SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 4, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

7728 Mary Ellen Von Ancken, et al., Plaintiffs-Appellants, Index 156497/13

-against-

7 East 14 L.L.C., et al., Defendants-Respondents.

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Gordon & Haffner, LLP, Harrison (Steven R. Haffner of counsel), for appellants.

Moses & Singer LLP, New York (Jay R. Fialkoff of counsel), for 7 East 14 L.L.C., respondent.

Solomon J. Jaskiel, Brooklyn, for Nest Seekers International LLC and Nest Seekers LLC, respondents.

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Order, Supreme Court, New York County (Debra A. James, J.), entered February 24, 2017, which granted defendants' motions to dismiss the complaint, unanimously affirmed, without costs.

Plaintiffs allege that defendants, the sponsor of a cooperative and its listing agent, made a material misrepresentation about the size of the apartment unit, and that they reasonably relied on that misrepresentation in purchasing the apartment.

Specifically, plaintiffs allege that defendants prepared a

floor plan, which accompanied the listing for the unit at issue, that stated that the unit was "~1,966" square feet, when it was, in fact, approximately 1,495 square feet. Plaintiffs contend that the floor plan was incorporated into the offering plan by reference, and the offering plan, in turn, was incorporated into the purchase agreement. They rely on the following language contained in the offering plan:

> "Any floor plan or sketch shown to a prospective purchaser is only an approximation of the dimensions and layout of a typical apartment. The original layout of an apartment may have been altered. All apartments and terraces appurtenant thereto are being offered in their 'as is' condition. Accordingly, each apartment should be inspected prior to purchase to determine its actual dimensions, layout and physical condition."

Based on the alleged misrepresentation incorporated into the purchase agreement, plaintiffs assert claims for breach of contract and express warranty, fraud, aiding and abetting fraud, negligent misrepresentations and violation of General Business Law §§ 349 and 350.

The doctrine of incorporation by reference "is appropriate only where the document to be incorporated is referred to and described in the instrument as issued so as to identify the referenced document 'beyond all reasonable doubt'" (*Shark Information Servs. Corp. v Crum & Forster Commercial Ins.*, 222 AD2d 251, 252 [1st Dept 1995]). Here, the listing is not

identified in any of the relevant purchase documents, let alone beyond all reasonable doubt, and therefore is not incorporated by reference. Thus, any alleged representation in the listing cannot form the basis of a breach of contract claim because it is not a part of the purchase agreement. No express warranty was made in the purchase agreement.

Moreover, any purported representation or warranty is refuted by the clear terms of the purchase agreement, which contains a merger clause, states that no representations are being made by the sponsor, that the unit was being purchased "as is" and that the onus was on the buyer to inspect "to determine the actual dimensions" prior to purchasing (*see Rozina v Casa 74th Dev. LLC,* 115 AD3d 506 [1st Dept 2014], *lv dismissed* 24 NY3d 1097 [2015]; *Plaza PH2001 LLC v Plaza Residential Owner, LP*, 98 AD3d 89 [1st Dept 2012]).

Reasonable reliance is an element of claims for fraud, aiding and abetting fraud and negligent misrepresentation (*see Bernstein v Clermont Co.*, 166 AD2d 247 [1st Dept 1990]; *J.A.O. Acquisition Corp. v Stavitsky,* 8 NY3d 144, 148 [2007]). Plaintiffs cannot as a matter of law establish reasonable reliance on a representation concerning the condition of the apartment since they had the means to ascertain the truth of the condition (*Bernstein* at 248). Since, pursuant to the terms of

the purchase agreement, plaintiffs had the opportunity to inspect and measure the apartment, their fraud and negligent misrepresentation claims were properly dismissed. Consequently, dismissal of the aiding and abetting fraud claim was also proper (*see Kaufman v Cohen*, 307 AD2d 113, 125-126 [1st Dept 2003]).

Finally, with respect to plaintiffs' allegations based on purported representations made in the listing, we reject defendants' argument that plaintiffs' claims are preempted under the Martin Act. Allegations of affirmative misrepresentations such as those at issue here are not preempted under the Martin Act (*see Bhandari v Ismael Leyva Architects, P.C.*, 84 AD3d 607 [1st Dept 2011]*; Assured Guar. [UK] Ltd. v J.P. Morgan Inv. Mgt. Inc.*, 80 AD3d 293 [1st Dept 2010], *affd* 18 NY3d 341 [2011]). However, plaintiffs fail to set forth a viable claim under General Business Law §§ 349 or 350 as defendants' purported representations do not fall within the type of deceptive acts, that, if permitted to continue, would have a broad impact on consumers at large (*see Thompson v Parkchester Apts. Co.*, 271 AD2d 311 [1st Dept 2000], *lv dismissed* 92 NY2d 946 [1998]). This dispute, involving the dimensions of an apartment and representations made regarding the size of that apartment, is unique to the parties to this transaction, and thus, does not fall within the ambit of the statute (*id.*).

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

> The Decision and Order of this Court entered herein on November 27, 2018 (166 AD3d 551) is hereby recalled and vacated (*see* M-493 decided simultaneously herewith).

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

ENTERED: APRIL 4, 2019

CLERK

Renwick, J.P., Tom, Webber, Kahn, Moulton, JJ.

7734 The People of the State of New York, Respondent, Ind. 1220/15

-against-

Zhakariyya Muhammad, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Robert M. Mandelbaum, J.), rendered June 24, 2016, convicting defendant, after a jury trial, of sexual abuse in the first degree and endangering the welfare of a child, and sentencing him to an aggregate term of 7 years, affirmed.

On this appeal, defendant's initial argument is that the trial court's responses to notes sent by the jury on the day of the verdict were coercive of that verdict. Specifically, defendant maintains that the trial court gave a coercive response to a note sent by the jury on the day of the verdict by repeating the same *Allen* charge (*see Allen v United States*, 164 US 492 [1896]) it had given the preceding day without providing any additional guidance, notwithstanding the jury's specific request for it. Defendant further contends that the trial court coerced

the verdict in responding to a note in which the jury requested to continue its deliberations that day by acceding to that request without addressing the scheduling conflicts some of the deliberating jurors had the following week, as first reported to the court in that same note. In addition, defendant maintains that in repeating the *Allen* charge without responding to the jury's specific request for additional guidance, the trial court failed to "respond meaningfully" to the jury's request (*see People v Malloy*, 55 NY2d 296, 302 [1982], *cert denied* 459 US 847 [1982]).

Defendant also contends that the court improperly provided the jury with written copies of the final charge to the jury, improperly considered charges of which defendant was acquitted in determining his sentence, and imposed an excessive sentence.

With respect to the trial court's responses to jury notes and instructions to the jury, on Monday, May 9, 2016, the first day of jury selection, the trial court told the prospective jurors that it anticipated that the jury would be "in a position to decide the case no later than the end of next week," i.e., Friday, May 20, 2016. On Tuesday, May 17, 2016, the trial court distributed written copies of its final charge to the jurors and invited them to "read along" during its reading of the final charge and to take the written instructions into the jury room

afterward. The trial court further instructed the jury that the "written copies [were] simply an aid to your absorbing and remembering [the court's oral] instructions" and that if "I deviate in my oral instructions, from the written instructions, in any way, it is the oral instructions you must follow." The trial court further instructed the jury not to "allow your receipt of a written copy to lead you to believe that you may consider only certain portions to the exclusion of others" and that if anything was not understood, the jury must send a note out asking for clarification. Defense counsel raised no objection either to the distribution of the written copies or to the trial court's instructions in that regard. The court then gave the jury its oral final charge, which was identical to the court's written final instructions, and the jury then retired to deliberate. On the morning of Thursday, May 19, 2016, the third day of deliberations, the jury sent a note asking: "[W]hat is the process if we can't come to a unanimous decision[?]" (Court Exhibit IX). The trial court responded by giving an *Allen* charge. The jury then continued its deliberations.

The following morning, Friday, May 20, 2016, the jury sent a note stating:

> "We the jury are still having extreme difficulty coming to a unanimous verdict. We feel it might be helpful to re-hear your guidance from yesterday morning and any

additional guidance you have."

(Court Exhibit XI).

Defense counsel moved for a mistrial, and the prosecutor suggested a more forceful *Allen* charge. The court responded, "I don't know what a stronger [*Allen*] charge would look like," noting that he had previously given "the full strong [*Allen*] charge." The court concluded, "I'm just going to give them the [*Allen*] charge. None of you have any suggestions as additional guidance . . . is that right?" Defense counsel answered, "That's right." The trial court then repeated its *Allen* charge to the jury a second time without offering any additional guidance.

At 12:28 p.m., the jury sent out a further note, requesting readback of certain testimony of the complaining witness and her grandmother (Court Exhibit XII). The court provided the readbacks and then instructed the jury to break for lunch and to return at 2:15 p.m.

When the jury returned, the court announced that "we're going to need to break for the day at this point. So I will ask you to cease your deliberations." The court then asked the jury to "please be back Monday morning at 9:30." On returning to the jury room, however, the jury sent out another note (Court Exhibit XIII) stating:

"We the jury request to continue deliberating until

> 5:00 PM. or 6:00 PM. because we are at a critical juncture[.] Also, multiple people have conflicts next week & they are -
>
> [First Juror] - out of state Monday & Tuesday
> [Second Juror] - out of country beginning Monday for three weeks
> [Third Juror] - out of country beginning Thursday
> [Fourth Juror] - out of state from Monday thru [sic] June 5th"

(Court Exhibit XIII).

Upon receiving Court Exhibit XIII, the trial court told the parties: "We will let [the jurors] keep deliberating." At that point, defense counsel moved for a mistrial, arguing that the existence of the scheduling conflicts could result in last-minute pressure on the jury. The court responded that the jury had stated that it was at a critical juncture in its deliberations, knew the issues it had to address, asked for readback, and expressed the view that it could resolve the case if it were given a few more hours to deliberate that day.

The trial court then read Court Exhibit XIII in the presence of the jurors and told them: "Your wish is our command. You may resume [your] deliberations." The jury resumed its deliberations.

At 4:35 p.m., the jury sent out a note stating that it had reached a verdict (Court Exhibit XIV). At the request of defense counsel, the court polled the jury, and each juror indicated

consent to its verdict, which was not guilty of the two top counts of predatory sexual assault against a child and guilty of the counts of sexual abuse in the first degree and endangering the welfare of a child. Defense counsel made no further objections, and the court accepted the jury's verdict.

On or about June 9, 2016, defendant moved to set aside the verdict pursuant to CPL 330.30(2). In support of his motion, defendant submitted a sworn statement from one of the jurors (the statement juror). According to the juror's statement, on the afternoon of Friday, May 20, 2016, after the court instructed the jurors to cease deliberations until the following Monday "without the court inquiring or instructing the jury as to what would happen if the entire jury could not reach a verdict within the next two to three hours," the jurors "all began to speculate as to what could happen to the jurors if we could not arrive at a verdict before Monday." The statement juror further averred that she had been the jury's lone holdout for acquittal on the sexual abuse in the first degree count but, after the court's announcement of its intent to adjourn deliberations to Monday, changed her vote from not guilty to guilty "because of the coercive pressure that was thrust upon me by the remaining jurors." The court denied defendant's CPL 330.30(2) motion, reasoning that the statement juror's description of the pressure

she felt from other jurors to change her vote could not be used to impeach the verdict.

On this appeal, defendant does not challenge the trial court's ruling on his motion to set aside the verdict. Rather, he relies on the sworn statement of the statement juror to support his claim that the trial court coerced the verdict by merely repeating the same *Allen* charge it had given the preceding day without offering any additional guidance in response to the jury's request that morning and by allowing the jury more time to deliberate that day, as requested in Court Exhibit XIII, without directly addressing the scheduling conflicts of some of the jurors as set forth in the same note.

We begin our inquiry by examining whether the trial court's second *Allen* charge was, by its terms, or in the circumstances under which it was given, coercive of the jury's verdict. The substance of an *Allen* charge is not coercive if it is "appropriately balanced and inform[s] the jurors that they [do] not have to reach a verdict and that none of them should surrender a conscientiously held position in order to reach a unanimous verdict" (*People v Hardy*, 26 NY3d 245, 252 [2015]). Here, the trial court's repeated *Allen* charge included an instruction that the jurors were to "make every possible effort to arrive at a just verdict," thereby implicitly instructing the

jurors that they were not required to reach a verdict if they did not all agree that the verdict was just. Further, the trial court advised the jury that it "was not asking any juror to violate his or her conscience or to abandon his or her best judgment." Defendant raised no objection to the language of the *Allen* charge either time it was given. Thus, neither in the trial court nor on this appeal does defendant take the position that the language of the court's *Allen* charge was inconsistent with the *Hardy* definition of a noncoercive charge.

Moreover, the jury expressly requested to "re-hear" the court's *Allen* instructions. Notably, this jury note did not advise the court of any deadlock. Rather, it was only a request for further guidance as to resolving present differences of opinion. The trial court repeated its *Allen* charge in response to that request, rather than at its own instance. Thus, both the language of the *Allen* charge and the circumstances under which it was repeated demonstrate that the charge was not coercive.

Defendant further contends that the trial court coerced the verdict by acceding to the request made in Court Exhibit XIII for more time to deliberate on the day of the verdict without immediately addressing the scheduling conflicts set forth in the same jury note in which the request was made. The record reflects that in making its request for more time, the jury

informed the court that it had reached a "critical juncture" in its deliberations. Although the better practice would have been to address the juror's scheduling conflicts by attempting to devise a means to accommodate them, the only request the jury actually made was to be allowed to continue its deliberations until 5:00 p.m. or 6:00 p.m. that day because it was at a "critical juncture." As the record reflects, the trial court construed Court Exhibit XIII as meaning that the jurors thought that they could quickly resolve any remaining differences among them and agree upon a verdict within hours that same day, and therefore permitted them to do so. Thus, there was no need for the court to address the traveling plans of some jurors for the following week because this did not appear to be a problem at the time. The court's view was supported by the fact that after its rereading of the *Allen* charge that morning, the jury had sent Court Exhibit XII requesting the readback of testimony, indicating that its deliberations were continuing. Further, after the jury had requested the opportunity to deliberate until 5:00 p.m. or 6:00 p.m., and the court had granted that request, the jury did not send out any follow-up note inquiring as to the continuation of deliberations if the jury were unable to reach a verdict by 6:00 p.m. that evening. The jurors were fully aware that they could have done so, as indicated by the jury's having

sent out Court Exhibit IX the preceding day inquiring about what the process would be if the jury did not come to a unanimous decision. The jury did not bring to the court's attention any doubts about or dissatisfaction with the court's response to Court Exhibit XIII. The jurors' advice to the court that they were at a "critical juncture" of the deliberations and their request that deliberations continue until 5:00 p.m. or 6:00 p.m. were clear indications of the likelihood that a verdict would be reached before the close of the day. Indeed, the jury was able to announce its verdict at 4:35 p.m., prior to the end of the additional period afforded for its deliberations.

The cases cited by our dissenting colleague each involve clear instances of improper coerciveness not found in the acts of the trial court here (*see People v Diaz*, 66 NY2d 744, 746 [1985] [singling out lone dissenting juror and questioning whether that juror's doubt was reasonable, as majority of jurors, who were "equally as intelligent" and "observant" and came "from equal backgrounds," had no doubt, and directing that deliberations "continue until such time [as] I decide that they should not continue"]; *People v DeJesus*, 134 AD3d 463, 465 [1st Dept 2015] [directing juror solely responsible for his child's care to report for continued deliberations the following week notwithstanding juror's fruitless search for alternative child

care]; *People v Nelson*, 30 AD3d 351, 352 [1st Dept 2006] [after jury had engaged in more than two days of deliberations without sequestration and had received *Allen* charge after advising court at end of each day that it was deadlocked, directing jury to return next morning for further deliberations and to prepare for possible overnight sequestration if no verdict reached by end of following day]).

Furthermore, even if we were to agree with our dissenting colleague that the court failed to provide a meaningful response to the request made in Court Exhibit XIII by not addressing the scheduling conflicts, such action would not constitute reversible error, as the court's failure to respond to the jury's request did not seriously prejudice defendant's rights (*People v Jackson*, 20 NY2d 440, 454-455 [1967], *cert denied* 391 US 928 [1968]; *cf. People v Lourido*, *70* NY2d 428, 435 [1987] [defendant was seriously prejudiced by court's providing no response at all to jury's request for readback of victim's cross-examination]).

Additionally, the court did not order the jury to continue its deliberations on Monday. Rather, the court's announcement that the jury would cease its deliberations that Friday and continue them on Monday was issued prior to the court's being advised for the first time, by way of Court Exhibit XIII, of the jurors' scheduling conflicts. The court's grant of the jury's

request in that note for more time to deliberate that afternoon effectively overrode the court's earlier direction that the jury cease deliberations that day and continue them on the following Monday.

Further, the statement juror's description of feeling pressured into changing her dissenting vote would not normally present an exception to the general rule that a "verdict may not be impeached by probes into the jury's deliberative process" (*People v Maragh*, 94 NY2d 569, 573 [2000]; *cf. Peña-Rodriguez v Colorado*, __ US __, 137 S Ct 855, 869 [2017] [narrow exception for "overt racial bias"]). This principle is especially applicable where, as here, the jury was polled at the taking of the verdict (*see People v Goode*, 270 AD2d 144, 145 [1st Dept 2000], [posttrial statement by juror complaining of coercion not proper basis for impeaching verdict under CPL 330.30, in view of juror confirmation of the verdict upon polling of the jury], *lv denied* 95 NY2d 835 [2000]; *People v Redd*, 164 AD2d 34, 38 [1st Dept 1990]).

In this case, the trial court's denial of defendant's CPL 330.30 motion is not before us, because that issue has not been raised, but we are asked to consider this juror's post-verdict statement as background evidence of coercion. Assuming, without deciding, that we may do so, the credibility of the statement is

undermined by the record, which shows that the statement juror was polled at defense counsel's request, and on her oath swore that the verdict accurately reflected her views. As noted, defense counsel raised no contemporaneous objection to the taking of the verdict.

Defendant further asserts that, in repeating the *Allen* charge on the day of the verdict without providing the jury with the additional guidance it mentioned in Court Exhibit XI, the trial court failed to "respond meaningfully" to the jury's request (*see People v Malloy*, 55 NY2d at 302). Because defense counsel raised no objection to the trial court's response at the time it was given, this claim is unpreserved and we decline to review it. As an alternative holding, we reject it. The jury's specific request was that the court provide "any additional guidance you have." Here, where the record makes clear that the trial court, after seeking suggestions for additional guidance from both counsel, had no such guidance to offer, "[t]he court was not obligated to go beyond the jury's specific request" (*People v Jiminez*, 244 AD2d 289, 289 [1st Dept 1997], *lv denied* 91 NY2d 927 [1998]). Moreover, the jury never stated that its concerns remained unsatisfied by the trial court's rereading of its original instructions without any further instructions or guidance (*see People v Williams*, 150 AD3d 902, 904 [2d Dept

2017], *lv denied* 29 NY3d 1038 [2017]).

Defendant also challenges the provision by the court of written copies of its complete final jury charge. Counsel offered no objection when the court announced its intention to distribute the charge, or when the court invited exceptions to its charge, which included the detailed limiting instructions on the use of the written charge. Accordingly, this claim is unpreserved, and we decline to review it in the interest of justice (*see People v McFadden*, 162 AD3d 501, 501 [1st Dept 2018], *lv denied* 32 NY3d 939 [2018]).

Further, we reject defendant's argument that the court's distribution of written copies of the final charge without defense counsel's consent constituted a mode of proceedings error not subject to preservation analysis. This is not a case such as *People v Miller* (18 NY3d 704 [2012]), *People v Collins* (99 NY2d 14 [2002]) or *People v Damiano* (87 NY2d 477 [1996]), all of which involved mode of proceedings errors with respect to unauthorized annotations of or court instructions pertaining to verdict sheets in contravention of applicable law (see CPL 310.20). Neither is this a case where the trial court erred in providing the jury with written copies of a complete final charge, or portions thereof, over the defendant's objection (*cf. People v Johnson*, 81 NY2d 980, 982 [1993] [provision to jury of copies of entire

charge over the defendant's objections violates CPL 310.30]; *People v Owens* (69 NY2d 585, 591-592 [1987] [provision to jury of written copies of portions of jury charge over defendant's objection constitutes reversible error]). Here, where defense counsel gave implied consent and where the trial court provided the jury with careful and detailed instructions concerning the use of the written copies of the charge, and there is no showing of prejudice, preservation analysis is applicable (*McFadden*, 152 AD3d at 502).

Additionally, defendant contends that this matter should be remanded for resentencing because the sentencing court improperly considered the counts of predatory sexual assault against a child, of which he was acquitted. Defendant concedes, however, that his trial counsel did not preserve this issue, and we decline to review it in the interest of justice. As an alternative holding, we reject it. When the court stated at sentencing that the trial evidence revealed that defendant "acted as a "predator," it made clear that "defendant was acquitted of the predatory sexual assault against a child counts" and that it was using the term "predator" only "in the colloquial sense" (*see People v Rivers*, 262 AD2d 108, 108 [1st Dept 1999] ["court carefully and explicitly stated on the record that it was imposing sentence solely upon the charges as reflected in the

jury's verdict"], *lv denied* 94 NY2d 828 [1999]).

We perceive no basis for reducing the sentence.

All concur except Renwick, J.P. and Moulton, J. who dissent in part in a memorandum by Renwick, J.P. as follows:

RENWICK, J.P. (dissenting in part)

After a week of jury deliberations, the jury rendered a split verdict; it convicted defendant of sexual abuse in the first degree and endangering the welfare of a child, and it acquitted him of the two charges of predatory sexual assault against a child. On this appeal, the majority affirms defendant's conviction, rejecting defendant's primary argument that the trial court committed numerous errors during jury deliberations that deprived him of a fair trial.[1] I agree with the majority that the trial court's two *Allen* charges provided to the deadlocked jury during deliberations were appropriate. Likewise, I agree that the trial court acted properly by distributing copies of the final charge to the jury with defense counsel's implicit consent.

In my view, however, the trial court committed reversible error by creating a substantial risk of jury coercion during jury deliberations. Specifically, at the end of the day on Friday, knowing the jury remained deadlocked, even after two *Allen* charges, and having been informed that three jurors had extended

[1] In addition to seeking a new trial, defendant seeks resentencing upon the grounds that the sentencing court improperly considered the counts of which he was acquitted and that his sentence was excessive. Because I believe that defendant was denied a fair trial, I do not reach these arguments.

travel plans beginning the following Monday, the court nevertheless granted the jury's request to continue deliberations that afternoon without addressing the schedule conflict presented by the travel plans.

Factual and Procedural Background

This is not a typical case where the jury had no difficulty reaching a verdict. These were extensive jury deliberations that carried on for almost an entire week. At the outset of jury selection, which began on Monday, May 9, 2016, the court told the prospective jurors: "I anticipate in this case you will all be in a position to decide the case no later than the end of next week," i.e., Friday, May 20, 2016.

The jury began deliberations the following Tuesday, May 17, and continued the next day, sending various notes requesting medical records. The jury requested readback of the victim's testimony about certain incidents. It also requested readback of the guardian's testimony about the victim's post-traumatic behavior, among other things.

On the third day of deliberations, Thursday, May 19, the jury sent a note, marked 11:37 a.m., asking: "[W]hat is the process if we can't come to a unanimous decision[?]" The court proposed an *Allen* charge. Defense counsel stated that "to give them an *Allen* would be more coercive than instructive," given

that it was "noon on Thursday" and the jury had been deliberating since "11:30 a.m. on Tuesday." The court responded, "I believe it would be instructive because they've never been given the *Allen* . . . and it's the first time they said they are having difficulty." The court gave an *Allen* charge.

The next morning, Friday, May 20, 2016, the court noted that at the end of the day on Thursday, after the parties had left, "an anonymous juror, who would not give her name, sa[id] she was feeling stressed in the jury room and wanted to speak to the judge. She was told to come in this [Friday] morning and tell an officer that she wanted to speak to the judge and that would be worked out." She responded, "I'll sleep on it and maybe I'll be okay in the morning." The court stated that no juror had requested to speak with the court that morning and concluded "presumably she's okay."

The jury's first note on Friday, which did not indicate the time but was apparently sent before a subsequent 12:28 p.m. note, stated: "We the jury are still having extreme difficulty coming to a unanimous verdict. We feel it might be helpful to re-hear your guidance from yesterday morning and any additional guidance you have."

Defense counsel moved for a mistrial, and the prosecutor suggested "a more forceful *Allen* charge." The court responded,

"I don't know what a stronger *Allen* charge would look like," noting that the court had previously given "the full strong *Allen* charge," not a "modified or abbreviated *Allen*." The court suggested that it was "implicit" in the first *Allen* charge that at some point the jury would need to stop if it was unable to reach a verdict. The court concluded: "I'm just going to give them the Allen charge. None of you have suggestions as additional guidance . . . is that right?" Defense counsel said, "That's right." The court then repeated the prior *Allen* charge to the jury.

At 12:28 p.m., the jury requested readback of the victim's and her guardian's testimony about certain incidents. The court responded to those requests, then instructed the jury to take a lunch break and return at 2:15 p.m.

When the jury returned to the courtroom, the court announced an end to the deliberations for the day and ordered the jury to return on Monday at 9:30 a.m., but then, the jury sent a note with the time incompletely written as "2:" -- suggesting that the note was written sometime after the break ended at 2:15 P.M. and before 3:00 p.m. This note stated: "We the jury request to continue deliberating until 5:00 p.m. or 6:00 p.m. because we are at a critical juncture[]. Also, multiple people have conflicts next week": one juror would be "out of state from Monday thru

[sic] June 5th"; another would be "out of country" for three weeks beginning on Monday; a third would be "out of state" on Monday and Tuesday; and a fourth would be "out of country" beginning Thursday.

The court told the parties, "We will let them keep deliberating." At that point, defense counsel moved for a mistrial arguing that "the scheduling conflicts are a problem [] that could lead to a last minute pressuring." The court responded, "They specifically say they are at the critical juncture. They know . . . what the issues are. They asked for readback. They think they can resolve this. . . . They are asking for a few more hours in fact. So I will give them a few hours they requested."

The court then read the note to the jurors and told them, "Your wish is our command. You may resume your deliberations." The jury's next note, marked 4:35 p.m., stated: "We the jury have reached a verdict." The court accepted the verdict after individual polling upon defense counsel's request.

On or about June 9, 2016, defendant moved to set aside the verdict pursuant to CPL 330.30(2). Although defendant does not argue on appeal that the court should have granted that motion, it is relevant on appeal because it was supported by a statement, notarized June 7, 2016, by the juror who was noted as having

plans to leave the state until June 5, beginning on the Monday following the Friday when four jurors noted their travel plans. This juror averred that she had "anticipated professional disruptions: a conference attendance obligation on May 31 in Montreal and a presentation on June 6 in New York." She recalled that jurors "all began to speculate" about what would happen if they failed to reach a verdict that day, including whether travel plans would need to be canceled or whether the jury would be ordered to resume deliberating after a "hiatus." The juror stated that she was the only juror who wanted to acquit defendant of first-degree sexual abuse, until she changed her vote after deliberation was extended on the last day. She stated that she "always" believed that the evidence did not prove defendant's guilt of that offense beyond a reasonable doubt, but she succumbed to pressure from other jurors. She also believed that this was the only "sensible choice" after the court did not "declare a mistrial after two deadlock notes."

The court denied defendant's motion to set aside the verdict at sentencing on June 24, 2016. As to the juror's statement, the court stated, "I don't know who drafted this for her," but whoever did so was incorrect that the jury sent two "deadlock notes," since the notes did not use the words "deadlocked" or "hopelessly," but merely expressed "difficulty" reaching

unanimity. This appeal ensued.

Discussion

During deliberations, the jury may, at any time, request from the court further instructions or information with respect to the law, with respect to the content or substance of any trial evidence, or with respect to any other matter pertinent to its consideration of the case (CPL 310.30). Although the court has discretion in determining how best to respond to the request, that discretion "is circumscribed . . . by the requirement that the court respond meaningfully to the jury's request" (*People v Malloy*, 55 NY2d 296, 302 [1982], *cert denied* 459 US 847 [1982]). In determining whether a response is meaningful, courts should consider "the form of the jury's question, which may have to be clarified before it can be answered, the particular issue of which inquiry is made, the supplemental instruction actually given and the presence or absence of prejudice to the defendant" (*id.*). The failure to provide a meaningful response constitutes reversible error where the defendant has been prejudiced by it (*People v Louridо*, 70 NY2d 428, 435 [1987]).

Here, unlike the majority, I would find that by merely directing the jury to continue deliberations on Friday afternoon, without addressing the scheduling conflict that was first raised by the jury in the same note seeking an extension of time to

deliberate that afternoon, the trial court failed to "respond meaningfully to the jury's request for further instruction or information" (*People v Malloy*, 55 NY2d at 302; *see* CPL 310.30). While the court's *Allen* charges had mentioned the possibility of ordering a new trial before a different jury, this did not negate the court's duty to address the scheduling conflict, because the court also ordered the jury to continue deliberating for a fifth day, Monday. That instruction, in the absence of any response to the scheduling conflicts, strongly suggested to the jurors with conflicting travel plans that they might need to cancel those plans. These circumstances raised a substantial likelihood that the jury rushed to agree to a verdict due to social pressure to avoid compelling three of their peers, and potentially a fourth, to cancel their travel plans (*see People v Nelson*, 30 AD3d 351 [1st Dept 2006]; *People v DeJesus*, 134 AD3d 463, 465 [1st Dept 2015]).

Ultimately, in responding to the jury note that revealed the scheduling conflict, the trial court failed to make an informed choice from the available alternatives. When defense counsel moved for a mistrial based on the reasonable concern that impending travel plans of four jurors (including three jurors scheduled to leave the state the following Monday) could lead to a coercive atmosphere, there were various ways the jurors'

conflicts could have been accommodated by the trial court. For instance, the court could have granted defense counsel's motion for a mistrial. There were also less drastic remedies, such as directing the jury to continue deliberating over the weekend or ordering the jurors who had conflicting travel plans to cancel those plans. Any of the foregoing alternatives would have been preferable to the court's response to jury notes on the fourth and final day of deliberation, which exerted undue pressure on the jury to reach a verdict.

The majority's finding -- that the circumstances here did not pose an inherent potential risk of a coerced verdict that needed to be addressed by the court -- is not persuasive and is unsupported by the record. The majority reasons that the trial court properly ignored the jury's revelation of a scheduling conflict because the court reasonably construed the subject note "as meaning that the jurors thought that they could quickly resolve any remaining differences among them and agree upon a verdict within hours that same day." It seems the majority misses the point. Whether the trial court surmised that the jury might reach a verdict that day did not eliminate the coercive atmosphere created by the jurors' concern over their conflicting schedules and the trial court's omission of a response to their concerns. Importantly, we must evaluate the possibility of jury

coercion from the perspective of the jurors with the conflicting schedules, not the trial court. The inherent coercive potential of the circumstances as they play upon the minds of the jurors must be considered in order to determine whether the court's action created, exacerbated, or alleviated the situation (*see People v Diaz,* 66 NY2d 744, 746 [1985*]; People v DeJesus*, 134 AD3d at 465*; People v Nelson,* 30 AD3d 351).

Here, from the perspective of the jurors who were experiencing, as they conveyed in their jury notes, "extreme difficulty coming to a unanimous verdict" and who had "multiple people" with scheduling conflicts, certainly it was reasonable to surmise, from the timing of the court's instruction to continue deliberations without addressing the schedule conflicts presented by the travel plans, that a verdict was being demanded before the unavailable jurors would be excused to attend to personal matters. These circumstances created an unacceptably high risk of a coerced verdict: any juror would be too preoccupied to give serious attention to analyzing the evidence and arriving at a personal opinion of guilt or innocence and consequently would simply fall in line with whatever view prevailed among the other jurors, in order to bring the case to a conclusion. Thus, the court's failure to address the scheduling conflict created a substantial possibility that any juror might forsake his or her

duties to deliberate on the merits of the case in favor of promptly reaching a disposition.

Still, the majority argues that "there was no need for the court to address the traveling plans of some jurors for the following week because this did not appear to be a problem." Yet, the very purpose of a jury note is to convey problems, questions, concerns, and issues weighing heavily on the minds of the jurors during the jury deliberations, a critical stage of the trial. Nonetheless, the majority essentially seems to be arguing that the fact that several jurors alerted the judge to their travel plans was not a real expression of their legitimate concerns of a schedule conflict. Like the trial court, the majority fails to appreciate the effect on the jurors' minds of the court's conduct of sending the jurors back to deliberate without addressing the schedule conflict affecting one-third of the jurors, as revealed in their note.

Again, it cannot be overstated that the overriding concern here is whether the jurors with schedule conflicts could reasonably construe the circumstances as coercive. There is every reason to believe that the jurors with conflicts would have perceived the failure to address their schedule conflicts as nothing less than what it appeared to be: a judicially enforced continuation of the deliberative process until a verdict was

reached, even if that meant continuing the next Monday. This threat of continuing deliberations could not be overcome, as the majority suggests, by "indications of the likelihood that a verdict would be reached before the close of the day." The position taken by the majority fails to come to grips with the fact that the court's representation that the following Monday could be devoted to jury duty, in direct conflict with some of the jurors' travel plans, had the clear capacity to cause jurors to reach a verdict based on considerations of jury convenience rather than on the weight of the evidence.

Nor, unlike the majority, would I find assurances that the jury was not coerced simply because it returned the verdict at 4:35 p.m., well before 6:00 p.m. Although the court broadly said, "Your wish is our command," the court was not entirely clear about whether it would end at 5:00 p.m. or extend deliberations to 6:00 p.m. after the jury requested either time. If the jury had expected that it might only have until 5:00 p.m. that Friday, the jurors might have felt that their time was almost up at 4:35 p.m. Even if the jurors believed they had until 6:00 p.m., that hardly refutes the probability that the jurors rushed to agree on a verdict for the sake of ending their participation in the trial rather than genuinely resolving their differences of opinion.

Our evaluation of whether jury coercion undermined a verdict should focus on probabilities, not certainties. Indeed, our analysis is guided by the fundamental legal principle that a defendant in a criminal proceeding has the right to a trial by his peers who are free to deliberate and make an independent personal judgment as to guilt.[2] Circumstances creating a substantial risk of juror coercion undermine the exercise of independent personal judgment during jury deliberations (*see e.g. People v DeJesus*, 134 AD3d at 465). Hence, verdicts potentially traceable to jury coercion should not stand.

Here, of course, we cannot know for sure whether the conflicting jurors surrendered to the pressure to be free or whether other jurors compromised their views to accommodate their own needs or to accommodate their fellow jurors. It is sufficient that the court's granting of the jury's request to continue deliberations, without addressing the scheduling conflict presented by the travel plans of a third of the jurors,

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[2] The right to an impartial jury has long been recognized by both the United States Supreme Court and the New York Court of Appeals as one of the most fundamental rights guaranteed to the accused (*see e.g. Irvin v Dowd*, 366 US 717, 722 [1961] [indicating that when the accused is denied a fair hearing by an impartial jury "even the minimal standards of due process" are violated]; *People v McQuade*, 110 NY 284, 300 [1888] [referring to "the fundamental rule that an accused person is entitled to be tried by a fair and impartial jury"]).

created a substantial risk of distracting the jury in its deliberations. Although exactly how the jury was divided was not revealed to the trial court, we can safely infer that a minority of the jurors (at least one) was not initially in favor of a guilty verdict, as suggested by the lengthy deliberations and the need to provide the jurors with two *Allen* charges. The fact that the jurors had trouble reaching a verdict indicates that to them, at least, the case was not as open and shut as it appears to the majority. Under the circumstances, a substantial risk of a coerced verdict was present here.

Moreover, while the court was correct that the description by the juror who made the statement of feeling pressured into changing her dissenting vote would not normally present an exception to the general rule that a verdict may not be impeached by probes into the jury's deliberative process, the juror's account of the jury room after the deliberation was extended provided further support for an inference that a substantial risk of a coerced verdict was present here.

Finally, the majority's holding that the trial court did not have to address the potential coercive atmosphere is at odds with *People v DeJesus* (134 AD3d 463), a recent case presenting similar facts. In *DeJesus*, this Court concluded that circumstances analogous to those in this case were impermissibly coercive.

This Court explained:

> "The court . . . indicated that the jury would likely continue deliberating into the next week although jurors had been told during jury selection that the case would be over by the aforementioned Friday, raising concerns for one juror who was going to start a new job the following Monday and another juror who was solely responsible for his child's care in the first three days of the next week. After the court informed the latter juror that he would be required to show up the next week despite the juror's purportedly fruitless efforts to obtain alternative childcare, and then brought the juror back into the courtroom solely to reiterate that point more firmly, the jury apparently returned its verdict within less than nine minutes, at about 3:29 p.m. on the Friday. The totality of the circumstances supports an inference that the jury was improperly coerced into returning a compromise verdict" (*id.* at 465 [citations omitted]).

In the instant case, the court was apparently not aware of such specific information about the jurors' travel plans and whether they might have been able to reschedule their plans, due to its failure to address the travel conflicts on the record. In the absence of further details, the court could have presumed that at least the two jurors who planned to be out of the state or country for about three weeks beginning the following Monday had plans that would have been impractical to change at the last minute. These circumstances were analogous to that of the juror in *DeJesus* who had been unable to find childcare for the Monday following the Friday when the note was sent. To be sure, the instant case involving a child witness's testimony about sexual

conduct is more complex than *DeJesus*, a "one-witness identification case" of assault (*id.* [internal quotation marks omitted]). However, even if the sheer length of deliberations here was not objectively unusual, what is more significant is that the jurors were likely surprised and frustrated at being ordered to continue deliberating into the week after the date by which the court had originally anticipated that their obligations would end.

In short, the constitutional guarantee of trial by jury contemplates a jury free of judicial or other coercion. The events in this case reflect the unfortunate and substantial possibility that some jurors were improperly coerced by an improper supplemental instruction.

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

ENTERED: APRIL 4, 2019

CLERK

Sweeny, J.P., Renwick, Gische, Kahn, Kern, JJ.

8586 The People of the State of New York, Respondent, Ind. 7117/02

-against-

Rovell Washington, Defendant-Appellant.

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Christina Swarns, Office of The Appellate Defender, New York (Stephen R. Strother of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered June 25, 2008, as amended July 31, 2008, convicting defendant, after a jury trial, of rape in the first degree (three counts) and criminal possession of a weapon in the third degree (two counts), and sentencing him, as a second violent felony offender, to an aggregate term of 25 years, unanimously affirmed.

The court properly found defendant fit to proceed to trial following CPL article 730 examinations. Defendant's answers to questions about the legal process showed that he "evinced an understanding of the purpose of a trial, the actors in a trial, their roles, the nature of the charges against him, and the severity of a potential conviction and sentence" (*People v Phillips*, 16 NY3d 510, 518 [2011]). Defendant had a psychiatric history and reports from psychiatrists over a period of years

that alternated between finding him competent to stand trial at times and incompetent at other times. There is no basis for disturbing the court's finding, based on the most recent psychiatric report and the court's own observations, that defendant was exaggerating psychiatric symptoms to avoid trial (*see id.* at 517-518), and that he could presently understand the proceedings and assist in his defense (*People v Jimenez*, 144 AD3d 402 [1st Dept 2016], *lv denied* 29 NY3d 1128 [2017]). Defendant's frequently obstreperous and violent behavior in court did not necessarily render him unfit (*see People v Findley*, 160 AD3d 492, 493 [1st Dept 2018], *lv denied* 31 NY3d 1116 [2018]).

In the circumstances presented, the court did not err when it determined that defendant's trial would commence notwithstanding that a different judge had ordered a sixth CPL article 730 examination, which had not yet been conducted because the defendant refused to be examined (*see e.g. People v Torres*, 194 AD2d 488 [1st Dept 1993], *lv denied* 82 NY2d 727 [1993]). The court acted within its discretion to decline to repeatedly issue force orders to compel defendant's submission to the extant competency examination order. Furthermore, the court considered the long history of examinations in this case and its own observations of defendant over its prolonged history. We find nothing in *People v Armlin* (37 NY2d 167 [1975]) that prohibits a

court from considering changed or extraordinary circumstances in denying a previously granted examination, particularly given defendant's profound lack of cooperation and a recent examination finding him competent.

We find that the trial court should have suppressed the 12 inch knife recovered by the police during a warrantless search of defendant's bag. Although at the time of the search the bag was on the floor within the "grabbable area" next to defendant, he was standing with his arms handcuffed behind his back (*People v Gokey*, 60 NY2d 309, 312 [1983]). These circumstances do not support a reasonable belief that the defendant could have either gained possession of a weapon or destroyed evidence located in the bag. Police did not show any exigency to justify the warrantless search of the bag (*People v Gokey supra* at 312).

Nonetheless any error in admitting the actual knife into evidence was harmless (*see People v Crimmins*, 36 NY2d 230, 237, [1975]). One rape charge did not involve the use of a knife and it is unaffected by the suppression ruling. There was overwhelming evidence to sustain the other convictions for rape by forcible compulsion and for criminal possession of a weapon, i.e. the knife, used in the commission of the rapes.

Each victim testified in great detail, identifying defendant and his use of a knife during the rapes. There was also DNA

evidence before the jury. One victim testified that defendant pulled a "very big knife," approximately 9 to 12 inches long, from a sheath at his waist. He held it to her neck as they rode the elevator and continue to hold it throughout the attack. The second victim also testified that she was raped at knife point. She described how defendant pulled the knife out from a leather case by his side and stuck it to her back. He raped her while holding the knife and then placed it on a windowsill where she could see it (*see People v Encarnation*, 25 AD3d 491 [1st Dept 2006], *lv denied* 6 NY3d 833 [2006]; *People v Shelton*, 175 AD2d 887, 888 [2d Dept 1991]).

The court providently exercised its discretion in precluding defendant from raising a psychiatric defense relating to the element of intent, in the absence of any showing that defendant's proffered expert testimony would be relevant to his intent to commit the crimes with which he was charged (*see People v Silburn*, 31 NY3d 144, 161 [2018]; *People v Almonor*, 93 NY2d 571, 582 [1999]).

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

ENTERED: APRIL 4, 2019

CLERK

Richter, J.P., Gische, Kern, Moulton, JJ.

8723 Salans LLP, Index 650747/13
Plaintiff-Appellant,

-against-

VBH Properties S.R.L., et al.,
Defendants,

VBH Luxury, Inc., et al.,
Defendants-Respondents.

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Elman Freiberg PLLC, New York (Howard I Elman of counsel), for appellant.

Reitler Kailas & Rosenblatt LLC, New York (Brian D. Caplan of counsel), for respondents.

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Order, Supreme Court, New York County (Debra A. James, J.), entered July 26, 2018, which denied plaintiff's motion for summary judgment dismissing defendants VBH Luxury, Inc. (Luxury) and Vernon Bruce Hoeksema's counterclaims, unanimously reversed, on the law, without costs, the motion granted in its entirety, and the counterclaims dismissed. The Clerk is directed to enter judgment accordingly.

Defendants VBH S.R.L. and Atelier Realm N.V. were not served and did not appear in this action. Defendants Luxury and Hoeksema do not contest that to the extent counterclaims are based on their alleged damages, the counterclaims must be dismissed.

Contrary to plaintiff's argument, the scope of the work it performed under the 2008 retainer agreement, which included not only numerous contracts and negotiations but also employment litigation in the U.K., makes it at least reasonable to construe the agreement as authorizing plaintiff to represent Luxury and Hoeksema in the underlying loan action (*see Shaw v Manufacturers Hanover Trust Co.*, 68 NY2d 172, 177 [1986] [where there is ambiguity in retention agreement, agreement is construed in favor of client]).

However, plaintiff demonstrated prima facie entitlement to judgment in the legal malpractice counterclaim by showing that defendants could not prove that but for plaintiff's failure to appear at the TRO hearing the hearing court would have denied the TRO or set a shorter return date (*see Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 272 [1st Dept 2004] [holding that to establish a claim for litigation malpractice the client "must meet the 'case within a case' requirement, demonstrating that 'but for' the attorney's conduct the client would have prevailed in the underlying matter or would not have sustained any ascertainable damages"]). Defendants speculate that had plaintiff appeared at the TRO hearing, injunctive relief may have been denied or the hearing court may have adjourned the case to an earlier date. Such speculation is

insufficient to sustain a claim for legal malpractice (*see Freeman v Brecher*, 155 AD3d 453, 453 [1st Dept 2017]; *Brooks v Lewin*, 21 AD3d 731, 734-735 [1st Dept 2005], *lv denied* 6 NY3d 713 [2006]).

Furthermore, the record shows that, after the TRO was entered, plaintiff refrained from raising defenses as a reasonable strategy to prevent Hoeksema, the individual client, from being liable on his personal guaranty pursuant to a so-called "bad boy" clause in the loan agreements (*see Morrison Cohen Singer & Weinstein v Zuker*, 203 AD2d 119 [1st Dept 1994]).

The counterclaims relating to the December 28, 2011 retainer agreement must be dismissed because Luxury and Hoeksema, as they concede, did not show any injury proximately caused by the existence, for approximately one week, of that agreement (*see Weil, Gotshal & Manges, LLP,* 10 AD3d at 271-272).

Luxury and Hoeksema contend that there is a conflict of interest in plaintiff's representation of both of them. However, as Hoeksema is the sole owner, director and officer of Luxury, there is no conflict (*see Topic: Concurrent Representation of Corporation and Sole Shareholder, Director and Officer* (NY St Bar Assn Comm on Prof Ethics Op 868 [May 31, 2011]). Moreover, Luxury and Hoeksema failed to show any injury caused by the alleged conflict.

The breach of contract counterclaim must be dismissed because Luxury and Hoeksema do not contest that they never paid the alleged overcharge that breached the contract, and thus sustained no damages (*see Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 [1st Dept 1988]).

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

ENTERED: APRIL 4, 2019

CLERK

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

8886 The People of the State of New York, Ind. 630/15
Respondent,

-against-

James Sharpe,
Defendant-Appellant.

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Christina Swarns, Office of the Appellate Defender, New York (William Kendall of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Lee M. Pollack 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, New York County (Jill Konviser, J.), rendered November 24, 2015,

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

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

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

ENTERED: APRIL 4, 2019

CLERK

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

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

8887 Hayden E. Mendoza, Index 304454/14
Plaintiff-Appellant,

-against-

L. Two Go, Inc., et al.,
Defendants-Respondents.

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Mitchell Dranow, Sea Cliff, for appellant.

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

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about December 4, 2017, which granted defendants' motion for summary judgment dismissing the complaint based on plaintiff's inability to establish that he suffered a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants established prima facie that plaintiff did not suffer a serious injury to his cervical or lumbar spine through the affirmed reports of their radiologist and neurologist, who found that plaintiff's CT scans were normal, plaintiff had full range of motion, and there was no evidence of traumatic injury (*see Holloman v American United Transp. Inc.*, 162 AD3d 423, 423 [1st Dept 2018]; *Hernandez v Marcano*, 161 AD3d 676, 677 [1st Dept 2018]). Defendants also relied on plaintiff's deposition

testimony that he reinjured the same body parts in an accident one year later.

In opposition, plaintiff submitted radiologist's reports finding that plaintiff had bulging and herniated discs in his spine after the subject accident, but did not provide competent medical evidence of the extent and duration of the disc injury sufficient to raise an issue of fact as to whether those conditions constituted a "serious injury" (*see DeJesus v Paulino*, 61 AD3d 605, 608 [1st Dept 2009]; *see also Pommells v Perez*, 4 NY3d 566, 574 [2005]*; Rivera v Gonzalez*, 107 AD3d 500, 500 [1st Dept 2013]). Plaintiff's neurologist found only a minor limitation in one plane of lumbar spine range of motion and no limitations in cervical range, which was insufficient to demonstrate a serious injury involving significant or permanent limitations in use (*see Nakumara v Montalvo*, 137 AD3d 695, 696 [1st Dept 2016]; *Phillips v Tolnep Limo Inc.*, 99 AD3d 534 [1st Dept 2012]). Further, the neurologist's opinion that plaintiff's current limitation was caused by the subject accident was speculative, as he failed to address the impact of plaintiff's subsequent accident (*see Zhijian Yang v Alston*, 73 AD3d 562, 563 [1st Dept 2010]).

As for plaintiff's 90/180 day claim, defendants, relying on his admissions in his deposition, met their initial burden, and plaintiff offered no competent medical evidence in support of the claim.

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

ENTERED: APRIL 4, 2019

CLERK

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

8888-
8889 In re Terrence B.,

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

Terrence J.B.,
Respondent-Appellant,

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

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Steven N. Feinman, White Plains, for appellant.

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

Dawne A. Mitchell, The Legal Aid Society, New York (Riti P. Singh of counsel), attorney for the child.

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Order of fact-finding and disposition (one paper), Family Court, New York County (Emily Olshansky, J.), entered on or about March 26, 2018, to the extent it found that respondent-father neglected the subject child, unanimously affirmed, without costs. Appeal from order, same court and Judge, entered on or about March 26, 2018, which granted the subject child an order of protection directing respondent to stay away from the child and refrain from communicating with him in any way until the child's 18th birthday, unanimously dismissed, without costs, as abandoned.

A preponderance of the evidence supports the Family Court's finding that respondent neglected the subject child by engaging

in multiple verbal and physical altercations with the child's mother, and inflicting physical violence upon her, while the child was present in the home, on at least two occasions (*see Matter of Carmine G. [Franklin G.]*, 115 AD3d 594 [1st Dept 2014]). The child's educational records indicating that he displayed "overly-aggressive and uncooperative" behavior towards teachers and peers and had "significant" behavioral difficulties at home demonstrate that the child was at imminent risk of emotional and physical impairment as a result of the acts of domestic violence (*see Matter of Gargano v New York State Off. of Children & Family Servs.*, 133 AD3d 556 [1st Dept 2015]; *Matter of Jeaniya W.[Jean W.]*, 96 AD3d 622 [1st Dept 2012]; *see also Nicholson v Scoppetta*, 3 NY3d 357, 371-372 [2014]).

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

ENTERED: APRIL 4, 2019

CLERK

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

8890 Peter Paul Biro, Index 154663/17
Plaintiff-Appellant,

-against-

Condé Nast, a division of Advance Magazine Publishers Inc.,
Defendant-Respondent.

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Law Office of Richard A. Altman, New York (Richard A. Altman of counsel), for appellant.

Ballard Spahr LLP, New York (David A. Schulz of counsel), for respondent.

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Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered June 12, 2018, which, inter alia, granted defendant's motion to dismiss the complaint as barred by the statute of limitations, unanimously affirmed, without costs.

Contrary to plaintiff's contention, the email sent by defendant to New Yorker magazine subscribers in April 2017 containing a hyperlink to an article published in the magazine in July 2010 does not constitute republication of the article (*see Martin v Daily News L.P.*, 121 AD3d 90, 103-104 [1st Dept 2014], *lv denied* 24 NY3d 908 [2014]). The article was unmodified and had been continuously archived on the same website since the printed version was first published. Moreover, it is not alleged that the 2017 email, which included the link to the article in

controversy, contained any defamatory statements about plaintiff. A reference to an article that does not restate the defamatory material is not a republication of the material (*see Klein v Biben*, 296 NY 638 [1946]). This action is therefore barred by the one-year statute of limitations for defamation claims (CPLR 215[3]), which generally accrues on the date of the first publication (*Gregoire v Putnam's Sons*, 298 NY 119, 123 [1948]; *see also Firth v State of New York*, 98 NY2d 365, 370 [2002]).

In light of the foregoing, we do not reach plaintiff's remaining contentions.

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

ENTERED: APRIL 4, 2019

CLERK

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

8891 Karen George, Index 651869/16
Plaintiff-Respondent,

-against-

Timothy Duignan, et al.,
Defendants-Appellants.

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Clark's Laws, P.C., Babylon (Adam Crowley of counsel), for appellants.

Law Office of Mark H. Goldey, New York (Mark H. Goldey of counsel), for respondent.

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Judgment, Supreme Court, New York County (Jeremy Feinberg, Special Referee), entered February 16, 2018, awarding plaintiff the total sum of $330,789.18, and bringing up for review an order, same court and Referee, entered on or about January 30, 2018, which awarded plaintiff damages of $266,502.35, together with interest and counsel fees, unanimously affirmed, without costs.

The IAS court properly granted plaintiff's motion for summary judgment on defendants' liability under the note and security agreement and properly referred the matter to the referee for a hearing on damages. Defendants failed to present any evidence that the sale of the truck held as collateral was not commercially reasonable under UCC 9-610(b). Defendants did not retain an expert to opine as to the value of the vehicle, but

even if they had, "a sale for 'a price much less than the original price does not by itself create a triable issue of fact'" (*Dougherty v 425 Dev. Assoc.*, 93 AD2d 438, 446 [1st Dept 1983]). 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 4, 2019

CLERK

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

8892 In re Schaffer, Schonholz & Drossman, LLP,
Petitioner,

-against-

Rachel S. Title, M.D.,
Respondent.

Index 1602015/18

Hughes Hubbard & Reed LLP, New York (Amina Hassan of counsel), for petitioner.

Richard A. Klass, Brooklyn, for respondent.

Upon facts submitted to this Court pursuant to CPLR 3222 (b)(3), it is declared that petitioner is entitled to the cash proceeds resulting from the demutualization of nonparty Medical Liability Mutual Insurance Company (MLMIC). The Clerk of Supreme Court, New York County is directed to enter judgment awarding petitioner said cash proceeds, including interest accrued while the proceeds were in escrow.

Although respondent was named as the insured on the relevant MLMIC professional liability insurance policy, petitioner purchased the policy and paid all the premiums on it. Respondent does not deny that she did not pay any of the annual premiums or any of the other costs related to the policy. Nor did she bargain for the benefit of the demutualization proceeds. Awarding respondent the cash proceeds of MLMIC's demutualization

would result in her unjust enrichment (*see Ruocco v Bateman, Eichler, Hill, Richards, Inc.*, 903 F2d 1232, 1238 [9th Cir 1990], *cert denied* 498 US 899 [1990]; *Chicago Truck Drivers, Helpers & Warehouse Workers Union [Ind.] Health & Welfare Fund v Local 710, Intl. Bhd. of Teamsters, Chicago Truck Drivers, Helper and Warehouse Workers Union [Ind.] Pension Fund*, 2005 WL 525427, *4, 8, US Dist LEXIS 42877, *10-11, 21-22 [ND Ill, Mar. 4, 2005]).

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

ENTERED: APRIL 4, 2019

CLERK

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

8893 The People of the State of New York, Respondent, Ind. 2193/14

-against-

Kareem Hendricks, Defendant-Appellant.

Michael E. Lipson, Jericho, for appellant.

Judgment, Supreme Court, New York County (Edward McLaughlin, J.), rendered December 3, 2014, unanimously affirmed.

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

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

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

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

ENTERED: APRIL 4, 2019

CLERK

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

8894 Walsam 316, LLC, et al., Index 153318/17
Plaintiffs-Respondents,

-against-

316 Bowery Realty Corp. et al.,
Defendants,

4-6 Bleecker Street LLC,
Defendant-Appellant.

_____

Herrick, Feinstein LLP, New York (Sean E. O'Donnell of counsel), for appellant.

Kasowitz Benson Torres LLP, New York (Mitchell Schrage of counsel), for respondents.

_____

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered October 2, 2018, which, insofar as appealed from as limited by the briefs, granted plaintiffs' motion to cancel defendant 4-6 Bleecker Street LLC's notice of pendency, unanimously affirmed, without costs.

The court properly cancelled 4-6 Bleecker's notice of pendency. Pursuant to CPLR 6501, "[a] notice of pendency may be filed in any action . . . in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property, except in a summary proceeding brought to recover the possession of real property." Here, 4-6 Bleecker seeks only a money judgment and has not asserted any claim that would directly

affect title to, or the possession, use or enjoyment of, real property.

Based on the foregoing, this Court need not address appellant's remaining arguments.

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

ENTERED: APRIL 4, 2019

CLERK

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

8895 & M-1150 315 West 103 Enterprises LLC, et al., Plaintiffs-Respondents, Index 155205/17

-against-

Richard A. Robbins, Defendant-Appellant.

- - - - -

The Public Participation Project, Amicus Curiae.

_____

Public Citizen Litigation Group, Washington, D.C. (Paul Alan Levy of the bar of the District of Columbia, admitted pro hac vice, of counsel), for appellant.

Goldberg Weg & Markus PLLC, New York (Steven A. Weg of counsel), for respondents.

Boies Schiller Flexner LLP, Armonk (Lisa Sokolowski of counsel), for amicus curiae.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered January 5, 2018, which, to the extent appealed from as limited by the briefs, denied defendant's motion to dismiss the complaint as moot and denied defendant's requests in such motion for compensatory damages, punitive damages, and attorneys' fees and costs, unanimously affirmed, without costs.

In this defamation action arising from defendant's alleged phone calls to 311 complaining about plaintiffs' construction project next door, Supreme Court granted plaintiffs' motion to discontinue the action by order entered on or about November 13,

2017 (CPLR 3217[b]) and subsequently denied defendant's motion to dismiss as moot (*see* CPLR 3211[a][7], [g]). Whereas "[a] defendant in an action involving public petition and participation . . . may maintain an action, claim, cross claim or counterclaim to recover damages, including costs and attorney's fees, from any person who commenced or continued such action" against him or her (Civil Rights Law § 70-a[1]), contrary to defendant's contention, that provision, which "is in derogation of the common law and must be strictly construed" (*Hariri v Amper*, 51 AD3d 146, 151 [1st Dept 2008]), does not provide for such recovery by motion to dismiss (*id.* at 150; CPLR 3211[g]; *see Harris v Ward Greenberg Heller & Reidy LLP*, 151 AD3d 1808, 1809 [4th Dept 2017] [holding that a motion to dismiss is not a pleading]).

As Supreme Court's grant of the motion to discontinue "dispose[d] of all of the causes of action between the parties in the action . . . and le[ft] nothing for further judicial action apart from mere ministerial matters," defendant's appeal does not bring up the November 13, 2017 order for review (*Burke v Crosson*, 85 NY2d 10, 15 [1995]). Regardless, as the discontinuance was without prejudice, it does not affect defendant's right of action to recover damages or fees should he make the requisite showings (CPLR 3217[c]; Civil Rights Law § 70-a[2]).

M-1150 - ***315 West 103 Enterprises LLC v Richard A. Robbins***

Motion for leave to file amicus curiae brief granted, and the brief deemed filed.

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

ENTERED: APRIL 4, 2019

CLERK

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

8896 Solomon Capital, LLC, et al., Index 651881/16
Plaintiffs-Respondents,

-against-

Lion Biotechnologies, Inc.,
Defendant-Appellant.

_____

Troy Gould PC, Los Angeles, CA (Russell I. Glazer of the bar of the State of California, admitted pro hac vice, of counsel), for appellant.

Proskauer Rose LLP, New York (Mark D. Harris of counsel), for respondents.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered August 15, 2018, which, to the extent appealed from as limited by the briefs, granted plaintiffs' motion to dismiss the eleventh affirmative defense and the first through fourth counterclaims as against plaintiffs Solomon Capital, LLC, Solomon Capital 401(k) Trust, and Solomon Sharbat, unanimously reversed, on the law, with costs, and the motion denied.

Accepting the allegations in the answer as true, and according defendant the benefit of every possible favorable inference, we find that the eleventh affirmative defense and first through fourth counterclaims are adequately pleaded.

In support of the eleventh affirmative defense and first counterclaim alleging fraudulent inducement (*see Eurycleia*

Partners, LP v Seward & Kissel, LLP, 12 NY3d 553, 559 [2009]), defendant alleges, as relevant herein, that, during a conference call with its CEO and CFO, plaintiff Solomon Sharbat, who was at the time a registered broker dealer with the Financial Industry Regulatory Authority (FINRA), represented, on behalf of himself and the other plaintiffs, that he had previously run a publicly traded U.S. company, that he had raised hundreds of millions of dollars for other biotech companies, that he had "massive investors" who were prepared to invest in defendant, and that these investments were "a done deal." Sharbat allegedly later asserted that he "had obtained high-value investors for [defendant] in Israel."

The statement that investments were "a done deal" is mere puffery; it has no fixed meaning (*see Sidamonidze v Kay*, 304 AD2d 415 [1st Dept 2003]).

However, Sharbat's statements that he had "massive investors" who were prepared to invest in defendant and that he "had obtained high-value investors for [defendant] in Israel," while partially hyperbolic, make concrete factual representations that go beyond mere puffery. Simply stated, Sharbat asserted that he had investors lined up and ready to go, when in fact he had none. Since plaintiffs were retained by defendant to bring investors in, these statements constitute misrepresentations of

material facts for purposes of the fraudulent inducement counterclaim (*see Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 [1st Dept 2002]). Finally, the statements that Sharbat had previously run a publicly traded U.S. company and that he had raised hundreds of millions of dollars for other biotech companies are concrete and measurable misrepresentations about Sharbat's experience (*see White v Davidson*, 150 AD3d 610, 611 [1st Dept 2017]).

It is undisputed that defendant adequately alleged scienter. In addition, it adequately alleged justifiable reliance (*see Knight Sec. v Fiduciary Trust Co.*, 5 AD3d 172, 173 [1st Dept 2004]). Thus, defendant adequately pleaded its affirmative defense of fraudulent inducement seeking rescission of the parties' agreement (*see People v Credit Suisse Sec. [USA] LLC*, 31 NY3d 622, 639 [2018] [Paul G. Feinman, J., concurring]; *Jack Kelly Partners LLC v Zegelstein*, 140 AD3d 79, 85 [1st Dept 2016], *lv dismissed* 28 NY3d 1103 [2016]).

Defendant stated a counterclaim for fraudulent inducement by pleading the additional element of damages, in the form of expenses incurred, at Sharbat's insistence, in retaining nonparty investment bank New World Merchant Services LLC to prepare for a securities offering anticipated based on investment monies promised by plaintiffs. Defendant was not required to plead its

damages with particularity; CPLR 3016(b) requires only that, for claims or defenses based on fraud, "the circumstances constituting the *wrong* shall be stated in detail [emphasis added]" (*see A.S. Rampell, Inc. v Hyster Co.*, 3 NY2d 369, 383 [1957]; *Kensington Publ. Corp. v Kable News Co.*, 100 AD2d 802, 802 [1st Dept 1984]).

The allegations that plaintiffs failed to disclose a FINRA investigation into Sharbat and the resulting FINRA complaint and eventual default judgment barring him from serving as a broker-dealer state a counterclaim for fraudulent concealment, under the special facts doctrine (*see P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 376, 378 [1st Dept 2003]). The initiation of the investigation was known to plaintiffs but was not a matter of public record and could not be discovered by defendant. Moreover, Sharbat was declining to cooperate with the investigation, with the predictable result that he ended up losing his broker-dealer license. Sharbat's being stripped of a financial license by a regulatory authority for impropriety could reasonably be expected to destroy defendant's confidence in him, whether or not the license was being used in their financial transaction.

In support of the counterclaim for breach of fiduciary duty, defendant alleges that plaintiffs were retained to "broker"

investments for it by "represent[ing] it in its efforts to obtain investors both in the United States and abroad, in Israel," and that they advised defendant to retain New World "to provide investment banking services for an offering that would be funded from the investments [they] would broker." Defendant further alleges that plaintiffs billed it for more than $135,000 in expenses that they claimed they had incurred in their efforts to secure investors, and that, at plaintiffs' instance, defendant gave plaintiffs a promissory note in the amount of $135,000, plus 67,500 shares of stock, as well as a right to participate in the next round of financing "on the same terms offered to the investors that [plaintiffs] would bring to [defendant]." These allegations plead a broker-principal relationship sufficient to impose a fiduciary duty on plaintiffs vis-a-vis defendant (*see EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19-20 [2005]). Plaintiffs' fiduciary role carried with it a duty to disclose material facts, including developments and filings in the FINRA investigation (*see Allen v Westpoint-Pepperell, Inc.*, 945 F2d 40, 45 [2d Cir 1991]).

Defendant alleges that plaintiffs negligently misrepresented that they were able to represent it in obtaining investors and facilitating the issuance of securities to raise capital for it, that they were skilled in obtaining financing from "high-value

investors," that they "had qualified, high-value investors who were to invest in [defendant]," and that plaintiffs themselves were qualified to invest in defendant. Defendant further alleges that plaintiffs made these misrepresentations with the intent of inducing it to rely on them and that it relied on the misrepresentations to its detriment by, among other things, incurring fees and expenses in retaining New World and attempting to make a securities offering with New World. These allegations state a counterclaim for negligent misrepresentation (*see Kimmell v Schaefer*, 89 NY2d 257, 263-264 [1996]; *Krog Corp. v Vanner Group, Inc.*, 158 AD3d 914, 918 [3d Dept 2018]).

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

ENTERED: APRIL 4, 2019

CLERK

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

8897 The People of the State of New York, Respondent, Ind. 1076/15

-against-

Joel Almonte, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J. at alibi preclusion; Arlene D. Goldberg, J. at jury trial and sentencing), rendered September 10, 2015, convicting defendant of two counts of assault in the first degree, and sentencing him, as a second violent felony offender, to concurrent terms of 15 years, unanimously affirmed.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*People v Danielson*, 9 NY3d 342, 348-349 [2007]). Moreover, we find the evidence to be overwhelming. There is no basis to disturb the jury's credibility determinations. Although there was no direct evidence linking defendant to the crime, the circumstantial evidence, including testimony about defendant's location, activity and attire minutes before the assault, permits no

reasonable inference except that defendant was the assailant depicted in a videotape slashing the victim's face (*see People v Thompson*, 6 AD3d 319 [1st Dept 2004], *lv denied* 3 NY3d 649 [2004]). Defendant's challenge to the proof of disfigurement required for one of his assault convictions (*see* Penal Law § 120.10[2]) is unavailing. The evidence adduced at trial established that there was only a six month lapse between injury and trial and included uncontroverted medical testimony that the victim suffered a severe and permanent disfiguring laceration that penetrated three layers of skin and required 100 stitches to close. Although the victim did not testify, photographs and expert testimony supported the conclusion that she remained seriously disfigured (*see generally People v McKinnon*, 15 NY3d 311, 316 [2010]).

Defendant did not preserve his argument that he was constitutionally entitled to present alibi testimony notwithstanding his failure to file a timely and sufficient alibi notice under CPL 250.20 (*see People v Brown*, 306 AD2d 12 [1st Dept 2003], *lv denied* 100 NY2d 592 [2003]), and we decline to review it in the interest of justice. As an alternative holding, we find that although the notice was untimely, as well as being defective in that it only stated the location of the alibi (defendant's residence) without naming any witnesses, preclusion

was improper because the record does not support a finding of willfulness (*see Taylor v Illinois*, 484 US 400, 414-415 [1988]). Nevertheless, we find that the error was harmless (*see People v Crimmins*, 36 NY2d 230, 237 [1975]). As noted, the proof of identity was overwhelming, and defendant never named any alibi witnesses or provided any details of any potential testimony. Accordingly, there is nothing to indicate that alibi testimony would have had any possibility of affecting the verdict.

Defendant's claim that his counsel rendered ineffective assistance by failing to file a timely and proper alibi notice is unreviewable on direct appeal because, as noted, it involves matters outside the record relating to the existence and value of any potential alibi testimony. Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claim may not be addressed on appeal (*see People v Alvarez*, 223 AD2d 401 [1st Dept 1994], *lv denied* 88 NY2d 980 [1996]).

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

ENTERED: APRIL 4, 2019

CLERK

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

8898 The People of the State of New York, Respondent, Ind. 1924/13

-against-

Dwayne Gentles, Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Joshua P. Weiss of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Miriam Best, J.), rendered August 13, 2015, convicting defendant, after a jury trial, of overdriving, torturing, and injuring animals (Agriculture & Markets Law § 353), and sentencing him to a term of one year, unanimously reversed, as a matter of discretion in the interest of justice, and the matter remanded for a new trial.

We find that there was an unpreserved error warranting reversal in the interest of justice. As the People essentially concede, the court's jury charge constructively amended the indictment (*see People v Kaminski*, 58 NY2d 886 [1982]). The indictment was limited to a theory that defendant personally mistreated his dog. However, the court read Agriculture & Markets Law § 353 to the jury almost in its entirety, including a provision that would allow the jury to convict defendant if he

merely permitted another person to mistreat his dog. Unlike ordinary accessorial liability under Penal Law § 20.00, this theory of "permitting" is an entirely different way of committing the crime from personally mistreating the animal. This error was not harmless, because there was evidence from which a reasonable jury could have inferred that defendant took the blame for his dog's condition to cover for his uncle, who lived with defendant and made inconsistent statements about whether he witnessed defendant beating the dog.

However, the fact that defendant has completed his sentence does not warrant dismissal of the indictment. That approach is suitable only in cases of "relatively minor crimes" (*People v Burwell*, 53 NY2d 849, 851 [1981]), and this case involves "serious" allegations (*People v Extale*, 18 NY3d 690, 696 [2012]) of abusing an animal. Accordingly, we remand for a new trial.

Since we are ordering a new trial, we need not reach defendant's remaining arguments.

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

ENTERED: APRIL 4, 2019

CLERK

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

8899 The People of the State of New York, Respondent, Ind. 6143/09

-against-

Paulino Camacho, Defendant-Appellant.

Christina A. Swarns, Office of the Appellate Defender, New York (Daniel R. Lambright of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered December 3, 2010, as amended January 11, 2011, convicting defendant, after a jury trial, of criminal possession of stolen property in the fourth degree and criminal possession of a controlled substance in the seventh degree, and sentencing him, as a second felony offender, to an aggregate term of two to four years, unanimously affirmed.

Defendant did not preserve his legal sufficiency claims regarding the elements of criminal possession of stolen property, or his related claim regarding the prosecutor's summation, and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence,

including defendant's implausible and conflicting explanations, amply supported inferences that defendant knew that a car in his possession was stolen (*see People v Zorcik*, 67 NY2d 670, 671 [1986]), and that he intended to permanently deprive the car's owner of his property (*see People v Kirnon*, 39 AD2d 666, 667 [1972], *affd* 31 NY2d 877 [1972]).

Defendant's challenge to the court's response to a jury note is also unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we find that the court provided a meaningful response (*see People v Malloy*, 55 NY2d 296 [1982], *cert denied* 459 US 847 [1982]) and that the response could not have caused any prejudice in light of the evidence presented at trial.

While portions of the courts *Sandoval* ruling, specifically the admission of two stale felony convictions (entered in excess of 25 years prior) and the underlying facts of all 13 convictions

(including the inflammatory details of a conviction for lewd public behavior) constituted an abuse of discretion, any error in the ruling is harmless in light of the overwhelming evidence of defendant's guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

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

ENTERED: APRIL 4, 2019

CLERK

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

8900-
8901 Index 314195/14

Caroline Anne Sitbon-Robson,
Plaintiff-Appellant,

-against-

Jonathan Robson,
Defendant-Respondent.

_____

Advocate, LLP, New York (Jason A. Advocate of counsel), for appellant.

Elliott Scheinberg, New City, for respondent.

_____

Order, Supreme Court, New York County (Laura E. Drager, J.), entered May 9, 2018, which, as limited by the briefs, directed that, if the marital residence was not sold by June 30, 2018, the parties were to confer with their broker, and set the asking price at an amount determined by the broker, and permitted the parties to apply for a receiver to sell the property if not sold by September 30, 2018, unanimously modified, on the law, to delete the court's directives and, as so modified, affirmed, without costs. Appeal from order, same court and Justice, entered June 11, 2018, which, as limited by the briefs, declined to sign a portion of an order to show cause, unanimously dismissed, without costs, as taken from a nonappealable order.

Prior to the trial court's order, the parties entered into a stipulation that resolved a portion of issues in their

matrimonial action, including how the marital residence would be priced and sold. Because the parties' stipulation addressed the pricing and sale of the marital residence and the parties did not challenge the validity of the stipulation or consent to the alteration of those terms, the trial court lacked the authority to reform those terms to what it thought was proper (*Rodolitz v Neptune Paper Prods.*, 22 NY2d 383, 386-387 [1968]; *Leffler v Leffler*, 50 AD2d 93, 95 [1st Dept 1975], *affd* 40 NY2d 1036 [1976]).

No appeal lies from the portion of the trial court's order that declined to sign the wife's order to show cause as it related to the husband's ComputerShare account (CPLR 5701[a][2]; *Matter of King v Carrion*, 128 AD3d 461, 462 [1st Dept 2015]; *USA Recycling, Inc. v Baldwin Endico Realty Assoc., Inc.*, 147 AD3d 697, 698 [1st Dept 2017]). We decline to construe nostra sponte the wife's notice of appeal as an application pursuant to CPLR 5704(a).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: APRIL 4, 2019

CLERK

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

8902 Jason Antonio, Index 305769/14
Plaintiff-Respondent,

-against-

West 70th Owners Corp.,
Defendant-Appellant-Respondent,

Titan Capital Group II LLC,
Defendant,

SEPI Realty, LLC,
Defendant-Respondent-Appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Jeremy M. Buchalski of counsel), for appellant-respondent.

Downing & Peck, P.C., New York (Marguerite D. Peck of counsel), for respondent-appellant.

Wingate, Russotti, Shapiro & Halperin, LLP, New York (David M. Schwarz of counsel), for respondent.

Order, Supreme Court, Bronx County (Robert T. Johnson, J.), entered on or about April 25, 2018, which, insofar as appealed from as limited by the briefs, denied defendants West 70th Owners Corp. and SEPI Realty, LLC's motions for summary judgment dismissing the Labor Law § 200 and negligence claims as against them, unanimously reversed, on the law, without costs, and the motions granted. The Clerk is directed to enter judgment accordingly.

Plaintiff claims that he was injured after slipping and

falling on slippery stairs because he was directed to remove his boots while working. Defendants established prima facie that they did not exercise supervisory control over the means and methods of plaintiff's work (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]). Their principals, the homeowners, testified that they were not home on the day of the accident and that they never asked any workers to remove their boots. In opposition, plaintiff failed to raise an issue of fact as to whether the man from whom he received the instruction to remove his boots had apparent authority to direct his work (*see Hallock v State of New York*, 64 NY2d 224, 231 [1984]). Plaintiff was unable to identify the man, the man's employer, or the man's relationship to the homeowners. Moreover, plaintiff testified that at first he refused to take his boots off. Plaintiff called his supervisor who warned him that if he did not remove his boots he would be fired. As such, plaintiff's supervisor gave the ultimate direction to remove his boots, which establishes that the employer exercised supervisory control over the injury-producing work.

The record also shows that the stairs were not in a dangerous condition (*see Cappabianca*, 99 AD3d at 144). Plaintiff

himself testified that there were no observable defects on the stairs, that they were not wet, and that they were free of chips and cracks. He admitted that he slipped solely because he was wearing socks with no boots (*see Eichelbaum v Douglas Elliman, LLC*, 52 AD3d 210 [1st Dept 2008]).

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

ENTERED: APRIL 4, 2019

CLERK

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

8903 Holger Siguencia, et al., Index 654984/17
Plaintiffs-Respondents,

-against-

504 W. 143rd Associates LLC,
Defendant-Appellant,

Amwest Realty Associates LLC,
et al.,
Defendants.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Gerald Lebovits, J.), entered on or about July 13, 2018,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated March 12, 2019,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

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

ENTERED: APRIL 4, 2019

CLERK

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

8904 Besen and Associates, Inc., Index 653526/15
Plaintiff-Appellant,

-against-

Cohen Media Group, LLC, et al.,
Defendants-Respondents.

_____

Rich, Intelisano & Katz, LLP, New York (Joseph A. Gershman of counsel), for appellant.

Harwood Reiff LLC, New York (Donald A. Harwood of counsel), for respondents.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered June 15, 2017, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the cause of action for breach of an express brokerage agreement, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff commenced this action, inter alia, on the ground that defendants breached a brokerage agreement orally entered into between its principal, Rolfe Haas, Besen & Associates and defendants' principal in connection with defendant Cohen Quad Cinema, LLC's purchase of the Quad Cinema.

Supreme Court granted defendants' summary judgment, finding that plaintiff is precluded from asserting the claim as a third party beneficiary of the agreements.

We reverse. Section 4.4 of the Share Purchase Agreement dated August 20, 2014 between the nonparty seller and defendant purchaser Cohen Quad Cinema LLC states that "[e]xcept for Cohen Brothers Realty Corporation and Rolfe Haas, Benson & Associates [sic], no broker, finder or investment banker is entitled to a commission in connection with the transaction". Section 7.1 of the Share Purchase Agreement explicitly provides "that Purchaser shall pay all amounts payable to Cohen Brothers Realty Corporation and Rolfe Haas, Benson & Associates [sic]". The nonparty seller and defendant purchaser Cohen Quad Cinema LLC also entered into a second contract of sale also dated August 20, 2014, which is a separate agreement and does not preclude plaintiff from asserting a breach of an oral brokerage agreement. The complaint makes clear that plaintiff's first cause of action is for breach of a brokerage contract and not based on a third party beneficiary relationship.

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

ENTERED: APRIL 4, 2019

CLERK

Sweeny, J.P., Kern, Oing, Singh, JJ.

8905 Leonardo Cutone, Index 157774/13
Plaintiff-Appellant,

-against-

Riverside Towers Corp., et al.,
Defendants-Respondents.

_____

Schlam Stone & Dolan LLP, New York (Peter J. Sluka of counsel), for appellant.

Braverman Greenspun P.C., New York (Andreas E. Theodosiou of counsel), for respondents.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered May 8, 2017, which granted defendant Riverside Towers Corp's (Riverside's) motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

We decline to entertain plaintiff's appeal from an order entered October 23, 2014, as no notice of appeal was filed from the 2014 order and no judgment was entered from the May 2017 order. Our jurisdiction here is limited to the appeal from the May 2017 order granting defendant Riverside's motion to dismiss the claim for breach of contract.

Defendant Riverside presented sufficient evidence to establish prima facie entitlement to judgment on the breach of contract claim on the ground that it did not breach the lease, the bylaw or the house rules. The evidence demonstrated that the

board was acting in a reasonably timely fashion regarding approval of the alteration agreement, and therefore, the Board's actions were subject to the business judgment rule (*see Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 540 [1990]). Plaintiff failed to raise a triable issue of fact on this issue.

The court correctly held that plaintiff failed to establish the breach of contract claim premised upon plaintiff's allegations that defendant improperly delayed plaintiff's renovations by repeatedly improperly stopping work and demanding modifications to plaintiff's renovation plans. Defendant was acting within its rights as set forth in the alteration agreement.

Finally, plaintiff failed to raise a triable issue of fact with respect to defendant's alleged interference with his right to sell the subject apartment.

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 4, 2019

CLERK

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

8906N Jasmine Jackson, Index 302996/14
Plaintiff-Appellant,

-against-

Adfia Realty, LLC, et al.,
Defendants-Respondents,

Sobro Realty,
Defendant.

_____

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

Miranda Slone Sklarin Verveniotis LLP, Elmsford (Debora J. Dillon of counsel), for Adfia Realty, LLC, respondent.

Koster, Brandy & Nagler, LLP, New York (William H. Gagas of counsel), for Hire Point Staffing Solutions, respondent.

_____

Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered on or about January 10, 2018, which, insofar as appealed from, granted defendant Hire Point Staffing Solutions's motion to strike the errata sheet to plaintiff's deposition transcript as to correction numbers 2, 3, 4, 5, 13, 14, 15, 17, 18, 28, and 30, as identified in the letter of Jason J. Lavery dated April 18, 2017 and annexed to the motion papers as Exhibit J, unanimously modified, on the law and the facts, to deny the motion as to correction numbers 2, 4, 13, 28 and 30, and otherwise affirmed, without costs.

This action for personal injuries arose when plaintiff

allegedly slipped and fell on a sidewalk in front of and/or adjacent to a property located at 258 East 138th Street. At the time of the accident, the property was managed by codefendant Sobro Realty, owned and operated by defendant Adfia Realty LLC, and leased by defendant Hire Point Staffing Solutions (Hire Point).

Supreme Court providently exercised its discretion in striking correction numbers: 3, 5, 14, 15, 17, and 18, because plaintiff failed to provide an adequate reason for the critical, substantive changes she sought to make, which would materially alter her deposition testimony on issues concerning the basis for Hire Point's negligence as alleged in the pleadings (*see Perez v Mekulovic*, 13 AD3d 158, 158-159 [1st Dept 2004]; *Schachat v Bell Atl. Corp.*, 282 AD2d 329 [1st Dept 2001]).

However, we modify the order to deny Hire Point's motion to strike correction numbers 2, 4, 13, 28 and 30, because those changes are not critical, substantive changes that materially alter plaintiff's original deposition testimony on issues concerning the basis for Hire Point's alleged negligence (*see Carrero v New York City Hous. Auth.*, 162 AD3d 566, 566 [1st

Dept 2018]). Lastly, we find that plaintiff has provided satisfactory explanations as to those corrections, which raise issues of credibility that should be left for trial (*see Cillo v Resjefal Corp.*, 295 AD2d 257 [1st Dept 2002]).

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

ENTERED: APRIL 4, 2019

CLERK

Friedman, J.P., Gische, Kapnick, Webber, Gesmer, JJ.

8907 The People of the State of New York, Ind. 3109/14
Respondent,

-against-

Joel Herrera,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Eric Del Pozo of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered November 4, 2015, convicting defendant, upon his plea of guilty, of conspiracy in the second degree, and sentencing him to a term of two to six years, unanimously affirmed.

Defendant's prosecution for conspiracy to commit murder, after a prior prosecution for the actual murder resulted in a trial conviction for manslaughter and gang assault, did not violate the federal or state double jeopardy prohibitions, because conspiracy is not the same offense, for double jeopardy purposes, as murder, manslaughter, or gang assault (*see People v Biggs*, 1 NY3d 225, 230 [2003]). "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to

determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not" (*Blockburger v United States*, 284 US 299, 304 [1932] [citations omitted]). Neither the fact that the evidence at the homicide trial would have also supported a conspiracy charge, nor the fact that defendant had been alleged to have acted in concert with other persons, has any relevance under the *Blockburger* test.

Defendant's plea allocution was sufficient and his plea was valid. The Court of Appeals has "never held that a plea is effective only if a defendant acknowledges committing every element of the pleaded-to offense, or provides a factual exposition for each element of the pleaded-to offense" (*People v Seeber*, 4 NY3d 780, 781 [2005][citation omitted]; *see also People v Goldstein*, 12 NY3d 295, 301 [2009]). Defendant pleaded guilty knowingly, intelligently and voluntarily, in return for a

sentence that, we note, was structured so that he would receive no additional incarceration beyond the 20 years he received for the homicide.

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

ENTERED: APRIL 4, 2019

CLERK

Friedman, J.P., Gische, Kapnick, Webber, Gesmer, JJ.

8908 Dov Grant, Index 150603/16
Plaintiff-Respondent,

-against-

Metropolitan Opera Association, Inc.,
Defendant-Appellant,

Lincoln Center for the Performing Arts, Inc.,
Defendant.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Paul A. Goetz, J.), entered on or about August 1, 2018,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated February 21, 2019,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

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

ENTERED: APRIL 4, 2019

CLERK

Friedman, J.P., Gische, Kapnick, Webber, Gesmer, JJ.

8909 In re Ariel P.,

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

_____

Dawne A. Mitchell, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Rebecca L. Visgaitis of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about August 31, 2017, 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 forcible touching and sexual abuse in the third degree, and imposed a conditional discharge for a period of 12 months, unanimously affirmed, without costs.

Appellant argues that the Family Court should have suppressed both the oral and written statements that he made to a detective. Regardless of whether both statements should have been suppressed, any error was harmless beyond a reasonable doubt because the evidence that appellant committed the charged offenses was overwhelming, and there is no reasonable possibility

that the court's finding would have been any different if appellant's "essentially exculpatory" statement, in which he offered an innocent explanation for his presence at the scene, had been suppressed (*Matter of Jahmeka W.*, 130 AD3d 437, 437 [1st Dept 2015], *lv denied* 26 NY3d 909 [2015]). Although the statement tended to establish the element of identity, that element was established by compelling circumstantial evidence, notwithstanding the absence of an in-court identification by the victim.

As to appellant's arguments regarding the order of disposition, a conditional discharge was the least restrictive alternative consistent with appellant's needs and the community's need for protection. Appellant was in need of treatment for longer than six months, which would have been the maximum period available under an adjournment in contemplation of dismissal (*see e.g. Matter of Steven F.*, 127 AD3d 536, 537 [1st Dept 2015], *lv denied* 26 NY3d 906 [2015]).

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

ENTERED: APRIL 4, 2019

CLERK

Friedman, J.P., Gische, Kapnick, Webber, Gesmer, JJ.

8910 Elliot Newhouse, Index 100123/14
Plaintiff-Appellant,

-against-

Lowell B. Davis,
Defendant-Respondent.

_____

Gary A. Lichtman, New York, for appellant.

Lowell B. Davis, Carle Place, respondent pro se.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered December 14, 2017, which denied plaintiff's motion to set aside a prior order, same court and Justice, rendered August 2, 2017, which dismissed the complaint, unanimously reversed, on the law, without costs, the motion granted, the complaint reinstated, and the matter remanded for an inquest to determine damages.

Defendant, having had his answer stricken, was limited to an inquest at which he could only contest the extent of plaintiff's

damages (*see Rokina Opt. Co. v Camera King*, 63 NY2d 728, 730-731 [1984]). Thus, the inquest court improperly re-opened the issue of liability and made a determination with respect thereto (*see Christian v Hashmet Mgt. Corp.*, 189 AD2d 597, 598 [1993]).

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

ENTERED: APRIL 4, 2019

CLERK

Friedman, J.P., Gische, Kapnick, Webber, Gesmer, JJ.

8911 Edgard Espinoza, Index 305358/14
Plaintiff-Respondent,

-against-

Fowler-Daley Owners, Inc.,
Defendant-Appellant,

Kenilworth Equities Ltd.,
et al.,
Defendants.

_____

Brody, O'Connor & O'Connor, New York (Scott A. Brody of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about May 8, 2017, which, inter alia, granted plaintiff's motion for partial summary judgment as against defendant Fowler-Daley Owners, Inc. (Fowler) on the issue of Labor Law § 240(1) liability, unanimously affirmed, without costs.

Plaintiff's post-note of issue summary judgment motion was not premature. If Fowler needed to conduct additional nonparty depositions in order to successfully oppose the motion, then it should have either deposed those witnesses during the nearly two years that discovery was open in this case or moved to vacate the note of issue on that basis. Fowler "cannot cite [its] own

inaction as justification to deny" plaintiff's summary judgment motion (*Judd v Vilardo*, 57 AD3d 1127, 1131 [3d Dept 2008]; *see also Auerbach v Bennett*, 47 NY2d 619, 636 [1979]).

Plaintiff's motion was properly granted, as he established prima facie that Fowler failed to provide equipment such as harnesses and tie-off points for safety lines, which plaintiff had specifically requested on and prior to the day of his accident, in order to give proper protection to individuals involved in pointing its building (*see Ramos v Port Auth. of N.Y. & N.J.*, 306 AD2d 147 [1st Dept 2003]). In opposition, Fowler failed to raise a triable issue of fact. Its argument that plaintiff was the sole proximate cause of the accident fails because "if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]).

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

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

ENTERED: APRIL 4, 2019

CLERK

Friedman, J.P., Gische, Kapnick, Webber, Gesmer, JJ.

8912 Madonna Ciccone, Index 651748/16
Plaintiff-Appellant,

-against-

One West 64th Street, Inc.,
Defendant-Respondent.

_____

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

Holland & Knight LLP, New York (Benjamin R. Wilson of counsel), for respondent.

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered September 21, 2017, which granted defendant's motion to dismiss the first and second causes of action, unanimously affirmed, with costs.

The first and second causes of action challenge the propriety of defendant cooperative corporation's amendments of the lease and allege that defendant cooperative corporation acted in bad faith, and are therefore barred by the four-month statute of limitations on proceedings against bodies such as cooperative boards (*see* CPLR 217; 7802[a]; 7803[2]; *Katz v Third Colony Corp.*, 101 AD3d 652 [1st Dept 2012], citing *Buttitta v Greenwich House Coop. Apts., Inc.*, 11 AD3d 250, 251 [1st Dept 2004]). Defendant amended paragraph 14 of the proprietary lease to provide, in pertinent part, that "the children, grandchildren,

parents, grandparents, brothers and sisters and domestic employees of the Lessee or Lessee's spouse or domestic partner" may occupy the apartment "while the Lessee or the Lessee's spouse or domestic partner are in residence." In the first cause of action, plaintiff seeks a declaration that paragraph 14 is void and unenforceable as against public policy and may not be enforced as against her, and that members of her family and one other occupant (and their children) may occupy her apartment whether or not she is "in residence." In the second, she alleges that the coop board amended paragraph 14 with the intention of interfering with her ability to use her apartment in a manner consistent with the original proprietary lease and that the board's actions were taken in bad faith. On appeal, plaintiff characterizes her claim as seeking a declaration of the meaning of the ambiguous phrase "in residence." However, that characterization conflicts with the claims asserted in her

complaint.

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 4, 2019

CLERK

Friedman, J.P., Gische, Kapnick, Webber, Gesmer, JJ.

8913-
8914 Jerzy Zieba, Index 158999/13
Plaintiff-Respondent,

-against-

345 Main Street Associates,
Defendant,

345 Main Street Associates LLC, et al.,
Defendants-Appellants,

National Retail Construction Group, LLC,
Defendant-Respondent.
- - - - -
[And Third-Party Actions]

_____

Law Offices of Michael E. Pressman, New York (Stuart B. Cholewa of counsel), for appellants.

Block O'Toole & Murphy, New York (Christina R. Mercado of counsel), for Jerzy Zieba, respondent.

Favata & Wallace LLP, Garden City (William G. Wallace of counsel), for National Retail Construction Group, LLC, respondent.

_____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered April 19, 2018, which, to the extent appealed from as limited by the briefs and as further limited by certain stipulations filed by the parties, denied defendant 345 Main Street Associates, LLC (345 Main), and defendants PB 1012, LLC, and WJ Partners, LLC's (together Pure Barre) motion for summary judgment on their indemnification claims against defendant

National Retail Construction Group, LLC (National Retail), unanimously modified, on the law, to grant summary judgment to Pure Barre on its contractual indemnification claim against National Retail, and otherwise affirmed, without costs. Appeals from order, same court and Justice, entered October 4, 2018, unanimously dismissed, without costs, as academic.

Pure Barre (lessee of the premises) is entitled to summary judgment on its claim against National Retail for indemnification under the construction contract, because plaintiff's injury was not caused solely by any negligence on its part. However, 345 Main (the owner of the premises) is not entitled to summary judgment on the contractual indemnification claim, because it is not a signatory to or an indemnitee under the contract, which identifies an affiliate of Pure Barre as the owner. In addition, 345 Main is not entitled to summary judgment on its claim against National Retail for common-law indemnification because, on this record, an issue of fact exists as to whether National Retail was

negligent.

We have considered the remaining contentions for affirmative relief and find them unavailing.

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

ENTERED: APRIL 4, 2019

CLERK

Friedman, J.P., Gische, Kapnick, Webber, Gesmer, JJ.

8916 The People of the State of New York, Respondent, Ind. 3216/10

-against-

Theophilus Burroughs, Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, Bronx County (Steven L. Barrett, J. at dismissal motion and first plea; Ralph Fabrizio, J. at second plea and sentencing), rendered November 5, 2015, convicting defendant of criminal sale of a firearm in the first degree, criminal tax fraud in the first degree, money laundering in the first degree and conspiracy in the fourth degree, and sentencing him to an aggregate term of 15 years, unanimously affirmed.

We decline to revisit our earlier determination (*People ex rel. Burroughs v Warden, O.B.C.C. Corr. Facility*, 132 AD3d 469 [1st Dept 2015]) that New York had territorial jurisdiction over certain offenses that occurred, in part, in another state. Although that determination was made on an appeal from a denial of habeas corpus, this Court reached the merits without discussing the availability of habeas corpus as a remedy, and the

parties had a "full and fair" opportunity to litigate the initial determination (*see People v Evans*, 94 NY2d 499, 502 [2000]). In any event, regardless of whether our prior determination has preclusive effect, we adhere to it for the reasons stated therein, as well as in the motion court's decision (40 Misc 3d 1089, 1092 [Sup Ct Bronx County 2013]).

Under the unusual procedural circumstances, the court did not exceed its authority in vacating defendant's first guilty plea without his consent. Defendant had placed the case in a posture where his continued litigation of the validity of the charges, not on appeal but before the plea court itself, was incompatible with the plea.

Regardless of the validity of defendant's waiver of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: APRIL 4, 2019

CLERK

Friedman, J.P., Gische, Kapnick, Webber, Gesmer, JJ.

8917 The People of the State of New York Ind. 5072/09
Respondent,

-against-

Jose Ramos,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Michael R. Sonberg, J.), entered on or about September 8, 2016, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed 20 points under the risk factor for continuing course of sexual misconduct. The victim's trial testimony provided clear and convincing evidence that defendant had engaged in other sex acts against her on multiple occasions before the act underlying the conviction (*see People v Singh*, 165 AD3d 444 [1st Dept 2018], *lv denied* 32 NY3d 914 [2019]). The fact that defendant was never prosecuted for those acts was relevant, but it did not preclude the court from considering reliable proof showing that the acts had in fact occurred (*see*

People v Santana, 162 AD3d 568 (1st Dept 2018]; *People v Epstein*, 89 AD3d 570, 571 [1st Dept 2011]).

The court also properly assessed 15 points under the risk factor for a history of drug abuse. Although occasional social use of marijuana does not amount to substance abuse for SORA purposes, the record indicates that defendant's admitted use of marijuana was more serious. The case summary reported that "testing" revealed that defendant was "in need of intervention," had been referred to a substance abuse treatment program while incarcerated, and that the report of a drug test was "substance abuse indicated." Defendant's admission and the documents indicating that testing had diagnosed him with a substance abuse problem provides clear and convincing evidence of a history of drug abuse (*see People v Finizio*, 100 AD3d 977, 978 [2d Dept 2012], *lv denied* 20 NY3d 860 [2013]).

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

ENTERED: APRIL 4, 2019

CLERK

Friedman, J.P., Gische, Kapnick, Webber, Gesmer, JJ.

8918- Index 653517/16
8919 CPTS Hotel Lessee LLC, 653096/16
Plaintiff-Appellant,

-against-

Holiday Hospitality Franchising LLC,
Defendant-Respondent.

- - - - -

Holiday Hospitality Franchising LLC,
Plaintiff-Respondent,

Intercontinental Hotels Group Resources, Inc.,
Plaintiff,

-against-

CPTS Hotel Lessee LLC,
Defendant-Appellant,

Times Square JV LLC, et al.,
Defendants.

_____

Pryor Cashman LLP, New York (Todd E. Soloway of counsel), for appellant.

Kasowitz Benson Torres LLP, New York (Paul M. O'Connor III of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Eileen Bransten, J.), entered on or about May 7, 2018, which, to the extent appealed from as limited by the briefs, denied CPTS Hotel Lessee LLC's motion to dismiss Holiday Hospitality Franchising LLC's causes of action for a declaration and a permanent injunction, granted Holiday Hospitality's motion for a preliminary injunction

enjoining CPTS from terminating the parties' agreement, granted Holiday Hospitality's motion to dismiss CPTS's cause of action for a declaration that the agreement is unenforceable as a contract for personal services, and determined that the standard for assessing Holiday Hospitality's performance of its obligations under section 4(D) of the agreement is "arbitrary and capricious," rather than "conscientious," unanimously modified, on the law, to deny Holiday Hospitality's motion to dismiss CPTS's cause of action for a declaration that the agreement is unenforceable as a contract for personal services and declare in Holiday Hospitality favor, and it is declared that the license agreement is not a contract for personal services, and otherwise affirmed, without costs.

The motion court correctly determined that the license agreement between Holiday Hospitality and CPTS is not a contract for personal services, because it lacks the requisite delegation of substantial discretion to the licensee (CPTS) in the operation of the subject hotel (*see Husain v McDonald's Corp.*, 205 Cal App 4th 860 [Cal Ct App 2012]). However, rather than dismissing CPTS's cause of action for a declaration in its favor, the court should have issued a declaration in Holiday Hospitality's favor (*Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954 [1989]).

The court correctly found that the harm to licensor Holiday

Hospitality's brand reputation and goodwill as a result of an improper termination of the agreement, which would cause the Times Square location to lose its branding as a Crowne Plaza hotel, was within the parties' contemplation at the time the agreement was signed (*see American List Corp. v U.S. News & World Report*, 75 NY2d 38, 43 [1989]), and constituted irreparable harm (*see David B. Findlay, Inc. v Findlay*, 18 NY2d 12 [1966], *cert denied* 385 US 930 [1966]).

The motion court correctly found that the standard for assessing Holiday Hospitality's performance of its obligations under section 4(D) of the agreement is whether it acted arbitrarily or irrationally in exercising that discretion (*Peacock v Herald Sq. Loft Corp*, 67 AD3d 442, 443 [1st Dept 2009]). Such discretion may not be exercised arbitrarily or irrationally or in bad faith so as to deprive the other party of the benefits of the contract (*Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995]).

The Section 4(D) requirement that Holiday Hospitality "conscientiously" adhere to certain standards of service in carrying out its obligations under the agreement does not impose

a standard higher than what is required by any other contractual obligation allowing for unilateral discretion by one of the parties. "Conscientiously" only refers to doing the work well and thoroughly and is encompassed by the concept of good faith.

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

ENTERED: APRIL 4, 2019

CLERK

Friedman, J.P., Gische, Kapnick, Webber, Gesmer, JJ.

8920 Maria Bautista, Index 301094/13
Plaintiff-Appellant,

-against-

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

_____

Peña & Kahn, PLLC, Bronx (Diane Welch Bando of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (D. Alan Rosinus, Jr. of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about May 15, 2017, which, to the extent appealed from as limited by the briefs, granted the motion of defendant New York City Department of Education (DOE) for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Plaintiff kindergarten teacher was injured when, while walking in her classroom, she slipped and fell on a piece of squash that a student had dropped on the floor. In opposition to DOE's prima facie showing that it neither created the condition nor had notice of the squash, plaintiff failed to raise a triable issue of fact. Nor was a triable issue of fact raised as to

whether there existed a recurring condition because there was no evidence that DOE routinely failed to address food being left on the floor by the children (*see Harrison v New York City Tr. Auth.*, 94 AD3d 512, 514 [1st Dept 2012]).

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

ENTERED: APRIL 4, 2019

CLERK

Friedman, J.P., Gische, Kapnick, Webber, Gesmer, JJ.

8921 The People of the State of New York, Respondent, Ind. 4852/13

-against-

Jose Ruiz, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered July 11, 2014, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the seventh degree, and sentencing him, as a second felony drug offender, to an aggregate term of 3½ years, unanimously affirmed.

While an officer's testimony as to the exact amount of cash recovered from a codefendant had been precluded by the court, the court providently exercised its discretion in denying defendant's motion for a mistrial. "The decision to declare a mistrial rests within the sound discretion of the trial court, which is in the best position to determine if this drastic remedy is necessary to protect the defendant's right to a fair trial" (*People v*

Wakefield, 212 AD2d 649 [2d Dept 1995]). Defendant was not denied his right to a fair trial by a brief reference in the officer's testimony to the amount recovered from the codefendant (*see People v O'Garro*, 293 AD2d 763 [2d Dept 2002], *lv denied* 98 NY2d 700 [2002]). The court found that it was not done intentionally or in bad faith. Accordingly, the drastic remedy of a mistrial was not warranted (*see People v Garcia*, 110 AD3d 500 [1st Dept 2013]). Further, the court sustained defendant's objections and took prompt curative action which sufficed to prevent any prejudice (*see People v Santiago*, 52 NY2d 865 [1981]).

Defendant did not preserve his challenges to the prosecutor's opening statement and summation, and we decline to review them in the interest of justice. As an alternative holding, we find that there was nothing in these remarks that was so egregious as to warrant reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-120 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

We have considered and rejected defendant's ineffective assistance of counsel claims relating to the issues we have found

to be unpreserved (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 4, 2019

CLERK

Friedman, J.P., Gische, Kapnick, Webber, Gesmer, JJ.

8922- Index 150632/16
8923-
8924 New York Yacht Club,
Plaintiff-Appellant,

-against-

John Lehodey, et al.,
Defendants-Respondents.

_____

Goetz Fitzpatrick LLP, New York (John B. Simoni, Jr. of counsel), for appellant.

Loeb & Loeb LLP, New York (Gil Feder of counsel), for John Lehodey, Sofitel New York Hotel, Accor Business and Leisure North America Inc. and Normandie, LLC, respondents.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (I. Elie Herman of counsel), for Accor North America Inc., respondent.

Allegaert Berger & Vogel LLP, New York (Richard L. Mattiaccio of counsel), for KSSNY, Inc., respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered September 21, 2017, which granted defendants' motions to dismiss the complaint as against them pursuant to CPLR 3211(a)(5), unanimously affirmed, with costs.

Plaintiff asserts seven causes of action in connection with defendants' construction of a 30-story building adjacent to its own shorter building, alleging, inter alia, that defendants failed to give it the requisite notice of their plans to build and failed to extend the chimneys and flues of its building, as

required by Administrative Code of City of NY § 27-860. Construction was completed on the new building no later than 2004. This action was not commenced until 2016.

The cause of action under Administrative Code § 27-860 accrued at the time of the completion of construction, and is governed by a three-year statute of limitations (CPLR 214[2]; *see e.g. West Chelsea Bldg. LLC v Guttman*, 139 AD3d 39 [1st Dept 2016]). Plaintiff's argument that defendants' noncompliance with § 27-860 represents a continuing wrong is unavailing. There has been no continuing wrongful conduct, only the continuing effects of the earlier alleged wrongful conduct (*see generally Town of Oyster Bay v Lizza Indus., Inc.*, 22 NY3d 1024 [2013]; *Henry v Bank of Am.*, 147 AD3d 599 [1st Dept 2017]). Similarly, plaintiff's purported continuing trespass claim is barred by the applicable three-year statute of limitations (CPLR 214[2], [4]), as the extent of its present damage claims was realized in 2004 when the new building was completed, and it is only the continuing effects of the original construction work that linger.

Plaintiff failed to establish that there is a basis for

finding the statutes of limitation that govern the remaining causes of action inapplicable.

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 4, 2019

CLERK

Friedman, J.P., Gische, Kapnick, Webber, Gesmer, JJ.

8925 The People of the State of New York, Ind. 2371/16
Respondent,

-against-

Jesse Illa,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (John S. Moore, J. at plea; Nicholas J. Iacovetta, J. at sentencing), rendered January 4, 2018,

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 4, 2019

CLERK

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

Friedman, J.P., Gische, Kapnick, Webber, Gesmer, JJ.

8926 Stephen LLC, Index 153553/16
Plaintiff-Respondent,

-against-

Anthony M. Zazula,
Defendant-Appellant.

_____

Hinckley & Heisenberg LLP, New York (Christoph C. Heisenberg of counsel), for appellant.

Douglas L. Fromme, P.C., New York (Douglas L. Fromme of counsel), for respondent.

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Judgment, Supreme Court, New York County (Paul A. Goetz, J.), entered May 17, 2018, against defendant in favor of plaintiff, unanimously affirmed, without costs.

Defendant's guaranty of payment of the tenant's rent to plaintiff under the 2013 lease provided that the guaranty would remain in effect "even if the lease is subsequently changed, amended, modified, renewed or if the [tenant] hold[s] over after expiration or termination of the term." When the tenant remained in the apartment following the expiration of the original lease term and continued to pay rent, which plaintiff accepted, a month-to-month tenancy was created on the same terms, and subject to the same covenants, as contained in the 2013 lease (*see City of New York v Pennsylvania R.R. Co.*, 37 NY2d 298, 300 [1975]; *Levy v Carol Mgt. Corp.*, 260 AD2d 27, 33 [1st Dept 1999]). The

broad language of the guaranty provided that the guaranty would remain in effect during this subsequent holdover period as well as when the lease was later renewed.

The motion court providently exercised its discretion in accepting plaintiff's opposition papers, which were filed after the date originally designated in the court's scheduling order, as defendant did not demonstrate any prejudice (*see Sanchez v Steele*, 149 AD3d 458 [1st Dept 2017]; *Narvaez v Wadsworth*, 165 AD3d 407, 408 [1st Dept 2018]; *but see Adotey v British Airways, PLC*, 145 AD3d 748, 750 [2d Dept 2016]). Plaintiff requested an adjournment of the return date pursuant to the Uniform Rules for Trial Courts (22 NYCRR) § 202.8(e)(2), which was granted, and defendant was afforded an opportunity to submit reply papers if he chose to do so (*see Sanchez*, 149 AD3d at 458; *Narvaez*, 165 AD3d at 408).

The court properly granted summary judgment to plaintiff

upon its request, contained in its opposition to defendant's motion, for a search of the record (*see* CPLR 3212[b]; *Maggio v 24 W. 57 APF, LLC*, 134 AD3d 621, 628 [1st Dept 2015]).

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

ENTERED: APRIL 4, 2019

CLERK

Friedman, J.P., Gische, Webber, Gesmer, JJ.

8927 Paul J. Napoli, Index 159576/14
Plaintiff-Respondent,

-against-

Marc J. Bern,
Defendant-Appellant.

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Robert & Robert, PLLC, Uniondale (Clifford S. Robert of counsel), for appellant.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Luke Nikas of counsel), for respondent.

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Order, Supreme Court, New York County (Mark C. Zauderer, Special Referee), entered on or about April 4, 2017, which determined that plaintiff executed a 2014 charitable pledge agreement with defendant's consent and that therefore the payments owed under the agreement are a debt of the "legacy" law firm of which the parties were the two equitable partners, unanimously affirmed, with costs.

The Special Referee correctly precluded defendant from calling a computer forensics expert to testify that three electronic documents, i.e., email "read receipts," produced in 2017 on behalf of plaintiff were falsified during litigation, on the ground that whether the email had been read by defendant was a collateral matter, not material to the issue of whether defendant agreed to the 2014 charitable pledge agreement (*see*

Badr v Hogan, 75 NY2d 629, 635 [1990]). The electronic documents were not received in evidence, and defendant otherwise presented no evidence connecting plaintiff to the creation of the allegedly wrongful documents. In any event, any error was harmless, because the Special Referee stated that, even if the evidence were material, it would not have changed his findings (*see People v Pabon*, 28 NY3d 147, 157-158 [2016]; *People v Umali*, 37 AD3d 164, 166 [1st Dept 2007], *affd* 10 NY3d 417 [2008], *cert denied* 556 US 1110 [2009]).

Defendant's contention that plaintiff should forfeit his claims in this matter is unsupported by clear and convincing evidence that plaintiff engaged in a willful and pervasive scheme to defraud the court that prejudiced defendant's ability to defend against the claims (*see CDR Creances S.A.S. v Cohen*, 23 NY3d 307, 321-322 [2014]).

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

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

ENTERED: APRIL 4, 2019

CLERK

Friedman, J.P., Gische, Kapnick, Webber, Gesmer, JJ.

8928N Elaine Martin, individually and Elaine Martin as Administatrix of the Estate of Lloyd Martin, deceased,
Plaintiff-Appellant,

-against-

Workmen's Circle Multicare Center, et al.,
Defendants-Respondents,

Tamara Erlikh, M.D., et al.,
Defendants.

Index 31815/17E

Wallace & Associates, P.C., Brooklyn (Larry Wallace of counsel), for appellant.

Sheeley LLP, New York (Gayle Halevy of counsel), for respondents.

Order, Supreme Court, Bronx County (Joseph Capella, J.), entered September 10, 2018, which granted defendants-respondents' motion seeking a change of venue of the action from Bronx County to Nassau County, unanimously affirmed, without costs.

The motion court properly applied the venue selection clause in the admission agreement for defendants-respondents' nursing home and dialysis facility (*see Medina v Gold Crest Care Ctr., Inc.*, 117 AD3d 633 [1st Dept 2014]; *Public Adm'r Bronx County v Montefiore Med. Ctr.*, 93 AD3d 620, 621 [1st Dept 2012]; *Puleo v Shore View Ctr. for Rehabilitation & Health Care*, 132 AD3d 651, 652 [2d Dept 2015]). The motion court properly rejected

plaintiff's conclusory assertions that the venue-selection clause violates public policy, New York State Department of Health Regulations and CPLR 501 (*see Medina*, 117 AD3d 633-634). Further, there is no evidence of fraud or overreaching in the execution of the agreement (*see British W. Indies Guar. Trust Co. v Banque Internationale A Luxembourg*, 172 AD2d 234 [1st Dept 1991]). Nor was plaintiff denied her day in court by transferring venue from Bronx to Nassau County (*see e.g. Bhonlay v Raquette Lake Camps, Inc.*, 120 AD3d 1015 [1st Dept 2014]; *see also e.g. Public Adm'r Bronx County*, 93 AD3d 620).

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 4, 2019

CLERK