SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 5, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Renwick, Tom, Gesmer, Oing, JJ.

9926 In re Carmit D.,
Petitioner-Appellant,

-against-

Gil D.,
Respondent-Respondent.

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Carmit P. Thacher, appellant pro se.

Berke & Berke, New York (Jeffrey R. Berke of counsel), for respondent.

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Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about November 21, 2017, which denied petitioner mother's objection to a Support Magistrate's order, entered on or about August 1, 2017, denying petitioner's motion to vacate orders, entered on her default, which granted respondent father's petitions to modify, enforce and suspend child support obligations, affirmed, without costs.

During the proceeding on March 25, 2015 before the Support Magistrate, the mother told the court, "I'm not going to be here. Whatever it's going to be the decision, it's going to be without me. I'm not coming for the April 8th or ever." The mother

subsequently fled the jurisdiction and took the parties' child to Italy without disclosing their whereabouts, thus depriving the father of his visitation rights, to which the mother had agreed in a stipulation that was incorporated in the divorce judgment. The mother then defaulted in three proceedings before the Support Magistrate, which resulted in a court order suspending the father's child support obligations for the subject children as of July 7, 2015 as a consequence of her defaults.

The mother's argument that the court lacked subject matter jurisdiction over the father's petitions to modify and enforce his child support obligations pursuant to a judgment of divorce entered in 2009 in Nassau County is without merit (*see* Family Court Act § 466[c]). The judgment of divorce provides that Supreme Court, Nassau County, retains jurisdiction of the matter concurrently with Family Court, Nassau County. When post-judgment proceedings brought by the father in Nassau County were transferred to New York County, the mother appeared therein and expressly consented to all proceedings being heard in New York County, where she lived. Nevertheless, the mother then withdrew her own petitions pending in New York County and told the court that she would not appear at any further court proceedings, and she in fact defaulted in the ensuing proceedings. The Support Magistrate then granted the father's petitions for modification

and enforcement based on the father's evidence of changed circumstances and the overpayments he had made with respect to the children's health and education.

The mother's argument that the court lacked subject matter jurisdiction over the father's petition to terminate his child support obligations and personal jurisdiction over her with respect to that petition is also without merit. After learning that the mother had left the country with the youngest child, the father commenced a separate proceeding to compel visitation and a proceeding to terminate or suspend his child support obligations based on the mother's interference with his visitation. Upon the father's showing that petitioner had moved abroad without providing an address, the court properly granted the father leave to serve the mother with the termination petition by alternate means, and the mother was served both by email and by mail at her last known address (*see* Family Court Act § 427[b], [c]). Upon the father's proof of service, and after confirming that a Family Court judge had issued a stayed warrant for the mother's arrest in the visitation proceeding, the Support Magistrate properly granted the father's petition to the extent of suspending the child support order. The mother contends that support magistrates may not decide visitation issues or suspend child support on the ground of interference with visitation (*see* Family

Court Act § 439). However, under these circumstances, the Support Magistrate did not impermissibly decide any issues related to visitation.

The mother's motion to vacate the default orders made on or about May 19, 2017 was untimely, as it was made more than one year after the orders were issued, and failed to provide both a reasonable excuse for her defaults and a meritorious defense, or indeed either (CPLR 5015[a][1]; *see Ashley v Ashley*, 139 AD3d 650 [2d Dept 2016]; *see also Matter of Bendeck v Zablah*, 105 AD3d 457 [1st Dept 2013]).

All concur except Gesmer, J. who dissents in a memorandum as follows:

GESMER, J. (dissenting)

I agree with the majority that New York County Family Court had jurisdiction over the father's modification and enforcement petitions. I also agree that the mother's motion to vacate her default on those petitions on the basis of excusable default was untimely, as she filed it more than a year after the orders were issued (CPLR 5015[a][1]).

However, the mother's request to vacate the order suspending child support was made on the basis of lack of jurisdiction, and was thus not subject to the one year time limitation set forth in CPLR 5015(a)(4). Because the record before us does not contain a finding by a Family Court judge that the mother deliberately frustrated or actively interfered with the father's visitation rights (*Rodman v Friedman*, 112 AD3d 537 [1st Dept 2013]; *Matter of Thompson v Thompson*, 78 AD3d 845, 846 [2d Dept 2010]), the order suspending child support should have been vacated (Family Ct Act § 439[a]). Accordingly, I would vote to vacate the order

suspending child support and remand the father's June 16, 2015 petition to suspend and terminate his child support obligations for hearing by a Family Court judge.

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

ENTERED: DECEMBER 5, 2019

CLERK

Gische, J.P., Tom, Kapnick, Kern, Moulton, JJ.

10296 The People of the State of New York, Respondent, Ind. 4206/14

-against-

Robert Knowles, Defendant-Appellant.

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Justine M. Luongo, The Legal Aid Society, New York (Tomoeh Murakami Tse of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered October 28, 2015, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree and unlawful possession of marijuana, and sentencing him, as a second felony offender, to a term of 2 to 4 years and a $50 fine, respectively, unanimously modified, on the facts, to the extent of vacating the conviction for criminal possession of a weapon in the third degree, and dismissing that count, and otherwise affirmed.

We find that defendant's conviction for criminal possession of a weapon in the third degree was against the weight of the evidence (*see generally People v Danielson*, 9 NY3d 342, 348-349 [2007]; *People v Correa*, ___AD3d___, 2019 NY Slip Op 07017 [1st Dept 2019]). The focus at trial was whether a box cutter

recovered from defendant in a search after his arrest for an open container violation (defendant was drinking a can of beer placed inside a brown paper bag) was a dangerous instrument, which defendant possessed with the intent to use unlawfully against another (*see* Penal Law § 265.01[2]).[1]

The sole witness at trial was the arresting officer, Officer Nicholas McKeever of the New York City Police Department's Transit Bureau. He testified that he was on duty in plain clothes on September 6, 2014 at about 1:00 a.m. on the east side of Sixth Avenue near the corner of Waverly Place when he saw defendant walking around with a can in a brown paper bag. The top of the can was labeled "24 ounce" and he believed, based on his experience enforcing the open container law, that the can was a Coors Light beer. The officer followed defendant across the street and saw defendant open the can and drink from it. He approached defendant and identified himself as a police officer. Defendant smiled and put the beer down on a ledge behind him. The officer examined the can and saw that it was, in fact, a Coors Light beer. He asked defendant for identification and when defendant could not provide it, he arrested defendant for an open

[1]Defendant was indicted for criminal possession of a weapon in the third degree under Penal Law § 265.02 (1) as opposed to criminal possession of a weapon in the fourth degree under Penal Law § 265.01 (2) based on his previous conviction of a crime.

container violation (NYC Administrative Code § 10-125[b]).

Officer McKeever searched defendant at the scene and found "one little bag" of marijuana in his shorts pocket. While he was conducting the search, the officer asked defendant if he had anything sharp on him. Asked by the prosecutor if defendant had provided him with anything, the officer replied no. Defendant was then transported to a nearby transit bureau office where he was again searched by Officer McKeever. At that time, the officer found a black bag containing five small bags of marijuana hanging out of defendant's underwear. While feeling around defendant's waist, the officer felt a metal object in defendant's shorts. Upon further search, the officer saw the butt end of a box cutter sticking out of the fly of defendant's underwear. The razor of the box cutter was in its sheath and not exposed. He later tested the box cutter to see if it was sharp, and he was able to cut paper with it. Officer McKeever never saw defendant holding the box cutter and did not see him argue with or threaten anyone.

> "[A] weight of the evidence review requires a court first to determine whether an acquittal would not have been unreasonable. If so, the court must weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate the strength of such conclusions. Based on the weight of the credible evidence, the court then decides whether the jury was justified in finding the defendant guilty beyond a reasonable doubt" (*People v Danielson*, 9 NY3d

at 348).

"Necessarily, in conducting its weight of the evidence review, a court must consider the elements of the crime, for even if the prosecution's witnesses were credible their testimony must prove the elements of the crime beyond a reasonable doubt" (*id.* at 349). We conclude that the People did not prove beyond a reasonable doubt that defendant possessed a dangerous instrument with the intent[2] to use it unlawfully against another (*see* Penal Law §§ 265.01[2]; 265.02[1]).

As the jury was charged, a "dangerous instrument" is "any instrument, article or substance, . . . which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or other serious physical injury" (Penal Law § 10.00[13]). An

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[2] Notably, the presumption of unlawful intent in Penal Law § 265.15(4) was not triggered here where defendant was charged with possession of a dangerous instrument, as opposed to a "dagger, dirk, stiletto, dangerous knife or any other weapon, instrument, appliance or substance designed, made or adapted for use primarily as a weapon" (*cf. People v Campos*, 93 AD3d 581 [1st Dept 2012], lv denied 19 NY3d 971 [2012]). Thus, the prosecution did not argue that the box cutter was a presumption-triggering weapon and the court did not charge the presumption. Even where the presumption did apply, a conviction of possession of a weapon in the third degree was held to be against the weight of the evidence where defendant "made no statement and exhibited no behavior from which it could be inferred that he possessed the [razor] with the intent to use it unlawfully against another" (*People v Rodgers*, 174 AD3d 924, 926 [2d Dept 2019]).

object "*becomes* a dangerous instrument when it is *used* in a manner which renders it readily capable of causing serious physical injury"(*People v Carter*, 53 NY2d 113, 116 [1981]).

Here, there was no proof that defendant used the box cutter, attempted to use it, or threatened to use it as required under the plain terms of the statute in order for it to be a dangerous instrument (*cf. People v Soares*, 80 AD3d 631-632 [2d Dept 2011], *lv denied* 16 NY3d 863 [2011] [box cutter properly found to be a dangerous instrument where evidence at trial established that "defendant held a box cutter to the victim's neck with one hand while, with his other hand and arm, he beat the victim, rifled through his pockets, and stole his property"]). Accordingly, the People failed to establish defendant's guilt on the weapon charge beyond a reasonable doubt.

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

ENTERED: DECEMBER 5, 2019

CLERK

Friedman, J.P., Renwick, Richter, Mazzarelli, Oing, JJ.

10372 The People of the State of New York, Respondent, Ind. 3843/14

-against-

Kashawn Ruffin, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered May 4, 2015, as amended June 29, 2015, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 4½ years, unanimously reversed, on the law, and the matter remanded for a new trial.

The court properly denied defendant's motion to suppress the evidence obtained from his cell phones pursuant to search warrants. Upon issuing the warrants, the issuing judge expressly stated that the warrants were "deemed executed at the date and time of issuance," which we find to be appropriate in the specific context of phones already in police custody, but not yet analyzed. Although the forensic examination of the phones was not conducted until 30 days after the warrants were issued, the

examination was in compliance with CPL 690.30(1), which requires that a search warrant be executed not more than 10 days after the date of issuance (*see generally People v DeProspero*, 20 NY3d 527, 529-533 [2013]; *United States v Brewer*, 588 F3d 1165, 1172-1173 [8th Cir 2009]). "The duration of a warrant's authority is more appropriately measured by the persistence of the cause for its issue" (*DeProspero*, 20 NY3d at 532). Here, the phones were in police custody between the issuance of the warrants and the forensic examination. Thus, "[n]othing had happened since the warrant[s] [were] signed to diminish the cause for [their issuance]" (*id.* at 531).

The evidence at a *Hinton* hearing established an overriding interest that warranted closure of the courtroom to the general public (*see Waller v Georgia*, 467 US 39 [1984]; *People v Echevarria*, 21 NY3d 1, 12-14 [2013], *cert denied sub nom. Johnson v New York*, 571 US 1111 [2013]; *People v King*, 151 AD3d 633, 634 [1st Dept 2017], *lv denied* 30 NY3d 1020 [2017], *cert denied* __ US __, 138 S Ct 1449 [2018]). The record sufficiently demonstrates that the court fulfilled its obligation under *Waller* to consider reasonable alternatives to closure, and to the extent the court considered some alternatives and not others, it can be inferred that the court determined that no lesser alternative would suffice (*see Echevarria*, 21 NY3d at 14-19).

The People concede that the trial court erred in excluding defendant's family members from some parts of the trial (*see People v Nazario*, 4 NY3d 70, 73 [2005] [the People must show "specific reasons why the family members must be excluded"]). Here, the People failed to show specifically that defendant's family posed a threat to the undercover officer's safety. The court's error requires reversal of the conviction (*see People v Martin*, 16 NY3d 607, 613 [2011] ["violation of the right to an open trial is not subject to harmless error analysis"]; *People v Moise*, 110 AD3d 49, 53 [1st Dept 2013] ["there is a per se rule of reversal when the right to a public trial is violated, regardless of prejudice"]).

The People acknowledge that a harmless error/lack of prejudice analysis does not apply to courtroom closure errors. Nevertheless, relying on nonbinding Second Circuit case law, they argue that reversal is not warranted because the exclusion of defendant's family was so trivial as not to implicate defendant's right to a public trial (*see e.g. Smith v Hollins,* 448 F3d 533 [2d Cir 2006]). We need not decide whether a triviality exception exists under State law, because even applying that standard, the closure here cannot be characterized as trivial. Defendant's family was kept out of the courtroom during the entirety of the direct examination, and part of the cross-

examination, of an undercover officer who was one of the People's key witnesses. That undercover was one of the officers involved in the narcotics operation that formed the basis of the charge against defendant. He set up the meeting to purchase the drugs, gave the buy money to defendant's accomplice, and received crack cocaine in return. Thus, the exclusion of defendant's family members "from the crux of the [People's] case" was not trivial (*id.* at 541).

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The People's circumstantial case, viewed as a whole, supports the inference that defendant supplied the drugs that the codefendant then gave to the undercover officer.

In light of our decision to remand for a new trial, we need not address defendant's remaining arguments.

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

ENTERED: DECEMBER 5, 2019

CLERK

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

10470 The People of the State of New York, Respondent, Ind. 3980/16

-against-

Antoine Thompson, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Melissa C. Jackson, J. at motion; Ellen N. Biben, J. at plea and sentencing), rendered August 24, 2017, as amended September 5, 2017, convicting defendant of disseminating indecent material to minors in the first degree, and sentencing him, as a second felony offender, to a term of 2½ to 5 years, unanimously reversed, on the law, the motion to suppress evidence obtained from cell phones through a search warrant granted, the plea vacated, and the matter remanded for further proceedings.

The search warrant for defendant's phones was overbroad. The application alleged that, on September 1, 2016, defendant sent texts to a 13 year old making indecent proposals, and called her on the same day. The warrant authorized examination of defendant's internet usage from January 1 to September 13, 2016,

and also authorized, without a time limitation, examination of essentially all the other data on defendant's phones. This failed to satisfy the particularity requirement of both the Fourth Amendment and Article 1, §12 of New York's Constitution (*see United States v Galpin*, 720 F3d 436 [2d Cir 2013]; *United States v Rosa*, 626 F3d 56 [2d Cir 2010]).

The pivotal question here is whether there was probable cause that evidence of the crimes specified in the warrant would be found in the broad areas specified. Notably, the warrant application alleged two discrete crimes and specified conduct that "began" on September 1, 2016, and, as far as the available information indicated, occurred entirely on that date. While it was of course possible that defendant's phone contained evidence of the specified offenses that predated September 1, there were no specific allegations to that effect. While the nature of defendant's relationship to the complainant – that he was a childhood friend of her mother's and married to her mother's friend – suggests a relationship that predated September 1, there were, again, no allegations of conduct relevant to the charged offenses during this period.

The information available to the warrant-issuing court did not support a reasonable belief that evidence of the crimes specified in the warrant would be found in all of the "locations"

within defendant's cell phone to which the warrant authorized access – for example, in defendant's browsing history six or seven months before September 1, 2016, or in his emails, the examination of which was authorized without any time restriction (*see Rosa*, 626 F3d at 61 [warrant that lacked requisite specificity for tailored search of the defendant's electronic media implicated "Fourth Amendment's core protection against general searches"]). While the search of a residence may be usefully analogized to the search of a cell phone in that each may necessitate the "opening" of "areas" in which evidence not legitimately targeted by the search may be found, *Galpin*'s comparison of the two contexts, relied on by the People, in fact cuts in favor of defendant's position (*see Galpin*, 720 F3d at 447 [limitations naturally imposed on the search of a residence "are largely absent in the digital realm, where the size or other outwardly visible characteristics of a file may disclose nothing about its content"]).

The conclusion that the warrant was overbroad is not undermined by the fact that the specified crimes involve child sex abuse, or the general recognition that this variety of crime often entails repeated and habitual conduct, including repeated

conduct on the internet. Here, there were no allegations of possession of child pornography, and there was no information specifically indicating defendant's use of his phone other than to communicate with the victim by text.

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

ENTERED: DECEMBER 5, 2019

CLERK

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

10498-
10498A-
10498B The People of the State of New York,
Respondent,

-against-

Emmitt Hunter,
Defendant-Appellant.

Ind. 5461/12
5639/13

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

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

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Judgment, Supreme Court, New York County (Charles H. Solomon, J. at suppression hearing; Ronald A. Zweibel, J. at jury trial and sentencing), rendered March 18, 2015, convicting defendant of criminal possession of a weapon in the third degree, and sentencing him to a term of 12 years, and judgments, same court (Jill Konviser, J.), rendered June 2, 2015, convicting defendant, upon his pleas of guilty, of two counts of attempted murder in the second degree, and sentencing him to a term of 7 years to run concurrently with the sentence on the weapon possession conviction and another term of 7 years to run consecutively to the sentence on the weapon possession conviction, unanimously affirmed.

The court properly denied defendant's suppression motion.

While investigating a radio run of a man bleeding from his hand and a radio run of a shooting in the same vicinity, the officers saw defendant, who was walking, stop "immediately" upon seeing the officers. Defendant was observed to have some kind of "bulge" or "weighted object" in the right sleeve of his leather jacket, in the forearm area. The bulge was observed to be significantly larger than the left sleeve. As one of the officers approached defendant he noticed defendant's hand "go into his sleeve" and his arm move "slowly back." He also saw that the object in the sleeve was "heavy." When asked by the officer, "[W]hat's going on[?]" defendant was unresponsive. As the officer drew closer, he grabbed the bulge in defendant's right sleeve and immediately determined it to be a gun.

The testifying officer's observation of a "weighted" bulge in the forearm area of defendant's right sleeve justified, at least, a common-law inquiry (*see People v DeBour*, 40 NY2d 210, 223 [1976]). Defendant's unresponsiveness to the officer's question, "[W]hat's going on[?]" and his pulling his hand into the sleeve toward the bulge, while the officer approached him, justified the officer's minimally intrusive safety precaution of grabbing the bulge, which turned out to be a revolver (*see People v Perez*, 142 AD3d 410, 415-416 [1st Dept 2016], *affd* 31 NY3d 964 [2018]; *see also People v Benjamin*, 51 NY2d 267, 271 [1980]).

Defendant's claim that his trial counsel rendered ineffective assistance in connection with the plea proceedings by failing to ascertain that defendant was mistaken in his insistence that he was a United States citizen is unreviewable on the present record (*see People v Nunez*, 158 AD3d 566 [1st Dept 2018], *lv denied* 31 NY3d 1120 [2018]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of this claim may not be addressed on appeal.

Defendant's claim that the court failed to review the minutes of the grand jury presentation is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we find no basis for a remand to the trial court for the purpose of a review of the grand jury minutes.

We have considered and rejected defendant's claim that the sentence on the weapon possession conviction should be reduced as excessive.

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

ENTERED: DECEMBER 5, 2019

CLERK

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

10499 Elvis Suero, Index 301272/15
Plaintiff-Appellant,

-against-

Villa Maria Academy,
Defendant-Respondent,

The Archdiocese of Notre Dame,
Defendant.

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Levine & Gilbert, New York (Harvey A. Levine of counsel), for appellant.

Connell Foley LLP, New York (Brian P. Morrissey of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about January 31, 2019, which granted the motion of defendant Villa Maria Academy (VMA) for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

VMA established prima facie entitlement to judgment as a matter of law in this action where plaintiff alleges that he was injured when he slipped and fell while descending an exterior stairway that led to a classroom in the basement of VMA's building. VMA submitted evidence, including an expert's report, showing that no dangerous condition existed on the premises; the stairwell met all applicable building code requirements and

tested above the industry standard to qualify as a highly slip-resistant surface (*see Ceron v Yeshiva Univ.*, 126 AD3d 630, 631-632 [1st Dept 2015]).

In opposition, plaintiff failed to raise a triable issue of fact. While plaintiff testified that it was not raining when he fell, but it had rained earlier in the day, "mere wetness on a walking surface due to rain is insufficient to raise a triable issue of fact" (*Mermelstein v East Winds Co.*, 136 AD3d 505, 505 [1st Dept 2016]). Furthermore, the opinions of plaintiff's expert failed to raise an issue of fact (*see Budano v Gurdon*, 110 AD3d 543 [1st Dept 2013]). The expert did not conduct any wet dynamic slip-resistance testing on the stairwell. He opined that the stairwell violated a code provision that is inapplicable to the stairwell (*see Hernandez v Callen*, 134 AD3d 654 [1st Dept 2015]). Plaintiff's expert's contention that the varying stair heights created an unbalanced condition is also unavailing. Plaintiff's expert failed to provide any engineering standard to support his contention that such a minor height differential

would create a dangerous condition (*see Lovell v Thompson*, 143 AD3d 511 [1st Dept 2016]). Notably, plaintiff never suggested that any height differential caused him to become unbalanced at any point before his fall.

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

ENTERED: DECEMBER 5, 2019

CLERK

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

10501 David M. Deneen, Index 307601/10
Plaintiff-Appellant,

-against-

Wilson A. Bucknor, et al.
Defendants-Respondents.

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Hasapidis Law Offices, Scarsdale (Annette G. Hasapidis of counsel for appellant.

Galvano & Xanthakis, P.C., Staten Island (Matthew Kelly of counsel), for respondents.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered on or about November 15, 2018, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing plaintiff's claims of serious injury to his cervical and lumbar spine and his 90/180-day claim within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Plaintiff alleged that, as a result of an accident involving defendants' vehicle, he sustained injury to his cervical and lumbar spine, and other consequential injuries. The record shows that defendants established prima facie entitlement to judgment as a matter of law that plaintiff's spinal conditions were preexisting and degenerative in nature through the expert report of their radiologist, as well as the MRI reports of plaintiff's

own radiologist, who noted degeneration and an encroaching spur in the cervical spine and found "[n]o acute process" in the lumbar spine (*see Ortiz v Boamah*, 169 AD3d 486 [1st Dept 2019]; *Rivera v Fernandez & Ulloa Auto Group*, 123 AD3d 509 [1st Dept 2014], *affd* 25 NY3d 1222 [2015]).

In opposition, plaintiff failed to raise an issue of fact as to the causal connection between his spinal condition and the accident because his physicians provided conclusory opinions without addressing the evidence of degeneration in his own medical records and explaining why his symptoms were not related to the preexisting conditions (*see Rivera* at 509-510). Plaintiff's failure to raise an issue of fact as to whether his spinal conditions were causally related to the accident means that he cannot recover for them. (*See Hojun Hwang v Doe*, 144 AD3d 507 [1st Dept 2016].

Furthermore, the court properly dismissed plaintiff's 90/180-day claim in view of plaintiff's testimony that he returned to work on a light duty basis two weeks after the accident, and continues to work (*see Anderson v Pena*, 122 AD3d 484 [1st Dept 2014]; *Pakeman v Karekezia*, 98 AD3d 840, 841 [1st Dept 2012]). Plaintiff's statements, that he has significant restrictions in performing his usual activities and hobbies, are

unsupported by the objective medical evidence (*see Mitchell v Calle*, 90 AD3d 584, 585 [1st Dept 2011]).

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 5, 2019

CLERK

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

10502 The Board of Managers on Behalf of the Unit Owners of the 322 West 57th Street Condominium, Plaintiff-Respondent, Index 150762/14

-against-

Leardon Boiler Works, Inc., et al., Defendants-Appellants,

Rose Associates, Inc., et al., Defendants.

Rawle & Henderson LLP, New York (Sylvia E. Lee of counsel), for appellants.

Asner LLC, New York (Karen M. Asner of counsel), for respondent.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered June 18, 2018, which, to the extent appealed from as limited by the briefs, denied defendants Leardon Boiler Works, Inc. and Rite Way Tank Maintenance Corp.'s motion to vacate a prior order imposing an adverse inference sanction against Leardon Boiler Works, Inc., and expanding the prior order to impose the same sanction against Rite Way Tank Maintenance Corp., unanimously affirmed, without costs.

A determination of sanctions pursuant to CPLR 3126 lies in the trial court's discretion, and defendants failed to show that the trial court abused its discretion in ordering an adverse

inference instruction against them at trial (CPLR 3126; *Husovic v Structure Tone, Inc.*, 171 AD3d 559, 560 [1st Dept 2019]). The fact that the documents requested by plaintiff may have been produced by other parties does not excuse defendants' failure to produce them.

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 5, 2019

CLERK

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

10503- Ind. 554/15
10503A The People of the State of New York, 4619/16
Respondent,

-against-

Ira Goldberg,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Laura Ward, J.), rendered December 12, 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 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 5, 2019

CLERK

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

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

10504 The People of the State of New York, Ind. 3721/13
Respondent,

-against-

Henri Traval,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Katheryne M. Martone of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Michael J. Obus, J. at suppression hearing; Bruce Allen, J. at plea and sentencing), rendered August 5, 2015, as amended December 4, 2015, convicting defendant of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of six years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]).

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

ENTERED: DECEMBER 5, 2019

CLERK

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

10505 Certain Underwriters at Lloyd's, et al.,
Plaintiffs-Respondents,

-against-

BioEnergy Development Group LLC, et al.,
Defendants-Appellants. Index 655792/17

_____

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

Zelle LLP, New York (Matthew L. Gonzalez of counsel), for respondents.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered October 22, 2018, which, to the extent appealed from as limited by the briefs, granted plaintiffs' motion to dismiss the first counterclaim, unanimously reversed, on the law, with costs, and the motion denied.

The first counterclaim alleges breach of the insurance policies' escalation clauses and breach of the implied duty of good faith and fair dealing. Plaintiffs did not move to dismiss the breach of contract part of the counterclaim, and the motion court did not address that part of the counterclaim. Thus, the breach of contract part of the counterclaim should not be dismissed. Moreover, these are not duplicative claims, and we find, contrary to the motion court, that plaintiffs' motion to

dismiss the part of the counterclaim that alleges breach of the implied duty of good faith and fair dealing should be denied as well.

The breach of the implied duty part of the counterclaim is based on allegations that plaintiffs refused to advance more than $6,806,725 in business interruption coverage until an appraisal panel awarded more than double that amount, and refused to pay the full amount of the property damage claim as determined by the appraisal panel (*see Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y.*, 10 NY3d 187, 196 [2008]). This part of the counterclaim seeks consequential damages to account for the delayed reconstruction of defendants' plant and for the attorneys' fees caused by plaintiffs' delayed interim payments or denial of payments. It may proceed, because, given the "purpose and particular circumstances of the [property damage and business interruption policies]" (*id.* at 193; *see also id.* at 194-195), it

was foreseeable that excessive delay would cause defendants to incur, as alleged, tens of millions of dollars in uncovered business interruption losses and attorneys' fees necessary to recover therefor (*see id.* at 192).

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

ENTERED: DECEMBER 5, 2019

CLERK

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

10507 David Suarez, Index 21715/14E
Plaintiff-Appellant,

-against-

Jesup Realty Group, LLC,
Defendant-Respondent.

_____

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph, III of counsel), for appellant.

O'Toole Scrivo, LLC, New York (Robert W. Gifford of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Robert T. Johnson, J.), entered June 26, 2018, dismissing the complaint pursuant to an order, same court and Justice, entered October 19, 2017, which granted defendant's motion for summary judgment, unanimously affirmed, without costs.

Defendant established prima facie entitlement to judgment as a matter of law in this action where plaintiff alleges that he was injured when he slipped and fell while descending the stairs in defendant's building.

Defendant submitted evidence, including the building superintendent's testimony, showing that it did not create the wet condition on the stairway, or have actual or constructive notice of the condition.

In opposition, plaintiff failed to raise a triable issue of

fact (*see Rivera v 2160 Realty Co., L.L.C.*, 4 NY3d 837 [2005]; *Pagan v New York City Hous. Auth.*, 121 AD3d 622 [1st Dept 2014]). There is no evidence of when the spill occurred, and plaintiff's own testimony demonstrates that the spill was not present about three hours earlier, after the superintendent had already ceased working for the day (*see Betances v 185-189 Audubon Realty, LLC*, 139 AD3d 404, 405 [1st Dept 2016]).

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

ENTERED: DECEMBER 5, 2019

CLERK

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

10508 The People of the State of New York, Ind. 3971/15
Respondent,

-against-

Robert Rosaro,
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 Tarbutton 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 Sonberg, J.), rendered January 10, 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 5, 2019

CLERK

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

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

10509 The People of the State of New York, Ind. 1905/17
Respondent,

-against-

Joel Vargas,
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 (Rebecca Hausneer 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 (Melissa Jackson, J.), rendered November 21, 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 5, 2019

CLERK

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

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

10510 Juan Soriano, et al., Index 651828/17
Plaintiffs-Respondents,

-against-

Victor Osorio, et al.,
Defendants-Appellants.

_____

Law Offices of Martin E. Restituyo P.C., New York (Martin E. Restituyo of counsel), for appellants.

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

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Order, Supreme Court, New York County (Margaret A. Chan, J.), entered October 2, 2018, which denied defendants' motion to dismiss the complaint, unanimously modified, on the law, to grant the motion to dismiss the complaint as against defendant J. Hernandez Contract Corp. a/k/a JR Construction (JR Construction) and the causes of action for an accounting, the appointment of a receiver, and a declaratory judgment as against defendant Santos, and otherwise affirmed, without costs.

We reject defendants' argument that plaintiffs were required to commence this action derivatively or assert that a demand on the board of defendant Sushi Vida, Inc. d/b/a Mama Sushi (Mama Sushi) to bring an action would be futile, as required by Business Corporation Law § 626. The complaint properly pleads direct, rather than derivative, claims because it seeks to

redress injury to plaintiffs individually (*See Yudell v Gilbert*, 99 AD3d 108, 113 [1st Dept 2012]).

As supplemented by plaintiff Juan Soriano's affidavit, the complaint states causes of action against defendants Wendy Hernandez, Mama Sushi and Santos. However, it contains no allegations against JR Construction and fails to connect JR Construction to Mama Sushi other than alleging that JR Construction is owned by Wendy Hernandez and that it provided construction services to Mama Sushi. Moreover, the claims for an accounting, the appointment of a receiver, and a declaratory judgment are based on shareholders' rights as against one another, and JR Construction and Santos are neither shareholders nor investors.

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

ENTERED: DECEMBER 5, 2019

CLERK

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

10511 J.T. Magen & Company, Inc., Index 160497/17
Plaintiff-Respondent,

-against-

Nissan North America, Inc.,
Defendant-Appellant,

Georgetown Eleventh Avenue Owners, LLC, et al.,
Defendants.

_____

Seyfarth Shaw LLP, New York (John R. Skelton of the bar of the Commonwealth of Massachusetts, admitted pro hac vice, of counsel), for appellant.

Meltzer, Lippe, Goldstein & Breitstone, LLP, Mineola (Manny A. Frade of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten), entered October 26, 2018, which, to the extent appealed from, denied the motion of defendant Nissan North America, Inc. (Nissan) to dismiss the claims against it for (1) foreclosure of a mechanic's lien and (2) quantum meruit, unanimously modified, on the law, to dismiss plaintiff's claim for quantum meruit, and otherwise affirmed, without costs.

To establish the right to enforce a mechanic's lien, a contractor must make a prima facie case that the lien is valid, and that it is entitled to the amount asserted in the lien (*Ruckle & Guarino, Inc. v Hangan*, 49 AD3d 267, 267 [1st Dept

2008]). Plaintiff has sufficiently alleged that it is entitled to foreclose on the lien, and the documents submitted in connection with the dismissal motion do not "conclusively establish[] a defense to the asserted claims as a matter of law" (*150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004]).

Nissan asserts that the mechanic's lien was "willfully exaggerated" because plaintiff failed to apportion the work over two leasehold interests (namely, nonparty BICOM, the signatory of the contract with plaintiff, and Nissan). It also contends that plaintiff stopped all work before even starting work on the Nissan facility, and thus the lien was willfully exaggerated because it included claims for work that benefited BICOM and not Nissan. These arguments fail.

First, Lien Law § 10 provides no indication that multiple liens should or must be filed for the work performed under one contract at a single premises. Second, the documents submitted on the motion do not "conclusively establish" that plaintiff performed no work for Nissan's benefit before walking off the project (*150 Broadway*, 14 AD3d at 5). In fact, Nissan acknowledges that many areas of the shared property were not separate spaces, and contained important common areas and services.

The IAS court also properly rejected Nissan's argument that plaintiff's execution of a partial lien waiver precluded it from subsequently filing a mechanic's lien. It is uncontested that the lien waiver at issue was not accompanied by the payment that plaintiff had expected to receive (*Katz v Anchor Constr.*, 247 AD2d 339 [1st Dept 1998]). The IAS court properly found that Nissan's reliance on the lien waiver did not "conclusively establish" its defense that the lien was willfully exaggerated (*150 Broadway*, 14 AD3d at 5). This is particularly true given the fact that the issue of exaggeration is one "that [] ordinarily must be determined at the trial of the foreclosure action," as it requires not only a showing of exaggeration, but also that the exaggeration was done intentionally (*Aaron v Great Bay Contr.*, 290 AD2d 326, 326 [1st Dept 2002]).

With respect to the cause of action for quantum meruit, the IAS court should have dismissed this claim. It is well-settled that the "theory of unjust enrichment lies as a quasi-contract claim," and contemplates "an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties" (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012] [internal quotation marks omitted]). Thus, the presence of a written contract between plaintiff and BICOM governing all aspects of the work to be done at the property bars

any quantum meruit claim by plaintiff against Nissan. "[T]here can be no quasi-contract claim against a third-party non-signatory to a contract that covers the subject matter of the claim" (*Randall's Is. Aquatic Leisure, LLC v City of New York*, 92 AD3d 463, 464 [1st Dept 2012], *lv denied* 19 NY3d 804 [2012]).

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

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

ENTERED: DECEMBER 5, 2019

CLERK

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

10512 Nova Casualty Company, Index 152807/14
Plaintiff-Respondent,

-against-

Peter Thomas Roth Labs, LLC,
Defendant-Appellant.

_____

Denis G. Kelly & Associates, P.C., Long Beach (Denis G. Kelly of counsel), for appellant.

Malloy & Associates, W. Simsbury, CT (John P. Malloy of the bar of the State of Connecticut, admitted pro hac vice, of counsel), for respondent.

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Order, Supreme Court, New York County (Robert R. Reed, J.), entered October 11, 2018, which granted plaintiff's motion for summary judgment declaring that plaintiff insurer owes no duty to provide flood coverage for defendant's properties in Carlstadt and Moonachie, New Jersey, unanimously affirmed, without costs.

We already held in *Heartland Brewery, Inc. v Nova Cas. Co.* (149 AD3d 522 [1st Dept 2017]) that the provision at issue on this appeal is ambiguous. In such a situation, "the parties may submit extrinsic evidence as an aid in construction, and the resolution of the ambiguity is for the trier of fact" (*State of New York v Home Indem. Co.*, 66 NY2d 669, 671 [1985] [internal citation omitted]).

The extrinsic evidence that was presented supports plaintiff

insurer's interpretation of the policy, and thus the motion court correctly declared that it had no duty to provide flood coverage. The conclusory and confusing statements by the chief operating officer during his deposition do not alter this result, and provide no basis to order a trial of the coverage claim.

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

ENTERED: DECEMBER 5, 2019

CLERK

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

10513 The People of the State of New York, Ind. 4585/14
Respondent,

-against-

Patrick Mathis,
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 (Luis Morales of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie Wittner, J. at plea; Patricia Nunez, J. at sentencing), rendered March 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 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 5, 2019

CLERK

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

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

10115- Index 20515/09
10115A-
10115B Irie Thompson, etc.,
Plaintiff-Appellant,

-against-

Beth Israel Medical Center, et. al.,
Defendants-Respondents.

_____

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph, III of counsel), for appellant.

Harris Beach PLLC, Pittsford (Svetlana K. Ivy of counsel), for Beth Israel Medical Center, respondent.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Judy C. Selmeci of counsel), for Montefiore Medical Center and The Jack D. Weiler Hospital of The Albert Einstein College of Medicine, respondents.

Chesney & Nicholas, LLP, Syosset (Stephen V. Morello of counsel), for Terence Cardinal Cooke Health Care Center, respondent.

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Appeal from order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered on or about August 10, 2017, which granted defendants' motions to dismiss the complaint for failure to prosecute, and denied plaintiff's motion to vacate the CPLR 3216 notices, deemed an appeal from judgments, same court and Justice, entered on or about September 7, 2017 (CPLR 5520[c]), and, as so considered, said judgments unanimously affirmed, without costs. Appeal from order, same court (Lewis J. Lubell, J.), entered on or about May 1, 2018, which recalled and vacated an order entered

on or about October 31, 2017, unanimously dismissed, without costs, as abandoned.

The court providently granted defendants' motions to dismiss this action alleging medical malpractice. Plaintiff failed to show that she did not intend to abandon prosecution of the action, that her history of extensive delay was justified, or that she had a meritorious claim (*see* CPLR 3216; *Mosberg v Elahi*, 80 NY2d 941 [1992]; *Garofalo v Mercy Hosp.*, 271 AD2d 642 [2d Dept 2000]; *Schneider v Meltzer*, 266 AD2d 801, 802 [3d Dept 1999]; *compare* Espinoza v 373-381 Park Ave. S., LLC, 68 AD3d 532 [1st Dept 2009]).

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

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

ENTERED: DECEMBER 5, 2019

CLERK

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

10516N Stefan Nieborak, et al., Index 157084/14
Plaintiffs-Respondents,

-against-

W54-7 LLC,
Defendant-Appellant.

_____

Hertz Cherson & Rosenthal, P.C., Forest Hills (Jeffrey M. Steinitz of counsel), for appellant.

Rozen Law Group, New York (Jennifer A. Rozen of counsel), for respondents.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered April 16, 2019, which, to the extent appealed from as limited by the briefs, denied defendant's motion to renew plaintiffs' motion for summary judgment, unanimously affirmed, without costs.

Defendant failed to explain why the voluminous documents that it concedes were in its possession at the time plaintiffs made their motion, and were "recovered" before the motion was decided, were not submitted with its original opposition papers

(CPLR 2221[e][3]; *Gordon v 476 Broadway Realty Corp.*, 161 AD3d 417, 418 [1st Dept 2018], *lv dismissed* 32 NY3d 1078 [2018]).

The limited issues we are deciding in this appeal do not implicate the Housing Stabilization and Tenant Protection Act of 2019 (HSTPA).

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

ENTERED: DECEMBER 5, 2019

CLERK

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

10517N-
10517NA Andrew Dietz, et al., Index 653023/18
Plaintiffs-Appellants,

-against-

Linde Gas North America, LLC,
et al.,
Defendants-Respondents.

Winston & Strawn LLP, New York (Luke A. Connelly of counsel), for appellants.

Day Pitney LLP, New York (Anthony J. Marchetta of counsel), for respondents.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered on or about November 21, 2018, which granted defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(4) or, in the alternative, stay the action pursuant to CPLR 2201, to the extent of staying the action pending a decision on a motion to dismiss in the pending New Jersey action, unanimously affirmed, without costs. Appeal from order, same court (Joel M. Cohen, J.), entered April 29, 2019, which denied plaintiffs' motion for reargument, unanimously dismissed, without costs, as taken from a non-appealable order.

Supreme Court providently exercised its discretion in granting and then continuing a stay of this litigation pending an outcome in the New Jersey action, given the substantial identity

of parties and claims in the two actions and the fact that the New Jersey action involves more comprehensive claims, including New Jersey statutory claims alleging racketeering and securities fraud, which encompass the issues in this litigation (*AIG Fin. Prods. Corp. v Penncara Energy, LLC*, 83 AD3d 495 [1st Dept 2011]; *see also Delos Megacore Ltd. v Omega Invs. Ltd.*, 152 AD3d 417 [1st Dept 2017]; *cf. Matter of Uni-Rty Corp. v New York Guangdong Fin., Inc.*, 117 AD3d 427, 489 [1st Dept 2014] [stay of state action alleging fraudulent conveyance not granted where federal action did not involve issues of fraudulent conveyance]).

The New York forum selection clause in the parties' share purchase agreement is permissive, not mandatory, and does not preclude the litigation in New Jersey, as plaintiffs contend (*see AIG Fin. Prods.*, 83 AD3d at 496; *cf. Carlyle CIM Agent, L.L.C. v Trey Resources I, LLC*, 148 AD3d 562 [1st Dept 2017] [New York actions not dismissed in favor of Oklahoma proceeding in which defendants filed counterclaims where forum selection clause mandatory as to defendants required them to commence any cause of action against the plaintiff in state or federal court in New York County]).

No appeal lies from that part of the April 23, 2019 order

denying reargument (*Forbes v Giacomo*, 130 AD3d 428 [1st Dept 2015], *lv dismissed in part, denied in part* 26 NY3d 1047 [2015]).

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

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

ENTERED: DECEMBER 5, 2019

CLERK