SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 2, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Richter, Manzanet-Daniels, Tom, Moulton, JJ.

8568 In re B.L., etc., Index 100712/16
Petitioner-Respondent,

-against-

Benjamin M. Lawsky, in His Official Capacity as Superintendent of New York State Department of Financial Services and as Administrator of the New York State Midical Indemnity Fund,
Respondent-Appellant,

Emily Prober, etc.,
Respondent.

_____

Barbara D. Underwood, Attorney General, New York (Anisha S. Dasgupta of counsel), for appellant.

Kelner & Kelner, New York (Gerard K. Ryan, Jr. of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Nancy M. Bannon, J.), entered August 4, 2017, granting B.L.'s petition brought pursuant to CPLR article 78 to annul a determination of the New York State Department of Financial Services (DFS), dated January 11, 2016, which denied his application for enrollment in the New York State Medical Indemnity Fund (Fund), denied respondent's cross motion to dismiss the petition, and directed DFS and third-party administrator Alicare to enroll B.L. in the Fund and provide him all benefits to which he is entitled,

retroactive to January 11, 2016, unanimously affirmed, without costs.

Supreme Court erroneously concluded that DFS lacked exclusive statutory authority to determine whether petitioner B.L. was a "qualified plaintiff" eligible for enrollment in the Fund, as the plain language of multiple provisions of the governing statute, Public Health Law 29-D, Title 4, shows otherwise (*see e.g.* Public Health Law § 2999-j[6][a], [7]), as do the implementing regulations (*see e.g.* 10 NYCRR 69-10.2[b]). The settlement agreement was a necessary prerequisite to Fund eligibility, but not sufficient, and DFS, moreover, was not a party to the underlying malpractice proceedings or settlement (*cf. Joyner-Pack v State of New York*, 38 Misc 3d 903 [Ct Cl 2012]).

However, we agree with Supreme Court that DFS's determination that B.L. was ineligible to enroll in the Fund was affected by an error of law. Where the matter "involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom" the agency charged with administration of the statute is entitled to deference, and its interpretation will be upheld if not irrational or unreasonable (*Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 [1980] [internal citation omitted]). However, as Supreme Court correctly found, DFS was

not entitled to deference because the issue involved "'the interpretation of statutes and pure questions of law'" (*Matter of DeVera v Elia*, 32 NY3d 423, 434 [2018] [internal citation omitted]).

Supreme Court correctly interpreted the relevant provisions of the Public Health Law. "'As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof'" (*id.* at 435 [internal citation omitted]). Contrary to DFS's argument, the Fund statutes do not limit enrollment eligibility to instances where plaintiff's birth-related injury was caused by medical malpractice during labor, delivery, resuscitation or a delivery admission. Rather, the plain language of the pertinent provisions of the Public Health Law requires that the *injury* take place in the course of labor, delivery or resuscitation. DFS should not have disqualified B.L. on grounds that the alleged malpractice occurred in the course of his mother's prenatal treatment, since the injuries he claimed to have suffered occurred at the time of birth. There are no allegations or findings that B.L. was deprived of oxygen or otherwise injured at any time before he was in the process of being born.

Moreover, because the alleged malpractice need not have taken place during the delivery admission, DFS's

extraterritoriality concerns are resolved, and we see no need to remit the matter for further proceedings before DFS to address this issue. We reject DFS's argument that it had no occasion to address the extraterritoriality issue when it chose not to do so in its denial. In any event, as a matter of statutory interpretation, B.L.'s premature birth at a Connecticut hospital does not affect his eligibility for enrollment in the Fund as a "qualified plaintiff." The malpractice claims here were asserted against and settled by New York entities and a New York doctor, and the Fund's payments will, as contemplated by the Legislature, alleviate those New York defendants' malpractice insurance costs.

Supreme Court properly directed enrollment in the Fund upon annulling DFS's determination of B.L.'s ineligibility, and did not err by failing to allow DFS to submit an answer to the petition. DFS clearly informed the article 78 court of its arguments in its affirmation in support of its cross motion to dismiss the petition (*see Matter of Hawkins v New York City Tr. Auth.*, 26 AD3d 169, 170 [1st Dept 2006]; *Matter of Davila v New York City Hous. Auth.*, 190 AD2d 511, 512 [1st Dept 1993], *lv denied* 87 NY2d 801 [1995]). DFS has not identified any factual issues in dispute after having reviewed both B.L.'s medical records and his Fund application. DFS's vague reference to "open questions" in its reply brief is a not a reference to factual questions. Rather, it is a reference to legal arguments arising

from its erroneous interpretation of the Public Health Law. DFS's opportunity to present evidence that B.L.'s deprivation of oxygen at the time of birth was caused by malpractice that occurred prior to birth, would be unavailing, as the plain language of Public Health Law § 2999-h(1) makes clear that B.L.'s "birth related neurological injury" was established by the deprivation of oxygen "occurring in the course of labor, delivery or resuscitation"

We interpret Supreme Court's directive to enroll B.L. in the Fund as a directive to DFS and third-party administrator Alicare to take all the necessary ministerial steps to process B.L.'s Fund application as a "qualified plaintiff" (*see Matter of Spencer-Cedeno v Zucker*, 161 AD3d 534 [1st Dept 2018]).

We have considered the parties' remaining arguments and find them unavailing.

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

ENTERED: APRIL 2, 2019

CLERK

Sweeny, J.P., Richter, Kapnick, Gesmer, Kern, JJ.

8117N Hotel Carlyle Owners Corporation, Index 157070/12
Plaintiff-Appellant,

-against-

Murray Schwartz,
Defendant-Respondent.

_____

Rosenberg & Estis, P.C., New York (Norman Flitt of counsel), for appellant.

Murray Schwartz, respondent pro se.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered November 28, 2017, which, to the extent appealed from as limited by the briefs, granted defendant's motion to compel the return of certain funds paid to plaintiff and directed the Clerk to enter judgment in favor of defendant and against plaintiff in the sum of $22,871.13, with interest thereon at the statutory rate from the date of February 28, 2017, unanimously reversed, on the law, without costs, defendant's motion denied, and plaintiff is credited with the amount of $10,238.46 in interest against defendant. The Clerk is directed to enter judgment in favor of plaintiff in the amount of $10,238.46, with interest thereon at the statutory rate from the date of February 28, 2017.

The court should have credited plaintiff cooperative corporation with statutory prejudgment interest on all the maintenance payments that defendant former unit owner failed to make. The court calculated that the total amount owed by

defendant was $363,361.71. However, properly calculated, defendant owed plaintiff $396,471.90. Plaintiff only collected $386,233.44. Therefore, plaintiff correctly calculates, without double counting for interest accrued on a partial judgment issued earlier in the action, that it is owed $10,238.46.

Plaintiff never moved for a determination of its attorneys' fees. Rather, it simply introduced evidence of the fees in an accounting called for sua sponte by the court to determine the application of monies collected by plaintiff. The court correctly held that, if plaintiff wished to seek a determination of attorneys' fees, it should move for summary judgment (*see Tirado v Miller*, 75 AD3d 153, 158 [2d Dept 2010]).

The Decision and Order of this Court entered herein on January 15, 2019 (168 AD3d 501 [1st Dept 2019]) is hereby recalled and vacated (*see* M-794 decided simultaneously herewith).

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

ENTERED: APRIL 2, 2019

CLERK

Renwick, J.P., Tom, Singh, Moulton, JJ.

8464 Nancy J. Hament, et al., Index 155410/16
Plaintiffs-Respondents,

-against-

Kevin P. FitzGerald,
Defendant-Appellant.

_____

Twomey, Latham, Shea, Kelley, Dubin & Quartararo LLP, Riverhead (Patrick B. Fife of counsel), for appellant.

Scarola Zubatov Schaffzin PLLC, New York (Richard J.J. Scarola of counsel), for respondents.

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered July 30, 2018, which, to the extent appealed from, upon renewal, denied defendant's motion pursuant to CPLR 3211, or, alternatively, CPLR 3212, to dismiss the cause of action for intentional tortious injury to property, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

Defendant, as a corporate officer of ARK Construction Co., contracted with plaintiffs to perform certain renovation and construction services. The agreement ended in disputes, and plaintiffs commenced an arbitration proceeding against ARK, while filing a Supreme Court complaint against defendant FitzGerald individually. The arbitration and Supreme Court action involved the same agreement, the same scope of work and, excepting defendant executing the agreement in his official capacity, the

same personnel. With the exception of claims regarding an improperly installed countertop and a damaged sink, resulting in an award in the amount of $4,688.25, all other claims were denied by the arbitrator. Although the arbitration award did not explicitly address claims against defendant individually, the claimants incorporated by reference the causes of action set forth in the Supreme Court complaint against defendant into the arbitration claim specification and the post-hearing submission. Hence, the second cause of action for intentional tortious injury to property was denied sub silencio by the arbitrator, barring relitigation of the claim in the Supreme Court action by defendant who was in privity with ARK Construction (*Prospect Owners Corp. v Tudor Realty Servs. Corp.*, 260 AD2d 299 [1st Dept 1999]) by operation of the doctrines of res judicata and collateral estoppel *(Corto v Lefrak,* 155 AD2d 246 [1st Dept 1989], *lv denied* 75 NY2d 707 [1990]; *Altamore v Friedman*, 193 AD2d 240, 244-45 [2d Dept 1993]).

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

ENTERED: APRIL 2, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Kahn, Gesmer, JJ.

8625 Darnley Clarke, Index 310675/11
Plaintiff-Appellant,

-against-

American Truck and Trailer, Inc., et al.,
Defendants,

National Freight, Inc.,
Defendant-Respondent.

_____

G. Wesley Simpson, P.C., Brooklyn (G. Wesley Simpson of counsel), for appellant.

Abrams, Gorelick, Friedman & Jacobson, LLP, New York (James E. Kimmel of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about September 21, 2017, which granted defendant National Freight, Inc.'s motion for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the matter remanded for further proceedings, including determination of those issues not previously reached by the motion court.

This is an action for personal injuries arising from a motor vehicle accident. Plaintiff, a truck driver, alleges that employees of defendant National Freight, Inc. negligently loaded his trailer with codefendant Ocean Spray Cranberry, Inc.'s products, placing more goods onto it than it was designed to carry. Plaintiff further alleges that this caused the trailer to

buckle and break apart, as a result of which he lost control of his vehicle and it crashed into a concrete divider. Finally, he alleges that he suffered serious injury from the incident.

National Freight failed to make out a prima facie case entitling it to summary judgment and dismissal of the complaint for two reasons. First, defendant offered, and the motion court relied on, the affidavit of Scott Brucker, general counsel to nonparty NFI Management Services. Brucker states that NFI Management Services provides "management and legal services" to National Freight and nonparty National Distribution Centers LLC. However, Brucker's affidavit was insufficient to establish that it was National Distribution Centers, and not National Freight, which provided distribution services for Ocean Spray at the subject distribution facility when the accident occurred. Although Brucker averred that he was "fully familiar with the corporate structure, governance and legal filings made and/or performed on behalf of both companies," he does not work for National Freight. Accordingly, he has no personal knowledge of National Freight's activities at the relevant times. Indeed, he admits as much when he states that the basis for his claimed knowledge of which entity was responsible for providing distribution services at the subject facility was his having been so "advised" by an unnamed person or persons. Accordingly, his affidavit is insufficient to establish defendant's entitlement to

summary judgment (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Second, defendant offered, and the motion court relied on, a copy of a distribution services agreement between Ocean Spray and National Distribution Centers, attached to defendant's attorney's affirmation. However, this document was not authenticated (CPLR 4518[a]). Accordingly, it was not admissible and was not an appropriate basis on which to grant summary judgment (*Zuckerman*, 49 NY2d at 562).

Since defendant did not make out a prima facie case for summary judgment in its favor, we need not address the arguments about the sufficiency of the opposition papers submitted by plaintiff.

Because the motion court granted summary judgment on the issue discussed above, it did not reach defendant's arguments based on the causation of the accident, and that plaintiff's injury did not constitute a "serious injury" under Insurance Law § 5102(d). We now remand to the motion court to address those issues.

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

ENTERED: APRIL 2, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Kern, Singh, JJ.

8840 The People of the State of New York, Ind. 1040/15
Respondent,

-against-

Jarel Moore,
Defendant-Appellant.

_____

Cardozo Criminal Appeals Clinic, New York (Stanley Neustadter of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (James M. Burke, J.), rendered October 19, 2016, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him to a term of eight years, unanimously affirmed.

The court providently exercised its discretion in denying defendant's request for a missing witness charge as to a "ghost" undercover officer. The trial evidence only established that, from a sufficient distance away to avoid being seen, the ghost was monitoring and broadcasting the purchasing undercover officer's location and movements. Any testimony by the ghost on that subject would have been cumulative. Defendant failed to make a prima facie showing that the ghost was located where he could see or hear any aspect of the drug transaction at issue (*see People v Dianda*, 70 NY2d 894 [1987]; *People v Mendez*, 69

AD3d 445 [1st Dept 2010], *lv denied* 15 NY3d 753 [2010]), and the evidence supports an inference to the contrary.

In any event, any error in denying a missing witness charge was harmless. There was overwhelming evidence of defendant's guilt, including a text message on his phone and the recovery of buy money from his person. Furthermore, defense counsel was permitted to comment on the lack of testimony from the ghost officer.

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

ENTERED: APRIL 2, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Kern, Singh, JJ.

8841 309 Fifth Owners LLC, Index 652383/15
Plaintiff-Appellant,

-against-

MEPT 309 Fifth Avenue LLC,
Defendant-Respondent.

_____

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Gregory F. Laufer of counsel), for appellant.

Reed Smith LLP, New York (Louis M. Solomon of counsel), for respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered October 29, 2018, which denied plaintiff's motion to compel defendant to produce documents in response to Requests No. 5 and 6 of its Demand for Production of Documents, without prejudice, unanimously reversed, on the law and the facts, and the motion granted.

Plaintiff alleges that defendant, obligated pursuant to the terms of a Purchase and Sale Agreement to prepare an appraisal of the subject property in the ordinary course of business, relied on an appraisal prepared for a related entity that was not prepared in the ordinary course of business, did not reflect market conditions, and was not consistent with good appraisal practice. Documents relating to the appraisal preparation and practices of the entities related to defendant in their ordinary course of business, as well as the appraisals so prepared, are

material and necessary to plaintiff's prosecution of its action (CPLR 3101[a]; *see Forman v Henkin*, 30 NY3d 656, 661-662 [2018]; *McMahon v New York Organ Donor Network*, 161 AD3d 680 [1st Dept 2018]).

The parties are free to raise before the motion court concerns about the reasonable scope of production responsive to Request No. 6., including appropriate temporal and geographical limitations.

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

ENTERED: APRIL 2, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Kern, Singh, JJ.

8842 In re Steven O.,
Petitioner-Respondent,

-against-

Trisha C.,
Respondent-Appellant.

_____

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

Tennille M. Tatum-Evans, New York, attorney for the child.

_____

Order, Family Court, Bronx County (Annette L. Guarino, Referee), entered on or about December 20, 2017, which, inter alia, granted the father sole custody of the subject child, unanimously affirmed, without costs.

There exists no basis upon which to disturb the determination that awarding custody to the father was in the child's best interests. The court had the benefit of a full evidentiary hearing at which it had the opportunity to hear the testimony of both parents and to assess their demeanor and credibility (*see Eschbach v Eschbach*, 56 NY2d 167, 173-174 [1982]; *see Nelisso O. v Danny C.*, 70 AD3d 572, 572-573 [1st Dept 2010]. The court concluded that the father was financially stable, that both parents rely on the father's family to help care for and feed the child, get her to school consistently and on time, pick her up after school, help with her homework, and supervise overnight visits.

While the mother showed that she was employed, loved the child and presently had a stable home environment, the court's finding that the father was capable of providing a more stable environment was supported by the record.

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

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

ENTERED: APRIL 2, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Kern, Singh, JJ.

8843 Hitech Homes LLC, Index 160469/15
Plaintiff-Respondent,

-against-

Tanya J. Burke, et al.,
Defendants-Appellants.

_____

Zara Watkins, New York, for appellants.

Altschul & Altschul, New York (Mark M. Altschul of counsel), for respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about September 14, 2017, which denied defendants' motion to vacate a judicial sale, unanimously affirmed, without costs.

Defendants failed to make the showing of substantial prejudice required to vacate a judicial sale on the ground of lack of notice provided for in Real Property Actions and Proceedings Law § 231 (*see* RPAPL 231[6]; CPLR 2003; *U.S. Bank N.A. v Martinez*, 162 AD3d 528, 529 [1st Dept 2018]; *Marine Midland Bank v Landsdowne Mgt. Assoc.*, 193 AD2d 1091, 1092 [4th Dept 1993], *lv denied* 82 NY2d 656 [1993]).

Nor did defendants show that the sale should be set aside on the ground of "exploitative overreaching" (*U.S. Bank*, 162 AD3d at 528). They failed to establish, among other factors, that the

auction price was unconscionably low – or even inadequate (*see Guardian Loan Co. v Early*, 47 NY2d 515, 521 [1979]; *Polish Natl. Alliance of Brooklyn v White Eagle Hall Co.*, 98 AD2d 400, 408 [2d Dept 1983]).

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

ENTERED: APRIL 2, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Kern, Singh, JJ.

8844 Naomi Charnov, Index 308310/11
Plaintiff-Appellant,

-against-

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

_____

Stavros E. Sitinas, LLC, Garden City (Lisa M. Comeau of counsel), for appellant.

Lester Schwab Katz & Dwyer, LLP, New York (Paul M. Tarr of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about January 26, 2018, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff was allegedly injured after she tripped over a missing floor tile while she was walking in a hallway in a school building owned by defendant New York City Board of Education. Defendant Temco Service Industries, Inc. was providing janitorial services at the time of the accident. It is undisputed that the subject location was repaired the day after the accident.

Supreme Court properly dismissed the complaint against defendants. Plaintiff's deposition testimony shows that she knew the defect was there, she was able to successfully avoid it for about four months before the accident, she had "no idea" what the height differential was between the missing tile and the

surrounding floor, there was nothing on the floor or in the section of missing tile when she fell, and nothing made it difficult for her to see the alleged defect when she fell (*see Thomas v Dever Props. LLC*, 115 AD3d 459, 460 [1st Dept 2014]; *Maciaszek v Sloninski*, 105 AD3d 1012, 1013 [2d Dept 2013]; *Riley v City of New York*, 50 AD3d 344 [1st Dept 2008]).

The motion court properly considered the out-of-state expert affidavit of Professional Engineer Duane R. Ferguson submitted by defendants in support of their summary judgment motion even though it lacked a certificate authenticating the authority of the notary who administered the oath, as required by CPLR 2309(c), because the absence of such a certificate is a mere irregularity and not a fatal defect, which could be disregarded by the motion court under CPLR 2001 given the fact that plaintiff has not alleged that she was prejudiced (*see Matapos Tech. Ltd. v Compania Andina de Comercio Ltda*, 68 AD3d 672, 673 [1st Dept 2009). Defendants met their initial burden to show that the alleged defect was trivial and not actionable, because Ferguson averred that when one of the tiles that was repaired after the accident was removed, he measured the difference in height between the remaining floor tiles and the exposed concrete floor and found that there was an 1/8 inch height differential which complied with the 1968 Building Code of the City of New York Reference Standard RS 4-6 § 4.5.2 because that section permits a

1/4th difference in height (*see Hunter v New York City Hous. Auth.*, 137 AD3d 717, 718 [1st Dept 2016], *lv denied* 28 NY3d 908 [2016]).

Although the burden shifted to plaintiff, she failed to raise a triable issue of fact as to whether the alleged defect's intrinsic characteristics or the surrounding circumstances magnified the dangers it posed and unreasonably imperiled her safety (*see Myles v Spring Val. Marketplace, LLC*, 141 AD3d 425, 427 [1st Dept 2016]). The affidavit from plaintiff's coworker averring that she saw that there was a 1/4 inch height differential between the exposed concrete floor and the surrounding tile after the accident fails to raise a triable issue of fact, because even if her measurement about the alleged defect's size is correct that differential is permissible under the 1968 Building Code.

Furthermore, the coworker's averment that she tripped over the missing tile does not raise a triable issue of fact because she did not allege that she told anyone about her accidents before plaintiff fell. Finally, the coworker's claim that she looked at the concrete floor where the floor tile was missing after plaintiff fell and saw that it was rough, uneven and appeared to be covered in dried glue fails to raise a triable issue of fact because it conflicts with plaintiff's deposition testimony that it was the difference in height between the tiles

and the concrete floor that caused the accident (*see Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 318-320 [1st Dept 2000]).

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

ENTERED: APRIL 2, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Kern, Singh, JJ.

8845-
8846 Jose Britton,
Plaintiff-Appellant,

-against-

Felicia Riley-Fann, et al.,
Defendants,

Starrett City, Inc, et al.,
Defendants-Respondents.

- - - - -

Jose Britton,
Plaintiff-Appellant,

-against-

Starrett Corporation, et al.,
Defendants-Respondents.

Index 300443/17
28361/17E

_____

Greenberg & Stein, P.C., New York (Ian Asch of counsel), for appellant.

Brody & Branch LLP, New York (Mary Ellen O'Brien of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about April 5, 2018, which, insofar as appealed from as limited by the briefs, granted defendants Starrett City, Inc., Starrett Preservation, LLC, and Starrett City Associates, L.P.'s motion to dismiss the complaint as against them, unanimously affirmed, without costs. Order, same court (Mary Ann Brigantti, J.), entered April 12, 2018, which, insofar as appealed from as limited by the briefs, granted defendants' motion to dismiss the complaint, unanimously

affirmed, without costs.

Both complaints allege that plaintiff's injuries were caused by a motor vehicle whose driver, defendant Anthony Britton, negligently and recklessly caused it to jump the curb and strike plaintiff, who was standing on the sidewalk in front of certain premises. The complaints further allege that the Starrett defendants and the Grenadier defendants negligently owned, controlled, managed, maintained and/or repaired the premises, including the driveway in front of the premises. Construing the allegations liberally in plaintiff's favor, the complaint fails to state a cause of action for negligence against these defendants, because it does not allege a basis for imposing a duty of care on them to take preventive action against the unforeseeable risk that a vehicle will mount the sidewalk and strike a pedestrian (*see Jiminez v Shahid*, 83 AD3d 900, 901 [2d Dept 2011], *lv denied* 18 NY3d 807 [2012]; *see also Green v Himon*, 165 AD3d 590, 591 [1st Dept 2018]).

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

ENTERED: APRIL 2, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Kern, Singh, JJ.

8847 The People of the State of New York, Ind. 1601/10
Respondent,

-against-

Christopher Flores,
Defendant-Appellant.

_____

Justine M. Luongo, The Legal Aid Society, New York (Whitney A. Robinson 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 (Eduardo Padró, J.), rendered May 8, 2013, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing him to a term of one year, unanimously affirmed.

The court providently exercised its discretion when it sentenced defendant under his original plea agreement after determining that he had forfeited the opportunity for a more lenient disposition by failing to satisfy the requirement of

successful completion of a drug program (*see People v Fiammegta*, 14 NY3d 90, 96 [2010]; CPL 216.05[9][c]).

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

ENTERED: APRIL 2, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Kern, Singh, JJ.

8848 Jorge Ajche, Index 156696/12
Plaintiff-Appellant-Respondent,

-against-

Park Avenue Plaza Owner, LLC, et al.,
Defendants-Respondents-Appellants,

53rd St. Food, LLC, et al.,
Defendants-Respondents.

- - - - -

Park Avenue Plaza Owner, LLC,
Third-Party Plaintiff-Respondent-Appellant,

-against-

53rd St. Food, LLC, et al.,
Third-Party Defendants-Respondents.

- - - - -

53rd St. Food, LLC, et al.,
Second Third-Party Plaintiffs-Respondents,

-against-

Cobra Kitchen Ventilation, Inc.,
Second Third-Party Defendant-Respondent,

- - - - -

Park Avenue Plaza Owner, LLC,
Third Third-Party Plaintiff-Respondent-Appellant,

-against-

Cobra Kitchen Ventilation, Inc.,
Third Third-Party Defendant-Respondent.

_____

Ginarte Gallardo Gonzalez Winograd, LLP, New York (Timothy Norton of counsel), for appellant-respondent.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for Park Avenue Plaza Owner, LLC, respondent-appellant.

Bartlett LLP, White Plains (David C. Zegarelli of counsel), for CPM Builders, Inc., respondent-appellant.

Camacho Mauro Mulholland, LLP, New York (Anthony J. Buono of counsel), for 53rd St. Food, LLC and Blake & Todd, respondents.

Cascone & Kluepfel, LLP, Garden City (James K. O'Sullivan of counsel), for Cobra Kitchen Ventilation, Inc., respondent.

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered June 6, 2017, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim, denied defendant/third-party plaintiff/third third-party plaintiff Park Avenue Plaza Owner, LLC's (Park) motion for summary judgment dismissing the Labor Law § 240(1) claim, denied defendant CPM Builders, Inc.'s (CPM) motion for summary judgment dismissing the Labor Law § 240(1) claim and Park's and defendants/third-party defendants/second third-party plaintiffs 53rd St. Food, LLC and Blake & Todd's (collectively 53rd Street) contractual indemnification claims against it, and declined to grant Park's request for defense costs from 53rd Street, CPM, and Cobra, unanimously modified, on the law, to grant plaintiff's motion for partial summary judgment on the Labor Law § 240(1) claim, and to grant Park's requests for reimbursement of reasonable defense costs as against CPM and Cobra, and otherwise affirmed, without costs.

Plaintiff sustained injuries while insulating air-conditioning ducts in the kitchen ceiling of a restaurant under construction. Park owned the property, and leased it to

53rd Street to operate a restaurant called Blake & Todd. 53rd Street retained CPM as the general contractor on the project, but also directly hired plaintiff's employer, Cobra, as the contractor for the kitchen HVAC work.

Nobody witnessed the accident, and plaintiff admittedly had no recollection of the fall. He claims he fell because the A-frame ladder on which he was working "moved," based on what his foreman had allegedly told his wife. Plaintiff's foreman, however, testified that plaintiff fell from a scaffold, as he saw plaintiff on the scaffold when he went to get coffee, and found him lying on the floor near the scaffold when he returned. CPM's superintendent testified that he heard a noise and an impact, and found plaintiff on the a floor a few feet away from a scaffold.

Plaintiff has demonstrated entitlement to partial summary judgment on the issue of liability on his Labor Law § 240(1) claim. Although the conflicting testimony raised an issue of fact as to whether plaintiff fell off a ladder or a scaffold (*see Perez v Folio House, Inc.*, 123 AD3d 519 [1st Dept 2014]), he has demonstrated that, under either version of the accident, his fall was caused by an inadequate safety device for his job, and none of the defendants raised a triable issue of fact.

As to the "ladder version," although plaintiff has no specific recollection of the ladder moving, he also testified that, immediately before the fall, he was standing on the second

to the last rung up, with his hands over his head toward the duct, which he could barely reach. Such testimony establishes prima facie that the ladder did not provide proper protection for plaintiff (*see Cuentas v Sephora USA, Inc.*, 102 AD3d 504 [1st Dept 2013]; *Burke v APV Crepaco*, 2 AD3d 1279 [4th Dept 2003]). Because the record is clear that the ladder did not prevent him from falling, his inability to identify the precise manner in which he fell is immaterial (*see Hill v City of New York*, 140 AD3d 568, 570 [1st Dept 2016]; *Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 290 [1st Dept 2002], *lv denied* 4 NY3d 702 [2004]; *Yu Xiu Deng v A.J. Contr. Co.*, 255 AD2d 202 [1st Dept 1998]). As to the "scaffold version," it is undisputed fact that the scaffold from which plaintiff purportedly fell had no guardrails. This fact establishes prima facie that it was an inadequate safety device (*Celaj v Cornell*, 144 AD3d 590 [1st Dept 2016]; *Vail v 1333 Broadway Assoc., L.L.C.*, 105 AD3d 636 [1st Dept 2013]). Under either version, defendants have not raised a triable issue of fact as to whether plaintiff's negligence was the sole proximate cause of his accident (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 n 8 [2003]).

CPM can be held liable as a general contractor. Although CPM did not retain plaintiff's employer, Cobra, for the HVAC work, CPM oversaw the entire construction project, and coordinated Cobra's work with the other trades (*see Kulaszewski v*

Clinton Disposal Servs., 272 AD2d 855, 856 [4th Dept 2000]).

53rd Street is entitled to contractual indemnification from CPM. The contract between the two requires CPM to indemnify 53rd Street from any "claim arising out of, in connection with, or as a consequence of the performance or nonperformance of [CPM's] or any Subcontractor's Work." CPM argues that plaintiff's claim did not arise out of or in connection with its work or "any Subcontractor's Work." Although we find "any Subcontractors" to encompass only the subcontractors that CPM retained, we find that plaintiff's claim arose in connection with CPM's work. As discussed, CPM oversaw and coordinated the entire project, including Cobra's work.

Park is also entitled to contractual indemnification from CPM, as the contract between 53rd and CPM required CPM to indemnify Park. Contrary to CPM's contention, the record establishes CPM's intent to be bound. CPM signed the contract with 53rd Street, which physically incorporated the indemnification agreement. Although the signature line in the indemnification agreement is blank, "an unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound" (*Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 369 [2005]). Here, the fact that CPM had purchased insurance policies naming Park as an additional insured demonstrates its intent to indemnify Park. We note that

CPM had acknowledged, in opposition to Park's motion for summary judgment, that the indemnification clause is enforceable if the accident arises out of CPM's work.

Park argues that, in granting conditional summary judgment on its contractual indemnification claims against 53rd Street, CPM, and Cobra, the motion court overlooked its request for defense costs, which were provided for in the relevant indemnification agreements. Under the relevant indemnification provisions, Park is entitled to reimbursement of reasonable defense costs from CPM and Cobra, but not 53rd Street.

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

ENTERED: APRIL 2, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Kern, Singh, JJ.

8850 In re Jovant E.,

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

_____

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

Zachary W. Carter, Corporation Counsel, New York (Deborah E. Wassel of counsel), for presentment agency.

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Order, Family Court, New York County (Adetokunbo O. Fasanya, J.), entered on or about January 30, 2018, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of menacing in the second and third degrees and criminal possession of a weapon in the fourth degree, and also committed the act of unlawful possession of weapons by persons under 16, and placed him with the Administration for Children's Services' Close to Home program for a period of 12 months, unanimously affirmed, without costs.

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

knife (*In re Jesus F*, 144 AD3d 602 (1st Dept. 2016).

We find appellant's remaining arguments unavailing, except that to the extent the court received hearsay evidence, any error was harmless.

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

ENTERED: APRIL 2, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Gische, Gesmer, JJ.

8851-
8852 E-Z Eating 41 Corp., et al.,
Plaintiffs-Respondents,

-against-

H.E. Newport, LLC, et al.,
Defendants-Appellants.

Index 653654/12

Rosenberg & Estis, P.C., New York (Jeffrey Turkel of counsel), for appellants.

Wiggin & Dana LLP, New York (Richard Gallucci, Jr. of the bar of the State of New Jersey and the State of Pennsylvania, admitted pro hac vice, of counsel), for respondents.

Orders, Supreme Court, New York County (Shlomo Hagler, J.), entered September 27, 2018, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the causes of action for breach of the lease and breach of the covenant of quiet enjoyment, unanimously reversed, on the law, without costs, and the motion granted.

In September 2008, plaintiffs commenced an action alleging that defendants had informed them that plaintiff tenant E-Z Eating 41 Corp. (EZ41) was obligated under the lease to operate a Burger King on the premises, and seeking, inter alia, a declaration that EZ41 could operate a non-Burger-King fast-food burger restaurant consistent with the lease. The instant complaint, which alleges, inter alia, wrongful eviction, does not allege that defendants physically expelled EZ41 from the

premises. Thus, until defendants served plaintiffs with a notice of cancellation of the lease, on March 27, 2009, the only eviction claim that plaintiffs could have asserted was a claim for constructive eviction. However, plaintiffs stopped paying rent as of October 1, 2008. Having elected that remedy, rather than remaining in the premises and paying rent, they are not entitled to damages (*see Bostany v Trump Org. LLC*, 88 AD3d 553, 554 [1st Dept 2011], citing *Frame v Horizons Wine & Cheese*, 95 AD2d 514, 519 [2d Dept 1983]; *see also Universal Communications Network, Inc. v 229 W. 28th Owner, LLC*, 85 AD3d 668, 669 [1st Dept 2011] [the obligation to pay rent under a commercial lease is an independent covenant not suspended by landlord's breach]).

The motion court erred in ruling that the doctrine of laches estopped defendants to assert the affirmative defense of the election of remedies. EZ41's decision to escrow funds after it was determined in March 2009 in the prior action that EZ41 breached the lease does not justify application of this equitable doctrine (*see Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 816 [2003], *cert denied* 540 US 1017 [2003]). Moreover, defendants were granted leave to amend their answer in August 2017, and EZ41 failed to show that it was actually prejudiced by the delay (*see id.*).

In light of the foregoing, we do not address defendants' remaining arguments.

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

ENTERED: APRIL 2, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Kern, Singh, JJ.

8853 The People of the State of New York, Ind. 4223/15
Respondent,

-against-

Carlos Jordan,
Defendant-Appellant.

_____

Justine M. Luongo, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (James Burke, J. at plea; Melissa Jackson, J. at sentencing), rendered September 15, 2016, as amended November 21, 2016, unanimously affirmed.

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

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

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

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

ENTERED: APRIL 2, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Kern, Singh, JJ.

8854- Index 161299/13
8855 Carlos Saquicaray, 595303/14
Plaintiff-Respondent,

-against-

Consolidated Edison Company of New York, Inc.,
Defendant.
- - - - -
Consolidated Edison Company of New York, Inc.,
Third-Party Plaintiff,

-against-

Clean Up Services, Inc.,
Third-Party Defendant-Appellant.

_____

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for appellant.

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

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Order, Supreme Court, New York County (Kelly O'Neill Levy, J.), entered October 27, 2017, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment on the Labor Law § 240(1) claim, and denied the motion of third-party defendant Clean Up Services, Inc. (Clean) for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) claims, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered July 11, 2018, which, inter alia, denied Clean's motion for leave to reargue plaintiff's motion for partial summary judgment on the Labor Law § 240(1) claim and Clean's motion for summary judgment dismissing

the Labor Law §§ 240(1) and 241(6) claims, unanimously dismissed, without costs, as taken from a nonappealable order.

Plaintiff made a prima facie showing that the work he was performing as an employee of Clean at the time of his accident was covered under section 240(1). There is no dispute that plaintiff was injured in the course of unloading an approximately two-ton steel plate at a construction site owned by defendant Con Ed, after transporting the plate to the site by truck. Witnesses consistently indicated that Clean routinely unloaded steel plates at the site for the purpose of covering areas excavated for electrical work. Clean performed this work pursuant to a contract that required it to provide steel plates at excavation sites owned by defendant including the subject site, and also required Clean to perform work ancillary to other tasks enumerated under Labor Law § 240(1) such as removing construction-related debris and installing barricades for excavation work (*see Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 881-882 [2003]). Moreover, plaintiff performed this work on an active construction site while another worker on the site was building a removable roof for a transformer vault.

Clean failed to raise triable issues of fact as to whether plaintiff's work was covered by Labor Law § 240(1). It does not avail Clean to assert that plaintiff unloaded the plate merely for the purpose of storage. The Court of Appeals has rejected an

interpretation of Labor Law § 240(1) that "would compartmentalize a plaintiff's activity and exclude from the statute's coverage preparatory work essential to the enumerated act" (*Saint v Syracuse Supply Co.*, 25 NY3d 117, 125 [2015]). This case is distinguishable from cases where a worker was injured while performing preparatory or fabrication work at his or her employer's facility, remote from the defendants' construction site (*see e.g. Flores v ERC Holding LLC*, 87 AD3d 419 [1st Dept 2011]; *cf. Gerrish v 56 Leonard LLC*, 147 AD3d 511 [1st Dept 2017], *affd* 30 NY3d 1125 [2018]).

Since the court properly granted partial summary judgment in favor of the Labor Law § 240(1) claim, Clean's remaining arguments, concerning plaintiff's Labor Law § 241(6) claim, are academic (*see Fanning v Rockefeller Univ.*, 106 AD3d 484, 485 [1st Dept 2013]).

The order denying Clean's reargument motion to the extent appealed from is not appealable (*see D'Andrea v Hutchins*, 69 AD3d 541 [1st Dept 2010]). This was not a case where the court effectively granted reargument by reaching the merits and

adhering to its prior decision (*compare Jean v Chinitz*, 163 AD3d 497, 499 [1st Dept 2018]).

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

ENTERED: APRIL 2, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Kern, Singh, JJ.

8856 Damaris Vasquez, Index 158968/14
Plaintiff-Appellant,

-against-

Yonkers Racing Corporation,
et al.,
Defendants-Respondents.

Scunziano & Associates, LLC, Brooklyn (Nicholas P. Scunziano of counsel), for appellant.

Bleakley Platt & Schmidt, LLP, White Plains (John W. McGowan of counsel), for respondents.

Order, Supreme Court, New York County (David B. Cohen, J.), entered August 16, 2017, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established entitlement to judgment as a matter of law in this action where plaintiff was injured when she fell while attempting to sit down at a slot machine that did not have a chair. Defendants showed that the missing chair was an open and obvious condition that was not inherently dangerous by submitting videotape footage showing the subject slot machine without a chair. Plaintiff also testified that she had previously noticed chairs missing from slot machines at the casino, and that she had been seated next to the subject machine that was without a chair for 20 to 25 minutes before her fall (*see Philips v Paco Lafayette LLC*, 106 AD3d 631 [1st Dept 2013];

Schulman v Old Navy/The Gap, Inc., 45 AD3d 475 [1st Dept 2007]).

Plaintiff's opposition failed to raise a triable issue of fact. Her argument that slot machines are distracting to the point of being all-encompassing, is unavailing, as she did not provide any probative evidence as to how distracted a person becomes when she or he uses slot machines. Plaintiff's testimony that she was distracted by the slot machines does not lead to a conclusion that they are so distracting that their mere existence makes an open and obvious condition such as a missing chair any less open and obvious (*see Mauriello v Port Auth. of N.Y. & N.J.*, 8 AD3d 200 [1st Dept 2004]). Furthermore, that a similar accident apparently occurred at defendant casino does not lead to the conclusion that a missing chair is a latent or inherently dangerous condition.

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

ENTERED: APRIL 2, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Kern, Singh, JJ.

8857 Jose Roldan, Index 159722/13
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant,

Shawn Lawrence,
Defendant.

- - - - -

New York City Housing Authority,
Third-Party Plaintiff-Appellant,

-against-

Shawn Lawrence,
Third-Party Defendant.

_____

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

Heller, Horowitz & Feit, P.C., New York (Stuart A. Blander of counsel), for respondent.

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Order, Supreme Court, New York County (Robert D. Kalish, J.), entered February 26, 2018, which denied the motion of defendant New York City Housing Authority (NYCHA) for summary judgment dismissing the complaint and all cross claims as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Dismissal of the complaint as against NYCHA is warranted in this action where plaintiff alleges that he was injured when, while visiting his wife in NYCHA's building, he was shot by

defendant Lawrence, who was able to enter the building because of a broken lock on the building's front door. The record establishes that NYCHA lacked notice of a broken lock inasmuch as NYCHA submitted evidence showing that although the front door lock had been repaired a number of times in the months leading up to the incident, NYCHA's supervisor of caretakers testified that the lock was working on the morning of the incident, and for almost a full week beforehand (*see Ramirez v BB & BB Mgt. Corp.*, 115 AD3d 555 [1st Dept 2014]).

The evidence also fails to show that the alleged assailant was an unauthorized intruder, rather than an invited guest (*see Hierro v New York City Hous. Auth.*, 123 AD3d 508 [1st Dept 2014]; *Rivera v New York City Hous. Auth.*, 239 AD2d 114 [1st Dept 1997]). The alleged assailant testified that he lived across from the subject building, that he had numerous family members and friends who lived in the building, and that he was a frequent visitor of the building. Furthermore, plaintiff admitted that he was the victim of a targeted attack by the alleged assailant, which severed the causal nexus between NYCHA's alleged negligence

and plaintiff's injuries (*see Buckeridge v Broadie*, 5 AD3d 298, 300-301 [1st Dept 2004]; *Cerda v 2962 Decatur Ave. Owners Corp.*, 306 AD2d 169 [1st Dept 2003]).

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

ENTERED: APRIL 2, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Kern, Singh, JJ.

8858 In re Unity Home Care Agency, Inc., Petitioner, Index 260005/18

-against-

The New York State Department of Health, et al., Respondents.

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Holihan & Associates, P.C., Richmond Hill (Stephen Holihan of counsel), for petitioner.

Barbara D. Underwood, Attorney General, New York (Joshua M. Parker of counsel), for respondents.

_____

Determination of respondent New York State Department of Health (DOH), dated November 20, 2017, which revoked petitioner's license to operate as a home health care agency and imposed a $1,000 civil penalty, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, Bronx County [Howard H. Sherman, J.], entered on or about January 24, 2018), dismissed, without costs.

The determination that petitioner violated numerous DOH regulations is supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). Statements of Deficiencies, prepared after DOH unsuccessfully attempted to survey petitioner's offices on four separate occasions between 2009 and 2015, and testimony of the

witnesses at the administrative hearing provided sufficient evidence to support the charges levied against petitioner (*see* Public Health Law § 10[2]).

The penalty imposed does not shock our sense of fairness. Petitioner's failure to comply with regulations requiring it, among other things, to notify DOH of changes in its office location and to provide access to its records, resulted in DOH being unable to monitor petitioner's operations over a period of at least six years. Revocation of an operating license is not an excessive penalty where the operators' multiple violations threaten the health and safety of others *(see e.g. Simpson v New York State Off. of Children and Family Servs, Bur. of Early Childhood Servs.*, 93 AD3d 588 [1st Dept 2012]); *Clarke v New York State Off. of Children and Family Servs.*, 91 AD3d 489 [1st Dept 2012]).

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

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

ENTERED: APRIL 2, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Kern, Singh, JJ.

8859 The People of the State of New York, Ind. 2068/16
Respondent,

-against-

Shykeim Terry,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (David A. Slott of counsel), for 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, Bronx County (Ralph Fabrizio, J.), rendered September 12, 2017,

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

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

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

ENTERED: APRIL 2, 2019

CLERK

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

Sweeny, J.P., Manzanet-Daniels, Kern, Singh, JJ.

8860 Rory Schwartz, Index 158614/14E
Plaintiff-Appellant,

-against-

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

Val-Mac Restaurant, Inc., et al.,
Defendants-Respondents.

_____

Gruenberg Kelly Della, Ronkonkoma (Zachary M. Beriloff of counsel), for appellant.

Law Office of James J. Toomey, New York (Jason Meneses of counsel), for respondents.

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Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered on or about January 2, 2018, which granted the motion of defendants Val-Mac Restaurant, Inc., Spain Restaurant and Bar, and Julio Diaz (collectively Val-Mac) for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Plaintiff tripped and fell in a tree well as he walked on the sidewalk in front of Val-Mac's property, which was undergoing repairs to a sewer line running to the street. Absent evidence that Val-Mac controlled the construction or made special use of the sidewalk, there is no issue of fact as to whether it proximately caused the accident, rather than "merely furnish[ing] the condition or occasion for the occurrence of the event" (*Sheehan v City of New York*, 40 NY2d 496, 503 [1976]; *Singh v*

McCrossen, 111 AD3d 531, 532 [1st Dept 2013]). As the tree well is not part of the sidewalk under Val-Mac's control, the court properly granted summary judgment (*see Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 521-522 [2008]).

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

ENTERED: APRIL 2, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Kern, Singh, JJ.

8861 The People of the State of New York, Ind. 1709/15
Respondent,

-against-

Jacob Larbie,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Michael J. Yetter 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 (Michael Obus, J.), rendered January 26, 2017,

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

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

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

ENTERED: APRIL 2, 2019

CLERK

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

Sweeny, J.P., Manzanet-Daniels, Kern, Singh, JJ.

8862N 3607 Broadway Realty, LLC, Index 654443/13
Plaintiff-Respondent-Appellant,

-against-

3607 BWY Food Center Inc., also known as 3607 Broadway Food Center, Inc. doing business as "Superior Market Carniceria," et al.,
Defendants-Appellants-Respondents.

_____

Joseph A. Altman, P.C., Bronx (Joseph A. Altman of counsel), for appellant-respondent.

Valiotis & Novella, LLC, Long Island City (Anthony J. Novella of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Melissa A. Crane, J.), entered June 13, 2018, which, inter alia, denied defendants' motion for summary judgment, granted plaintiff's cross motion for summary judgment on its claim for costs incurred cleaning the premises and returning it to broom clean condition, an amount to be determined at a hearing for an assessment of damages, and otherwise denied plaintiff's cross motion, unanimously affirmed, with costs.

Plaintiff was entitled to summary judgment on its claim that defendants' failure to leave the premises in broom clean condition constituted a breach of the lease. The parties' December 21, 2012 stipulation did not vitiate defendants' obligation under the lease to leave the premises in broom clean condition because the stipulation did not express "'a clear

expression of intent to modify' the lease or an expression of waiver concerning [defendants'] obligations pursuant thereto that 'is clear, unmistakable and without ambiguity'" (*Shelvin Plaza Assoc., LLC v Lew Leiberbaum Holdings Co., Inc.*, 18 AD3d 730, 731-732 [2d Dept 2005] [citations omitted]; *see also Lexington Ave. & 42nd St. Corp. v Pepper*, 221 AD2d 273, 274 [1st Dept 2005]). Based on the narrow provisions of the December 21, 2012 stipulation, which does not contain a merger clause, there is no basis to conclude that any terms of the lease other than the $25,000 settlement of arrears and the vacate date of January 31, 2013 had been modified.

Furthermore, neither party was entitled to summary judgment on the issue of whether defendants breached the stipulation by failing to vacate the premises by January 31, 2013. Article 24 of the lease, upon which the plaintiff relies, does not address return of the keys after the final judgment of possession and warrant is issued. Therefore, the motion court correctly determined that issues of fact preclude resolution of this claim.

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

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

ENTERED: APRIL 2, 2019

CLERK

Friedman, J.P., Gische, Tom, Gesmer, Moulton, JJ.

8863 The People of the State of New York, Ind. 4318/14
Respondent,

-against-

Joseph Calderon,
Defendant-Appellant.

_____

Christina A. Swarns, Office of The Appellate Defender, New York (Rosemary Herbert of counsel), and Milbank, Tweed, Hadley & McCloy LLP, New York (Yelena Ambartsumian of counsel), for appellant.

Joseph Calderon, appellant pro se.

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

_____

Judgment, Supreme Court, Supreme Court, New York County (Charles H. Solomon, J. at suppression hearing; Abraham Clott, J. at jury trial and sentencing), rendered October 23, 2015, convicting defendant of two counts of criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to concurrent terms of 15 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Moreover, the evidence was overwhelming. The People presented a chain of circumstantial evidence that had no rational explanation other than defendant's guilt. In particular, although a surveillance videotape of events that occurred immediately before defendant's

arrest was too grainy to permit recognition of defendant's face, there was no reasonable possibility that defendant and the man of identical dress and appearance depicted in the videotape were two different people.

We agree that the court erred in failing to sustain defense counsel's objection when the arresting officer, while viewing the videotape, and without prompting, identified defendant as one of the people depicted. The officer was not previously familiar with defendant, and there was no basis to conclude he was "more likely to correctly identify the defendant from the [videotape] than [was] the jury" (*People v Sanchez*, 95 AD3d 241, 249 [1st Dept 2012], *affd* 21 NY3d 216 [2013]). However, this isolated instance of apparent lay opinion was plainly harmless. After the overruled objection, the prosecutor immediately elicited that the officer could not "make out the face of the person" in the video whom he had said was defendant. The officer's testimony as a whole made clear that he did not claim to recognize defendant in the video, but that he was testifying about similarities between the appearance and distinctive clothing of the man in the video and that of defendant when he was arrested.

Defendant's argument that the officer's testimony regarding these similarities, while "narrating" the video, was improper is unpreserved, and we decline to reach it in the interest of justice. As an alternative holding, we find that the testimony

did not constitute lay opinion testimony. The officer testified about matters within his personal knowledge regarding defendant's appearance at his arrest, and pointed out things that were readily visible to the jury, which could note the obvious similarities between the man in the video and defendant's appearance at the time of his contemporaneous arrest.

The court providently exercised its discretion in admitting a photograph of defendant and a boy, in which both had their middle fingers extended in a crude gesture, over defense objection that it was unduly inflammatory. It is undisputed that the photo was relevant to show that defendant possessed distinctive shoes matching those worn by the man in the video. The court properly concluded that the photo's probative value outweighed its potential for prejudice. The fact that the prosecution declined to take up defense counsel's offer to stipulate to defendant's possession of the shoes does not render the court's ruling an improvident exercise of discretion (*see People v Andrade*, 87 AD3d 160, 165-168 [1st Dept 2011], *lv denied* 17 NY3d 951 [2017]; *People v Merzianu*, 57 AD3d 385, 386 [1st Dept 2008], *lv denied* 12 NY3d 819 [2009]).

In any event, any error regarding any of the above-discussed evidentiary issues was also harmless in light of the overwhelming evidence (*see People v Crimmins*, 36 NY2d 230 [1975]).

We perceive no basis for reducing defendant's sentence.

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

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

ENTERED: APRIL 2, 2019

CLERK

Friedman, J.P., Gische, Tom, Gesmer, Moulton, JJ.

8864 James Antwine, Index 302900/12
Plaintiff-Appellant,

-against-

Shervin Mgt., LLC,
Defendant-Respondent.

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Law Offices of Brian P. Wright & Associates, P.C., Lake Success (Anthony V. Gentile of counsel), for appellant.

Gennet, Kallman, Antin, Sweetman & Nichols, P.C., New York (Alan L. Korzen of counsel), for respondent.

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Order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered on or about March 5, 2018, which denied plaintiff's motion to renew a prior motion seeking to restore this action to the calendar, unanimously reversed, on the law, without costs, the motion granted, and the matter restored to the calendar.

This personal injury action arose in March 2012, after plaintiff slipped and fell on a staircase in a building owned by defendant. In June 2014, the Supreme Court denied defendant's motion for summary judgment, finding that defendant had failed to meet its prima facie burden. In August 2015, plaintiff obtained new counsel. On January 20, 2016, plaintiff's counsel failed to appear at a scheduled trial conference. Consequently, the action was marked off the trial calendar.

In March 2016, plaintiff moved to restore the action to the calendar, arguing that counsel's absence arose from a medical

emergency. Defendant opposed the motion, arguing that plaintiff's counsel was not the attorney of record in January 2016. On or about April 8, 2016, the court denied plaintiff's motion to restore the action with the condition that he could renew his motion once he submitted proof of a valid substitution of counsel. On April 14, 2016, plaintiff's attorney filed a consent of attorney change form that had been signed and dated in August 2015. In January 2018, plaintiff moved to renew the prior motion seeking to restore this action (*see* CPLR 2221[e]; 3404). In support, he submitted valid proof of change of counsel per the April 2016 order, which was a new fact not offered in the prior motion (*see* CPLR 2221[e][2]; *Burgess v Charles H. Greenthal Mgt. Corp.*, 37 AD3d 151, 151 [1st Dept 2007]). We also find that this motion was timely (CPLR 2221[e]).

A case may be restored to the calendar provided that the movant demonstrates "(a) the merits of his/her claim; (b) a lack of prejudice to the opposing party or parties; © a lack of intent to abandon the action; and (d) a reasonable excuse for the delay" (*see Kaufman v Bauer*, 36 AD3d 481, 482 [1st Dept 2007]; CPLR 3404). The evidence plaintiff submitted establishes a meritorious case, since he had survived defendant's motion for summary judgment and a question remained as to whether defendant had notice of the hazardous condition that caused his fall. Further, plaintiff has satisfied each of the other criteria.

While defendant contends that it is prejudiced from the delay, the mere passage of time is not sufficient to establish prejudice (*see Muriel v St. Barnabas Hosp.*, 3 AD3d 419, 421 [1st Dept 2004]).

We also find that the court erred by characterizing plaintiff's motion as one for leave to reargue when he had not specifically identified it as such (*see* CPLR 2221[d]).

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

ENTERED: APRIL 2, 2019

CLERK

Friedman, J.P., Gische, Tom, Gesmer, Moulton, JJ.

8865 in re Cristian M-B.,
Petitioner-Respondent,

-against-

Rosalba S.,
Respondent-Appellant.

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Geoffrey P. Berman, Larchmont, for appellant.

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Order, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about June 1, 2017, which, upon findings that respondent committed the family offenses of assault in the third degree (two counts), harassment in the second degree (two counts), and menacing in the second degree, granted the petition for a one-year order of protection on behalf of petitioner against respondent, unanimously modified, on the law, to vacate the finding of one count of assault in the third degree relating to the March 2016 incident, and otherwise affirmed, without costs.

The expiration of the order of protection does not render respondent's appeal moot in light of the "significant enduring consequences" of such an order (*Matter of Veronica P. v Radcliff A.*, 24 NY3d 668, 671 [2015]).

The court erred in determining that respondent's actions constituted the family offense of assault in the third degree during the March 2016 incident because the facts necessary to

support such a finding were not alleged in the petition (*see Matter of Sasha R. v Alberto A.*, 127 AD3d 567 [1st Dept 2017]). However, contrary to respondent's contention, the petition sufficiently alleged facts that would constitute the family offenses of harassment in the second degree (Penal Law § 240.26[1]), menacing in the second degree (Penal Law § 120.14[1]), and the second count of assault in the third degree (Penal Law § 120.00[1]).

Furthermore, a fair preponderance of the evidence supports the court's findings that respondent committed the offenses sufficiently alleged in the petition (Family Ct Act § 832), and there exists no basis to disturb the court's credibility determinations (*see Matter of Everett C. v Oneida P.*, 61 AD3d 489 [1st Dept 2009]).

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

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

ENTERED: APRIL 2, 2019

CLERK

Friedman, J.P., Gische, Tom, Gesmer, Moulton JJ

8866 Julian Mora, Index 303432/14
Plaintiff-Respondent,

-against-

Wythe and Kent Realty LLC,
et al.,
Defendants-Appellants,

Silvercup Scaffolding 1 LLC., et al.,
Defendants.

_____

Baxter Smith & Shapiro, P.C., White Plains (Sim R. Shapiro of counsel), for appellants.

William Schwitzer & Associates, P.C., New York (Howard R. Cohen of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about October 26, 2017, which granted plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim, unanimously affirmed, without costs.

Plaintiff's deposition testimony establishes that a proximate cause of his injury was the unsecured scaffold planks which tipped when he stepped on them (*see Kristo v Board of Ed. of the City of N.Y.*, 134 AD3d 550 [1st Dept 2015]). Thus, contrary to defendants' contention, plaintiff was not the sole proximate cause of his accident and we reject defendant's

recalcitrant worker defense (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003] ["if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it"]).

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

ENTERED: APRIL 2, 2019

CLERK

Friedman, J.P., Gische, Tom, Gesmer, Moulton, JJ.

8867 Churchill Real Estate Holdings LLC, Plaintiff-Appellant, Index 655257/17

-against-

CBCS Washington Street LP, et al., Defendants-Respondents.

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Morrison Cohen LLP, New York (Y. David Scharf of counsel), for appellant.

Law Office of Steven Cohn, P.C., Carle Place (Steven Cohn of counsel), for respondents.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered June 15, 2018, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment as to liability, and granted defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, to grant plaintiff's motion as to liability on its breach of contract claim and deny defendants' motion as to that claim, and otherwise affirmed, without costs.

While the parties were not obligated to enter into a loan, the "Break-Up Fee" and "Miscellaneous" provisions of their agreement, which obligated defendant lenders to pay a termination fee, costs, and legal fees, even if no loan closed, were expressly made binding, and therefore must be given force (*see Beal Sav. Bank v Sommer*, 8 NY3d 318, 324-25 [2007]).

Contrary to defendants' contention, the doctrine of contra

proferentem is inapplicable here, because the language of the agreement is unambiguous *(see 327 Realty, LLC v Nextel of N.Y., Inc.*, 150 AD3d 581, 582 [1st Dept 2017]), and because the parties are sophisticated (*see Westchester Fire Ins. Co. v MCI Communications Corp.*, 74 AD3d 551 [1st Dept 2010]).

The claim for breach of the covenant of good faith and fair dealing is duplicative of the breach of contract claim (see *Mill Fin., LLC v Gillett*, 122 AD3d 98, 104 [1st Dept 2014]). Further, because the loan transaction was entirely contingent, defendants did not breach the covenant by failing to enter into a loan (*see Moran v Erk*, 11 NY3d 452, 456-457 [2008]).

The claim for unjust enrichment is barred by the existence of an express agreement governing the subject matter (*see Cox v NAP Constr. Co., Inc.*, 10 NY3d 592, 607 [2008]). In any event, defendants were allegedly "enriched" not by plaintiff but by a third party (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]).

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

ENTERED: APRIL 2, 2019

CLERK

Friedman, J.P., Gische, Tom, Gesmer, Moulton, JJ.

8868 Marvin Weaver, Index 300508/12
Plaintiff-Appellant,

-against-

Gotham Construction Company LLC, et al.,
Defendants-Respondents,

Ingersoll Rand Company, et al.,
Defendants.

- - - - -

[And a Third Party Action]

_____

Law Offices of Michael S. Lamonsoff, New York (Stacey Haskel of counsel), for appellant.

Ropers Majeski Kohn & Bentley PC, New York (Jason L. Beckerman of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about May 16, 2018, which, to the extent appealed from as limited by the briefs, granted defendants Gotham Construction Company LLC and 44th Street Development LLC's motion for summary judgment dismissing the common law negligence and the Labor Law § 241(6) and § 200 claims as against them, unanimously affirmed, without costs.

Defendants established prima facie that they did not control the method and means of the work that plaintiff was performing when he was injured and that therefore they cannot be held liable under Labor Law § 200 or for common-law negligence (*see Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476 [1st Dept

2011]). Plaintiff testified that he was employed by third-party defendant, whose superintendent directed his work, and that he never took direction in the performance of his work from representatives of defendants, whom he never saw at the work site.

Defendants established prima facie that Industrial Code (12 NYCRR) § 23-1.7(d) (slipping hazards) and (e) (tripping hazards), on which plaintiff relies, are inapplicable to this case and that therefore the Labor Law § 241(6) fails (*see Carrera v Westchester Triangle Hous. Dev. Fund Corp.*, 116 AD3d 585, 585-586 [1st Dept 2014]). Plaintiff testified that at one moment he was reaching toward the control panel of the motorized hydraulic drill lift he was operating and the next he was pinned to the wall by the drill. He expressly denied that he had lost his footing.

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: APRIL 2, 2019

CLERK

Friedman, J.P., Gische, Tom, Gesmer, Moulton, JJ.

8870 The People of the State of New York, Respondent, SCI 4252/15

-against-

Jose Ruiz,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Larry Stephen, J. at plea; Patricia Nunez, J. at sentencing), rendered May 19, 2016, unanimously affirmed.

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

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

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

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

ENTERED: APRIL 2, 2019

CLERK

Friedman, J.P., Gische, Tom, Gesmer, Moulton, JJ.

8871- Ind. 3101/12
8871A The People of the State of New York, SCI 3676/13
Respondent,

-against-

Ramel Blount,
Defendant-Appellant.

_____

Justine M. Luongo, The Legal Aid Society, New York (Andrea Yacka-Bible of counsel), for appellant.

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

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An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Richard Carruthers, J.), rendered October 2, 2013,

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

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

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

ENTERED: APRIL 2, 2019

CLERK

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

Friedman, J.P., Gische, Tom, Gesmer, Moulton, JJ.

8872-
8873 In re O'Ryan Elizah H.,
and Others,

Children Under Eighteen Years
of Age, etc.,

Kairo E.,
Respondent-Appellant,

Commissioner of Social Services of the
City of New York,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Diana Lawless of counsel), for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Shirim Nothenberg of counsel), attorney for children.

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Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about February 15, 2018, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about November 30, 2017, which found that respondent father neglected the subject children, unanimously affirmed, without costs. Appeal from fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The finding of neglect is supported by a preponderance of the evidence (*see* Family Ct Act §§ 1012 [f][i][B]; 1046 [b][i]) and there is no basis to disturb the court's credibility

determinations. The record shows that the children were subject to actual or imminent danger of injury or impairment to their emotional and mental condition as a result of their exposure to repeated incidents of domestic violence between the father and mother (*Matter of Tyjaa E.[Kareem McC.]*, 157 AD3d 420 [1st Dept 2018]; *Matter of Jihad H.[Fawaz H.]*, 151 AD3d 1063 [2nd Dept 2017]). Impairment or an imminent danger of impairment to the physical, mental, or emotional condition of the subject children could be inferred from the father's conduct because the children were in close proximity to violence directed against a family member, even absent evidence that they were aware of or emotionally impacted by it (*Matter of Andru G.[Jasmine C.]*, 156 AD3d 456 [1st Dept 2017]; *Matter of Jalicia G.[Jacqueline G.]*, 130 AD3d 402 [1st Dept 2015]; *Matter of Angie G.[Jose D.G.]*, 111 AD3d 404 [1st Dept 2013]).

In view of our affirmance of the court's finding of neglect based on domestic violence, we need not consider any other basis upon which the court found neglect.

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

ENTERED: APRIL 2, 2019

CLERK

Friedman, J.P., Gische, Tom, Gesmer, Moulton, JJ.

8874 Kimberly Battocchio, etc., et al., Index 306330/11
Plaintiffs-Respondents,

-against-

Scott V. Paolino, et al.,
Defendants-Appellants,

City of New York, et al.,
Defendants.

_____

Saretsky Katz & Dranoff, LLP, New York (Allen L. Sheridan of counsel), for appellants.

Brown, Gaujean, Kraus & Sastow, PLLC, White Plains (Steven W. Kraus of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered on or about May 2, 2018, which denied defendants Scott V. Paolino and Dragonetti Brothers Landscaping Nursery and Tree Care, Inc.'s motion for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

In this rear-end collision case, the fact that the truck owned and operated by defendants had entered onto the parkway one exit earlier than authorized by a permit issued by the Department of Transportation, standing alone, does not establish that the early entry onto the parkway was a proximate cause of the accident (*Barry v Pepsi-Cola Bottling Co. of N.Y., Inc.*, 130 AD3d 500 [1st Dept 2015], *lv denied* 26 NY3d 910 [2015]). The record

reflects that the accident occurred on a dry and sunny day with light traffic, that defendant Paolino was driving the truck slowly, and that Paolino had turned on the truck's hazard lights. The truck's presence on the parkway merely furnished the condition or occasion for the occurrence of the accident, but not its cause (*id.*; *Beloff v Gerges*, 80 AD3d 460 [1st Dept 2011]).

Plaintiffs' proffered excuse for the accident, that the bright sunlight may have made it difficult for the decedent to see defendants' truck driving through the tunnel, does not constitute a nonnegligent explanation for the rear-end collusion (*Morales v Garzon*, 120 AD3d 1126 [1st Dept 2014], *lv denied* 25 NY3d 902 [2015]; *Barry*, 130 AD3d at 500). The affidavit by plaintiffs' accident reconstruction expert is not based on any evidence and therefore fails to raise an issue of fact (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; *Wright v New York City Hous. Auth.*, 208 AD2d 327, 331 [1st Dept 1995]).

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

ENTERED: APRIL 2, 2019

CLERK

Friedman, J.P., Gische, Tom, Gesmer, Moulton, JJ.

8875 The People of the State of New York, Ind. 539/16
Respondent,

-against-

Jerome Craig,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered June 15, 2016, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree, and sentencing him to a term of one to three years, unanimously affirmed.

Defendant made a valid and enforceable waiver of his right to appeal. The oral colloquy sufficiently ensured that defendant understood that the right to appeal is separate from the trial rights automatically forfeited by pleading guilty (*see e.g. People v Roberson*, 161 AD3d 544, 545 [1st Dept 2018], *lv denied* 32 NY3d 940 [2018]). The validity of the waiver was not undermined by any statements made by the court relating to sentencing. The court's reference to the sentence as the lawful minimum prison sentence available to defendant was not misleading, because one to three years was the minimum permitted

by law unless the court made a determination (*see* Penal Law § 70.00[4]) that it had already declined to make.

Defendant's waiver of his right to appeal forecloses review of his challenge to the suppression ruling and sentence. As an alternative holding, we find that the police conduct leading to the recovery of a gravity knife was lawful in all respects, and we perceive no basis for reducing the sentence.

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

ENTERED: APRIL 2, 2019

CLERK

Friedman, J.P., Gische, Tom, Gesmer, Moulton, JJ.

8876 Orville Rogers, Index 306807/13
Plaintiff-Appellant,

-against-

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

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

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

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about February 14, 2018, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The false arrest and imprisonment claims were correctly dismissed because the police had probable cause to arrest plaintiff for constructive possession of illegal drugs (*see De Lourdes Torres v Jones*, 26 NY3d 742, 759 [2016]; *Marrero v City of New York*, 33 AD3d 556, 557 [1st Dept 2006]; *Weyant v Okst*, 101 F3d 845, 852 [2d Cir 1996]). The police entered an apartment at which plaintiff was a frequent overnight guest pursuant to a valid search warrant based on three confirmed drug buys from the apartment by a reliable informant. Plaintiff was inside the apartment at the time of the search, asleep in his pajamas. The police recovered multiple items of contraband during the search,

including a glass pipe containing crack cocaine residue, which was discovered in the room in which plaintiff was sleeping, within his "lungeable" area, i.e., "next to him." In addition, the evidence showed that plaintiff was more than merely present at the apartment when the police arrived, as he had stayed there "on and off" for five or six years, for days or a week at a time, stored clothing there, and used the apartment as his official and mailing address (*see Walker v City of New York*, 148 AD3d 469 [1st Dept 2017]; *People v Shoga*, 89 AD3d 1225, 1227 [3d Dept 2011], *lv denied* 18 NY3d 886 [2012]; *Lawson v City of New York*, 83 AD3d 609 [1st Dept 2011], *lv dismissed* 19 NY3d 952 [2012]). The minor inconsistencies in the record regarding the precise location of the pipe within the room are immaterial. Contrary to plaintiff's contention, there is no separate "plain view" requirement for constructive possession.

The malicious prosecution claim was correctly dismissed because there is no evidence in the record from which a fact-finder could reasonably infer that the probable cause at the time of plaintiff's arrest had dissipated by the time of his arraignment (*see Brown v City of New York*, 60 NY2d 893, 894-895 [1983]; *Thomas v City of New York*, 562 Fed Appx 58, 60 [2d Cir 2014]; *Lowth v Town of Cheektowaga*, 82 F3d 563, 571 [2d Cir 1996]). There is also no evidence of actual malice (*see De Lourdes*, 26 NY3d at 760-61).

The excessive force, assault, and battery claims were correctly dismissed because the act of handcuffing plaintiff in connection with the execution of a valid search warrant and pursuant to a lawful arrest was objectively reasonable (*see Fowler v City of New York*, 156 AD3d 512, 513 [1st Dept 2017], *lv dismissed* 31 NY3d 1042 [2018]; *Harris v City of New York*, 153 AD3d 1333, 1335 [2d Dept 2017]; *Akande v City of New York*, 275 AD2d 671, 672 [1st Dept 2000]).

In view of the foregoing, we do not the reach the issue of qualified immunity for the individual police officers.

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: APRIL 2, 2019

CLERK

Gische, J., Tom, Gesmer, Moulton, JJ.

8877 Hertz Vehicles, LLC, Index 154077/15
Plaintiff-Respondent,

-against-

Jagga Alluri, M.D., et al.,
Defendants,

Advanced Orthopedics, P.C.,
Defendant-Appellant.

_____

Jonathan B. Seplowe, P.C., Malverne (Damin J. Toell of counsel), for appellant.

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

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Order, Supreme Court, New York County (Kathryn Freed, J.), entered on or about December 11, 2017, which, to the extent appealed from, granted plaintiff's motion for summary judgment declaring that plaintiff does not owe coverage for the no-fault claims allegedly assigned to defendant Advanced Orthopedics, P.C. (Advanced), unanimously affirmed, without costs.

The failure of a party eligible for no-fault benefits to appear for a properly-noticed Examination under Oath (EUO) constitutes a breach of a condition precedent, vitiating coverage (*Hertz Corp. v Active Care Med. Supply Corp.*, 124 AD3d 411, 411 [1st Dept 2015]). As it is undisputed that Hertz Vehicles, LLC (Hertz) received a claim from Advanced on April 10, 2015, and that Advanced failed to appear at its scheduled EUOs in January and February of 2015, Hertz is under no obligation to honor any

claims submitted by Advance retroactive to the date of loss (*Mapfre Ins. Co. of N.Y. v Manoo*, 140 AD3d 468 [1st Dept 2016]; *Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011]).

We have considered this defendant's remaining contentions and find them to be unavailing.

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

ENTERED: APRIL 2, 2019

CLERK

Friedman, J.P., Gische, Tom, Gesmer, Moulton, JJ.

8878-
8878A Index 651463/15

Board of Managers of the
Modern 23 Condominium,
Plaintiff-Appellant-Respondent,

-against-

350-52 West 23, LLC, et al.,
Defendants-Respondents-Appellants.

_____

Cozen O'Connor, New York (Amanda L. Nelson of counsel), for appellant-respondent.

Rivkin Radler LLP, New York (Cheryl Korman of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered May 7, 2018, which granted defendants' motion to strike plaintiff's jury demand, unanimously affirmed. Order, court and Justice, entered May 10, 2018, which, inter alia, granted the individual defendants' motion for summary judgment to the extent of dismissing the complaint as against defendant Israel, and denied it with respect to defendant Hollander, unanimously modified, on the law, to dismiss with respect to Hollander, and otherwise affirmed, without costs.

The court correctly granted defendant's motion to enforce the jury waiver included in the purchase agreement because the complaint alleged claims arising from that agreement, and the request for a jury waiver was not untimely. Since plaintiff contends that it derived certain rights from the purchase

agreement, it should be bound by all of its terms, including the jury waiver.

Defendants' motion for summary judgment was correctly granted in favor of defendant Israel because defendants demonstrated prima facie, and plaintiffs failed to rebut, that Israel's conduct did not go beyond the limited powers of a member and manager of the corporate sponsor, and the corporate formalities were observed between the sponsor and Israel's law firm (*see Board of Mgrs. of the Gansevoort Condominium v 325 W. 13th, LLC*, 121 AD3d 554, 554-555 [1st Dept 2014]). There was no evidence of the intermingling of funds between the sponsor and either Israel or his law firm; the law firm did not share office space or a telephone number with the sponsor; there was no evidence that Israel engaged in personal transactions with the sponsor that were not at arm's length or that his law firm was not an independent profit center.

Defendants' motion for summary judgment with respect to defendant Hollander should also have been granted. The law permits the incorporation of a business for purpose of escaping personal liability and those seeking to pierce the corporate veil bear a "heavy burden" of showing that the corporation (here, sponsor), was dominated as to the transaction and such domination resulted in the harm alleged (*see Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]; *Sheridan*

Broadcasting Corp. v Small, 19 AD3d 331, 332 [1st Dept 2005]). The conduct cited by plaintiff with respect to Hollander was in conformance with the operative, disclosed documents, including the offering plan and operating agreements. Personal loans made to the sponsor, which charged interest, were not prohibited, and there is no proof that the transactions were a sham. The operating agreement expressly provided that the managers of the sponsor, although not compensated, could enter into agreements and receive fair and reasonable compensation for providing, either directly or through their affiliates, professional services to the sponsor. Thus the management agreement with Marin was permissible under the sponsor's operating agreement.

Any argument that Hollander denuded the sponsor is belied by express terms in the offering plan that the sponsor would not be providing a reserve fund because, upon the completion of the building construction, capital replacements or repairs should not be required for an extended period of time. Thus, the "undercapitalization" plaintiff alleges was specifically disclosed to the unit purchasers.

The facts that the sponsor, Hollander and Marin did not maintain separate office space, and that they shared telephone numbers, some staff and email do not in itself support a claim for alter ego liability (*see Gansevoort Condominium*, 121 AD3d at 555). Having failed to raise triable issues of fact regarding

Hollander's potential liability pursuant to veil piercing or alter ego theories, those claims against him should have been dismissed (*see id.*). Collectively, these facts were insufficient to raise a triable issue as to whether the sponsor was Hollander's alter ego.

We have considered the parties' remaining arguments and find them unavailing.

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

ENTERED: APRIL 2, 2019

CLERK

Friedman, J.P., Gische, Tom, Gesmer, Moulton, JJ.

8879 In re Albert Sigal, et al., SCI 3411/10K
Petitioners-Respondents,

-against-

Tara Kulukundis,
Respondent-Appellant.

_____

Moses & Singer LLP, New York (David Rabinowitz of counsel), for appellant.

Joseph M. Weitzman, New York, for respondents.

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Order, Surrogate's Court, New York County (Rita Mella, S.), entered June 15, 2018, which, in this turnover proceeding brought pursuant to SCPA 2103, granted the petition of the coexecutors of the estate, to the extent of directing respondent to vacate the subject apartment by January 15, 2019, upon threat of eviction, unanimously affirmed, without costs.

The Surrogate's Court properly granted the petition. It is undisputed that the apartment is an asset of decedent's residuary estate, and its disposition is subject to petitioners' discretion under the provisions of decedent's last will and testament. Thus, petitioners acted within their duty to marshal estate assets and to prevent waste by seeking the sale of the subject apartment (*see Matter of Sehr*, 169 Misc 2d 543, 545 [Sur Ct, New York County 1996]). Given that respondent has no ownership interest in the apartment, as she conceded, there was no legal basis at the time for her to continue occupying the premises or

for the Surrogate's Court to enjoin its sale.

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

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

ENTERED: APRIL 2, 2019

CLERK

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

8880 Anna Condo, Index 300341/14
Plaintiff-Appellant,

-against-

George Condo,
Defendant-Respondent.
- - - - -
Susan L. Bender,
Nonparty Respondent.

Dentons US LLP, New York (Anthony B. Ullman of counsel), for appellant.

Blank Rome LLP, New York (Sheila Ginsberg Riesel of counsel), for George Condo, respondent.

Bender & Rosenthal LLP, New York (Susan L. Bender of counsel), for Susan L. Bender, respondent.

Order, Supreme Court, New York County (Michael L. Katz, J.), entered on or about August 23, 2018, which granted Special Master Susan Bender, Esq.'s motion for a money judgment in the amount of $113,527.30, and denied the wife's cross motion to remove the Special Master, unanimously affirmed, without costs.

A final judgment of divorce incorporating, but not merging, the parties' financial settlement agreement was entered in the case. Collateral postjudgment disputes later arose, leading to a further agreement by the parties (SM agreement) to the appointment of a "special master." Susan Bender Esq. was appointed as special master. The SM agreement expressly detailed the scope of Bender's authority, the manner in which she could

proceed, that the parties would pay her fees, and the method of her compensation. The SM agreement was presented to the court for so-ordering, making it an order of the court with attendant enforcement rights. Notwithstanding that the SM agreement was made into a court order, it did not lose its fundamental character as an enforceable agreement among the parties (*see e.g. Aivaliotis v Continental Broker-Dealer Corp.*, 30 AD3d 446, 447 [2d Dept 2006]). Consequently, we reject the wife's arguments that the "order" was unenforceable because it did not fit within the strictures of CPLR 4312, 4317 or 22 NYCRR § 202.14 or that the court exceeded its authority in ordering the appointment of Bender. The "special master" in this case was, and remains, a privately engaged, neutral person, mutually selected, agreed to and hired by the parties to supervise the division of marital assets pursuant to their original settlement agreement. Bender's authority to act is derived from the scope of the parties' SM agreement and not statute. Where the parties were both represented by highly experienced counsel at all times in their acrimonious and protracted disputes over a vast cache of valuable artwork and other marital assets, we embrace the parties' SM agreement to a special master's oversight and resolution of their property disputes, and find that Supreme Court properly held the wife to the SM agreement.

The intent of the parties' SM agreement was to have the

special master act as a neutral facilitator and decision maker, but the wife makes no credible claim that Bender should be removed due to bias. Bender's motion for a money judgment did not on its own create an appearance of bias, and the wife cites no authority to show otherwise. *Matter of Yeampierre v Gutman* (57 AD2d 898 [2d Dept 1977]) did not concern fees, and Bender bears no resemblance to the referees in *Ament v Schubert Piano Co.* (172 AD 423 [1st Dept 1916]), *Topia Min. Co. v Warfield* (145 AD 422 [1st Dept 1911]), *Smith v Dunn* (94 AD 429 [1st Dept 1904]), or *National Bank of N. Am. v New Paltz Growers* (89 AD2d 647 [3d Dept 1982]). There is no indication in the record that Bender conditioned her work on receipt of additional fees or that, before making her fee motion, she ever broached the fee issue with the parties at all. Bender sent the parties invoices, keeping an appropriate, professional distance on the matter, and her invoices should have come as no surprise as they simply reflected the terms agreed to.

Supreme Court also properly rejected the wife's argument that Bender, as a nonparty, was not entitled to the entry of a judgment representing fees owed for her services. Because the SM agreement was also a court order, the court retained jurisdiction over its implementation. For the court to have required Bender to commence a new action to seek enforcement of the fee provisions of the order would have served no apparent purpose,

other than to create more cost and delay.

Although the order is silent as to the timing of payments to Bender other than the initial retainer, we reject the wife's claim that Bender can only collect fees at the conclusion of her work. The SM agreement provided details about her billing rate and that her fees would be paid by the parties in the manner agreed. The SM agreement also recognized that the special master would bill for her time spent. It is reasonable for Bender to have expected that she would be paid on an ongoing basis, given the protracted and time consuming nature of the work required.

Nor does the wife show that her understanding was any different from Bender's. She never challenged the bills on the basis of prematurity or any other basis prior to Bender filing her motion for fees. The wife's emails demonstrate that contrary to withholding payment because the bills were premature, she deliberately chose not to pay Bender because she claimed (albeit incorrectly) that Bender was in "default."

Finally, the wife was fully on notice that the fees Bender sought were those due at the time of her moving papers plus any additional fees that might accrue. She was aware that Bender continued her work as a special master while the motion was pending. We affirm the entire amount of the judgment awarded Bender by the motion court.

We have considered the parties' remaining arguments and find them unavailing.

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

ENTERED: APRIL 2, 2019

CLERK

Friedman, J.P., Gische, Tom, Gesmer, Moulton, JJ.

8881 The People of the State of New York, Ind. 1137/15
Respondent,

-against-

Malick Bah,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Waleska Suero Garcia of counsel), for 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, Bronx County (Alvin Yearwood, J.), rendered September 27, 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: APRIL 2, 2019

CLERK

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

Friedman, J.P., Gische, Tom, Gesmer, Moulton, JJ.

8882 The People of the State of New York, Ind. 5081/11
Respondent,

-against-

Alexis Ramirez,
Defendant-Appellant.

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Justine M. Luongo, The Legal Aid Society, New York (Steven R. Berko of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered November 21, 2013, convicting defendant, after a jury trial, of attempted assault in the first and second degrees and assault in the second degree, and sentencing him to an aggregate term of six years, unanimously affirmed.

After a sufficient inquiry, the court providently exercised its discretion in discharging a juror based on unavailability (*see* CPL 270.35[1],[2][a]). The juror explained that he had an appointment for a physical examination the next morning. It was clear that the examination would require him to be absent from court for more than two hours, given the length and location of the examination. The juror also explained that he could not reschedule the appointment because the examination was a requirement of a program he was about to enter. "The Court of Appeals has held that the 'two-hour rule' gives the court broad

discretion to discharge any juror whom it determines is not likely to appear within two hours" (*People v Kimes*, 37 AD3d 1, 19 [1st Dept 2006], *lv denied* 8 NY3d 881 [2007], citing *People v Jeanty*, 94 NY2d 507, 516-17 [2000]). Accordingly, the court providently chose not to delay the trial any further (*see e.g. People v Lopez*, 18 AD3d 233, 234 [1st Dept 2005], *lv denied* 5 NY3d 807 [2005]).

Contrary to defendant's argument, the court was not required to ascertain whether the juror could reach an impartial verdict. A juror's state of mind is a separate consideration from unavailability.

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

ENTERED: APRIL 2, 2019

CLERK

Friedman, J.P., Gische, Tom, Gesmer, Moulton, JJ.

8884-
8885N Index 850171/13

JPMorgan Chase Bank, National Association,
Plaintiff-Respondent,

-against-

Lynn D. Salvage,
Defendant-Appellant,

The Executor of the Estate of Rita Lerner, et al.,
Defendants.

_____

Law Office of Susan Pepitone, Forest Hills (Susan R. Pepitone of counsel), for appellant.

Parker Ibrahim & Berg LLP, New York (Daniel Schleifstein of counsel), for respondent.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered on or about March 10, 2017, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion to add the Executor of the Estate of Rita Lerner as a defendant and to dismiss defendant Lynn D. Salvage's counterclaims, and denied Salvage's cross motion to dismiss the complaint, unanimously modified, on the law and the facts, to deny plaintiff's motion, and to grant plaintiff's alternate motion to compel Salvage to accept its late reply to her counterclaims, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered October 23, 2017, which, insofar as appealed from as limited by the briefs, denied Salvage's motion to renew,

unanimously dismissed, without costs, as academic.

This is an action to foreclose a mortgage on a condominium unit owned and occupied by Salvage, who is Lerner's daughter. Before Lerner passed away, she and Salvage owned the unit as joint tenants with right of survivorship. Lerner was the sole borrower on the loan that is secured by the mortgage.

The motion to add the executor of Lerner's estate should have been denied because no such person had been appointed at the time plaintiff made its motion. "[A] plaintiff is unable to commence an action during the period between the death of a potential defendant and the appointment of a representative of the estate" (*Arbelaez v Chun Kuei Wu,* 18 AD3d 583, 584 [2d Dept 2005] [internal quotation marks omitted]).

However, the court properly denied Salvage's cross motion to dismiss the complaint for failure to join an indispensable party, namely, the executor. The estate does not have any ownership interest in the condominium, which passed entirely, as a matter of law, to Salvage upon Lerner's death. Moreover, dismissal for nonjoinder is a last resort (*see Saratoga County Chamber of Commerce v Pataki,* 100 NY2d 801, 821 [2003], *cert denied* 540 US 1017 [2003]), and the factors mentioned in CPLR 1001(b) do not tip overwhelmingly in favor of dismissal. For example, Lerner's estate will not be prejudiced by nonjoinder because "[t]he absence of a necessary party in a mortgage foreclosure action. .

. leaves that party's rights unaffected by the judgment of foreclosure and sale" (*Glass v Estate of Gold,* 48 AD3d 746, 747 [2d Dept 2008]). Plaintiff has recently waived its right to seek a deficiency judgment; hence, this action does not require the estate's joinder (*see Countrywide Home Loans, Inc. v Keys,* 27 AD3d 247 [1st Dept 2006], *lv denied* 7 NY3d 702 [2006]).

Salvage's counterclaims should not have been dismissed pursuant to CPLR 3215(c). Salvage and plaintiff/counterclaim defendant (hereinafter Chase) engaged in negotiations after Salvage asserted her counterclaims (*see e.g. Iorizzo v Mattikow,* 25 AD3d 762, 764 [2d Dept 2006]). It would not be equitable (*see generally Jo Ann Homes at Bellmore v Dworetz,* 25 NY2d 112, 122 [1969] ["a foreclosure action is a proceeding in a court of equity" (internal quotation marks omitted)]) to dismiss the counterclaims based on a nine-month gap between the end of negotiations and the making of Salvage's cross motion, especially when Chase has hardly been a model of celerity. Further, Chase did not show that it had been prejudiced by Salvage's failure to pursue her counterclaims (*see Laourdakis v Torres,* 98 AD3d 892, 893 [1st Dept 2012]), and Salvage has demonstrated that the counterclaims she was pursuing in her own right were "potentially meritorious" (*Brooks v Somerset Surgical Assoc.,* 106 AD3d 624, 625 [1st Dept 2013]).

Since we are denying Chase's motion to dismiss Salvage's

counterclaims, we consider its alternate motion to compel her to accept its late reply. That motion is granted (*see HSBC Bank USA v Lugo*, 127 AD3d 502, 503 [1st Dept 2015]).

In light of the denial of Chase's motion to add the executor of Lerner's estate as a defendant, Salvage's arguments about her motion to renew are academic.

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

ENTERED: APRIL 2, 2019

CLERK