SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 3, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Richter, Mazzarelli, Webber, Kern, JJ.

10146- Index 153565/17
10147-
10147A Clare Grady,
Plaintiff-Respondent,

-against-

Hessert Realty L.P., et al.,
Defendants-Appellants.

_____

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

Grimble & LoGuidice, LLC, New York (Robert Grimble of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered June 14, 2019, in plaintiff's favor, unanimously reversed, on the law, without costs, the judgment vacated, and the matter remanded for a recalculation of damages and interest. Appeals from orders, same court and Justice, entered June 29, 2018, and March 28, 2019, which, respectively, granted plaintiff's motion for summary judgment, and denied defendants' cross motion, and, upon reargument, adhered to the original determination, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

In August 1974, nonparties R. John Punnett and Hessert & Co., Inc. purchased the building at 118 East 92nd Street in Manhattan. Punnett and Hessert & Co. transferred the building to nonparty Punnet Realty Corp., which in turn transferred the building back to Punnett and Hessert & Co. in December 1976.

In December 2012, Punnett c/o defendant Mautner Glick Corp. (MGC) sold his interest in the building to defendant 118 East 92nd Street, LLC. Finally, in October 2014, Hessert & Co., c/o MGC, sold its interest in the building to defendant Hessert Realty L.P.

In 1998, apartment 2C in the building was registered with the Department of Housing and Community Renewal (DHCR) with a rent-stabilized rent of $1,022.92. By lease dated May 8, 1999, plaintiff Clare Grady rented apartment 2C from Kent Realty Company as "owner" at a monthly rent of $1,450. Her lease was renewed several times: on February 17, 2000, at a rate of $1,495 per month; on May 10, 2001, at a rate of $1,550 per month; on February 14, 2002, at a rate of $1,550 per month; on March 31, 2003, at a rate of $1,550 per month; and on April 6, 2004, at a rate of $1,550 per month.

Beginning in 2005, the renewal leases listed defendant MGC as "owner's/agent name." The renewal lease dated January 24, 2005 for the apartment set the monthly rent at $1,580. It also

stated the apartment was "not subject to rent regulation laws." The lease renewal was signed by defendant Alvin Glick as "owner." This form of lease was used for the renewals on February 21, 2006, at a rate of $1,595 per month; on February 21, 2007, at a rate of $1,695 per month; on February 19, 2008, at a rate of $1,745 per month; on February 19, 2009, at a rate of $1,745 per month; on February 19, 2010, at a rate of $1,650 per month; on February 22, 2011, at a rate of $1,650 per month; on February 15, 2012, at a rate of $1,675 per month; on March 5, 2013, at a rate of $1,725 per month; on February 25, 2014, at a rate of $1,750 per month; on March 11, 2015, at a rate of $1,850 per month; and on March 23, 2016, at a rate of $2,050 per month. Except for the 2009 and the 2015 renewals, the renewal leases were signed by defendant Alvin Glick as owner. From 1999 through 2016, the apartment was not registered with DHCR as rent-stabilized.

By letter dated April 11, 2017, MGC's counsel advised plaintiff that it was electing not to renew her lease, and that she had until May 31, 2017 to vacate the apartment. Plaintiff then commenced this action seeking declaratory relief and damages on or about April 18, 2017.

By letter dated April 21, 2017, MCG acknowledged receipt of the pleading and provided plaintiff with an analysis of the rent history, determining that the overcharges amounted to $4,626.16

and sending a copy of a check for that amount, together with a renewal lease commencing August 1, 2017 for a monthly rent of $1,767.50 for the first year and $1,802.80 for the second year. Plaintiff declined to accept the offer.

Defendants then registered the apartment with DHCR in May 2017, stating that the monthly rent for the period May 1999 to May 2000 was $1,207.05, and that the rent increase from $1,022.92 was due to a vacancy lease. They also retroactively registered the apartment for years 1999 through 2016, with the legal regulated rent calculated in accord with the Rent Guidelines Board increases applicable during plaintiff's tenancy.

Plaintiff sought declaratory and injunctive relief, and money damages, based on the alleged rent overcharges. Specifically, plaintiff sought: (1) a declaration that the apartment was rent-stabilized, a determination that plaintiff's legal, regulated rent is $1,022.92 per month, and an injunction requiring defendants to comply with the Rent Stabilization Law and Code, including offering plaintiff a proper renewal lease and prohibiting defendants from terminating her tenancy; (2) money damages in the amount of the rent overcharge, alleged to be $106,923.08, plus any subsequent overcharges, with interest; and (3) legal fees under Real Property Law § 234.

Defendants denied the allegations and asserted various

affirmative defenses including that they had refunded to plaintiff, any overcharge. Defendants also moved for summary judgment. Defendants argued that the four-year lookback period applied unless plaintiff could prove fraud, which she could not. Defendants claimed they had treated plaintiff as a deregulated tenant based on the representations of prior management, and when they realized their error they offered to reimburse her, and began treating her as a rent-stabilized tenant. Defendants asserted that a rent freeze based solely on the failure to register was unjustified, and that the cases holding otherwise involved clear examples of fraud.

The motion court granted plaintiff's motion for summary judgment and denied defendants' cross motion. The court, while finding scant evidence of fraud, determined that the last legal, registered rent was $1,022.92, and therefore, plaintiff's rent was frozen at that amount. The court also found that because defendants were collecting overcharges prior to lawfully registering the apartment, they were not entitled to any increases in rent. Accordingly, the court calculated the overcharges from the base date of May 2013 to be the difference between $1,022.92 and the monthly rent charged through April 2017. The motion court also found that plaintiff was entitled to attorneys' fees and treble damages.

On June 14, 2019, New York State enacted the Housing Stability and Tenant Protection Act of 2019 (L 2019, ch 36) (HSTPA). This legislation made comprehensive changes to the rent laws. As relevant here, Part F of the HSTPA amended RSL § 26-516 and CPLR 213-a, which govern claims of rent overcharge and the statute of limitations for bringing such claims. The amendments to the rent laws that went into effect on the same day that the judgment was entered in this rent overcharge case apply to any claims pending on that date. Because plaintiff's overcharge claims were pending on the effective date of the HSTPA, the changes made therein are applicable here (*see Dugan v London Terrace Gardens, L.P.*, 177 AD3d 1, 10-11 [1st Dept 2019]).

The motion court properly found that pursuant to Rent Stabilization Law (Administrative Code of City of NY) § 26-517(e), that plaintiff's rent was frozen at $1022.92 for the purpose of determining the amount of the overcharge. Defendants failed to file any rent registrations for the apartment after the registration of 1998. That registration reflected a rent of $1022.92. The imposition of a rent freeze reflects a statutory requirement. The Rent Stabilization Code (RSC § 2528.4) provides that an owner who fails to timely file rent registrations with DHCR is barred from collecting rent in excess of the base date rent, and is retroactively relieved of that penalty upon filing a

proper registration only when "increases in the legal regulated rent were lawful except for the failure to file a timely registration" (*see Nolte v Bridgestone Assoc. LLC*, 167 AD3d 498, 499 [1st Dept 2018]; *Matter of 215 W 88th St. Holdings LLC v New York State Div. Of Housing & Community Renewal*, 143 AD3d 652, 653 [1st Dept 2016]). That is not the situation here.

The court should have lifted the rent freeze prospectively after defendants filed the rent registration statements with DHCR in May 2017. RSL § 26-517(e) provides that "[t]he filing of a late registration shall result in the prospective elimination of [rent-freeze] sanctions" (*see also* RSC § 2528.4; *Matter of Cardona v New York State Div. of Hous. & Community Renewal*, 214 AD2d 393, 394 [1st Dept 1995] ["rent freeze imposed because of an owner's failure to file rent stabilization registration statements may be prospectively eliminated upon the filing of those statements"]). Here, defendants re-registered the apartment with DHCR in May 2017 and filed registration statements for the missing years. Those statements reflected the proper legal regulated rent during plaintiff's tenancy, including lawful increases, bringing the legal rent to $1,767.50 as of May 2017. Thus, defendant is entitled to collect that amount going forward from that date, along with any lawful increases thereafter.

We also find that the court correctly awarded treble damages

based on defendants' failure to rebut the presumption of willfulness arising from the admitted overcharges (*see Matter of Sohn v New York State Div. of Hous. & Community Renewal*, 258 AD2d 384 [1st Dept 1999]). While defendants contend that their offer to refund the overcharges to plaintiff shows that the overcharges were not willful, under Administrative Code § 26-516(a), as amended, the voluntary tender of a refund after a complaint has been filed is not considered evidence of lack of willfulness. In any event, it is disputed as to whether defendants tendered an actual check to plaintiff or the copy of a check.

The court correctly determined that defendants' assumption that the apartment was deregulated, based solely on a representation by prior management, amounts to willful ignorance, which constitutes willful conduct, particularly since defendants are sophisticated property managers and owners (*see Matter of Obiora v New York State Div. of Hous. & Community Renewal*, 77 AD3d 755, 756 [2d Dept 2010]).

The court correctly determined that defendants Mautner-Glick Corp. and Alvin Glick may be held personally liable as owners, as defined in Rent Stabilization Code (9 NYCRR) § 2520.6(i). In no lease or correspondence with plaintiff contained in the record did these defendants disclose any principal upon whom liability should be imposed instead (*see I. Kaszirer Diamonds, Ltd. v Zohar*

Creations, Ltd., 146 AD2d 492, 494 [1st Dept 1989]).

The court improperly awarded plaintiff prejudgment interest prior to the date of its decision. "Interest on a rent overcharge award is generally authorized from the date of the initial monthly overpayment, *except when treble damages are warranted*. In those circumstances, treble damages are imposed in lieu of interest from the date of the monthly overcharge to the date of the [court's] decision" (*Mohassel v Fenwick*, 5 NY3d 44, 50 [2005] [emphasis added]). Because treble damages were awarded here, interest should have been awarded only from the date of the court's decision going forward (*id.*).

Under the amended RSL §26-516 (a)(2), "recovery of overcharge penalties shall be limited to the six years preceding the complaint," and treble damages "shall be assessed upon all overcharges willfully collected by the owner starting six years before the complaint is filed." As such, the matter is remanded to the motion court for a recalculation of damages and interest.

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

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

ENTERED: DECEMBER 3, 2019

CLERK

Acosta, P.J., Renwick, Mazzarelli, Kapnick, JJ.

10476-
10476A The People of the State of New York,
Respondent,

-against-

David Snipes,
Defendant-Appellant.

Ind. 1304/09

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (R. Jeannie Campbell-Urban of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered March 23, 2010, convicting defendant, after a jury trial, of robbery in the first degree (three counts), burglary in the first degree (three counts), robbery in the second degree (six counts), and assault in the second degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 25 years to life, and judgment of resentence, same court and Justice, rendered December 12, 2017, reimposing the sentence imposed on March 23, 2010 and bringing up for review an order of the same court and Justice, entered on or about October 17, 2017, which granted the People's CPL 440.40 motion to set aside an intervening sentence as invalid, unanimously affirmed.

The court did not violate defendant's rights under CPL 310.30 and *People v O'Rama* (78 NY2d 270 [1991]) by failing to

place on the record and discuss in advance with the attorneys a jury note that unambiguously requested a specific exhibit in evidence. The parties had agreed in advance to follow such a procedure in the event of a request for exhibits. In any event, regardless of whether there was a prior agreement, "[n]otes that only require the ministerial act of sending exhibits into the jury room do not implicate the requirements of *O'Rama*" (*People v Dunham*, 172 AD3d 524, 524 [1st Dept 2019], *lv denied* 34 NY3d 930 [2019]). The note simply called for the delivery of the exhibit, and there was nothing that called for input from counsel.

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

In granting the People's CPL 440.40 motion to reinstate defendant's original sentence as a persistent violent felony offender, which had been set aside on a ground later rejected by the Court of Appeals in *People v Smith* (28 NY3d 191 [2016]), the court correctly determined that defendant's 1999 guilty plea was not unconstitutionally obtained. After a hearing, the court found that defendant failed to demonstrate a reasonable probability that he would not have pleaded guilty had he been aware of the postrelease supervision component of the 1999

sentence (*see Smith*, 28 NY3d at 205). The record supports that finding. We find it unnecessary to address the People's procedural arguments relating to this issue.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 3, 2019

CLERK

Acosta, P.J., Renwick, Mazzarelli, Kapnick, JJ.

10477-
10477A-
10477B

Index 162616/14

Ivan Pena,
Plaintiff-Appellant,

-against-

Pinnacle Associates II NY LLC,
Defendant-Respondent,

R&L Construction, Inc., et al.,
Defendants.

- - - - -

[And a Third-Party Action]

_____

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

Mischel & Horn, New York (Christen Giannaros of counsel), for respondent.

_____

Order, Supreme Court, New York County (David B. Cohen, J.), entered December 21, 2018, which denied plaintiff's motion to vacate an order of dismissal entered May 14, 2018, restore the case to active status on the trial calendar, and set down a new trial date, unanimously reversed, on the facts, without costs, and the motion granted. Order, same court and Justice, entered May 14, 2018, which denied plaintiff's motion for summary judgment as academic, unanimously reversed, on the law, without costs, and the matter remanded to Supreme Court for consideration of the motion. Appeal from aforesaid order of dismissal,

unanimously dismissed, without costs, as subsumed in the appeal from the December 21, 2018 order.

Plaintiff demonstrated both a reasonable excuse for his default and a meritorious claim (*see Gibbs v St. Barnabas Hosp.*, 16 NY3d 74 [2010]). He submitted an affirmation by his counsel and an affidavit by counsel's calendar clerk that established law office failure and an affidavit of merit sufficient to raise an issue of fact as to the merit of his claim (*see Nieves v Citizens Advice Bur. Jackson Ave. Family Residence*, 140 AD3d 566 [1st Dept 2016]).

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

ENTERED: DECEMBER 3, 2019

CLERK

Acosta, P.J., Renwick, Mazzarelli, Kapnick, JJ.

10478 In re Albiery R.E.,

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

_____

Janet E. Sabel, The Legal Aid Society, New York (John A. Newbery of counsel), for appellant.

Georgia M. Pestana, Acting Corporation Counsel, New York (Jamison Davies of counsel), for presentment agency.

_____

Order of disposition, Family Court, New York County (Adetokunbo O. Fasanya, J.), entered on or about April 20, 2018, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he had committed acts that, if committed by an adult, would constitute the crimes of attempted robbery in the first degree, criminal possession of a weapon in the fourth degree and assault in the third degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-49 [2007]). There is no basis for disturbing the court's determinations concerning credibility. The evidence supported conclusions that appellant's use of force

and demand for money constituted a single incident of attempted robbery, that appellant caused "more than slight or trivial pain" to the victim (*People v Chiddick*, 8 NY3d 445, 447 [2007]), and that appellant used a metal part of a broken umbrella in a manner that rendered it a dangerous instrument (*see People v Dones*, 279 AD2d 366, 366 [1st Dept 2001], *lv denied* 96 NY2d 799 [2001]).

In the course of challenging the sufficiency and weight of the evidence, and arguing that the petition should be dismissed on that basis, appellant also makes several claims of procedural or evidentiary error. However, none of these claims warrant a finding that the evidence was insufficient or that the finding was against the weight of the evidence, nor do these claims otherwise require reversal.

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

ENTERED: DECEMBER 3, 2019

CLERK

Acosta, P.J., Renwick, Mazzarelli, Kapnick, JJ.

10479 In re Boris Teichmann, Index 101209/18
Petitioner-appellant,

-against-

New York City Employees' Retirement System,
Respondent-Respondent.

_____

Boris Teichmann, appellant pro se.

James E. Johnson, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Arlene P. Bluth, J.), entered November 28, 2018, denying the petition brought pursuant to CPLR article 78 for retroactive retirement benefits dating back to 2008, and granting respondent's cross motion to dismiss the petition, unanimously affirmed, without costs.

The court properly found that the petition is time-barred, since petitioner failed to commence this action within four months of respondent's final determination regarding his retirement disability benefits (*see* CPLR 217[1]; *Matter of Best Payphones, Inc. v Department of Info. Tech. & Telcom. of City of N.Y.*, 5 NY3d 30, 34 [2005]). Respondent notified petitioner of its final determination in June 2017, but petitioner did not commence this proceeding until August 2018. Contrary to his contentions, the June 2018 letter from respondent explaining its

reasoning for denying petitioner retroactive benefits did not constitute a fresh and complete examination based on newly presented evidence, but merely reiterated its June 2017 determination that petitioner was not entitled to such benefits (*see Matter of Baloy v Kelly*, 92 AD3d 521 [1st Dept 2012]; *Raykowski v New York City Dept. of Transp.*, 259 AD2d 367 [1st Dept 1999]). A request for reconsideration of a final and binding determination "does not toll or revive the statute of limitations" (*Matter of Moskowitz v New York City Police Pension Fund*, 82 AD3d 473, 473 [1st Dept 2011]).

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

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

ENTERED: DECEMBER 3, 2019

CLERK

Acosta, P.J., Renwick, Mazzarelli, Kapnick, JJ.

10480 Carmen Cano, Index 310129/11
Plaintiff,

Catherine Hidalgo, et al.,
Plaintiffs-Appellants,

-against-

U-Haul Company of Arizona,
Defendant,

Lara Andretti, et al.,
Defendants-Respondents.

_____

Sacco & Fillas, LLP, Astoria (Nazareth Markarian of counsel), for appellants.

Gerber Ciano Kelly Brandy LLP, New York (Michael F. Harris of counsel), for Lara Andretti, respondent.

Marjorie E. Bornes, Brooklyn, for Sunrise Limo Enterprise and Neho F. Abouo, respondents.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about December 1, 2017, which granted the motion of defendants Sunrise Limo Enterprise (Sunrise) and Neho F. Abouo and the cross motion of defendant Lara Andretti for summary judgment dismissing the complaint of plaintiffs Catherine Hidalgo, Mario Ayala, and Alexis Cerda for lack of a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Plaintiffs Hidalgo, Ayala and Cerda each allege that they

sustained serious injuries as the result of a motor vehicle collision that occurred while they were passengers in a taxi owned by Sunrise and driven by Abouo. Defendants established prima facie that each plaintiff's claimed cervical and lumbar spine injuries were not serious through the affirmed reports of their expert orthopedist, who found normal range of motion and no objective evidence of injury (*see Pouchie v Pichardo*, 173 AD3d 643, 644 [1st Dept 2019]; *see also Munoz v Robinson*, 170 AD3d 414 [1st Dept 2019]).

In opposition, each plaintiff failed to raise an issue of fact. Their expert physiatrist failed to reconcile her findings of limitations in range of motion at a recent examination with the reports of plaintiffs' treating physician finding normal or near-normal range of motion in each claimed body part within weeks of the subject accident (*see Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043, 1044 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]; *Jno-Baptiste v Buckley*, 82 AD3d 578, 578-579 [1st Dept 2011).

Regarding plaintiff Hidalgo's claim of right shoulder injury, defendants' expert orthopedic surgeon's report established their prima facie entitlement to dismissal, since his examination documented normal range of motion in that body part as well (*see Pouchie*, 173 AD3d at 644; *Alvarez*, 120 AD3d at 1044). Because she offered no evidence of treatment to that body

part contemporaneous with the accident, Hidalgo failed to raise an issue of fact in opposition (*see Stephanie N. v Davis*, 126 AD3d 502 [1st Dept 2015]; *Rosa v Mejia*, 95 AD3d 402, 403-404 [1st Dept 2012]).

Ayala's claimed left knee injury may not be considered, since an injury to that body part was not pled in the bill of particulars (*see Sanchez v Steele*, 149 AD3d 458, 459 [1st Dept 2017]). In any event, Ayala's left knee claim was properly dismissed, since the only objective evidence of injury to that body part was his radiologist's MRI report that noted only degenerative changes, which plaintiffs' expert physiatrist failed to address or explain (*see Acosta v Traore*, 136 AD3d 533 [1st Dept 2016]; *Farmer v Ventkate Inc.*, 117 AD3d 562 [1st Dept 2014]).

Furthermore, each plaintiff's 90/180-day claim was properly dismissed. Defendants established their prima facie entitlement to dismissal of these claims through the submission of each plaintiff's deposition testimony, in which they denied being incapacitated for the minimum amount of time during the requisite time frame (*see Pouchie*, 173 AD3d at 645). In opposition, plaintiffs failed to raise an issue of fact since they "did not

submit any medical or other documentary proof in support of [their] claim[s]" (*id.*).

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

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

ENTERED: DECEMBER 3, 2019

CLERK

Acosta, P.J., Renwick, Mazzarelli, Kapnick, JJ.

10481 The People of the State of New York, Respondent, Ind. 4477/16

-against-

Angelique Mejias, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered November 27, 2017, convicting defendant, after a jury trial, of assault in the second degree and disorderly conduct, and sentencing her to an aggregate term of five years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348–349 [2007]). There is no basis for disturbing the jury's credibility determinations, including those relating to the element of physical injury. The evidence warranted the inference that the victim's injuries went beyond mere "petty slaps, shoves, kicks and the like" (*Matter of Philip A.*, 49 NY2d 198, 200 [1980]), and that they caused "more than slight or trivial pain" (*People v Chiddick*, 8 NY3d 445, 447 [2007]; *see*

also People v Guidice, 83 NY2d 630, 636 [1994]).

Defendant failed to preserve her claim that a summation remark by the prosecutor rendered the court's adverse inference charge inadequate to remedy the prejudice resulting from the loss of a videotape of the incident, and we decline to review it in the interest of justice. As an alternative holding, we find that the isolated summation remark at issue did not negate the adverse inference charge, which was the only remedy defendant ever requested, and that it did not require a mistrial (*see generally 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 claim.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 3, 2019

CLERK

Acosta, P.J., Renwick, Mazzarelli, Kapnick, JJ.

10482 & M-7290 — Index 110073/06

43rd Street Deli, Inc. doing business as Bella Vita Restaurant,
Plaintiff-Appellant-Respondent,

-against-

Paramount Leasehold, L.P.,
Defendant-Respondent-Appellant.

_____

Cornicello, Tendler & Baumel-Cornicello, LLP, New York (David Tendler of counsel), for appellant-respondent.

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

_____

Order, Supreme Court, New York County (Joel M. Cohen, J.), entered on or about January 3, 2019, which, to the extent appealed from as limited by the briefs, adjudged that plaintiff tenant was not entitled to exercise a right to renew its lease, referred plaintiff's claim for rent credit in the amount of $62,724.79 to a Judicial Hearing Officer to hear and determine, awarded defendant attorneys' fees and referred the reasonable amount of defendant's attorneys' fees to a JHO to hear and determine, unanimously affirmed, without costs.

Supreme Court's determination that plaintiff was not entitled to exercise its right to renew the lease was supported by the evidence. The lease provided that tenant could renew the lease for a 5-year period starting February 1, 2011 provided that

tenant was not in default of the lease beyond the allowed grace period following the expiration of the lease. This provision made the lease renewal option conditional (*see e.g. Ahmed v C.D. Kobsons, Inc.*, 67 AD3d 467, 467-468 [1st Dept 2009]), and therefore, tenant could not exercise this right validly unless it was in full compliance with the lease (*see Jefpaul Garage Corp. v Presbyterian Hosp. in City of N.Y.*, 61 NY2d 442, 448 [1984]).

Tenant's arguments that external circumstances should alter this conclusion are unavailing. The lease clearly provides that tenant defaulted as soon as it failed to pay percentage rent, and landlord was not obligated to provide notice of such default. Moreover, tenant failed to make any payments towards its water bills as additional rent from November 2005 until January 2013, including at the time of the renewal notice (July 1, 2009) and commencement of the renewal term (February 1, 2011). Tenant's bona fide objection to the inflated water bills did not warrant a complete failure to pay. Tenant could have preserved its right to dispute the accuracy of its bills by mitigating this litigation and paying its bills simultaneously (*Beltway 7 Props., Ltd. v Blackrock Realty Advisers, Inc.*, 167 AD3d 100, 104 [1st Dept 2018], *lv denied* 32 NY3d 916 [2019]; *Jenoure v Body Solutions Plus, LLC of Westbury*, 29 Misc 3d 84, 86 [App Term, 2d Dept 2010]).

Supreme Court properly referred the issue of the "waived rent arrears" or "rent credit" to a JHO to hear and determine. Prior to this litigation, the parties were involved in a separate rent litigation whereby landlord sought $133,936.03 from tenant. The parties settled that litigation for $71,211.24, and landlord agreed to waive its collection of the remaining $62,724.79. In connection with this litigation, the parties dispute whether landlord ever removed the $62,724.79 debt from tenant's rental account. At trial, Supreme Court found that landlord's only witness, the building's managing agent, provided testimony that did not allow for a reliable conclusion as to whether the rent credit was ever applied to tenant's account. As this was a bench trial, "deference is accorded the trial court's factual findings particularly where they rest largely upon an assessment of credibility" (*Jump v Jump*, 268 AD2d 709, 710 [3d Dept 2000]; *see also Cushman & Wakefield, Inc. v 214 E. 49th St. Corp.*, 218 AD2d 464, 467-468 [1st Dept 1996], *lv dismissed* 88 NY2d 951, *lv denied* 88 NY2d 816 [1996]). Moreover, the documentary evidence in the record was inconclusive with respect to whether the rent credit was applied fully, partially, or not at all.

Landlord was entitled to attorneys' fees. While normally litigants are required to pay their own legal fees, there is an exception if the parties contract otherwise, as was the case here

(*Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 31 NY3d 569, 584 [2018]). In addition, landlord prevailed over the central relief sought (*Matter of Wiederhorn v Merkin*, 98 AD3d 859, 863 [1st Dept 2012], *lv denied* 20 NY3d 855 [2012]; *see also Blue Sage Capital, L.P. v Alfa Laval U.S. Holding, Inc.*, 168 AD3d 645, 646 [1st Dept 2019], *lv denied* 33 NY3d 904 [2019]). Landlord's other contentions with respect to attorneys' fees address unappealable dicta (*see Grunewald v Metropolitan Museum of Art*, 125 AD3d 438, 439 [1st Dept 2015], *lv denied* 27 NY3d 907 [2016]).

M-7290 - *43rd Street Deli, Inc. v Paramount Leasehold, L.P.*

Motion to strike portions of the brief denied.

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

ENTERED: DECEMBER 3, 2019

CLERK

Acosta, P.J., Renwick, Mazzarelli, Kapnick, JJ.

10483 STB Investments Corporation, et al., Index 650390/14
Plaintiffs-Appellants,

-against-

Sterling & Sterling, Inc.,
Defendant-Respondent.

_____

Duane Morris LLP, New York (Fran M. Jacobs of counsel), for appellants.

Goldberg Segalla LLP, New York (Peter J. Biging of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joel M. Cohen, J.), entered April 11, 2019, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Issues of fact exist as to whether a special relationship arose between plaintiff STB Investments Corporation and its managing agent plaintiff 303 West 42nd Street Realty Co. (plaintiffs), on the one hand, and defendant insurance broker, on the other, that imposed on defendant a duty to advise plaintiffs as to insurance coverage that would have included the loss arising from plaintiffs' demolition project (*see Voss v Netherlands Ins. Co.*, 22 NY3d 728, 735 [2014]). Plaintiffs contend that the special relationship arose from an interaction with defendant in which they relied on defendant's expertise as

to coverage. There is evidence that plaintiffs' property manager, who allegedly had never before purchased insurance for a demolition project, requested that defendant obtain adequate coverage for that particular risk, and that defendant agreed to do so, reviewed the demolition contract as part of its efforts, and discussed with plaintiffs the demolition contractor's coverage in the larger context of determining the appropriate level of coverage to obtain for plaintiffs (*see NWE Corp. v Atomic Risk Mgt. of N.Y., Inc.*, 25 AD3d 349 [1st Dept 2006]).

We note that defendant does not dispute plaintiffs' contention that the professional negligence claim is not duplicative of the breach of contract claim and therefore should not have been dismissed on that alternative ground.

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

ENTERED: DECEMBER 3, 2019

CLERK

Acosta, P.J., Renwick, Mazzarelli, Kapnick, JJ.

10484- Index 151738/16
10484A Jeffrey Feuer,
Plaintiff-Appellant,

-against-

Rhoda Feuer,
Defendant-Respondent.

_____

Law Office of Fank Taddeo, Jr., New York (Fank Taddeo, Jr. of counsel), for appellant.

Law Office of Barton P. Levine, New York (Barton P. Levine of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered May 24, 2019, awarding defendant $33,000 of escrow funds, plus prejudgment interest at 9% per year from July 8, 2010 to November 7, 2018, and bringing up for review (1) an order, same court and Justice, entered April 24, 2019, which denied that part of plaintiff's order to show cause that sought to adjust statutory interest; (2) an order, same court and Justice, entered September 24, 2018, which denied plaintiff's motion for leave to renew and reargue his prior motion for summary judgment and defendant's cross motion for summary judgment; and (3) an order, same court (Erika M. Edwards, J.), entered December 27, 2017, which denied plaintiff's motion for summary judgment and granted defendant's cross motion for summary judgment, unanimously

affirmed, without costs.

After the death of defendant's husband, defendant was required to probate his Last Will and Testament in order to receive his 50% interest in a cooperative apartment, which the couple owned as tenants in common. To probate the will quickly, so as to consummate the sale of the co-op, it was necessary to obtain Waivers of Probate/Consents to Probate from the couple's three children, including plaintiff herein. Plaintiff refused to sign a waiver, claiming that before his death, his father told him that he signed a superseding will, which provided for $100,000 in specific bequests to be shared equally by plaintiff and his two sisters. As a result, plaintiff claimed to be entitled to $33,000.

To obtain the waiver in an expeditious manner, the parties signed an agreement which stated that "[i]n consideration of [plaintiff's] agreement to execute [the probate waiver], [defendant] agree[d] to deliver the sum of $33,000 to [her] closing attorney upon the sale of [her] apartment," to be held by him as escrow agent and "shall only be released upon [the parties'] joint written instructions."

Plaintiff commenced the instant action contending that this agreement unambiguously required defendant to pay him $33,000 upon the closing of the co-op. Defendant asserted a counterclaim

which sought a declaration that the money held in escrow should be released to her since plaintiff never produced any proof that substantiated his claim that her husband executed a subsequent will entitling plaintiff to $33,000.

Defendant was entitled to summary judgment on her counterclaim and to dismissal of the complaint. The agreement unambiguously provides that defendant promised to place the $33,000 from the sale of the co-op into her attorney's escrow account, which would only be released upon joint written instructions by the parties. Since there was no promise to release the money unconditionally, as plaintiff contends, there is no breach of contract. Moreover, it would be improper to read into the agreement the additional obligation, as suggested by plaintiff, that the parties agreed to release the money to plaintiff upon the closing of the co-op (*see Kolmar Ams., Inc. v Bioversel Inc.*, 89 AD3d 493, 494 [1st Dept 2011]). Additionally, defendant's counterclaim for the release of the money to her is based on the undisputed fact that the agreement was necessary because of plaintiff's claim that a subsequent Will existed. By agreeing to "deposit" the money into escrow and only release it upon joint written approval, the agreement reflected an intent to set aside the money pending further discussions. However, it is undisputed that plaintiff has failed to produce any evidence

substantiating his position. Therefore, no outstanding factual issues remain.

Prejudgment interest was correctly awarded. CPLR 5001 mandates an award of interest in breach of contract actions (*see* CPLR 5001; *J. D'Addario & Co., Inc. v Embassy Indus., Inc.*, 20 NY3d 113, 117 [2012]). Contrary to plaintiff's contention, "[t]here is no requirement that the breaching party obtain some benefit from the wronged party's money for statutory interest to be paid" (*id.*). Moreover, *Manufacturer's & Traders Trust Co. v Reliance Ins. Co.*, 8 NY3d 583 (2007), a case relied upon by plaintiff, is factually distinguishable because the issue of which party was in breach of the agreement is central to this action, a sum and a judgement was awarded against plaintiff in defendant's favor and defendant was deprived of the use of the money in escrow, due to the competing contractual claims between the parties.

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: DECEMBER 3, 2019

CLERK

Acosta, P.J., Renwick, Mazzarelli, Kapnick, JJ.

10485 The People of the State of New York, Ind. 4207/15
Respondent,

-against-

Confesor Pagan,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles Solomon, J.), rendered February 7, 2017,

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

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

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

ENTERED: DECEMBER 3, 2019

CLERK

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

Acosta, P.J., Renwick, Mazzarelli, Kapnick, JJ.

10486 C. Louise Hepworth, etc., Index 651730/14
Plaintiff-Respondent, 59495/17

-against-

Douglas J. Hepworth, et al.,
Defendants-Appellants.

- - - - -

Douglas J. Hepworth, et al.,
Third-Party Plaintiffs-Appellants,

-against-

Michael Charles,
Third-Party Defendant-Respondent.

_____

Brick Law PLLC, White Plains (Brian H. Brick of counsel), for appellants.

Loeb & Loeb LLP, New York (Paula K. Colbath of counsel), for respondents.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered on August 17, 2018, which, to the extent appealed from as limited by the briefs, denied the request of defendants/third-party plaintiffs (hereinafter defendants) for declarations that (1) defendant George S. Coyne is the current, valid independent trustee of the Hepworth Family Residence Trust and (2) any actions taken by plaintiff or third-party defendant that contravene certain amendments to the trust are null and void *ab initio,* unanimously affirmed, without costs.

While defendants preserved their request for a declaration

regarding Coyne and are not estopped from seeking it (*see generally Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.,* 7 NY3d 96, 106-107 [2006]), their failure to obtain a stay pending appeal prevents them from obtaining the declarations they seek (*see Da Silva v Musso,* 76 NY2d 436, 440 [1990]). Even though defendants appealed from the September 1, 2016 order which invalidated the 2013 amendments to the trust agreement, it remained binding until this Court reversed it in *Hepworth v Hepworth* (156 AD3d 461 [1st Dept, Dec. 2017], *lv denied* 31 NY3d 1112 [2018]) (*see Da Silva,* 76 NY2d at 440). Because defendants failed to obtain a stay of the 2016 order pending appeal, plaintiff had the right – pursuant to the original, unamended trust agreement – to unilaterally remove Coyne as the Independent Trustee (on September 13, 2016) and appoint successor Independent Trustees (on September 13 and November 18, 2016). Since plaintiff's appointment of third-party defendant as Independent Trustee was valid, respondents – who comprise the majority of the trustees – could enter into brokerage agreements on behalf of the trust in February and September 2017.

A party may not request for the first time on appeal "that

the Justice presiding over this matter be recused and a new Justice assigned" (*Yoda, LLC v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 63 AD3d 424, 425 [1st Dept 2009]). Were we to consider this request, we would conclude that recusal is unwarranted (*see Liteky v United States*, 510 US 540, 555 [1994]).

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

ENTERED: DECEMBER 3, 2019

CLERK

Acosta, P.J., Renwick, Mazzarelli, Kapnick, JJ.

10487 In re Linda Reynolds, Index 100624/17
Petitioner-Appellant,

-against-

Towers on the Park Condominium,
an unincorporated association, et al.,
Respondents-Respondents.

_____

Brian M. DeLaurentis, P.C., New York (Brian M. DeLaurentis of counsel), for appellant.

Boyd Richards Parker & Colonnelli, P.L., New York (Matthew T. Clark of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered July 5, 2018, denying the petition brought pursuant to CPLR article 78 seeking, inter alia, to void two amendments to the condominium declaration and by-laws dated May 25, 2011 and June 12, 2012, and granting respondents' motion to dismiss the proceeding, unanimously affirmed, without costs.

The first amendment at issue, which changed the voting threshold needed to amend the declaration and by-laws from 80% to 66 & 2/3%, was approved by over 80% of the common interest in May 2011. The second, which altered the by-laws to allow unit owners to lease their units after having owned them for at least one year, was approved by over 67% of the common interest in June 2012.

The delay in recording the amendments with the City Register until March 2017 was a "technical defect[]" insufficient to invalidate the amendments (*Board of Mgrs. of Madison Med. Bldg. Condominium v Rama*, 249 AD2d 140, 140 [1st Dept 1998]; *see Caruso v Board of Managers of Murray Hill Terrace Condominium*, 146 Misc 2d 405, 408 [Sup Ct, NY County 1990]). The record demonstrates that voting was held; a contractor conducted the voting and reported the vote totals; the amendments were recorded before petitioner commenced this proceeding; and the amendments were executed by the former board president upon approval. Moreover, petitioner relied on their passage when, as a board member in 2012, she approved procedures governing the leasing of units.

The process of holding the meeting open on the voting threshold amendment, in order to reach a quorum, was, at most, a technical defect. This allowed over 96% of the common interest to cast a vote, including petitioner (*see Board of Mgrs. of Madison Med. Bldg. Condominium*, 249 AD2d at 140). Petitioner waived any challenge to the procedure used to approve the leasing amendment by conceding, in her opposition to respondents' motion, that a quorum was reached at the meeting.

The amendment to the by-laws allowing leasing after one year of ownership is not barred by a blanket ban contained in covenants running with the land, which are set forth in the Land

Disposition Agreement between the City of New York and the sponsor. Paragraph 5.02(a)(2) thereof requires owner occupancy only for the "first" bona fide purchaser of each unit. Paragraph 5.01(d) thereof excludes bona fide purchasers from the related covenant to sell to purchasers "who agree to own and occupy" the units "for their primary and personal use," and that covenant "cease[d] to exist" as to each unit upon its sale by the sponsor. Paragraph 2.15 thereof, which is in the article governing construction and marketing by the sponsor, and requires the sponsor to build homes for sale "unless otherwise authorized in writing by HPD," does not apply to bona fide purchasers.

Petitioner's remaining contentions are unpreserved (*see Antiohos v Morrison*, 144 AD3d 427, 428 [1st Dept 2016]), and, in any event, are unavailing. The failure to file amendments with the Secretary of State does not invalidate them (Real Property Law § 339-s[2]; *see Matter of Bronco Dev. Corp. v Assessor of the Town of Bethlehem*, 26 Misc 3d 1219[A], 2010 NY Slip Op 50173[U] [Sup Ct, Albany County 2010]), as they become effective when "duly recorded" with the City Register (Real Property Law § 339-s[1]; *see* Real Property Law § 290[4]; *Ashland Equities Co. v Clerk of N.Y. County*, 110 AD2d 60, 65 [1st Dept 1985]).

Furthermore, a "practical interpretation" of the declaration leads to the conclusion that consent of the sponsor — which is no

longer involved — to changes in the amendment process was not required (*JFURTI, LLC v First Capital Real Estate Advisors, L.P.*, 165 AD3d 419, 420 [1st Dept 2018]).

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

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

ENTERED: DECEMBER 3, 2019

CLERK

Acosta, P.J., Renwick, Mazzarelli, Kapnick, JJ.

10488 Justin Lerner, Index 657273/17
Plaintiff-Appellant,

-against-

Newmark & Company Real Estate, Inc., et al.,
Defendants-Respondents.

_____

Ronald P. Hart, P.C., New York (Ronald P. Hart of counsel), for appellant.

Miguel A. Lopez, New York, for respondents.

_____

Order, Supreme Court, New York County (Andrea Masley, J.), entered September 18, 2018, which, insofar as appealed from as limited by the briefs, granted defendants' motion to dismiss the causes of action for breach of contract, unjust enrichment, and fraud, and denied plaintiff's cross motion for leave to amend the complaint and for issuance of judicially ordered subpoenas duces tecum pursuant to CPLR 3119, unanimously modified, on the law, to deny defendants' motion as to the causes of action for breach of contract and unjust enrichment, and grant plaintiff's motion to the extent of granting leave to serve so much of the proposed amended complaint as pertains to the breach of contract and unjust enrichment causes of action, and otherwise affirmed, with costs to be paid by defendants to plaintiff.

Plaintiff, a licensed real estate broker, alleges that, in

November 2014, he and defendant Newmark & Company Real Estate, Inc. (Newmark), entered into an "Engagement Agreement," for a two-year term, pursuant to which plaintiff was to be paid commissions as set forth in the appended Schedule 1. The Engagement Agreement recited that most of its provisions, expressly including Schedule 1, would survive its termination or expiration. Plaintiff alleges that the parties mutually agreed to his departure before the expiration of the two-year term. Hence, accepted as true, plaintiff's allegations establish that his departure was not a breach of the Engagement Agreement.

Moreover, even if plaintiff's departure were technically a breach of the Engagement Agreement, the agreement expressly provided that Schedule 1, which contained the commissions payment mechanisms, survived termination. Thus, the Engagement Agreement made no material distinction between termination with cause and termination without cause.

Schedule 1 set forth a mechanism for payment of commissions following the broker's departure. Viewed in the light most favorable to plaintiff (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-52 [2002]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]), the complaint and supporting submissions establish that the parties set plaintiff's departure date as of March 14, 2016. Plaintiff submitted his list of

pending transactions by April 11, 2016, within 30 days of the "termination date" as provided for in Schedule 1. Therefore, he was entitled to be paid his share of any commissions received for pending transactions within a specified time after his departure. However, while defendants have received covered commissions, they have refused to pay plaintiff his share. These allegations state a claim for breach of the Engagement Agreement's surviving payment mechanism (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]).[1]

Plaintiff has also stated a claim for breach of the Termination Agreement, dated June 16, 2016, and drafted by defendants themselves. The Termination Agreement on its face did little more than confirm the Engagement Agreement's post-termination provisions, including maintenance of confidentiality

[1] At this early procedural juncture, we decline to dismiss the claim of breach of the Engagement Agreement as against defendant BGC Partners, Inc. While not a signatory to the contract, BGC is expressly referred to in the preamble as an affiliate of Newmark, and thus is arguably a party thereto. Thus, the cases cited by defendants for the proposition that "a person or entity who is not a party to a contract cannot be held liable for its breach" are inapposite (*see Stern v H. DiMarzo, Inc.*, 19 Misc 3d 1144[A], 2008 NY Slip Op 51163[U], * 10 [Sup Ct, Westchester County 2008]; *HDR, Inc. v International Aircraft Parts*, 257 AD2d 603, 604 [2d Dept 1999]). Moreover, while Schedule 1 states that affiliates like BGC will not pay compensation under the contract, this does not necessarily compel the conclusion that the affiliates cannot be held liable for its breach.

by plaintiff and non-solicitation of defendants' clients, and payment of commissions per the "pending list" mechanism of Schedule 1. Plaintiff complied with his obligations thereunder, including submission of his list of pending transactions as of the date of his departure.

It is true that neither party signed the Termination Agreement. However, where the evidence supports a finding of intent to be bound, a contract will be unenforceable for lack of signature only if the parties "positive[ly] agree[d] that it should not be binding until so reduced to writing and formally executed" (*Matter of Municipal Consultants & Publs. v Town of Ramapo*, 47 NY2d 144, 149 [1979]; *Elizabeth St. v 217 Elizabeth St. Corp.*, 301 AD2d 481, 482 [1st Dept 2003]). While the Termination Agreement contained a counterparts clause and signature lines indicating that it could be accepted by signature and countersignature, it did not positively state that the parties could assent only by signing. By contrast, the Engagement Agreement, also drafted by defendants, expressly provided that "in unsigned form [it] does not become an offer of any kind and does not become capable of acceptance." Thus, defendants knew how to draft an agreement that could be accepted only by signature, but they did not so draft the Termination Agreement. The evidence, i.e., the parties' months-long email

exchanges, during which plaintiff submitted his list of pending transactions, defendants drafted the Termination Agreement and forwarded it to plaintiff, and the parties disagreed about the extent to which transactions listed by plaintiff were covered, supports a finding that the parties intended to be bound by the Termination Agreement, despite their failure to sign it (*see Kolchins v Evolution Mkts., Inc.*, 31 NY3d 100, 107-108 [2018]).

Credited as true, plaintiff's allegations establish that defendants accepted his resignation. They then drafted the Termination Agreement to lay out a framework for payment of commissions on transactions that he brokered but that closed only after his departure. Defendants then quibbled over the terms of payment, drawing out indefinitely the matter of payment, while controlling all information about which transactions had closed. Defendants' goal was to obstruct and refuse to pay commissions that plaintiff had earned by virtue of brokering the transactions. These allegations state a claim for unjust enrichment as an alternative to plaintiff's contract claims (*see Sabre Intl. Sec., Ltd. v Vulcan Capital Mgt., Inc.*, 95 AD3d 434, 438-439 [1st Dept 2012]; *Curtis Props. Corp. v Greif Cos.*, 236 AD2d 237 [1st Dept 1997]).

Plaintiff contends that defendants induced him to enter into the Termination Agreement, while, from the moment they conceived

of the agreement, they had no intention of carrying out their end of the bargain. As a remedy for this alleged fraud, plaintiff seeks the same measure of damages as he demands on his contract claim. He makes no detailed factual allegations to support the claim of fraud, instead inferring from the fact that negotiations were drawn out, and ended up with non-payment, that the entire Termination Agreement was conceived of as a plot to withhold commissions that he had earned. Thus, he has failed to state a cause of action for fraud (*see Cronos Group Ltd. v XComIP, LLC*, 156 AD3d 54, 62-63 [1st Dept 2017]; *MBIA Ins. Corp. v Credit Suisse Sec. [USA] LLC*, 165 AD3d 108, 114 [1st Dept 2018]; *MMCT, LLC v JTR Coll. Point, LLC*, 122 AD3d 497, 499 [1st Dept 2014]).

Plaintiff's proposed amended complaint is substantially similar to the original complaint, asserting the same causes of action and adding a few allegations that serve chiefly to elaborate on the claim for breach of the Termination Agreement. Thus, plaintiff should be granted leave to serve the proposed amended complaint to the extent it pertains to the causes of action for breach of contract and unjust enrichment (*see Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015]).

Plaintiff requested, pursuant to CPLR 3119, that the court so-order subpoenas duces tecum to compel three persons located in California to produce documents. However, CPLR 3119 "provides a

mechanism for disclosure in New York for use in an action that is pending in another state ..., not the other way around" (*Matter of 91 St. Crane Collapse Litig.*, 159 AD3d 511, 512 [1st Dept 2018]).

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

ENTERED: DECEMBER 3, 2019

CLERK

Acosta, P.J., Renwick, Mazzarelli, Kapnick, JJ.

10489 The People of the State of New York, Ind. 2939/14
Respondent,

-against-

Richard Pearson,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Ronald Alfano of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael J. Obus, J.), rendered June 2, 2016,

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

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

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

ENTERED: DECEMBER 3, 2019

CLERK

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

Acosta, P.J., Renwick, Mazzarelli, Kapnick, JJ.

10490 The People of the State of New York, Respondent, Ind. 2941/16

-against-

Fabian Miller, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno 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 (Ruth Pickholz, J.), rendered July 13, 2017, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him to a term of 3½ years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis upon which to disturb the jury's determinations concerning credibility. The evidence established every element of robbery under the theory of forcible retention of stolen property immediately after the taking (Penal Law § 160.00[1]). The jury could reasonably infer that defendant's violent response to the victim's attempt to reclaim a backpack that the victim had laid aside while sleeping on a park bench was incompatible with the behavior of a person

who had innocently acquired lost or abandoned property (*see generally People v Gordon*, 23 NY3d 643, 650 [2014]). The jury could also infer that defendant's use of force was sufficiently proximate in time to his original taking of the backpack so as to satisfy the requirement of immediacy (*see People v Dekle*, 83 AD2d 522 [1st Dept 1981], *affd* 56 NY2d 835 [1982]). We have considered and rejected defendant's remaining arguments.

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

ENTERED: DECEMBER 3, 2019

CLERK

Acosta, P.J., Renwick, Mazzarelli, Kapnick, JJ.

10491 River Park Associates (1972) L.P., Index 305004/10
Plaintiff-Appellant,

-against-

Richman Plaza Garage Corp.,
Defendant-Respondent.

_____

Westermann Sheehy Keenan Samaan & Aydelott, LLP, East Meadow (Michael J. Rosenthal of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Doris Gonzalez, J.), entered on or about January 23, 2018, which denied plaintiff's motion for summary judgment on liability on its rent arrears claim, for dismissal of defendant's counterclaims and affirmative defenses, and to preclude defendant from presenting evidence in support of its counterclaims and affirmative defenses based on the failure to comply with discovery, unanimously modified, on the law, to grant the summary judgment motion, dismiss the affirmative defenses and the fourth counterclaim, and otherwise affirmed, without costs.

Defendant failed to present any evidence disputing the rent arrears claimed by plaintiff. Although the correspondence submitted by plaintiff in support of its motion and the stipulation settling the prior rent arrears action indicated that

plaintiff may have had some responsibility for repairs to the garage, paragraph 4 of the lease expressly provided that plaintiff's failure to make repairs could not be used as a set off for rent arrears. Moreover, defendant did not contend that plaintiff failed to provide requested discovery concerning the arrears or that the outstanding depositions would provide evidence refuting the existence of the arrears or of the amount claimed by plaintiff. Information as to the existence and amount of the arrears was not within plaintiff's exclusive knowledge and defendant provided no evidence that it had requested discovery on this issue. In order to avail oneself of CPLR 3212(f) to defeat or delay summary judgment, "a party must demonstrate that the needed proof is within the exclusive knowledge of the moving party, that the claims in opposition are supported by something other than mere hope or conjecture, and that the party has made at least some attempt to discover facts at variance with the moving party's proof" (*Voluto Ventures, LLC v Jenkens & Gilchrist Parker Chapin LLP*, 44 AD3d 557 [1st Dept 2007] [internal citations omitted]).

The first counterclaim alleged a breach of the covenant of good faith and fair dealing based on plaintiff's failure to act promptly in seeking DHCR approval of the proposed rent increase, and in preventing defendant from taking action to increase the

rent prior to such approval. Documents provided by plaintiff in support of its motion raise issues of fact as to whether the delay in seeking DHCR approval was due to defendant's failure to provide documentation to support the application or resulted from plaintiff's inaction.

There are also issues of fact as to the second counterclaim, for breach of contract based on plaintiff's failure to make repairs to the garage. The stipulation signed by plaintiff in connection with the settlement of the prior rent arrears action provided that plaintiff would make numerous repairs. Plaintiff failed to submit evidence that conclusively established that it made the repairs or was not required to do so.

The third counterclaim, for breach of the covenant of quiet enjoyment, required a showing that plaintiff's conduct substantially and materially deprived defendant of the beneficial use and enjoyment of the premises or that defendant was actually evicted or abandoned the premises. There must be an actual ouster, whether total or partial, or if constructive, the tenant must have actually abandoned the premises (*Jackson v Westminister House Owners Inc.*, 24 AD3d 249, 250 [1st Dept 2005], *lv denied* 7 NY3d 704 [2006]).

There were triable issues of fact as to whether plaintiff's failure to make cited repairs breached its duty of quiet

enjoyment in that defendant alleged that it was unable to rent a portion of the garage due to water leaks that plaintiff failed to remedy.

However, plaintiff demonstrated that there are no triable issues of fact concerning the fourth counterclaim, for tortious interference with contract. The leaflets and notices plaintiff sent to building residents accurately stated that defendant was not permitted to raise the rent on the garage space without approval of DHCR, and that such approval had not yet been obtained. Defendant failed to present evidence supporting its claim that it was entitled to increase the rent absent that approval.

Deference is accorded to the motion court's discretionary determinations regarding disclosure (*see Allen v Cromwell-Collier Publ. Co.*, 21 NY2d 403, 405 [1968]). The court did not improvidently exercise its discretion in declining to sanction

defendant's failure to produce additional records in that the outstanding depositions would reveal whether additional responsive material existed.

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

ENTERED: DECEMBER 3, 2019

CLERK

Acosta, P.J., Renwick, Mazzarelli, Kapnick, JJ.

10492 Ronald Hamilton, Index 25434/15
Plaintiff-Appellant,

-against-

David Marom,
Defendant-Respondent.

_____

Ogen & Sedaghati, P.C., New York (Eitan Ogen of counsel), for appellant.

Clausen Miller, P.C., New York (Don R. Sampen of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (John R. Higgitt, J.), entered October 26, 2018, which, to the extent appealed from as limited by the briefs, granted the branch of defendant's motion for summary judgment dismissing plaintiff's claim of a serious injury to his right shoulder, unanimously reversed, on the law, without costs, and that part of the motion denied.

Defendant satisfied his prima facie burden of showing that plaintiff did not sustain a serious injury to his right shoulder by submitting the reports of a neurologist and orthopedist, who found that plaintiff had normal range of motion and opined that any alleged injuries had resolved with no permanent or residual effects (*see Diakite v PSAJA Corp.*, 173 AD3d 535 [1st Dept 2019]; *Frias v Gonzalez-Vargas*, 147 AD3d 500 [1st Dept 2017]). Defendant also pointed to plaintiff's deposition testimony

acknowledging a prior right shoulder injury for which he had arthroscopic surgery about 10 years earlier.

In opposition, plaintiff raised a triable issue of fact through the reports of his treating physician and orthopedic surgeon who found limitations in range of motion, and who acknowledged the prior injury and surgery, and opined that there was a causal relationship between plaintiff's current right shoulder injuries and the accident. The surgeon opined, based on plaintiff's history, his own treatment of plaintiff, his review of the MRI report, and observations during surgery that the tears in plaintiff's shoulder were traumatically induced, noting that plaintiff had been asymptomatic before the accident (*see Pouchie v Pichardo*, 173 AD3d 643, 644 [1st Dept 2019]; *Portillo v Island Master Locksmith, Inc.*, 160 AD3d 463 [1st Dept 2018]).

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

ENTERED: DECEMBER 3, 2019

CLERK

Acosta, P.J., Renwick, Mazzarelli, Kapnick, JJ.

10493 The People of the State of New York, Ind. 1118/17
Respondent,

-against-

Fernando Rios,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Michael J. Yetter of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Kevin McGrath, J. at plea; Curtis J. Farber, J. at sentencing), rendered March 22, 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: DECEMBER 3, 2019

CLERK

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

Acosta, P.J., Renwick, Mazzarelli, Kapnick, JJ.

10495N Rogerio Cervantes Figueroa, et al., Index 24747/17E
Plaintiffs-Respondents,

-against-

Relgold, LLC,
Defendant-Appellant.

_____

Shafer Glazer, LLP, New York (Howard S. Shafer of counsel), for appellant.

McMahon & McCarthy, Bronx (Matthew J. McMahon of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered July 16, 2019, which, in this action for personal injuries, denied defendant's motion to vacate a default judgment in plaintiffs' favor in the amount of $4,200,000, unanimously reversed, on the law, without costs, and the motion granted.

An affidavit from a principal of defendant property owner, who also served as property manager for the premises, established that defendant did not receive timely notice of the action on account of an outdated business address on file with the Secretary of State (*see* CPLR 317; *Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141-142 [1986]). The affidavit also showed that defendant had a meritorious defense, in that the default judgment was defective, given the conclusory allegations of a purportedly viable negligence claim (*see* CPLR 3215[f]; *Brown*

v Rosendale Nurseries, 259 AD2d 256 [1st Dept 1999]*; St. Paul Marine Fire & Mar. Ins. Co. v Eastmond & Sons*, 244 AD2d 294 [1st Dept 1997]). Furthermore, the commercial lease for the premises where plaintiff fell indicated that the tenant, which was the injured plaintiff's employer, was responsible for maintaining the nonpublic, allegedly dangerous staircase and for obtaining insurance to indemnify defendant for any liability that arose from the tenant's negligent acts or omissions.

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

ENTERED: DECEMBER 3, 2019

CLERK

Acosta, P.J., Renwick, Mazzarelli, Kapnick, JJ.

10496N- Index 150053/18
10496NA In re American Express Company,
Petitioner-Appellant,

-against-

United States Virgin Islands
Department of Justice, et al.,
Respondents-Respondents.

_____

Wilmer Cutler Pickering Hale and Dorr LLP, New York (David S. Lesser of counsel), for appellant.

Motley Rice LLC, New York (David I. Ackerman of counsel), for respondents.

_____

Orders, Supreme Court, New York County (John J. Kelley, J.), entered August 30, 2018, which denied the petition to quash the subpoena and granted respondents' motion to dismiss the proceeding, unanimously reversed, on the law, without costs, the petition granted, the subpoena quashed and the motion to dismiss denied.

Petitioner seeks to quash a subpoena issued by the Attorney General and Commissioner of the Department of Licensing and Consumer Affairs of the United States Virgin Islands (USVI).

The motion court improvidently exercised its discretion in dismissing the instant action in favor of the related USVI action.

Although the USVI action was filed first, it was only first

by a few hours (*see L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1, 9 [1st Dept 2007]; *Seaboard Sur. Co. v Gillette Co.*, 75 AD2d 525, 525 [1st Dept 1980]). Moreover, respondents at least arguably induced petitioner to delay filing this action and filed the USVI action preemptively before the deadline to respond to the subpoena expired (*see IRX Therapeutics, Inc. v Landry*, 150 AD3d 446, 447 [1st Dept 2017]; *L-3*, 45 AD3d at 8-9; *White Light Prods. v On the Scene Prods.*, 231 AD2d 90, 100 [1st Dept 1997]).

While the USVI clearly has a significant interest in protecting its residents from unfair business practices, the more pressing concern at this stage - when all that is at issue is a subpoena seeking information, not an enforcement action - is the protection of the party from whom discovery is being sought from unreasonable or burdensome discovery requests (*see Hyatt v State of Cal. Franchise Tax Bd.*, 105 AD3d 186, 200-201 [2d Dept 2013]; *see also* CPLR 3119[e]).

The petition to quash should have been granted.

The subpoena is preempted by federal law insofar as it seeks documents from American Express Centurion Bank and American Express Bank, FSB, which entities have since merged into American Express National Bank, a federally chartered national bank (*see* 12 USC § 484[a]; *Cuomo v Clearing House Assn., L.L.C.*, 557 US 519, 524-525, 535-536 [2009]; *Watters v Wachovia Bank, N.A.*, 550

US 1, 13 [2007], *superseded by statute on other grounds as stated in Gordon v Kohl's Dept. Stores, Inc.*, 172 F Supp 3d 840, 863-864 [ED Pa 2016]). Even if respondents limited their investigation to conduct occurring prior to the merger, the result would be the same (*see Capital One Bank (USA), N.A. v McGraw*, 563 F Supp2d 613, 621-622 [SD W Va 2008]).

The subpoena also failed to meet the procedural requirements for out-of-state subpoenas because it was not issued "under authority of a court of record" (*see generally* CPLR 3119[a][1], [4]; Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, C3119:2). Although the subpoena need not have been issued in connection with a pending litigation, there must have been some court involvement, such as the issuance of a commission by a state court clerk or signature of the subpoena by a state court judge (*see e.g. Matter of Harris v Seneca Promotions, Inc.*, 149 AD3d 1508, 1509-1510 [4th Dept 2017]; *Hyatt*, 105 AD3d at 191-192, 199-200; *see also* CPLR 2308[a]; Connors at C3119:2). We reject respondents' argument that administrative subpoenas are

outside the scope of CPLR 3119 and not subject to any restrictions on issuance.

In light of our disposition of these issues, we need not reach petitioner's remaining arguments for reversal.

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

ENTERED: DECEMBER 3, 2019

CLERK

Friedman, J.P., Kapnick, Webber, Oing, Moulton, JJ.

7470 Courtney Quinn, et al., Index 155195/17
Plaintiffs-Appellants,

-against-

Parkoff Operating Corp, et al.,
Defendants-Respondents.

_____

Newman Ferrara LLP, New York (Roger Sachar of counsel), for appellants.

Katsky Korins LLP, New York (Adrienne B. Koch of counsel), for respondents.

_____

Order, Supreme Court, New York County (Robert Reed, J.), entered March 19, 2018, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the causes of action alleging violations of the Rent Stabilization Law on behalf of a putative class of tenants, unanimously reversed, on the law, without costs, and the motion denied.

Initially, we reject defendants' argument that the complaint fails to state a cause of action for rent overcharge claims under the Rent Stabilization Law on behalf of the named plaintiffs and that therefore none of the named plaintiffs could be "typical" representatives of the putative class asserting rent overcharge claims (*see* CPLR 901[a][3]).

In light of the Court of Appeals' decision in *Maddicks v Big City Props., LLC* (__ NY3d __, 2019 Slip Op 07519 [2019]), we find

that it was premature to dismiss the class action allegations on the ground that the complaint does not adequately plead the class action prerequisites of typicality and commonality (CPLR 901[a][3],[2]). "[A] motion to dismiss should not be equated to a motion for class certification" (*Maddicks*, 2019 Slip Op 07519, *1). Thus, it is "premature" to dismiss "class claims based on allegations of a methodical attempt to illegally inflate rents" (*id.* at *2).

Like the instant plaintiffs, the tenants in *Maddicks* resided in several buildings owned by entities under common control, and asserted class action claims similar to the instant claims, alleging that the defendant building owners engaged in a common scheme to evade rent regulations by failing to follow the rent requirements for landlords participating in the J-51 tax incentive programs and by claiming rent increases based on individual apartment improvements that were not actually performed (*id.* at *1). Accordingly, as in *Maddicks*, defendants' motion was premature.

We have considered and find unavailing defendants' other arguments in support of dismissing the class action allegations at this early stage. We do not reach defendants' argument that the claims against certain individual plaintiffs are time-barred.

With the class action allegations reinstated, the action may not, at this point, be dismissed so that it can be adjudicated by DHCR.

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

ENTERED: DECEMBER 3, 2019

CLERK

Sweeny, J.P., Gische, Webber, Moulton, JJ.

9163 Odilson Fuentes, Index 450153/14
Plaintiff-Respondent,

-against-

Kwik Realty LLC,
Defendant-Appellant.

_____

Horing Welikson & Rosen, P.C., Williston Park (Richard T. Walsh of counsel), for appellant.

Northern Manhattan Improvement Corp. Legal Services, New York (Matthew J. Chachère of counsel), for respondent.

_____

Order, Supreme Court, New York County (Ellen Coin, J.) entered October 19, 2017, amending a prior order, same court and Justice, entered October 17, 2017, which, insofar as appealed from, granted plaintiff partial summary judgment on his claim for rent overcharge, and declared that plaintiff's initial lease was subject to rent stabilization, solely to the extent of referring the matter to a referee or judicial hearing officer to hear and report at the earliest availability, unanimously affirmed, without costs.

Plaintiff, Odilson Fuentes, is the tenant of an apartment in a building located on West 183rd Street in New York, New York, owned by defendant Kwik Realty LLC. The building consists of 48 residential apartments, and is subject to the Rent Stabilization Law.

By lease dated February 15, 2010 for a one-year term from February 1, 2010 to January 31, 2011, plaintiff agreed to pay defendant a preferential rent of $1,300 per month, although the listed unit charge was $2,200 per month. This lease and the later leases were Blumberg form leases that bore the notation "EXEMPT UNIT" in handwriting. The leases contained no references to rent stabilization and no rent stabilization riders were included with the leases.

By lease dated November 10, 2010 for a one-year term from February 1, 2011 to January 31, 2012, plaintiff agreed to pay defendant a preferential rent of $1,350 per month, although the listed unit charge was again $2,200 per month. By yet another lease dated November 28, 2011 for a one-year term from February 1, 2012 to January 31, 2013, plaintiff agreed to pay defendant a preferential rent of $1,400 per month, although this time, the listed unit charge was now $2,500 per month. Finally, by lease dated December 5, 2012 for a one-year term from February 1, 2013 to January 31, 2014, plaintiff agreed to pay defendant a preferential rent of $1,450 per month, although the listed unit charge was $2,600 per month.

On or about December 5, 2013, defendant sent plaintiff a letter stating that his lease would not be renewed and demanding that plaintiff vacate the apartment "due to hazardous

conditions." Plaintiff continued to pay his monthly rent of $1,450 to defendant.

Plaintiff commenced this action on January 27, 2014, asserting that defendant illegally deregulated the apartment and overcharged his rent. The complaint sought a declaratory judgment declaring plaintiff to be a rent-stabilized tenant and his prior leases to be illegal and fraudulent, and ordering defendant to offer plaintiff a proper, rent-stabilized lease. Plaintiff also sought declaratory and injunctive relief declaring the legal rent to be the last amount validly registered, $628.34, until defendant registered the apartment with the Division of Housing and Community Renewal (DHCR). Plaintiff also sought money damages and punitive damages for the overcharges, including interest, as well as his attorneys' fees under Real Property Law § 234 and the Rent Stabilization Law and Code.

The motion court properly held that plaintiff was entitled to a rent-stabilized lease. Plaintiff, as the first nonstabilized tenant of the apartment, was entitled to the notices required by RSL § 26-504.2 (b) and RSC § 2522.5(c)(3). Defendant was required to give written notice to the first tenant of the apartment after the apartment became exempt from rent stabilization, indicating the last regulated rent, the reason that the apartment is no longer subject to rent stabilization,

and how the rent amount is computed (RSC § 2522.5[c][1]). Where an owner fails to provide the rent stabilization rider or requested documentation, "the owner shall not be entitled to collect any adjustments in excess of the rent set forth in the prior lease unless the owner can establish that the rent collected was otherwise legal" (RSC § 2522.5[c][3]).

We find that the motion court properly awarded summary judgment to plaintiff as to liability and referred the matter to a referee to hear and report on damages, if any. Rental history may be examined beyond four years to determine rent-stabilized status, as well as for the purpose of calculating an overcharge (Housing Stability and Tenant Protection Act of 2019 (L 2019, ch 36)(HSTPA); *Dugan v London Terrace Gardens, L.P.*, 177 AD3d 1, 9 [1st Dept 2019]). Rent overcharge claims are no longer generally subject to a four-year statute of limitations (Rent Stabilization Law § 26-516[a][2]; *see also* CPLR 213-a). "[B]ecause the legislature has made changes to the law that directly impact this

ase, and has made those changes applicable to this pending litigation, a remand is appropriate" to set forth a methodology for calculating rents and overcharges consistent with the HSTPA (*Dugan v London Terrace Gardens*, 177 AD3d at 10).

The Decision and Order of this Court entered herein on July 30, 2019 (174 AD3d 483 [1st Dept 2019]) is hereby recalled and vacated (*see* M-7301 decided simultaneously herewith).

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

ENTERED: DECEMBER 3, 2019

CLERK

Manzanet-Daniels, J.P., Tom, Kapnick, Gesmer, Singh, JJ.

10368 Gorgi Georgievski, Index 8000001/16
Plaintiff-Appellant,

-against-

Howard F. Robins,
Defendant-Respondent.

_____

Gorgi Georgievski, appellant pro se.

Lewis Johs Avallone Aviles, LLP, New York (Theresa Scotto-Lavino of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered January 17, 2019, which granted defendant's motion for summary judgment dismissing the complaint, and denied plaintiff's motion for summary judgment on liability, unanimously modified, on the law, to deny defendant's motion, and otherwise affirmed without costs.

In this medical malpractice action, plaintiff testified that after he saw an advertisement by defendant in a magazine about alternative medicine he sought treatment from defendant for Lyme disease. Defendant is a licensed podiatrist who the record shows told plaintiff that he could treat a host of incurable non-podiatric conditions. Defendant wrote in plaintiff's medical records that plaintiff suffered from varicose veins, and recommended that plaintiff take part in his ozone therapy study.

It is undisputed that this treatment is not FDA-approved. Following the third session of this therapy, defendant noted in the medical record, plaintiff fell asleep, and on waking became confused and disoriented. He was taken and admitted to a hospital, where he was examined and found, inter alia, to have left-sided weakness and paralysis. Although there was an initial concern that plaintiff had suffered a stroke, and he was evaluated for a possible stroke and seizure, this was not a conclusive diagnosis. Nevertheless, plaintiff was kept in the hospital from October 26, 2013, the date of his admission, until he was discharged on November 8, 2013, which would seem to suggest that plaintiff was suffering a valid, even if undiagnosed, medical condition. Plaintiff claims that after he was released from the hospital he was confined to bed for three months, and that inflammation caused by the ozone therapy damaged veins in his forearms, and that inflammation of his brain and nerves resulted in paralysis of his limbs and face, memory loss, lack of concentration, chronic fatigue, personality changes, and other physical and neurological injuries that some evidence shows may be associated with ozone therapy.

Defendant has a history of being accused of using his putative study of ozone therapy's ostensible benefits in treating podiatric conditions as a cover for his treatment of non-

podiatric conditions (*see e.g. Altman v Robins*, Sup Ct, NY County, Mar. 9, 2009, Lobis, J., index No. 103794/08). In the present case, the record reflects that the putative treatment was not for a podiatric condition, and thus that defendant was practicing medicine outside of the medical confines of podiatry (*see* Education Law § 7001[2]), which raises an issue of professional misconduct (*see* Education Law § 6509[2]).

Defendant failed to make the necessary prima facie showing of entitlement to judgment as a matter of law, requiring reversal and denial of his motion for summary judgment regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Bongiovanni v Cavagnuolo*, 138 AD3d 12 [2d Dept 2016]). Defendant failed to establish the standard of care with which he should have complied for the treatment of Lyme disease, as to which he submitted no expert evidence (*see Ocasio-Gary v Lawrence Hosp.*, 69 AD3d 403 [1st Dept 2010]). Thus, on this record, it cannot be determined whether defendant

deviated from accepted standards of practice. A trial is required on the issue whether defendant's treatment proximately caused the physical and neurological manifestations of injury alleged by plaintiff.

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

ENTERED: DECEMBER 3, 2019

CLERK

Friedman, J.P., Oing, Singh, Moulton, JJ.

10454- Ind. 2127/17
10454A The People of the State of New York, 3708/17
Respondent,

-against-

Hunter Waring,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Michael J. Obus, J.), rendered February 1, 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 judgments so appealed from be and the same are hereby affirmed.

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

ENTERED: DECEMBER 3, 2019

CLERK

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

Friedman, J.P., Oing, Singh, Moulton, JJ.

10455 Robert Pritsker, Index 155269/17
Plaintiff-Appellant,

-against-

Oppenheimer Acquisition Corp.,
et al.,
Defendants-Respondents.

_____

Robert Pritsker, appellant pro se.

Tannenbaum Helpern Syracuse & Hirschtritt, LLP, New York (Richard Trotter of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Gerald Lebovits, J.), entered May 14, 2018, dismissing the action, unanimously affirmed, without costs.

This is, essentially, an action for conversion. Plaintiff's fraud allegations do not constitute independent claims for fraud and constructive fraud; rather, they form the building blocks for his argument that equitable estoppel should toll the statute of limitations for conversion (*see Simcuski v Saeli*, 44 NY2d 442, 448 [1978]).

The complaint fails to state a cause of action for conversion. Money that allegedly was converted "must be specifically identifiable and be subject to an obligation to be returned or to be otherwise treated in a particular manner" (*McBride v KPMG Intl.*, 135 AD3d 576, 580 [1st Dept 2016]

[internal quotation marks omitted]). In his opposition to the motion, plaintiff admitted that money is "fungible" and "impossible to trace." Moreover, the money that plaintiff seeks is not his, but that of nonparty AIG Life Insurance Company, n/k/a American General Life Insurance Company (AGL).

The first and second causes of action, for fraud and constructive fraud, respectively, were correctly dismissed as free-standing claims. The first cause of action fails adequately to allege scienter and reliance, both of which are essential elements of fraud (*see Lama Holdings Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; *Meyercord v Curry*, 38 AD3d 315, 316 [1st Dept 2007]; *Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003]). The second cause of action fails to allege a fiduciary relationship (*see e.g. Gregor v Rossi*, 120 AD3d 447, 448 [1st Dept 2014]). While defendant Tremont Partners, Inc. – the general partner of defendant Tremont International Insurance Fund, L.P. (TIIF) – owed a fiduciary duty to the limited partners of TIIF, such as AGL, plaintiff is not a limited partner of TIIF; rather, he has a

variable annuity contract with AGL (*see SSR II, LLC v John Hancock Life Ins. Co. [U.S.A.]*, 37 Misc 3d 1204[A], 2012 NY Slip Op 51880[U], *1-2, 4, 7-8 [Sup Ct, NY County 2012]; *see also Lama*, 88 NY2d at 424).

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

ENTERED: DECEMBER 3, 2019

CLERK

Friedman, J.P., Oing, Singh, Moulton, JJ.

10456 In re Johanna Del C.T.,
Petitioner-Respondent,

-against-

Gregorio A.L.,
Respondent-Appellant.

_____

Marion C. Perry, Brooklyn, for appellant.

James E. Iniguez & Associates, PPLC, New York (Ilana Hochman of counsel), for respondent.

Diaz & Moskowitz, PLLC, New York (Hani Moskowitz of counsel), attorney for the child.

_____

Order, Family Court, New York County (Referee Marva A. Burnett), entered on or about April 26, 2018, which, after a hearing, granted petitioner mother's application to modify a prior order of custody to grant the mother sole legal custody of the child, with alternate weekend visitation to respondent father, unanimously modified, on the law, to remand the matter for further proceedings on visitation in accordance with this order and to include a provision directing the mother to inform the father of all major decisions with respect to the child, and otherwise affirmed, without costs.

The mother provided sufficient evidence that a breakdown in the parties' communication constituted a change in circumstances since their divorce (*Matter of Moore v Gonzalez*, 134 AD3d 718,

720 [2d Dept 2015]). The determination that it is in the best interests of the child that sole custody be awarded to the mother has a sound and substantial basis in the record (*see Lubit v Lubit*, 65 AD3d 954, 955 [1st Dept 2009], *lv denied* 13 NY3d 716 [2010], *cert denied* 560 US 940 [2010]). The evidence demonstrates that the mother has been responsible for major decisions with respect to the child, with little input or interest from the father (*see Matter of Dean W. v Karina McK.*, 121 AD3d 440, 441 [1st Dept 2014]).

With respect to the visitation schedule set forth by the Family Court, we agree with the father that the matter should be remanded for further proceedings on the visitation schedule, to address, inter alia, holidays and vacations (*see Matter of Aly T. v Francisco B.*, 146 AD3d 425, 426 [1st Dept 2017]). In light of evidence that the mother inappropriately depended upon the child to communicate with the father, upon remand, the Family Court must also include a provision directing the mother, as custodial parent, to inform the father of any major decision she makes concerning the child (*Moore*, 134 AD3d at 719-720).

The father contends that the Family Court erred in dismissing his petition alleging that the mother violated a temporary order of visitation. The issue, however, is moot, since

the final custody order superseded the temporary order for which the violation petition was filed (*see Matter of Grace E.-J. v Robert J.-R.*, 158 AD3d 509, 509 [1st Dept 2018]).

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

ENTERED: DECEMBER 3, 2019

CLERK

Friedman, J.P., Oing, Singh, Moulton, JJ.

10457 Lenworth Hines, et al., Index 158407/17
Plaintiffs-Respondents,

-against-

ABM Janitorial Service-Northeast, et al.,
Defendants,

230 PAS, LLC formerly known as 230 PAS (15 CLIFF) LLC, et al.,
Defendants-Appellants.

_____

Mischel & Horn, P.C., New York (Christen Giannaros of counsel), for appellants.

Law Offices of Michelle S. Russo, P.C., Port Washington (Michelle S. Russo of counsel), for respondents.

_____

Order, Supreme Court, New York County (David B. Cohen, J.), entered October 22, 2018, which denied defendants 230 PAS, LLC and 230 PAS (RRPIII), LLC's (PAS) motion to dismiss the complaint as against them pursuant to CPLR 3211(a)(5), unanimously affirmed, without costs.

In opposition to PAS's showing that the statute of limitations had elapsed, plaintiffs demonstrated that their claims against PAS relate back to their claims against defendant TF Cornerstone, Inc., by submitting evidence that TF Cornerstone had apparent authority to act on behalf of PAS at the time of the accident (*see L & L Plumbing & Heating v DePalo*, 253 AD2d 517,

518 [2d Dept 1998]; CPLR 203[b]). TF Cornerstone entered into a janitorial service agreement with defendant ABM Janitorial Service-Northeast, Inc. for the property about 10 months before plaintiff Lenworth Hines's accident. Therefore, PAS, as owner of the building at the time of the accident, may be found to be vicariously liable if TF Cornerstone is ultimately found to be its agent (*see De Sanna v Rockefeller Ctr., Inc.*, 9 AD3d 596, 599 [3d Dept 2004]).

PAS relies on *Bossung v Rebaco Realty Holding Co., N.V.* (169 AD3d 538 [1st Dept 2019]), in which the agreement between the property owner and the building manager established that the manager was not in complete and exclusive control of the premises and therefore would have a defense not available to the owner. In the instant case, we cannot conclude that TF Cornerstone has a defense not available to PAS, because the agreement between them is not included in the record.

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

ENTERED: DECEMBER 3, 2019

CLERK

Friedman, J.P., Oing, Singh, Moulton, JJ.

10458 In re The Center for Discovery, Inc., Index 160157/16
Petitioner-Respondent,

-against-

New York City Department of Education,
Respondent-Appellant.

_____

Georgia M. Pestana, Acting Corporation Counsel, New York (Barbara Graves-Poller of counsel), for appellant.

Moritt Hock & Hamroff LLP, Garden City (Robert L. Schonfeld of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Lynn R. Kotler, J.), entered January 31, 2019, inter alia, granting the petition seeking to annul a determination of respondent dated August 18, 2016, which refused to reimburse petitioner for all of the services it was providing to the subject student and directing respondent to reimburse petitioner for such services, unanimously affirmed, without costs.

The New York State Education Department and the Office for People with Developmental Disabilities are not necessary parties to this article 78 proceeding (CPLR 1001[a]; *see Matter of Samy F. v Fabrizio*, 176 AD3d 44, 48 [1st Dept 2019]). Petitioner in this proceeding seeks no relief as against either of those agencies, and those agencies will not be equitably affected by the disposition of this petition.

The court properly determined that the relevant New York State Education Department regulations required respondent, not petitioner, to arrange for the appropriate special education programs and services to be provided, which includes either arranging for or providing the funding for such services (8 NYCRR 200.2[d][1]; *Matter of Center for Discovery, Inc. v NYC Dept. of Educ.*, 162 AD3d 83, 87 [1st Dept 2018]).

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

ENTERED: DECEMBER 3, 2019

CLERK

Friedman, J.P., Oing, Singh, Moulton, JJ.

10459 The People of the State of New York, Ind. 4070/17
Respondent,

-against-

Lanelle A. Marine,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Thomas A. Farber, J.), rendered May 14, 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: DECEMBER 3, 2019

CLERK

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

Friedman, J.P., Oing, Singh, Moulton, JJ.

10460 The People of the State of New York, Ind. 2269/15
Respondent,

-against-

Kirk McGowan,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Susan Epstein of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Jason E. Navia 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 (Miriam R. Best, J.), rendered November 9, 2016,

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

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

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

ENTERED: DECEMBER 3, 2019

CLERK

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

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

10461 The Moore Charitable Foundation, et al., Plaintiffs-Appellants-Respondents, Index 654584/17

-against-

PJT Partners, Inc., et al., Defendants-Respondents-Appellants,

Andrew W.W. Caspersen Defendant.

Susman Godfrey L.L.P., New York (Stephen Shackelford Jr. of counsel), for appellants-respondents.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Aidan Synnott of counsel), for respondents-appellants.

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered August 14, 2018, which granted the corporate defendants' motion to dismiss the causes of action for fraud based on respondeat superior and negligence, and denied the motion as to the cause of action for fraud based on apparent authority, and denied plaintiff's request to amend the complaint, unanimously modified, on the law, to dismiss the cause of action for fraud based on apparent authority, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint as against the corporate defendants.

Defendants' employee orchestrated a fraudulent scheme through a fictitious transaction solely for personal gain. Thus,

defendants are not liable for that fraud under the doctrine of respondeat superior (*see Bowman v State of New York*, 10 AD3d 315, 316 [1st Dept 2004]). It is of no moment that some of the fraudulently obtained funds were used to repay formerly embezzled funds so as to allow the employee to continue his fraudulent schemes undetected (*see Heffernan v Marine Midland Bank*, 267 AD2d 83 [1st Dept 1999]).

The complaint fails to state a cause of action for negligent supervision, because it does not allege that defendants were aware of the facts that plaintiff contends would have put them on notice of the employee's criminal propensity (*see Doe v Alsaud*, 12 F Supp 3d 674, 680 [SD NY 2014]).

Further, the complaint also fails to allege that plaintiffs were ever customers of defendants, which is fatal to a claim of negligent supervision (*see Gottlieb v Sullivan & Cromwell*, 203 AD2d 241 [2d Dept 1994]). Although defendants first raised this argument in reply on the motion, we consider it, because it is a question of law that can be resolved on the face of the existing record (*see Chateau D'If Corp. v City of New York*, 219 AD2d 205, 209 [1st Dept 1996], *lv denied* 88 NY2d 811 [1996]).

The court providently exercised its discretion in denying plaintiffs' unelaborated request for leave to amend (*see McBride v KPMG Intl.*, 135 AD3d 576, 580 [1st Dept 2016]).

The cause of action for fraud based on apparent authority should be dismissed, because the complaint does not identify any words or conduct of defendants that would give rise to a belief on plaintiffs' part that defendants' employee had authority to enter into the transaction (*see Hallock v State of New York*, 64 NY2d 224, 231 [1984]). At most, the allegations establish that defendants had imbued the employee with actual authority with respect to a somewhat related but different type of transaction (*see Standard Funding Corp. v Lewitt*, 89 NY2d 546, 551 [1997]).

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

ENTERED: DECEMBER 3, 2019

CLERK

Friedman, J.P., Oing, Singh, Moulton, JJ.

10462 Nina Wager, as Executrix of the Estate of Sally Cordaro, Deceased, etc., et al.,
Plaintiffs-Respondents,

-against-

Narasinga Rao, M.D.,
Defendant,

Michael Swirsky, M.D., et al.,
Defendants-Appellants.

Index 21072/12

_____

Voute, Lohrfink, Magro & McAndrew, LLP, White Plains (John R. Braunstein of counsel), for Michael Swirsky, M.D., appellant.

Garbarini & Scher, P.C., New York (William D. Buckley of counsel), for St. Barnabas Hospital, appellant.

The Jacob Fuchsberg Law Firm, New York (Aaron S. Halpern of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered March 7, 2018, which, insofar as appealed from, denied the motions of defendants Michael Swirsky, M.D. and St. Barnabas Hospital for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Plaintiffs claim that defendants departed from the standard of care by failing to timely diagnose the decedent's lung cancer and that, as a result, the cancer progressed to a more advanced and less treatable stage and the decedent died.

The motion court improvidently exercised its discretion in

denying defendants' summary judgment motions as "incomplete." Nonetheless, the motions must be denied on the merits.

Defendants' expert opined that proximate cause was lacking because the decedent's cancer had already metastasized by the time she presented to defendants for treatment and, as such, her outcome would not have been different if she had been diagnosed at that time. This was sufficient to prima facie establish entitlement to judgment as a matter of law (*see Mignoli v Oyugi*, 82 AD3d 443 [1st Dept 2011]; *see also Vargas v St. Barnabas Hosp.*, 168 AD3d 596 [1st Dept 2019]).

In opposition, plaintiffs raised a triable issue of fact. Plaintiffs' expert opined that, as a result of the allegedly negligent delay in diagnosis, the decedent's cancer progressed from the very treatable stage I to the terminal stage IV. These competing opinions on the progression of the disease created an issue of fact for a jury to decide (*see Polanco v Reed*, 105 AD3d 438, 441 [1st Dept 2013]). Although there is no direct evidence regarding the stage of the decedent's cancer when she presented to defendants, and it is thus not possible for either expert to really know what the status of the decedent's condition was at that time, both experts based their opinions on their own knowledge of the rate of progression of this particular type of cancer. Plaintiffs' expert's explanation of the basis of this

knowledge was sufficient to create an issue of fact.

Contrary to defendants' claim, plaintiffs' expert affidavit may properly be considered. Although the affidavit as initially submitted was not notarized and did not qualify as an affirmation under CPLR 2106, plaintiffs corrected this defect by submitting a notarized version of the affidavit prior to oral argument (*see Stewart v Goldstein*, 175 AD3d 1214 [1st Dept 2019]). Defendants argue that the corrected affidavit is also not in proper form because it was signed outside New York State but notarized by a New York notary, without providing a certificate of conformity as required by CPLR 2309(c). However, the absence of a certificate of conformity "is a mere irregularity, and not a fatal defect" and "[a]s long as the oath is duly given, authentication of the oathgiver's authority can be secured later, and given nunc pro tunc effect if necessary" (*Matapos Tech. Ltd. v Compania Andina de Comercio Ltda*, 68 AD3d 672, 673 [1st Dept 2009]; *Hall v Elrac, Inc.*, 79 AD3d 427, 427-428 [1st Dept 2010]).

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

ENTERED: DECEMBER 3, 2019

CLERK

Friedman, J.P., Oing, Singh, Moulton, JJ.

10463 Jean-Pascal Simon, Index 162867/14
Plaintiff-Appellant,

-against-

Francinvest, S.A.,
Nominal Defendant,

French American Surgery Center, Inc., et al.,
Defendants-Respondents,

George Kessler, et al.,
Defendants.

_____

Jean-Pascal Simon, appellant pro se.

Lebow & Sokolow LLP, New York (Mark D. Lebow of counsel), for French American Surgery Center, Inc., French-American Clinic, Inc., JJS Group, Inc. and Jean-Francois Simon, respondents.

Schwartzman Garelik Walker & Troy, P.C., New York (Donald A. Pitofsky of counsel), for Fifth Avenue Surgery Center, LLC and Charles Raab, respondents.

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Mario Castellitto of counsel), for VCC, Inc., respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered September 7, 2018, which, to the extent appealed from as limited by the briefs, granted in part defendants' motion to dismiss, and granted defendants Fifth Avenue Surgery Center, LLC (FASC), Charles Raab, and VCC, Inc. d/b/a Cicero Consulting Associates' (CCA) motions for summary judgment, unanimously modified, on the law, to deny defendants' motion to dismiss the

ninth claim for fraud, and otherwise affirmed, without costs.

The court properly dismissed the third, sixth, and seventh causes of action alleging rescission, fraud, and aiding and abetting fraud, respectively, against defendant Jean-Francois Simon (Francois), which are based on the sale of FASC, an ambulatory surgery center, allegedly at less than market value, because plaintiff failed to plead sufficient facts to show he had any ownership or investment interest in FASC. He conceded that he does not own shares in FASC, and he cites no evidence of any agreement to issue him shares or make him a shareholder or owner in exchange for his loans to FASC or the salary he waived as FASC's Medical Director; thus, these contributions were not agreed upon as "consideration for the issue of shares" (*see* Business Corporation Law § 504[a]; *Kun v Fulop*, 71 AD3d 832, 834 [2d Dept 2010], *lv denied* 15 NY3d 701 [2010]). Thus, he lacks standing to bring a derivative suit against Francois on FASC's behalf (*Silverstein v Exciting Fashions, Inc.*, 281 AD 854, 854 [2d Dept 1953]).

As the trial court found, plaintiff also cannot bring a direct claim against Francois for fraud based on the sale of FASC at below market value because any alleged damage is to FASC (*Gordon v Credno*, 102 AD3d 584, 585 [1st Dept 2013]).

Absent a valid underlying fraud claim, the court also

properly dismissed the seventh cause of action for aiding and abetting fraud against defendants Fifth Avenue Surgery Center, LLC (Fifth LLC), which acquired the surgery center in the sale, and defendant VCC, Inc. d/b/a Cicero Consulting Associates (CCA), which obtained the relevant medical licenses to transfer the surgery center to Fifth LLC (*Oster v Kirschner*, 77 AD3d 51, 55-56 [1st Dept 2010]; *see also Little Rest Twelve, Inc. v Zajic*, 137 AD3d 540, 541 [1st Dept 2016]).

In addition, the motion court properly dismissed the rescission claim for lack of standing, as plaintiff was not a shareholder in FASC or a party to the sale agreement at issue (*see Romanoff v Superior Career Inst.*, 69 AD2d 856, 856 [2d Dept 1979]). In any case, rescission would not be an appropriate remedy in light of the expenditures defendant Fifth Avenue Surgery Center, LLC (Fifth LLC) made to the premises since it acquired the surgery center in 2009 (*Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 71 [1st Dept 2002] [citations and quotation marks omitted]; *Tarleton Bldg. Corp. v Spider Staging Sales Co.*, 26 AD2d 809 [1st Dept 1966]).

The court properly dismissed the fifth cause of action seeking a constructive trust against Fifth LLC because there is no evidence of any fiduciary relationship between plaintiff and Fifth LLC (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 473-474 [1st

Dept 2010]).

The court should not have granted the motion to dismiss the ninth cause of action, a double derivative claim alleging fraud against Francois on behalf of defendant JJS Group, Inc. (JJS), which owned the condominium out of which the surgery center operated, and which leased the premises, first to FASC and then to Fifth LLC. JJS is 80% owned by nominal defendant FrancInvest, S.A. (FrancInvest), in which plaintiff is a shareholder. The complaint alleged that Francois mismanaged JJS funds, including by refinancing the mortgage and keeping the cash-outs for himself, and receiving "kickbacks" for negotiating a below market rate lease for the property. The court concluded that plaintiff failed to plead with particularity how Francois had a duty to reveal his conduct, taken on behalf of JJS, to FrancInvest shareholders. However, as the court recognized, plaintiff, as a shareholder in JJS's parent corporation, had standing to bring a double derivative claim on behalf of JJS. Thus, plaintiff, standing in the shoes of JJS shareholders, was required to plead with particularity that Francois concealed material facts from JJS shareholders, not FrancInvest shareholders, which he did (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 [1st Dept 2014]; *see Euryclieia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *Kaufman v Cohen*,

307 AD2d 113, 119-120 [1st Dept 2003]; *Dembeck v 220 Cent. Park S., LLC*, 33 AD3d 491, 492 [1st Dept 2006]; *see* CPLR 3016[b]; *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491-493 [2008]). The complaint alleges that Francois was Vice President of JJS, and thus had a fiduciary duty to reveal his conduct to JJS shareholders. The allegations in the complaint also allow a reasonable inference that Francois concealed his alleged conduct from JJS shareholders. The court properly dismissed the eleventh claim for fraud against Francois based on the same conduct on behalf of JJS, brought derivatively on behalf of FrancInvest shareholders, for failure to plead with particularity Francois's duty to reveal his conduct on behalf of JJS to FrancInvest shareholders.

The court properly dismissed the claim seeking a permanent injunction which sought, inter alia, to restore FASC as the tenant of the property and owner of the surgery center because it failed to plead facts showing that defendants are presently causing or threatening to cause harm to plaintiff, as the conduct at issue occurred well before 2014, when plaintiff commenced the instant action (*Matter of Long Is. Power Auth. Hurricane Sandy Litig.*, 134 AD3d 1119, 1120 [2d Dept 2015] [citations omitted]; *see also Lemle v Lemle*, 92 AD3d 494, 500 [1st Dept 2012]) Plaintiff also failed to allege how monetary damages would be

inadequate (*Mini Mint Inc. v Citigroup, Inc.*, 83 AD3d 596, 597 [1st Dept 2011]). Regarding CCA, since the cause of action for aiding and abetting fraud was the only other claim against it, the court properly dismissed this claim on the additional ground that no substantive causes of action remained against CCA (*Weinreb v 37 Apts. Corp.*, 97 AD3d 54, 59 [1st Dept 2012]).

The court properly denied leave to replead the dismissed claims, including the second cause of action for unjust enrichment based on the failure to repay plaintiff the funds he loaned to FASC in 1991, which the court dismissed as untimely. Plaintiff failed to submit arguments showing that he would be able to state any viable causes of action upon repleading (*Genger v Genger*, 135 AD3d 454, 455 [1st Dept 2016], *lv denied* 27 NY3d 912 [2016]).

The remaining dismissed claims have been abandoned (*Gad v Almod Diamonds Ltd.*, 147 AD3d 417, 418 [1st Dept 2017]), and we find plaintiff's remaining arguments unavailing or improperly before this Court.

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

ENTERED: DECEMBER 3, 2019

CLERK

Friedman, J.P., Oing, Singh, Moulton, JJ.

10464 Malon 433, Inc., Index 153166/17
Plaintiff-Respondent,

-against-

Metro Electrical Contractors, Inc.,
Defendant-Appellant,

Mayer Weber,
Defendant.

_____

Alter & Barbaro, Brooklyn (Nichole Bishop Castillo of counsel), for appellant.

Peyrot & Associates, P.C., New York (David C. Van Leeuwen of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Paul A. Goetz, J.), entered December 5, 2018, after inquest, awarding plaintiff the total amount of $88,228.67, and bringing up for review orders, same court and Justice, entered September 25, 2018 and December 3, 2018, respectively, which denied defendant Metro Electrical Contractors, Inc.'s motions to vacate the default and to set aside the inquest, unanimously affirmed, with costs.

Defendant failed to demonstrate both evidence of excusable default and a meritorious defense (CPLR 5015[a]; *US Bank N.A. v Brown*, 147 AD3d 428, 429 [1st Dept 2017]). Although a court has discretion to treat a motion made under CPLR 5015(a) as having been made as well under CPLR 317, which does not require

defendant to show reasonable excuse for its default, but only a showing of a meritorious defense, here defendant does not deny receiving the initial papers (*see M.R. v 2526 Valentine LLC*, 58 AD3d 530, 531 [1st Dept 2009]; *cf. Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138 [1986]). Defendant acknowledges that plaintiff served the summons and complaint on the Secretary of State, who then sent them to defendant. The papers, however, allegedly were misplaced by an agent of the office. This excuse is insufficient to warrant vacating the default judgment (*see e.g. Carmody v 208-210 E. 31st Realty, LLC*, 135 AD3d 491 [1st Dept 2016]). Furthermore, the Judicial Hearing Officer's determination as to damages was supported by the evidence, and the order directing inquest did not contemplate further action.

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: DECEMBER 3, 2019

CLERK

Friedman, J.P., Oing, Singh, Moulton, JJ.

10465 The People of the State of New York, Respondent, Ind. 2013/11

-against-

Monserrate Rodriguez, Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Kristian D. Amundsen of counsel), for respondent.

Order, Supreme Court, Bronx County (Efrain Alvarado, J.), entered on or about January 30, 2018, which denied defendant's Correction Law § 168-o(2) petition to modify his sex offender classification, unanimously affirmed, without costs.

We decline to revisit our holding that this type of order is appealable (*People v Shaljamin*, 164 AD3d 1169 [1st Dept 2018]).

The court providently exercised its discretion when it declined to grant a downward modification of defendant's level three classification (*see People v Lashaway*, 25 NY3d 478 [2015]). Defendant's law abiding conduct after being released from

custody, but while under supervision, is insufficient to demonstrate that his serious threat of recidivism against children has abated.

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

ENTERED: DECEMBER 3, 2019

CLERK

Friedman, J.P., Oing, Singh, Moulton, JJ.

10466-
10466A The People of the State of New York,
Respondent,

Ind. 1718/15
1993/15

-against-

Jorge Gonzalez,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Whitney Elliott of counsel), for appellant.

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

_____

Judgments, Supreme Court, Bronx County (Ralph Fabrizio, J.), rendered August 3, 2017, convicting defendant, upon his pleas of guilty, of burglary in the third degree and attempted robbery in the third degree, and sentencing him to an aggregate term of one to three years, unanimously affirmed.

Defendant validly waived his right to appeal (*see People v Bryant*, 28 NY3d 1094 [2016]) with respect to each case, which forecloses review of his excessive sentence claim and his challenge to the issuance of an order of protection. Regardless of whether defendant made a valid waiver of his right to appeal, his claim that the order of protection imposed at sentencing was procedurally defective requires preservation (*see People v Nieves*, 2 NY3d 310, 315-317 [2004]), and we decline to review

this unpreserved claim in the interest of justice. As an alternative holding, we find that the record sufficiently reflects the reasons for the imposition of the order of protection. We also perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 3, 2019

CLERK

Friedman, J.P., Oing, Singh, Moulton, JJ.

10467 Linda Borrero, Index 21558/12E
Plaintiff-Appellant, 43035/13E
43116/14E

-against-

ACC Construction Corporation, et al.,
Defendants-Respondents,

Liberty Contracting Corporation,
Defendant.

- - - - -

ACC Construction Corporation,
Third-Party Plaintiff,

-against-

South Bay Air Systems, LLC,
Third-Party Defendant-Respondent.

- - - - -

[And Other Third-Party Actions]

_____

David Horowitz, PC, New York (Christopher S. Joslin of counsel), for appellant.

Pillinger Miller Tarallo Law Firm, Elmsford (Leslie G. Abele of counsel), for ACC Construction Corporation, and the Trustees of Columbia University in the City of New York, respondents.

Goldberg Segalla, Garden City (Brendan T. Fitzpatrick of counsel), for South Bay Air Systems, LLC, respondent.

_____

Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered August 24, 2018, which granted the motion of defendants ACC Construction Corporation and The Trustees of Columbia University in The City of New York for summary judgment dismissing the complaint and all cross claims as against them,

unanimously affirmed, without costs.

Plaintiff's common-law negligence and Labor Law § 200 claims were properly dismissed. Plaintiff, who could not describe the defect in any dimensional manner, testified that the area in photographs taken by defendants was not the area of her fall, and she did not take her own photographs until the floor, which had been raw concrete during the gut renovation, had been patched with sealant. Defendants' witnesses denied seeing any "crater crack," and while plaintiff believed that the defect was caused by ACC or one of its subcontractor's dropping debris, she had no evidence of this theory. Under the circumstances, any finding on notice would be based on pure speculation (*see Canning v Barneys N.Y.*, 289 AD2d 32, 33 [1st Dept 2001]).

The court also properly dismissed plaintiff's Labor Law § 241(6) claim premised upon a violation of 12 NYCRR 23-1.7(e)(1). Plaintiff's accident occurred in an open room located about a

foot and a half away from the entrance leading to a passageway, but not in the passageway itself (see *Conlon v Carnegie Hall Socy., Inc.*, 159 AD3d 655 [1st Dept 2018]; *Rodriguez v Dormitory Auth. of the State of N.Y.*, 104 AD3d 529, 530 [1st Dept 2013]).

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

ENTERED: DECEMBER 3, 2019

CLERK

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

10468 Ellen Oxman, Index 350213/04
Plaintiff-Respondent-Appellant,

-against-

John Craig Oxman,
Defendant-Appellant-Respondent.

_____

Blank Rome LLP, New York (Dylan S. Mitchell of counsel), for appellant-respondent.

Norman A. Olch, New York, for respondent-appellant.

_____

Order, Supreme Court, New York County (Laura E. Drager, J.), entered December 8, 2017, which, insofar as appealed from as limited by the briefs, held plaintiff wife in contempt for violating an order of protection, same court and Justice, entered on or about May 10, 2016, and sanctioned her $10,000 pursuant to Judiciary Law § 753, awarded defendant husband, pursuant to Domestic Relations Law § 238, $10,000 in attorneys' fees incurred as a result of his contempt application and plaintiff's violation of the May 10, 2016 order, and denied defendant's application for attorneys' fees pursuant to the parties' stipulation of settlement, unanimously affirmed, without costs.

Contrary to plaintiff's contention, the contempt proceedings did not violate her right to counsel; plaintiff knowingly waived that right (*see e.g. People v Providence*, 2 NY3d 579 [2004];

Franklin v Leff, 192 AD2d 328 [1st Dept 1993], *lv dismissed* 82 NY2d 749 [1993]). The record shows that plaintiff was well aware of her right to counsel, having retained experienced matrimonial lawyers at various stages of this litigation. Moreover, by the time of the December 2017 proceedings, she had not long before appeared in court pro se at least twice, and at the March 2016 proceedings she had confronted the same issue raised in December 2017: her communications with defendant's family members and employer. Although plaintiff had been placed on notice of the consequences of continuing to send offending emails in the March 2016 proceedings, which resulted in the May 10, 2016 order specifically warning her that she could face penalties for civil contempt, plaintiff chose not to retain counsel in the December 2017 proceedings.

Defendant established by clear and convincing evidence that plaintiff knowingly disobeyed the clear and unequivocal May 10, 2016 order, causing prejudice to him (*see Simens v Darwish*, 104 AD3d 465 [1st Dept 2013]). The order clearly identified prohibited communications. Plaintiff repeatedly disobeyed its terms, and she does not disclaim knowledge or understanding of those terms. Prejudice to defendant is readily apparent, given the nature of the emails and the identity of their recipients, including his employer's chief executive officer. Plaintiff's

assertions that the offending emails pre-dated the May 2016 order are belied by the record, which shows that almost every email is dated after May 2016. Some of the emails attach or re-forward older emails, but the transmitting emails post-date May 2016.

The $10,000 fine is not excessive, given plaintiff's multiple separate emails in disobedience of the order (*see* Judiciary Law § 773; *Town Bd. of Town of Southampton v R.K.B. Realty, LLC*, 91 AD3d 628, 631 [2d Dept 2012]; *317 W. 87 Assoc. v Dannenberg*, 170 AD2d 250, 251 [1st Dept 1991]). Nor did plaintiff offer any financial evidence to support her contention that the fine is punitive.

The award to defendant of $10,000 in attorneys' fees is proper. Plaintiff argues that any award must be limited to fees directly incurred in preparing the contempt motion. However, the court reasonably found that $10,000 in fees was "directly related to [plaintiff's] contemptuous conduct" and therefore is recoverable (*see e.g Vider v Vider*, 85 AD3d 906, 908 [2d Dept 2011]). Defendant's submissions included bills commencing in May 2016, reflecting work done in response to plaintiff's violations of the May 10, 2016 order. Defendant did not file his motion until October 2016, but the conduct warranting the award of fees necessarily preceded the filing of the motion, and therefore the award rationally includes fees incurred before October 2016.

In light of the court's reasonable reduction of the approximately $14,000 in billed fees to $10,000, one particular billing entry, for approximately $2,000, that plaintiff claims was unrelated to the contempt proceedings does not warrant disturbing the fee award.

Plaintiff's argument that the court failed to identify the specific communications that violated the May 10, 2016 order is without merit, given the clarity of the May 10, 2016 order and plaintiff's failure to cite any authority showing that it was the court's obligation to do so.

Plaintiff's arguments about the validity and effect of her "Notice of Discontinuance" and the denial of her recusal motion are not properly before us. Were we to entertain them, we would reject them.

The court properly denied defendant's application for fees pursuant to paragraph 59 of the parties' stipulation of settlement. Defendant's argument that fees incurred in connection with plaintiff's cross motion fall within this provision is unpreserved and, in any event, unavailing. Rather than challenging or seeking to set aside the stipulation, plaintiff sought to reverse the court's denial of her previous efforts to withdraw her motion to invalidate the stipulation.

While defendant's request for attorneys' fees incurred in

the Connecticut action presents a closer case, we agree with the motion court's denial of that request as well.

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

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

ENTERED: DECEMBER 3, 2019

CLERK

Friedman, J.P., Oing, Singh, Moulton, JJ.

10469 South Shore D'Lites, LLC, et al., Index 650827/12
Plaintiffs-Respondents,

-against-

First Class Products Group, LLC, et al.,
Defendants-Appellants.

_____

Fox Rothschild LLP, New York (Brett A. Berman of counsel), for appellants.

The Law Office of Russell D. Morris PLLC, New York (Russell D. Morris of counsel), for respondents.

_____

Order, Supreme Court, New York County (Tanya R. Kennedy, J.), entered September 14, 2018, which granted plaintiffs' motion to compel defendants to produce an attorney-client-privileged email under the crime-fraud exception to the privilege, unanimously modified, on the law and the facts, to remand the matter for an in camera review of the email to determine whether there is probable cause to believe that the communication was made in furtherance of the alleged fraud, and otherwise affirmed, without costs.

An in camera review is needed to determine whether the subject email was sent "in furtherance" of the fraud, so as to

bring the email within the crime-fraud exception to the attorney-client privilege (*Fragin v First Funds Holdings, LLC*, 150 AD3d 410 [1st Dept 2017]).

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

ENTERED: DECEMBER 3, 2019

CLERK

Friedman, J.P., Oing, Singh, Moulton, JJ.

10471 In re Brookdale Physicians' Dialysis Associates, Inc., formerly known as Church Avenue Associates, Inc., Petitioner-Respondent,

Samuel and Bertha Schulman Institute for Nursing and Rehabilitation Fund, Inc., etc., Petitioner,

-against-

The Department of Finance of the City of New York, Respondent-Appellant.

Index 156074/17

_____

Georgia M. Pestana, Acting Corporation Counsel, New York (Joseph J. Kroening of counsel), for appellant.

Cozen O'Connor, New York (Menachem J. Kastner of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Margaret A. Chan, J.), entered August 3, 2018, granting the petition brought pursuant to CPLR article 78 to annul a determination of respondent, dated April 4, 2017, which denied petitioners' application for an exemption from real property taxation, and denying respondent's cross motion to dismiss the petition, unanimously affirmed, without costs.

The article 78 court correctly determined that the building owned by petitioner Samuel and Bertha Schulman Institute for

Nursing and Rehabilitation Fund, Inc. (Schulman) and used for the provision of a critical healthcare service qualifies for tax-exempt status, notwithstanding the for-profit status of the provider of the service.

Schulman is a not-for-profit organization established for the purpose of providing funding and support to Brookdale Hospital Medical Center (Brookdale Hospital), a major hospital complex in eastern Brooklyn, and to the Schulman and Shachne Institute for Nursing and Rehabilitation, Inc. (the Nursing Institute), a 446-bed rehabilitation facility located on the Brookdale Hospital campus. Brookdale Hospital and the Nursing Institute, which are non-profit entities devoted to the provision of healthcare, and Schulman are affiliated by virtue of common control by Brookdale Health System, Inc., a charitable organization.

Since 1996, Schulman has leased the first floor and basement of its building, which is located one block away from Brookdale Hospital, to petitioner Brookdale Physicians' Dialysis Associates, Inc. (Brookdale Dialysis), a for-profit corporation. As provided for in the lease, Brookdale Dialysis provides dialysis services in the building. Eighty percent of the patients treated at Brookdale Dialysis are referred there by Brookdale Hospital or the Nursing Institute. Brookdale Dialysis

is staffed exclusively by physicians and other employees of Brookdale Hospital. Brookdale Dialysis pays Brookdale Hospital a fee for the use of its employees, and pays for and provides all dialysis functions for patients at Brookdale Hospital and the Nursing Institute, which have no other dialysis capability. Brookdale Dialysis physicians do not maintain private offices in the building. In sum, Schulman, Brookdale Hospital, and the Nursing Institute, as well as the nephrologists and other healthcare professionals working through Brookdale Dialysis, participate in an arrangement by which Brookdale Dialysis renders a critical healthcare service — hemodialysis and peritoneal dialysis — to Brookdale Hospital and the Nursing Institute at little to no direct cost to the non-profit entities. Although the non-profit entities received an ostensible financial benefit, and Schulman's rent receipts exceed its building maintenance expenses, no benefit exists because Schulman placed the profit back into its healthcare-provider affiliates.

The provision of dialysis services for Brookdale Hospital and Nursing Institute patients qualifies the building for tax-exempt status, because it is "reasonably incident" to Schulman's purpose of funding and supporting its healthcare affiliates (*see Matter of St. Luke's Hosp. v Boyland*, 12 NY2d 135, 143 [1962] [internal quotation marks omitted] [hospital-owned property used

as dwelling space for hospital personnel reasonably incident to hospital's major purpose and thus qualified for tax exemption]; *Matter of Pace Coll. v Boyland*, 4 NY2d 528, 532-534 [1958] [use of college cafeteria for provision of meals by for-profit contractor did not warrant revocation of tax exemption]; *Congregation Rabbinical Coll. of Tartikov, Inc. v Town of Ramapo*, 72 AD3d 869, 871 [2d Dept 2010], *affd* 17 NY3d 763 [2011] [operation of for-profit religious summer camp did not warrant revocation of tax exemption]).

The Brookdale Dialysis services are closely analogous to the X-ray services performed on commission in *Matter of Genesee Hosp. v Wagner* (47 AD2d 37 [4th Dept 1975], *affd on op below* 39 NY2d 863 [1976]). Genesee Hospital owned an adjacent professional office building in which it leased suites to physicians for their own private practices and used other spaces for hospital services, such as an ambulatory X-ray unit; the radiologists in the unit received a percentage of the hospital's billings from the X rays taken. The Court of Appeals adopted the Fourth Department's decision holding that the suites leased to the physicians were not entitled to tax exemption but the spaces used

for hospital services were entitled to tax exemption, notwithstanding that the radiologists received commissions on the administration of X rays (*id.* at 46-47).

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

ENTERED: DECEMBER 3, 2019

CLERK

Friedman, J.P., Oing, Singh, Moulton, JJ.

10472 James Koretz, Index 656255/17
Plaintiff-Appellant-Respondent,

-against-

363 East 76th Street Corporation,
Defendant-Respondent-Appellant.

_____

Wagner, Berkow & Brandt, LLP, New York (Bonnie Reid Berkow of counsel), for appellant-respondent.

Cullen and Dykman LLP, Garden City (Jennifer A. McLaughlin of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered April 23, 2018, which, to the extent appealed from as limited by the briefs, granted defendant's motion to dismiss the claim for breach of the covenant of quiet enjoyment based on an actual or constructive eviction from the apartment and the claim for a permanent injunction, and denied the motion as to the breach of contract claim and the claims for breach of the covenant of quiet enjoyment and private nuisance based on dust, debris, noise, and vermin, unanimously modified, on the law, to deny the motion as to the claims for breach of the covenant of quiet enjoyment and private nuisance based on an actual or constructive eviction from the apartment and the claim for a permanent injunction, and otherwise affirmed, without costs.

The motion court correctly declined to dismiss the breach of

contract claim on the ground that the Supplement to the Proprietary Lease (the Supplement), which provides that plaintiff "shall continue to have the right to use the existing separate entrance to the apartment located on the southerly side of the building," is sufficiently ambiguous to permit the introduction of extrinsic evidence to discern the parties' intent as to whether plaintiff has the exclusive right to use the garden area (*Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Neither the Proprietary Lease nor the Supplement defines the terms "existing separate entrance" or plaintiff's right to "continue ... to use" the existing separate entrance, and neither specifies the manner in which plaintiff had been using it.

The part of the claim for breach of the covenant of quiet enjoyment based on an actual or constructive eviction from the apartment should not be dismissed (*see Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 82-83 [1970]; *Eastside Exhibition Corp. v 210 E. 86th St. Corp.*, 23 AD3d 100, 102, 105 [1st Dept 2005]; *Washburn v 166 E. 96 St. Owners Corp.*, 166 AD2d 272 [1st Dept 1990]). Plaintiff alleges that the erection of the large handicap ramp and the walls covering a large portion of the private garden entrance effectively ousted him from physical possession of the garden portion of the premises, which was an

unlawful interference with his beneficial use of the property. The Supplement provides that plaintiff will continue to have the right to use the separate entrance and that defendant will not prevent him from doing so.

The court correctly declined to dismiss the claims for breach of the covenant of quiet enjoyment and private nuisance to the extent they are based on dust, debris, noise, and vermin (*see Berenger v 261 W. LLC*, 93 AD3d 175, 182 [1st Dept 2012]). Plaintiff alleges that he actually vacated the apartment for two weeks in July 2016 due to its condition in the wake of defendant's construction activities. Defendant cites paragraph 29(a) of the Proprietary Lease, which provides that defendant will not be liable for "interference with light, air, view or other interests" of plaintiff, "except by reason of [its] negligence." Construing the complaint liberally and accepting the facts alleged as true, the court correctly determined that the complaint pleads a claim for negligence.

The claim for a permanent injunction should not be dismissed. It is well settled that real property and the shares of stock allocated to a cooperative apartment are "unique" and therefore subject to injunctive relief (*see Dinicu v Groff Studios Corp.*, 257 AD2d 218, 223 [1st Dept 1999]).

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

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

ENTERED: DECEMBER 3, 2019

CLERK

Friedman, J.P., Oing, Singh, Moulton, JJ.

10473N Ann Minogue, etc., et al., Index 24783/17E
Plaintiffs-Respondents,

-against-

Rishi Malhan, M.D., et al.,
Defendants,

Worku Bitew Zewdu, M.D., et al.,
Defendants-Appellants.

_____

Bartlett LLP, Mineola (Robert G. Vizza of counsel), for appellants.

Antin, Ehrlich & Epstein, LLP, New York (Anthony V. Gentile of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Joseph Capella, J.), entered July 9, 2018, which to the extent appealed from, denied defendants-appellants' motion to compel arbitration and stay the action, unanimously modified, on the law, to grant the motion to the extent of directing that the arbitration proceed only with respect to plaintiffs and defendants Worku Bitew Zewdu, M.D., Jewish Home Lifecare Harry and Jeanette Weinberg Campus Bronx, Jewish Home Lifecare, Jewish Home Lifecare Care Management, LLC, and "The New Jewish Home" (collectively, the JHL defendants), and otherwise affirmed, without costs.

Contrary to plaintiffs' argument, the arbitration clause at issue in this case is enforceable. Because the JHL defendants

were engaged in interstate commerce, the Federal Arbitration Act preempts the New York Public Health Law § 2801-d and New York State General Business Law § 399 (*see Friedman v Hebrew Home for the Aged at Riverdale*, 131 AD3d 421, 421 [1st Dept 2015, lv dismissed 28 NY3d 1050 [2016]).

Furthermore, Supreme Court erred in declining to enforce the arbitration clause between plaintiffs and the JHL defendants. Arbitration is the proper form of resolution for the issues being litigated between plaintiffs and the JHL defendants, since the pertinent issues arise out of their contract, which, as noted, contains an enforceable arbitration agreement (*see Lerman v Russell*, 207 AD2d 746 [1st Dept 1994]; *Dot's Blvd. Corp. v Rosenfeld*, 285 App Div 425 [1st Dept 1955]). The mere fact that plaintiffs named additional defendants, who are not signatories to the arbitration agreement, does not foreclose the JHL defendants' right to enforce arbitration.

However, we decline to stay plaintiffs' plenary action against those defendants who are not signatories to the arbitration agreement. The allegations in plaintiffs' complaint against the JHL defendants and the non signatory defendants are not "so intertwined" as to warrant a stay pending arbitration

(*cf. Dot's Blvd. Corp.*, 285 App Div at 426 [action stayed as to non signatory to arbitration agreement where causes of action in complaint were "so intertwined" with issues to be decided by arbitrator]).

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

ENTERED: DECEMBER 3, 2019

CLERK

Friedman, J.P., Oing, Singh, Moulton, JJ.

10474N U.S. Bank National Association as Trustee for CMALT REMIC, 2007 A4 PRAA-REMIC Pass Through Certificates, Series 2007 A4,
Plaintiff-Respondent,

-against-

Mindy N. Chait also known as Mindy Chait,
Defendant-Appellant,

Joshua Kirschenbaum, et al.,
Defendants.

Index 850037/15

_____

Richland & Falkowski, PLLC, Astoria (Michal Falkowski of counsel), for appellant.

Akerman LLP, New York (Jordan M. Smith of counsel), for respondent.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered July 11, 2018, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment on its foreclosure complaint, and denied defendant Mindy Chait's cross motion to dismiss the complaint, unanimously affirmed, without costs.

The court properly determined that while the foreclosure action commenced in 2012 by plaintiff's predecessor-in-interest was not formally discontinued when it was marked off the calendar and "disposed" of in 2013, the record supports a finding that the prior action was inactive and effectively abandoned and therefor

not pending (*see Bank of N.Y. Mellon v Adamn P10tch LLC*, 162 AD3d 502 [1st Dept 2018]). When a foreclosure action is "not formally discontinued, the effective abandonment of that action is a de facto discontinuance which militates against dismissal of the present action pursuant to RPAPL 1301(3)" (*Old Republic Natl. Tit. Ins. Co. v Conlin,* 129 AD3d 804, 805 [2d Dept 2015] [internal quotation marks omitted]). Accordingly, at the time this action was commenced in 2015, RPAPL 1301(3) did not require that this action be dismissed (*see id.; compare U.S. Bank N.A. v Beymer*, 161 AD3d 543, 544 [1st Dept 2018]).

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

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

ENTERED: DECEMBER 3, 2019

CLERK

Friedman, J.P., Oing, Singh, Moulton, JJ.

10475 In re Tyshawn Luke, Petitioner, Ind. 2016/17 792/18

-against-

Hon. Steven Michael Statsinger, etc., Respondent.

_____

Tyshawn Luke, petitioner pro se.

Letitia James, Attorney General, New York (Charles F. Sanders of counsel), for respondent.

_____

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

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

ENTERED: DECEMBER 3, 2019

CLERK

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

10630N Bersin Properties, LLC, Index 452630/14
Plaintiff-Appellant, 650276/15

-against-

Nomura Credit & Capital, Inc., et al.,
Defendants-Respondents.

- - - - -

NCCMI, Inc.,
Plaintiff-Respondent,

-against-

Bersin Properties, LLC, et al.,
Defendants-Appellants.

_____

Selendy & Gay PLLC, New York (Yelena Konanova of counsel), for appellants.

Greenberg Traurig, LLP, New York (Richard A. Edlin of counsel), for respondents.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered January 16, 2019, which denied Bersin Properties, LLC's request to take discovery into NCCMI, Inc.'s motive for denying Bersin's drawdown request, unanimously affirmed, with costs.

Supreme Court providently exercised its discretion in denying plaintiff's discovery requests (*see Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 745 [2000]; *Don Buchwald & Assoc. v. Marber-Rich*, 305 AD2d 338, 338 [1st Dept 2003] ["deference is afforded to the trial court's discretionary determinations

regarding disclosure"]). Here, plaintiff sought discovery regarding defendant's motives and intent on its breach of contract claim. However, as the court correctly recognized, in a breach of contract claim, the issue is whether the defendant failed to perform its obligations pursuant to the terms of the contract (*see generally Metropolitan Life Ins. Co. v Noble Lowndes Intl.*, 84 NY2d 430 [1994]).

Furthermore, while plaintiff accurately points out that in limited circumstances, a defendant's intent may be relevant in a breach of contract claim in determining whether the defendant's "bad faith" or "alleged misconduct prevented or hindered . . . compliance" with a contractual condition precedent *(A.H.A. Gen. Constr. v New York City Hous. Auth.*, 92 NY2d 20, 31 [1998]), the motion court did not abuse its discretion by declining to apply the exception.

Accordingly, the court's discovery ruling should not be disturbed. 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: DECEMBER 3, 2019

CLERK