see Nina Penina, Inc. v Njoku*, 30 AD3d 193, 193-194 [1st Dept 2006]).

There is similar uncertainty concerning whether Blackrock was justified in charging interest for the November to December period. Blackrock argues that because payment can only be made on a "Payment Date," and plaintiff missed the November 9th payment date, interest was properly charged through the next interest period, which ran from November 15 through December 14. Plaintiff counters that the term "Payment Date" is specifically defined in the mezzanine loan agreement as the "9th day of each calendar month *during the term of the Loan*" (emphasis added). Plaintiff argues that the last "Payment Date . . . during the term of the Loan" was November 7th (the business day before November 9th, a Sunday), and thus the last interest period ended on November 14th. This creates sufficient ambiguity concerning what plaintiff's obligations were to prevent us from determining how the provision should be properly interpreted.

Similarly, we are unwilling at this stage to declare that the amount charged by Blackrock was not an unenforceable penalty. The late charge was, according to the agreement, designed "to defray the expense incurred by Lender in handling and processing such delinquent payment and to compensate Lender for the loss of the use of such delinquent payment." However, we are unable to determine on the limited record before us whether such damages

were incapable of calculation at the time the mezzanine loan agreement was executed, or whether there is a proportional relationship between the consequences to Blackrock of receiving late payment, and the sum plaintiff was required to pay (*see Truck Rent-a-Ctr. Inc. v Puritan Farms Snd,* 41 NY2d 420 [1977]). None of the cases cited by Blackrock involving a 5% penalty resulted in so large a payment as encountered here, for such a negligible period of default. Furthermore, we are mindful of the unique circumstance here, which is that, while plaintiff was ultimately responsible for ensuring that the subject properties were covered by the requisite insurance, it was an innocent victim of JP Morgan's agent's failure to fulfill its duty of renewing the policy.

This is not to say that a garden variety dispute over the meaning of contractual terms will serve as the basis of a viable duress claim. It is necessary that the second prong of the duress analysis, which involves the deprivation of meaningful choice on the duress victim's part, also be present. Thus, the possibility, or even the fear, of litigation is insufficient to establish duress (*see Oleet v Pennsylvania Exch. Bank*, 285 AD 411, 414 [1st Dept 1955]). In *Oleet*, the defendant lender represented to the plaintiff borrowers, who were seeking a three-

year loan, that it could only issue notes for 90 days at a time, but that it would continually extend such notes for the desired three years. However, when the first note became due, the lender told the plaintiffs that it would only extend the note if the plaintiffs, inter alia, paid certain charges to it. This Court rejected the plaintiffs' duress claim, stating:

> "At the time the extension agreement was executed, the bank had no interest in or control over plaintiffs' business or property. All the bank had was a claim for repayment of a loan, represented by ninety-day notes. Despite their financial distress, the borrowers could have refused to honor the fraudulently induced notes, thereby compelling the bank to institute suit, in which event the defense of fraud and, perhaps, equitable estoppel would have been available to them. Fear of financial embarrassment not created by the bank or the stress that might follow from a lawsuit brought to enforce the notes, is not sufficient to constitute such duress as will excuse or invalidate an agreement made to avoid such consequences. An impending suit, without more, does not create the cognizable impulsion of duress" (*id.*, internal citations omitted).

Here, plaintiff's duress claim derives not from a fear it had that, should it demur from Blackrock's insistence that it pay the late charges and extra interest, thus foregoing its ability to refinance, Blackrock would merely sue to recover the mezzanine loan. Rather, plaintiff claims that it feared that Blackrock

would foreclose on plaintiff's very valuable portfolio of properties. For this reason, it asserts, it was placed in a position where, even though it doubted Blackrock's entitlement to the charges, it had no choice but to comply with Blackrock's demand. Indeed, "economic duress is established when the facts show that [breach of a contractual obligation] will result in an irreparable injury or harm" (*Sosnoff v Carter*, 165 AD2d 486, 491 [1st Dept 1991]). Furthermore, as this Court observed in *Oleet*, a demand can be characterized as improper when it is based on "a claim insignificant when contrasted with the demands" (285 AD at 415). Here, plaintiff contends that there is a gross disproportionality between the claim (a payment that was one week late) and the demand (nearly $850,000).

That plaintiff may have established a question whether Blackrock may have had a right to extract the late charge from it does not compel a decision upholding the complaint, for while there is a question whether Blackrock acted reasonably in imposing the penalty, we must also consider the consequence of plaintiff's failure to seek recovery of the payment after the threat of foreclosure had passed. "[O]ne who would recover moneys allegedly paid under duress must act promptly to make his claim known" (*Austin Instrument v Loral Corp.*, 29 NY2d 124, 133

[1971]). That is because a contract procured by duress is not void, but merely voidable, such that the duress victim's failure to act can be viewed as a ratification of the contract (*see Oregon Pac. R.R. Co. v Forrest*, 128 NY 83, 91-92 [1891]). Plaintiff dismisses this principle as inapplicable here because Blackrock did not procure a contract by duress, but rather a payment concomitant with an already existing contract. This appears to be a distinction without a difference. Plaintiff does not explain why a payment like the one at issue is void (not simply voidable), nor does it offer any authority to support that contention. Indeed, in *Austin Instrument*, a party was held to have procured price increases on an *already existing* contract through economic duress, and the Court still weighed whether the victim of that duress had ratified the price increase by waiting too long to seek recovery (29 NY2d at 133).

Plaintiff further asserts that the proper analysis where a party fails to promptly seek recovery of a payment made under duress is whether it is guilty of laches. It argues that because a showing of laches requires prejudice on the part of the party asserting the defense, it must prevail here, because Blackrock was not prejudiced. We disagree. Plaintiff has not cited any authority to support its theory that prejudice enters the

analysis. Indeed, decisions by this Court declaring that a party has waived a duress claim have not even suggested that prejudice is a relevant factor (*see Achache v Och*, 128 AD3d 563 [1st Dept 2015]; *Kaminsky v Herrick, Feinstein* LLP, 59 AD3d 1, 13-14 [1st Dept 2008], *lv denied* 12 NY3d 715 [2009]). This is not to say that a lengthy wait to recover funds paid under duress bars the claim absolutely. In *Austin Instrument*, for example, the victim of the duress faced an imminent threat of wrongful compulsion long after it was placed in a position of duress, excusing its delay (29 NY2d at 133). Here, however, plaintiff fails to allege any set of facts justifying its decision to wait nearly two years to invoke duress, and then only after defendant invoked the voluntary payment doctrine. For that reason, its complaint was properly dismissed.

Accordingly, the order of the Supreme Court, New York County (O. Peter Sherwood, J.), entered September 19, 2017, which

granted defendants’ motion to dismiss the complaint, should be affirmed, with costs.

All concur.

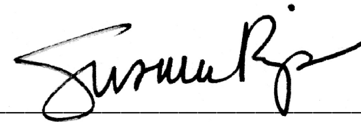
Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered September 19, 2017, affirmed, with costs.

Opinion by Mazzarelli, J. All concur.

Renwick, J.P., Gische, Mazzarelli, Kern, Moulton, JJ.

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

ENTERED: NOVEMBER 15, 2018



CLERK