SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 26, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Renwick, J.P., Manzanet-Daniels, Tom, Mazzarelli, Webber, JJ.

8031 The People of the State of New York, Respondent, Ind. 717/15

-against-

Raymond Alexander,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered January 4, 2017, convicting defendant, after a jury trial, of assault in the second degree, criminal possession of a weapon in the second degree (two counts) and attempted assault in the first degree, and sentencing him, as a second felony offender, to an aggregate term of 15 years, unanimously affirmed.

The court providently exercised its discretion in admitting in evidence a photograph, taken less than two months before the shooting, showing a person, sufficiently established to be defendant, holding a revolver of the type used in the crime.

This evidence was relevant to show that defendant had access to such a weapon, thus tending to establish his identity as the perpetrator, and there was no requirement of proof that the revolver in the photograph was the actual weapon used in the crime (*see e.g. People v Del Vermo*, 192 NY 470, 478-482 [1908]; *People v Bailey*, 14 AD3d 362, 363 [1st Dept 2005], *lv denied* 4 NY3d 851 [2005]; *People v Marte*, 7 AD3d 405, 407 [1st Dept 2004], *lv denied* 3 NY3d 677 [2004]).

Defendant has not established that he was prejudiced by the timing of, and alleged change in, the court's ruling regarding the photograph. The court expressly stated that it would reserve decision on admissibility until it determined whether the People could lay a foundation establishing that defendant was the person depicted. Then, after defendant's testimony, elicited through permissible cross-examination, established such a foundation, the court appropriately received the photograph in evidence. The evidence was not received as rebuttal evidence or on a door-opening theory, but because of the particular circumstance that defendant's testimony supplied the necessary foundation.

The court also properly admitted a series of text messages sent and received about a day before the shooting, discussing the operability of a "22." Even though the weapon used in the shooting was not a .22 caliber, the text messages, viewed in

context, tended to show that defendant was planning the shooting.

The record refutes defendant's claim that he was denied his right to be present at proceedings relating to the admissibility of uncharged crimes evidence.

The court properly instructed the jury on accessorial liability, notwithstanding that no such language appeared in the indictment and the People's main theory was that defendant personally shot the victim. There was no improper amendment of the indictment, because an indictment charging a defendant as a principal is "not unlawfully amended by the admission of proof and instruction to the jury that a defendant is additionally charged with acting-in-concert to commit the same crime, nor does it impermissibly broaden a defendant's basis of liability, as there is no legal distinction between liability as a principal or criminal culpability as an accomplice" (*People v Rivera*, 84 NY2d 766, 769 [1995]). A theory that defendant intentionally aided a particular other person, who did the actual shooting, was supported by defendant's own testimony. Although defendant claimed he had not shared the gunman's intent, such intent could be inferred from the totality of the evidence. We reject defendant's claim of unfair surprise, particularly because the theory of accessorial liability arose from defendant's own testimony (*see People v Spann*, 56 NY2d 469 [1982]; *People v*

Alford, 246 AD2d 337 [1st Dept 1998]).

During defendant's testimony, the court providently exercised its discretion when it precluded, as hearsay, the contents of a statement allegedly made to defendant by the actual perpetrator. Defendant's offer of proof was insufficient to demonstrate that the content of the statement was admissible for a legitimate purpose other than its truth.

The court also providently exercised its discretion in denying defendant's mistrial motion made on the basis of a police officer's isolated reference to inadmissible evidence. The court's curative instruction, which the jury is presumed to have followed, was sufficient to prevent any prejudice (*see People v Santiago*, 52 NY2d 865 [1981]; *People v Young*, 48 NY2d 995 [1980]).

To the extent that defendant is raising constitutional claims relating to the above-discussed issues, those claims are

unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 26, 2019

CLERK

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

8230 The People of the State of New York, Respondent, Ind. 282/12

-against-

Christopher Reed, Defendant-Appellant.

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Christina A. Swarns, Office of the Appellate Defender, New York (Meredith J. Nelson of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (T. Charles Won of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Peter J. Benitez, J.), rendered February 7, 2014, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him to a term of 25 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342 [2007]). There is no basis for disturbing the jury's determinations concerning credibility and identification. Reliable identifications by two eyewitnesses were corroborated by circumstantial evidence, including defendant's false exculpatory statements to the police.

The court providently exercised its discretion in admitting testimony that, during an argument at a party in defendant's building (not attended by defendant) that occurred shortly before the homicide, a nontestifying declarant stated to the victim and

others that the declarant could make a phone call to have them killed. This testimony was not admitted to show that the declarant actually had the power to compel someone to kill the victim, or that the declarant (who was not charged with any crime in this case) actually solicited defendant to do so. Instead, it was admitted to show the declarant's state of mind (*see* Guide to NY Evid rule 8.41 [state of mind] http://www.nycourts.gov/judges/evidence/8-HEARSAY/8.41_STATE%20OF%20MIND.pdf), that is, her anger at the victim on that occasion. This was relevant because there was other evidence, including portions of defendant's statement to the police, that supported an inference that the declarant conveyed her anger to defendant in a phone call. This, in turn, supplied a possible motive for an otherwise unexplained shooting.

The court also properly exercised its discretion in permitting a police witness to testify that after having unspecified conversations with certain witnesses, he went to defendant's apartment. This testimony came within the permissible bounds of evidence that completes the narrative and provides the jury with necessary background to explain the subsequent actions of the police (*see People v Tosca*, 98 NY2d 660, 661 [2002]), and it was not unduly prejudicial. Defendant's Confrontation Clause argument is unpreserved, and we decline to

review it in the interest of justice. As an alternative holding, we reject it on the merits. We have considered and rejected defendant's ineffective assistance of counsel claim relating to the lack of preservation (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

The court also providently exercised its discretion in admitting surveillance video recordings, because witnesses provided sufficient authentication under the circumstances (*see People v Patterson*, 93 NY2d 80, 84-85 [1999]). The totality of the evidence, including the relationship of the videotapes at issue to other videotapes that were undisputedly authenticated, supported the inference that the videotapes at issue depicted the relevant locations in defendant's building, and any alleged uncertainty went to the weight to be accorded the evidence rather than its admissibility (*see People v McEachern*, 148 AD3d 565, 566 [1st Dept 2017], *lv denied* 29 NY3d 1083 [2017]).

Defendant's challenges to the prosecutor's summation are entirely unpreserved, notwithstanding defendant's postsummations mistrial motion (*see People v Romero*, 7 NY3d 911, 912 [2006]; *People v LaValle*, 3 NY3d 88, 116 [2004]), and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236

AD2d 133, 143-144 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-120 [1992], *lv denied* 81 NY2d 884 [1993]).

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 26, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Tom, Kahn, Singh, JJ.

8272 In re SR, etc. File 4673/08B
4673/08C

- - - - -

Susan Noack, et al.,
Objectants-Appellants,

-against-

Seymour Reitknecht,
Fiduciary-Respondent.

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Feldman, Golinski, Reedy & Ben-Zvi, PLLC, New York (Leslie H. Ben-Zvi of counsel), for appellants.

The Mintz Fraade Law Firm, P.C., New York (Alan P. Fraade of counsel), for respondent.

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Order, Surrogate's Court, New York County (Rita S. Mella, S.), entered on or about April 11, 2017, which, to the extent appealed from as limited by the briefs, fixed legal fees at $520,000 and directed counsel to return the fees in excess thereof, unanimously modified, on the facts and in the exercise of discretion, to further reduce the fees awarded by the Surrogate to $420,000, and otherwise affirmed.

Respondent's counsel sought approval for legal fees in the amount of $1,037,183 for their representation of respondent. The amount requested represented 33.7% of the estate and trust assets. The Surrogate noted that the fees were far in excess of a typical fee for the services performed by respondent's counsel, concluded that the fees were excessive, and fixed the fees in the

total amount of $520,000.

Although the Surrogate reduced the fees from the exorbitant amount originally requested, we conclude that the fees as reduced are still excessive given the size of the estate (*see generally Matter of Morris*, 57 AD3d 674 [2d Dept 2008]; Turano & Radigan, New York Estate Administration § 13.03 [2019 ed]). While there is no set formula for fee awards, upon our review of counsel's time records and in the exercise of discretion, we conclude that a further reduction in the amount of $100,000 is warranted. This additional reduction is necessary to properly account for excessive charges for inter-office communications and discussions amongst members of the firm, and unnecessary work performed (*see Matter of Schoonheim*, 158 AD2d 183 [1st Dept 1990]).

We reject objectants' argument that the fees should be reduced further because most of the fees attributable to the Supreme Court action were unnecessary. Objectants specifically argue that the action could have been settled at an earlier time for a modest amount. We agree with the Surrogate that "whether, when, and at what amount the case could have settled is wholly speculative." Moreover, objectants' contention that respondent should be held jointly and severally liable with counsel for the return of counsel's excessive legal fees is improperly raised for the first time on appeal (*Zacharius v Kensington Publ. Corp.*, 167

AD3d 452 [1st Dept 2018).

We have considered objectants' remaining arguments, including the claim that counsel's fees should be further reduced by one third based on the of-counsel agreement between respondent and his counsel, and find them unavailing.

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

ENTERED: FEBRUARY 26, 2019

CLERK

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

8494 The People of the State of New York, Respondent, Ind. 3285/09

-against-

John Rivera, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered January 5, 2010, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the seventh degree, and sentencing him to a term of one year, unanimously affirmed.

The court correctly denied defendant's challenge for cause to a prospective juror. Although the panelist originally demonstrated a misapprehension of the burden of proof in criminal cases, he then repeatedly and unequivocally affirmed that he would follow the court's instructions regarding the law, regardless of whether they conflicted with his own understanding (*see People v Bludson*, 97 NY2d 644, 645-46 [2001]; *People v Johnson*, 94 NY2d 600, 614 [2000]). He also unequivocally affirmed that he understood that the only party with any burden

to convince him of anything was the prosecution.

To the extent defendant is arguing that the panelist's professional experience was a factor supporting a challenge for cause, that argument is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. The panelist's background as an expert witness on financial matters in civil cases did not create any potential for him to inappropriately influence jury deliberations (*see People v Arnold*, 96 NY2d 358, 364-68 [2001]).

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

ENTERED: FEBRUARY 26, 2019

CLERK

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

8495 In re Myrna Vazquez as Administratrix of the Estate of Luis Vazquez, Deceased, etc., Petitioner-Appellant, Index 260114/17

-against-

Howard A. Zucker, M.D., etc., et al., Respondents-Respondents.

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Law Office of Sandra M. Prowley & Associates LLC, Bronx (Sandra M. Prowley of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jamison Davies of counsel), for City of New York respondents.

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

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Appeal from order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about October 27, 2017, which denied petitioner's motion to reargue and renew respondents' motions to dismiss the petition brought pursuant to CPLR article 78 challenging respondents' determination to deny petitioner's claim for medical assistance on the grounds of available resources, unanimously dismissed, without costs, as taken from a nonappealable paper.

In support of petitioner's motion to renew and reargue, she failed to allege any new or previously unavailable facts (CPLR 2221[e][2]). Accordingly, petitioner's motion was solely one to

reargue, the denial of which is not appealable (*see Lichtman v Mount Judah Cemetary*, 269 AD2d 319, 320 [1st Dept 2000], *lv dismissed in part and denied in part* 95 NY2d 860 [2000]).

Because she did not appeal from the order that granted respondents' motions to dismiss the proceeding as time-barred, petitioner's arguments addressed to that determination are not properly before us (*see D'Andrea v Hutchins*, 69 AD3d 541 [1st Dept 2010]).

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

ENTERED: FEBRUARY 26, 2019

CLERK

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

8496 In re Brandy P.,
Petitioner-Appellant,

-against-

Pauline W.,
Respondent-Respondent.

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Leslie S. Lowenstein, Woodmere, for appellant.

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

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

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Order, Family Court, New York County (Ta-Tanisha D. James, J.), entered on or about January 16, 2018, which dismissed the father's petition to modify a prior order of custody, unanimously affirmed, without costs.

The father failed to make the required evidentiary showing of changed circumstances warranting modification of custody (*Matter of Patricia C. v Bruce L.*, 46 AD3d 399 [1st Dept 2007]). His arguments regarding interference with visitation do not alone support a conclusion that the grandmother is unable to meet the children's mental, emotional or physical needs, and the father has not shown that he has addressed the issues that caused him to lose custody of his children.

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

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

ENTERED: FEBRUARY 26, 2019

CLERK

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

8497 NYCTL 2012-A Trust, et al., Index 155415/13
Plaintiffs,

-against-

1698 Lex Corporation,
Defendant-Appellant,

Residential Funding Corporation, et al.,
Defendants,

Tower Lexington Inc., et al.,
Intervenor Defendants-Respondents.

_____

Kossoff PLLC, New York (Stacie Bryce Feldman of counsel), for appellant.

Butler, Fitzgerald, Fiveson & McCarthy, P.C., New York (David K. Fiveson of counsel), for respondents.

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Order, Supreme Court, New York County (Judith N. McMahon, J.), entered July 12, 2018, which granted intervenor defendants' motion to confirm a referee's report, dated May 31, 2018, and denied defendant 1698 Lex Corp.'s cross motion to reject the report, unanimously affirmed, without costs.

Defendant 1698 Lex Corp. seeks an order vacating the sale of its property at an auction held following foreclosure on a tax lien, on the ground that the price realized was unconscionably low and that the principals of intervenor defendants, Louis Zazzarino and Yossef Azour, may have improperly colluded to suppress bidding. The matter was referred to a referee to hear

and report on the issue of whether Zazzarino and Azour "engaged in fraud, collusion and/or misconduct at the Sale, [so] as to cast suspicion upon the fairness of the Sale, thereby mandating its vacatur." The referee concluded that defendant failed to establish fraud, collusion or misconduct by Zazzarino and Azour, and recommended dismissing the action.

Contrary to defendant's contention, the one-sentence order on appeal confirming the referee's report is not deficient for failing to "state the facts it deems essential" (CPLR 4213). CPLR 4213 is not applicable, because the order was not issued after a nonjury trial. The applicable provision is CPLR 2219(a), which governs the time and form of an order determining a motion and provides that the judge shall "give the determination . . . in such detail as the judge deems proper."

Defendant failed to demonstrate that the referee exceeded her authority or that the report was otherwise inadequate. The referee recommended that the matter be dismissed, having concluded, after hearing testimony, that Zazzarino and Azour did not engage in fraud or collusion – the very issue that was referred to her (*see* CPLR 4311). The report, which referred to

an intermediate order considering intervenor-defendants' motion for a directed verdict, adequately complies with the requirements of CPLR 4320.

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

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

ENTERED: FEBRUARY 26, 2019

CLERK

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

8498 Ramona Santana, Index 303324/13
Plaintiff-Appellant,

-against-

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

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

Zachary W. Carter, Corporation Counsel, New York (Nwamaka Ejebe of counsel), for respondents.

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Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about March 28, 2018, which granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

The governmental function immunity doctrine does not apply in this case where plaintiff pedestrian was injured when she was struck by a police vehicle that was allegedly pursuing a vehicle that had committed a traffic infraction (*see generally Valdez v City of New York*, 18 NY3d 69, 75-76 [2011]). Instead, where a plaintiff alleges that a municipality and/or its employees were negligent in the ownership or operation of an authorized emergency vehicle while engaged in one of the activities protected by Vehicle and Traffic Law § 1104(b), the "reckless

disregard" standard set forth in Vehicle and Traffic Law § 1104(e) applies (*Kabir v County of Monroe*, 16 NY3d 217 [2011]).

Here, a factual issue exists as to whether defendants were engaged in a protected activity under Vehicle and Traffic Law § 1104(b), namely, proceeding past a steady red signal (*see* Vehicle and Traffic Law § 1104[b][2]), while pursuing a vehicle for a traffic violation so as to apply the reckless standard of care as opposed to ordinary negligence principles (Vehicle and Traffic Law § 1104[e]; *see Kabir*, 16 NY3d at 220).

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

ENTERED: FEBRUARY 26, 2019

CLERK

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

8499 In re Joseph Ferdico, Petitioner, Index 101199/17

-against-

The Waterfront Commission of New York Harbor, Respondent.

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Gerald J. McMahon, New York, for petitioner.

Phoebe S. Sorial, New York, for respondent.

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Determination of respondent, dated August 14, 2017, which revoked petitioner's registration as a longshoreman, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Arlene P. Bluth, J.], entered November 13, 2017), dismissed, without costs.

Respondent's determination is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). The record, including petitioner's testimony during an article 4 interview, shows that petitioner associated with members of two organized crime families who had also been convicted of racketeering activity. The Administrative Law Judge (ALJ) noted petitioner's interview that he had worked for one of the two individuals from 1999 through 2006, had been to that individual's home, had his phone

number, had spoken with him a few months prior, and that the individual had his car serviced at the auto repair business where petitioner also worked. Concerning the second individual, petitioner stated in his interview that he knew him as the owner of a shop across the street from where petitioner worked and where the individual had his car serviced, that petitioner occasionally purchased cigars from the individual's store, and that the individual had petitioner's personal phone number and had called him on it previously. Such associations, which petitioner had previously failed to disclose, "potentially undermine[] [respondent's] continuing efforts to ensure public safety by reducing corruption on the waterfront" (*Matter of Dillin v Waterfront Commn. of N.Y. Harbor*, 119 AD3d 429, 430 [1st Dept 2014]).

Petitioner's due process rights were not violated when the ALJ applied an adverse inference against him for failing to testify during the administrative hearing (*see Matter of Youssef v State Bd. for Professional Med. Conduct*, 6 AD3d 824, 826 [3d Dept 2004]; *Matter of Steiner v DeBuono*, 239 AD2d 708, 710 [3d Dept 1997], *lv denied* 90 NY2d 808 [1997]). That petitioner testified during the investigation interview prior to the issuance of charges against him, does not render the adverse inference improper.

The penalty imposed does not shock our sense of fairness (*see e.g. Dillin* at 430; *see also In re Pontoriero*, 439 NJ Super 24, 44, 106 A3d 532, 544 [2015]).

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: FEBRUARY 26, 2019

CLERK

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

8500-
8501 George W. Gowen, etc., Index 650646/14
Plaintiff-Respondent,

-against-

Helly Nahmad Gallery, Inc., et al.,
Defendants-Appellants.

_____

Aaron Richard Golub, Esquire, PC, New York (Nehemiah S. Glanc of counsel), for appellants.

Landrigan & Aurnou, LLP, White Plains (Phillip C. Landrigan of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered on or about May 9, 2018, which, insofar as appealed from as limited by the briefs, denied defendants' motion to dismiss on grounds of forum non conveniens, unanimously affirmed, with costs, and so much of an order, same court and Justice, entered on or about May 9, 2018, as denied defendants' motion to vacate the decision of the special master, unanimously affirmed, with costs.

In this action seeking return of a painting allegedly looted by the Nazi-occupied French government, the motion court did not improvidently exercise its discretion in denying the motion to dismiss the complaint on the ground of forum non conveniens (*see Swaney v Academy Bus Tours of N.Y., Inc.*, 158 AD3d 437 [1st Dept

2018]; *see also Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-479 [1984], *cert denied* 469 US 1108 [1985]). In weighing the relevant factors, the court correctly observed that plaintiff and several defendants maintained residences in New York (*see OrthoTec, LLC v Healthpoint Capital, LLC*, 84 AD3d 702, 703 [1st Dept 2011]). Although defendants suggest that France is the more appropriate forum, they also argued below, and submitted expert affidavits in support of the position, that this action would be time-barred in that jurisdiction, an important factor to consider (*see Highgate Pictures v De Paul*, 153 AD2d 126, 128-129 [1st Dept 1990]). This Court observes that retaining this action would not be particularly burdensome; New York has previously entertained actions concerning Nazi looting of art during World War II (*see generally Reif v Nagy*, 149 AD3d 532 [1st Dept 2017]). That the originals of some documents are located abroad does not require dismissal, and it is noted that the key documents have already been translated for the court (*see OrthoTec* at 703). In light of the foregoing, defendants failed to meet their heavy burden of establishing that the action should be dismissed on forum non conveniens grounds (*see Banco Ambrosiano, S.P.A. v Artoc Bank & Trust*, 62 NY2d 65, 74 [1984]).

The motion court also correctly denied defendants' motion to vacate the directives of the special master appointed to oversee

discovery (see CPLR 3104; *see also Those Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, 11 NY3d 843, 845 [2008]). While the estate's sole heir was not purely a nonparty (*see Stutz v Guardian Cab Corp.*, 273 AD 4 [1st Dept 1947]; *Duhnin v Herbst*, 193 AD 906 [2d Dept 1920]), it was not an improvident exercise of discretion for the referee to direct that his deposition would be held in France, particularly in light of the limited nature of his knowledge, that he had not been born when the painting at issue was confiscated and that he was a toddler at the time of Stettiner's death (*see also Wygocki v Milford Plaza Hotel*, 38 AD3d 237 [1st Dept 2007]; *Allen v Crowell-Collier Publ. Co.*, 32 AD2d 897 [1st Dept 1969]; *Beauchamp v Marlborough-Gerson Gallery*, 29 AD2d 937 [1st Dept 1968]).

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: FEBRUARY 26, 2019

CLERK

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

8502 The People of the State of New York, Ind. 643/15
Respondent,

-against-

David Barnes,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Vincent Rivellese 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 (Jill Konviser, J.), rendered March 22, 2016,

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

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

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

ENTERED: FEBRUARY 26, 2019

CLERK

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

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

8504 The City of New York, Index 401168/03
Plaintiff-Respondent,

-against-

Shellbank Restaurant Corporation,
Defendant-Appellant.

_____

Weisberg & Weisberg, Great Neck (Sidney A. Weisberg of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Eric Lee of counsel), for respondent.

_____

Order, Supreme Court, New York County (James E. d'Auguste, J.), entered September 13, 2017, which denied defendant's motion for summary judgment on its counterclaims and dismissing the complaint, and granted plaintiff's cross motion for summary judgment on three of its four claims and dismissing the counterclaims, unanimously affirmed, with costs.

The motion court correctly found that the parties' unambiguous agreement was terminable at will and therefore did not create a property interest protected by the due process clause or the takings clause of the US Constitution (*see White Plains Towing Corp. v Patterson*, 991 F2d 1049, 1062 [2d Cir 1993], *cert denied* 510 US 865 [1993]; *Brooklyn Historic Ry. Assn. v City of New York*, 126 AD3d 837, 840 [2nd Dept 2015]).

The breach of contract counterclaim is barred by defendant's

failure to serve a notice of claim (*see* Administrative Code of City of NY § 7-201). The claim also fails because the agreement was terminable at will, giving plaintiff the unfettered right to terminate it (*see Red Apple Child Dev. Ctr. v Community School Dists. Two*, 303 AD2d 156, 157-158 [1st Dept 2003], *lv denied* 1 NY3d 503 [2003]). In any event, defendant expressly waived damages of any kind arising from the exercise of the right of termination.

The counterclaim for conversion is barred by defendant's failure to comply with General Municipal Law §§ 50-i and 50-e (*see Matter of White v City of Mount Vernon*, 221 AD2d 345 [2d Dept 1995]). The reference to damages for cancelled events in the parties' stipulation staying the TRO that barred defendant from the premises is insufficiently informative to substitute for a notice of claim (*cf. Montana v Incorporated Vil. of Lynbrook*, 23 AD2d 585 [2d Dept 1965] [formal or technical requirements of notice of claim waived where defendant is fully cognizant of claim]). Moreover, the property allegedly converted, whether characterized as access to the premises or loss of business opportunities, cannot form the basis for a conversion claim (*Sun Gold, Corp. v Stillman*, 95 AD3d 668, 669-670 [1st Dept 2012]). The counterclaim also is duplicative of the breach of contract counterclaim, as there were no facts pleaded beyond those that

support the contract claim or that would support the existence of a duty separate from the parties' agreement (*see Fesseha v TD Waterhouse Inv. Servs.*, 305 AD2d 268, 269 [1st Dept 2003]).

The counterclaim for breach of the covenant of good faith and fair dealing fails because it is predicated on plaintiff's exercise of its unambiguous contractual right to terminate at its discretion (*see Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 69-70 [1978]).

The actions taken by plaintiff that defendant contends breached the agreement, precluding enforcement, were not breaches; the agreement granted plaintiff the right to take those actions. In any event, these alleged breaches were not material (*see Greenspan v Amsterdam*, 145 AD2d 535 [2d Dept 1988]).

The fact that it was terminable at will does not make the agreement illusory (*see McCall Co. v Wright*, 133 App Div 62, 68 [1st Dept 1909], *affd* 198 NY 143 [1910]). Moreover, it is clear

from the face of the agreement that each side received something of value (*see Apfel v Prudential-Bache Sec.*, 81 NY2d 470, 476 [1993]).

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

ENTERED: FEBRUARY 26, 2019

CLERK

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

8505 Bayview Loan Servicing, LLC, Index 810056/11
Plaintiff,

-against-

Celeste Wenegieme,
Defendant-Appellant,

Alleyne Sylvester, et al.,
Defendants.
- - - - -
Goldstein Group Holding, Inc.,
Nonparty Respondent.

_____

Ronald D. Weiss, P.C., Melville (Ronald D. Weiss of counsel), for appellant.

Jeremy M. Doberman, Monsey, for respondent.

_____

Appeal from order and judgment (one paper), Supreme Court, New York County (Arlene P. Bluth, J.), entered August 2, 2016, which, inter alia, granted plaintiff's motion for a judgment of foreclosure and sale, unanimously dismissed, without costs.

Defendant Celeste Wenegieme is neither an owner nor a tenant of the subject property and does not have an interest therein.

Accordingly, since she was not injured by the judgment, she may not appeal (CPLR 5511; *see also Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 NY3d 377, 384 [2017]).

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

ENTERED: FEBRUARY 26, 2019

CLERK

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

8506-
8506A Top On International Group Limited,
Plaintiff-Appellant,

-against-

Iconix Brand Group, Inc., et al.,
Defendants-Respondents.

Index 652238/17

Lazarus & Lazarus, New York (Harlan M. Lazarus of counsel), for appellant.

Meister Seelig & Fein LLP, New York (Jeffrey P. Weingart of counsel), for respondents.

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered October 10, 2018, dismissing the complaint seeking a declaratory judgment, unanimously modified, on the law, the complaint reinstated, and the Clerk is directed to enter judgment declaring that plaintiff is not owner of 49% of defendant Hydraulic, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered December 13, 2017, which granted defendants' motion to dismiss the complaint, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

In a letter agreement entered into between plaintiff and defendant Iconix Brand Group, Inc., and acknowledged and agreed to by defendant Icon DE Holdings, LLC and nonparty Apex Brands

International, plaintiff agreed to provide security for Apex's obligations to pay minimum royalties of $9 million per year under a separate license agreement with Icon DE. The letter agreement provided that, if the license agreement were terminated by Icon DE, then Iconix would have the right to transfer plaintiff's interests in defendant Hydraulic IP Holdings, LLC to itself until all amounts due under the license agreement had been paid in full. Apex defaulted in its payment obligations under the license agreement. It then entered into a settlement agreement with Icon DE in which the parties agreed that the license agreement would be terminated, that, in lieu of its obligations under the license agreement, Apex would pay $500,000, and that in the event of Apex's default, Icon DE would be entitled to pursue the minimum royalty payments due under the license agreement. Upon Apex's failure to pay amounts due under the settlement agreement, Iconix exercised its right under the letter agreement to transfer plaintiff's interest in Hydraulic until Apex fulfilled its obligation under the license agreement.

Contrary to plaintiff's arguments, the settlement agreement between Icon DE and Apex did not supersede or terminate the letter agreement, because it does not contain any "clear expression of intention" that it do so (*Matter of Continental Stock Transfer & Trust Co. v Sher-Del Transfer & Relocation*

Servs., 298 AD2d 336, 336 [1st Dept 2002]). The merger clause in the settlement agreement pertains specifically to agreements "between Licensor and Licensee," i.e., Icon DE and Apex, and makes no reference to plaintiff, Iconix, or the letter agreement.

To the extent the letter agreement created a principal-surety contract between plaintiff and Icon DE, plaintiff's obligation was not discharged by the subsequent settlement agreement, in which Icon DE exercised "indulgence or leniency" concerning the debt due under the license agreement (*see Bier Pension Plan Trust v Estate of Schneierson*, 74 NY2d 312, 316 [1989]; *Aetna Cas. & Sur. Co. v LFO Constr. Corp.*, 207 AD2d 274, 276-277 [1st Dept 1994]).

The plain terms of the letter agreement do not demonstrate any intent by the parties to make unilateral termination of the license agreement by Icon DE a condition precedent to Iconix's right to transfer plaintiff's interest in Hydraulic (*see Unigard Sec. Ins. Co. v North Riv. Ins. Co.*, 79 NY2d 576, 581 [1992]).

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

Because this declaratory action was resolved on the merits, defendants are entitled to a declaration in their favor, rather than dismissal of the complaint (*Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954 [1989]).

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

ENTERED: FEBRUARY 26, 2019

CLERK

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

8507 Konstandina Kales, Index 155690/12
Plaintiff-Appellant,

-against-

City of New York,
Defendant-Respondent.

_____

Sacco & Fillas, LLP, Astoria (Albert R. Matuza, Jr. of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Dona B. Morris of counsel), for respondent.

_____

Order, Supreme Court, New York County (James E. d'Auguste, J.), entered June 13, 2017, which deemed defendant's motion for summary judgment dismissing the complaint a motion to dismiss pursuant to CPLR 3211(a)(7), granted the motion, and dismissed the complaint, unanimously affirmed, without costs.

No action may be maintained against the City of New York as a result of injury arising from a dangerous, defective, unsafe, or obstructed condition on its, inter alia, streets or sidewalks unless the City received prior written notice of such condition and failed to repair it within 15 days of such notice (Administrative Code of City of NY § 7-201[c][2]). Failure to "plead and prove" such prior written notice requires dismissal of the complaint (*Katz v City of New York*, 87 NY2d 241, 243 [1995]; *Kelly v City of New York*, 172 AD2d 350, 352 [1st Dept 1991]).

Plaintiff failed to assert in the notice of claim or plead in the complaint that defendant had prior written notice of the roadway defect that allegedly caused her accident. In any event, she does not dispute that the evidence submitted by the City established that it had received no such prior written notice.

Moreover, while an exception to the prior written notice requirement applies where the City caused or created the dangerous condition (*Yarborough v City of New York*, 10 NY3d 726, 728 [2008]), plaintiff never asserted such a theory in her notice of claim or complaint and she is precluded from doing so in opposition to defendant's motion after the statute of limitations has expired (*Semprini v Village of Southampton*, 48 AD3d 543, 544-545 [2d Dept 2008], citing *Mahase v Manhattan & Bronx Surface Tr. Operating Auth.*, 3 AD3d 410, 411 [1st Dept 2004]). In any event, even if she could assert such a theory through the disclosure she served for her expert, as she seeks to do, his contention that the roadway "was foreseeably caused to deteriorate over time from weather conditions and vehicular traffic" is not the type of affirmative act of negligence "that immediately results in the existence of a dangerous condition" that is necessary to support the caused or created exception to the prior written notice requirement (*Yarborough*, 10 NY3d at 728).

Although defendant framed its motion as seeking summary

judgment dismissing the complaint, because plaintiff failed to state a meritorious cause of action, Supreme Court did not err in treating it as a motion to dismiss pursuant to CPLR 3211(a)(7) (see *Ganzenmuller v Incorporated Vil. of Port Jefferson*, 18 AD3d 703, 704 [2d Dept 2005]) which may be made at any time (CPLR 3211[e]).

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

ENTERED: FEBRUARY 26, 2019

CLERK

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

8508 1424-1428 Realty LLC, Index 155635/17
Plaintiff-Respondent,

-against-

Stuart Liu, et al.,
Defendants,

Nicolo Ottomanelli also known as
Nicholas Ottomanelli, et al.,
Defendants-Appellants.

_____

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

Golino Law Group PLLC, New York (Brian W. Shaw of counsel), for respondent.

_____

Order, Supreme Court, New York County (David B. Cohen, J.), entered on April 2, 2018, which, to the extent appealed from as limited by the briefs, denied defendants Nicolo Ottomanelli, Joseph Ottomanelli, Jr., Ottomanelli's Café Franchising Corp. and Ottomanelli Brothers Ltd.'s (collectively the Ottomanelli defendants) motion to dismiss based upon documentary evidence, unanimously affirmed, without costs.

Nicolo Ottomanelli and Joseph Ottomanelli, Jr. were the sole shareholders of 1424 Lexington Avenue Corp. a/k/a 1424 Corp. In 2003, 1424 Corp. leased a space from plaintiff on 93rd Street and Lexington Avenue in Manhattan and operated a restaurant named "Ottomanelli Bro's Grill." On November 1, 2010, 1424 Corp.

entered into an agreement with SL93 Corp. whereby 1424 Corp. sold its assets related to the restaurant, assigned its lease, and obtained a license for SL93 Corp. to continue operating under the Ottomanelli name in exchange for $125,000. The lease expressly provided that any assignment would not release 1424 Corp. from its obligations under the lease. Sometime between 2014 and 2016, SL93 Corp. stopped paying rent to plaintiff. Plaintiff alleges that sometime between 2010 and the time of SL93 Corp.'s rent default, the Ottomanelli defendants intentionally caused 1424 Corp. to fraudulently convey its assets to the Ottomanelli defendants without consideration, rendering 1424 Corp. insolvent and unable to pay its future obligations to plaintiff. In 2016, plaintiff brought an action against 1424 Corp. and SL93 Corp. in Civil Court, but 1424 Corp. failed to answer or appear. SL93 Corp. settled the claims against it by consenting to a money judgment, and then defaulted on payment of that judgment.

The Ottomanelli defendants submitted documentary evidence of the November 30, 2010 transaction between 1424 Corp. and SL93 Corp. and argued that plaintiffs' claims of fraudulent transfer and piercing the corporate veil are time barred as the alleged transfer occurred more than six years prior to commencement of this case on June 21, 2017 (*Bloomfield v Bloomfield*, 280 AD2d 320, 321 [1st Dept 2001]). Here, the documentary evidence does

not utterly refute plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Defendants have failed to submit any documentary evidence showing that 1424 Corp. currently still has assets (i.e., the $125,000) or providing the date of transfer of any assets from 1424 Corp. to the Ottomanelli defendants. Plaintiff was not required to plead the exact date of the alleged fraudulent transfer as part of its cause of action and it is noted that such information is likely exclusively in the knowledge of the Ottomanelli defendants (*see Jered Contr. Corp. v New York City Tr. Auth.*, 22 NY2d 187, 194 [1968]).

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: FEBRUARY 26, 2019

CLERK

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

8509 The People of the State of New York, Ind. 698/15
Respondent,

-against-

Michael Walker,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Samuel Goldfine 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 (Jill Konviser, J.), rendered January 5, 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: FEBRUARY 26, 2019

CLERK

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

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

8510-
8510A The People of the State of New York, Respondent,

Ind. 2045/11
3098/12

-against-

Francisco Martinez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Michael J. Obus, J. at pretrial motions; Daniel P. FitzGerald, J. at jury trial and sentencing), rendered May 13, 2016, as amended May 17, 2016 and July 11, 2016, convicting defendant of stalking in the first degree (two counts), rape in the third degree, stalking in the second degree and menacing in the second degree, and sentencing him to an aggregate term of five to seven years, and judgment, same court (Michael J. Obus, J.), rendered June 16, 2016, convicting defendant, upon his plea of guilty, of bail jumping in the second degree, and sentencing him to a consecutive term of one to three years, unanimously affirmed.

The stalking and menacing statutes under which defendant was convicted are not unconstitutionally vague as applied to him (*see*

People v Stuart, 100 NY2d 412, 425-429 [2003]; *People v Foley*, 94 NY2d 668, 681 [2000]). Defendant asserts that the core requirement of the statutes at issue, that he intentionally engaged in a course of conduct likely to cause a person to reasonably fear specified forms of harm (*see* Penal Law § 120.50[3]), does not provide sufficient notice where, as here, a defendant lives with the alleged victim, rather than "intruding" on the victim's life. Contrary to defendant's argument, the fact that he was married to and living with his victim did not deprive him of a reasonable opportunity to know that his conduct was prohibited, and there is no danger of arbitrary enforcement in this situation. Nothing in the language or legislative history of the relevant statutes suggests that they would not apply in a domestic abuse setting. Furthermore, the statute does not criminalize any domestic interactions except those reaching the particularized level of seriousness set forth in the statute.

Nor were the counts of the indictment charging course of conduct crimes jurisdictionally defective for failing to give sufficiently specific notice of the alleged criminal conduct. These offenses were continuing crimes (*see People v Shack*, 86 NY2d 529, 540-541 [1995]), and the allegation that they occurred over a period of 3½ years was permissible (*see People v Palmer*, 7 AD3d 472 [1st Dept 2004], *lv denied* 3 NY3d 710 [2004]).

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. The People presented detailed testimony that established all required elements, including, where applicable, course of conduct with a continuity of purpose, physical injury, and threatened use of a firearm.

Regarding the bail jumping conviction, the court providently exercised its discretion when, after according defendant a sufficient opportunity to be heard, it denied his patently meritless motion to withdraw his guilty plea (*see People v Frederick*, 45 NY2d 520 [1978]).

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

ENTERED: FEBRUARY 26, 2019

CLERK

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

8511 The People of the State of New York, Respondent, Ind. 2755/10

-against-

Jonny Anjudar, Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Gregory Carro, J.), entered on or about April 23, 2015, which adjudicated defendant a level three predicate sex offender pursuant to the Sex Offender Registration Act (Correctional Law Art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion in granting an upward departure based on the extent and egregiousness of defendant's history of sexual misconduct, including repeated

instances while he was in custody. This background was not adequately accounted for in the risk assessment instrument, and it evinced a serious risk of reoffense (*see generally People v Gillotti*, 23 NY3d 841, 861 [2014]).

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

ENTERED: FEBRUARY 26, 2019

CLERK

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

8512-
8513 Index 151771/16

L.Y.E. Diamonds, Ltd., et al.,
Plaintiffs-Appellants,

-against-

Gemological Institute of America, Inc., et al.,
Defendants-Respondents,

Rapaport USA, Inc., et al.,
Defendants.

_____

Miller, Leiby & Associates, P.C., New York (Jeffrey R. Miller of counsel), for appellants.

DLA Piper LLP (US), New York (Andrew L. Deutsch of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Barry R. Ostrager, J.), entered December 22, 2017, dismissing the amended complaint as against defendants Gemological Institute of America, Inc. (GIA) and Thomas Moses, unanimously affirmed, with costs. Appeals from ruling, same court and Justice, rendered December 6, 2017, which granted GIA and Moses's motion to dismiss all causes of action as against them except the alleging defamation and trade libel causes of action, and order, same court and Justice, entered on or about December 7, 2017, which granted GIA and Moses's motion to dismiss the defamation and trade libel causes of action as against them, unanimously dismissed, without costs,

as subsumed in the appeal from the judgment.

The motion court correctly dismissed, pursuant to CPLR 3211(a)(1), the defamation and trade libel causes of action on the ground that the statements at issue were protected by a qualified privilege (*see Baines v Daily News, L.P.*, 51 Misc 3d 229 [Sup Ct, NY County 2015] [defamation complaint may be dismissed pursuant to CPLR 3211(a)(1) on documentary evidence establishing privilege defense as matter of law]; *see also Rodriguez v Daily News, L.P.*, 142 AD3d 1062 [2d Dept 2016], *lv denied* 28 NY3d 913 [2017]; *Saleh v New York Post*, 78 AD3d 1149 [2d Dept 2010], *lv denied* 16 NY3d 714 [2011]; *compare Fletcher v Dakota, Inc.*, 99 AD3d 43, 55-56 [1st Dept 2012] ["we would not give conclusive effect to defendants' position of qualified privilege before any affirmative defense to that effect was raised in a responsive pleading"] [internal quotation marks omitted]; *but see Matter of Abbitt v Carube*, 159 AD3d 408, 410 [1st Dept 2018] [granting motion to dismiss libel claim on pleadings because petitioner's allegation of malice was "conclusory and therefore insufficient to overcome the privilege"]).

GIA and Moses produced client agreements that conclusively demonstrate that they made the challenged statements "in the discharge of some public or private duty, legal or moral, or in

the conduct of [their] own affairs, in a matter where [their] interest [was] concerned" (*Rosenberg v MetLife, Inc.*, 8 NY3d 359, 365 [2007]). In the agreements, plaintiffs acknowledged GIA's stated duty to serve the public and to maintain its trust in the diamond trade, acknowledged that the duty could be executed by, among other things, public disclosure of information about the diamonds that GIA inspected, including GIA's reasonable suspicions about the quality of the diamonds, and further acknowledged that GIA could make such public disclosures at its discretion and without their prior authorization.

Plaintiffs question the reliability of the client agreements, given the different versions in the record. As they point out, the most comprehensive presentation of the contracts signed by them was made on reply (via an affidavit by GIA associate corporate counsel Christina Yates). However, the signature pages and the terms and conditions of the various agreements were also annexed to defendants' moving papers. Plaintiffs did not annex a competing version to their opposition and, even on appeal, do not directly assert that they would have done so (*see Burlington Ins. Co. v Guma Constr. Corp.*, 66 AD3d 622, 624 [2d Dept 2009]). Moreover, the Yates affidavit and exhibits were offered in direct response to plaintiffs' opposition (*see Home Ins. Co. v Leprino Foods Co.*, 7 AD3d 471

[1st Dept 2004]).

Plaintiffs argue that, even where a qualified privilege has been conclusively established, a plaintiff should have an opportunity to show common-law or constitutional malice to defeat it (*see e.g. Foster v Churchill*, 87 NY2d 744, 751-752 [1996]; *Hoesten v Best*, 34 AD3d 143, 158 [1st Dept 2006]). They raise the reasonable concern that holding the plaintiff to the allegations in the complaint, where the defendant has established the affirmative defense on a pre-answer motion to dismiss, deprives the plaintiff of an adequate opportunity to defeat the affirmative defense (*see Wilcox v Newark Val. Cent. School Dist.*, 74 AD3d 1558, 1562 [3d Dept 2010]). However, holding these particular plaintiffs to the allegations in their amended complaint does not present the risk of unfair surprise (*see* CPLR 3018[b]). As a result of motion practice on the original complaint, plaintiffs were aware of defendants' qualified privilege arguments. Yet, rather than amending the complaint to allege facts that would establish malice, they continued to assert only the most conclusory allegations of malice. Plaintiffs rely on *Whelehan v Yazback* (84 AD2d 673 [4th Dept 1981]). However, this Court has determined that conclusory allegations do not suffice (*see O'Neill v New York Univ.*, 97 AD3d 199, 212-213 [1st Dept 2012]).

Nor do the arbitration proceedings buttress the malice allegations, as those proceedings post-date the statements at issue and shed no light on whether defendants made the statements with the requisite disregard for the truth. In any event, plaintiffs acknowledge that the arbitration resulted in a monetary award against them.

Plaintiffs failed to show that the court applied an incorrect standard in determining the motion to dismiss the amended complaint. Their argument consists of conclusory statements without supporting facts, such as the assertion that it was "entirely possible" that defendants sought to defame them with malice. Nor do these conclusory statements suffice to justify further discovery.

Plaintiffs' remaining causes of action, with the exception of tortious interference with contract, were correctly dismissed as duplicative of the failed defamation and trade libel claims. The tortious interference claim was correctly dismissed, because its conclusory allegations fail to state a cause of action (*see*

M.J. & K. Co. v Matthew Bender & Co., 220 AD2d 488, 490 [2d Dept 1995]).

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

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

ENTERED: FEBRUARY 26, 2019

CLERK

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

8514N- Index 654414/13
8514NA Transasia Commodities Investment Limited,
Plaintiff-Respondent,

-against-

NewLead JMEG, LLC, et al.,
Defendants-Appellants,

Jan Berkowitz,
Defendant.

_____

Coburn & Greenbaum, PLLC, New York (Jonathan Grenbaum of counsel), for appellants.

Cozen O'Connor, New York (Melissa F. Brill of counsel), for respondent.

_____

Appeal from order, Supreme Court, New York County (Charles Ramos, J.), entered November 22, 2017, which granted plaintiff's motion to accept and confirm the referee's report and recommendation on damages and attorneys' fees and costs, deemed appeal from amended judgment (CPLR 5520[c]), same court and Justice, entered February 16, 2018, in favor of plaintiff as against all defendants in the total sum of $22,262,965.44, and as so considered, said judgement unanimously affirmed, without costs. Order, same court and Justice, entered May 22, 2018, which denied defendants-appellants' motion to vacate an order, entered upon default, striking their answer for discovery violations, unanimously affirmed, without costs.

Although a stay is automatic under CPLR 3219(c) on account of the death, removal or disability of an attorney (*see Moray v Koven & Krause, Esqs.*, 15 NY3d 384 [2010]), here, the court properly exercised its discretion in denying defendants-appellants a stay of this action when their counsel withdrew due to defendants-appellants' failure to pay accrued counsel's fees over an extended period of time (*see generally Sarlo-Pinzur v Pinzur*, 59 AD3d 607 [2d Dept 2009]). Affidavits submitted attesting that defendants-appellants were unable to pay, due to alleged financial difficulties, were properly discounted by the court absent substantiation via financial records and where the past conduct of defendants-appellants in frustrating discovery and delaying the action supported the court's determination.

Defendants-appellants' motion to vacate their default was properly denied. Defendants's failure to timely pay a $15,000 court-ordered sanction may be deemed willful, as such recent conduct was consistent with defendants-appellants' pattern of noncompliance with multiple prior discovery orders, as well as their: (i) deliberate disposal of nearly three years worth of relevant email correspondence between defendants-appellants' controlling principals, (ii) their misleading statements made to the court, (iii) their providing altered documents to plaintiff, and (iv) their assertion of counterclaims founded upon, inter

alia, altered documents — which counterclaims were ultimately withdrawn after forensic study of the documents. Where a party is found to have engaged in a protracted pattern of delay and noncompliance with numerous court orders, willful and contumacious conduct may be inferred, and it is a provident exercise of discretion under such circumstances to reject the party's excuse for such conduct (*see e.g. Cipriano v Rish*, 116 AD2d 541 [1st Dept 1986]). As defendants-appellants failed to provide an acceptable excuse for their noncompliance with the court's October 19, 2016 order, it is unnecessary to determine whether a meritorious defense exists (*see Vasquez v Lambert Houses Redevelopment Co.*, 110 AD3d 450 [1st Dept 2013]). Moreover, plaintiff has established it would be prejudiced if defendants-appellants' default was vacated, as defendants admittedly erased tens of thousands of relevant emails that were exchanged between defendants' two primary principals during the time period in question (*see generally Metral v Bonifacio*, 309 AD2d 724 [1st Dept 2003]; *Mutual Mar. Off., Inc. v Joy Constr. Corp.*, 39 AD3d 417 [1st Dept 2007]).

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

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

ENTERED: FEBRUARY 26, 2019

CLERK

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

8515-
8516N Index 101382/10

Xiao Hong Wang,
Plaintiff-Respondent,

-against-

Chi Kei Li, et al.,
Defendants,

Chung Cheong Chan, et al.,
Defendants-Appellants.

_____

Law Offices of Stephen K. Seung, New York (Stephen H. Marcus of counsel), for appellants.

Krause & Glassmith, LLP, New York (Paul Maiorana of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered January 30, 2018, which, after a hearing, denied defendants Chung Cheong Chan and Pui Yee Chan's application to vacate their default, unanimously affirmed, without costs. Order, same court and Justice, entered July 30, 2018, which denied defendants' motion to renew, unanimously affirmed, without costs.

Plaintiff established by a preponderance of the evidence that defendants Chung Cheong Chan and Pui Yee Chan were properly served pursuant to CPLR 308(2). The testimony from nonparty New York City Department of Finance (DOF) Senior Supervising Assessor for the Borough of Manhattan established that defendant Chung

Cheong Chan held 32 Market Street as his actual place of business, because he testified that the DOF was mailing its assessment notices and tax bills between 2008 and 2015 to Chan at that address, and that the July 1, 2008 tax bill was paid in full. Accordingly, defendant Chung Cheong Chan may not now reasonably claim that he was not properly served (*see* CPLR 308[6]; *McCord v Larsen*, 132 AD3d 1115, 1117 [3d Dept 2015]; *Central City Brokerage Corp. v Acosta*, 49 AD3d 455 [1st Dept 2008]).

In addition, plaintiff established by a preponderance of the evidence that defendant Pui Yee Chan was properly served with the complaint at her actual place of business pursuant to CPLR 308(2), because she testified at the hearing that she had tenants in the building and would go to the property when they notified her that they had an issue, which established that she was regularly transacting business at the property.

Contrary to defendants' contention, plaintiff established a presumption of service because the affirmations of service from her process server reflected that the summons was personally served on a "person of suitable age and discretion" at defendants' actual place of business and she was not required to establish that codefendant Cho S. Wong was actually a coworker of defendants or otherwise officially authorized to accept service

on their behalf (*see Public Adm'r of County of N.Y. v Markowitz*, 163 AD2d 100, 100-101 [1st Dept 1990]). The evidence presented by defendants at the hearing failed to refute plaintiff's proof that the summons was delivered to a person of suitable age and discretion at their place of business, and defendants' mere denial of receipt of the summons and complaint failed to rebut the presumption of proper service created by the affidavits of service (*see Anderson v GHI Auto Serv., Inc.*, 45 AD3d 512, 513 [2d Dept 2007]). Although defendants testified that they did not know Wong and asserted that he was not someone of suitable discretion, their testimony was conclusory and was properly not credited by the hearing court. We find that the court's findings should not be disturbed because they are supported by a fair interpretation of the evidence (*see Ortiz v Jamwant*, 305 AD2d 477, 478 [2d Dept 2003]).

The court properly exercised its discretion in not considering the evidence defendants submitted in support of their motion to renew, because it was based on facts that were or should have been known to them at the time of their original motion to vacate, and there was no explanation as to why those facts were not presented during the hearing (*see United States Life Ins. Co. in City of N.Y. v Burke Assoc.*, 162 AD2d 112 [1st Dept 1990]).

We find that defendants failed to preserve for appellate review the issue of whether they are entitled to vacate the default judgment against them under CPLR 317 (*see Costine v St. Vincent's Hosp. & Med. Ctr. of N.Y.*, 173 AD2d 422, 422-423 [1st Dept 1991]), and we decline to review the issue in the interest of justice.

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

ENTERED: FEBRUARY 26, 2019

CLERK

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

8517 The People of the State of New York, Respondent, Ind. 5541/11

-against-

Alex Bloise, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered July 22, 2015, convicting defendant, after a jury trial, of murder in the second degree and two counts of criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 20 years to life, unanimously reversed, on the law, and the matter remanded for a new trial.

The court erred in granting the prosecution's reverse-*Batson* challenge to defense counsel's exercise of two peremptory challenges. "[A]lthough appellate courts accord great deference to trial judges' step three determinations, . . . there is no record support for Supreme Court's rejection of defense counsel's race-neutral reasons for striking [two panelists]. The People simply failed to meet their burden that racial discrimination was the motivating factor" (*People v Hecker*, 15 NY3d 625, 661 [2010];

see also People v Hechavarria, 138 AD3d 543 [1st Dept 2016], *appeal withdrawn* 27 NY3d 1133 [2016]). Defense counsel presented facially race-neutral reasons for challenging the panelists at issue based on their having been crime victims or relatives of crime victims (*see People v Dixon*, 202 AD2d 12, 18 [2d Dept 1994]), and there was no evidence of disparate treatment by defense counsel of similarly situated panelists (*see People v Powell*, 92 AD3d 610 [1st Dept 2012]). The record otherwise fails to support the court's finding that the race-neutral reasons given for these challenges were pretextual.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence. Because we are ordering a new trial, we find it unnecessary to reach any other issues.

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

ENTERED: FEBRUARY 26, 2019

CLERK

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

8518 Tonjalaya Brown, Index 303309/14
Plaintiff,

-against-

Derrick McKenzie,
Defendant-Respondent,

Value Store It, LLC,
Defendant-Appellant.

_____

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for appellant.

Cerussi & Spring, P.C., White Plains (Christopher B. Roberta of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about September 27, 2017, which, in this action for personal injuries sustained in a motor vehicle accident, denied the motion of defendant Value Store It, LLC (Value) for summary judgment dismissing the complaint and all cross claims as against it, unanimously affirmed, without costs.

Value failed to establish entitlement to judgment as a matter of law under the Graves Amendment (49 USC § 30106[a][1]; *Cassidy v DCFS Trust*, 89 AD3d 591 [1st Dept 2011]). The evidence submitted by Value was insufficient to show that it was engaged in the trade or business of renting or leasing motor vehicles. Rather, the evidence showed that Value was in the business of

renting storage space and that the certificate of title for the subject vehicle designates its use as "private."

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

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

ENTERED: FEBRUARY 26, 2019

CLERK

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

8519-
8519A In re Angel N.,
Petitioner-Appellant,

-against-

Elizabeth A.,
Respondent-Respondent.

Law Offices of Randall S. Carmel, Jericho (Randall S. Carmel of counsel), for appellant.

Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for respondent.

Janet Neustaetter, The Children's Law Center, Brooklyn (Chai Park of counsel), attorney for the child.

Appeal from order, Family Court, Bronx County (Rosanna Mazzotta, Referee), entered on or about January 15, 2016, which held that the father's supervised visitation should continue, unanimously dismissed, without costs, as taken from a nonappealable order. Appeal from order, same court and Referee, entered on or about October 28, 2015, which awarded the father supervised visits only, unanimously dismissed, without costs, as academic.

The January 15, 2016 order was issued on the father's default, and because he apparently "did not avail himself of the opportunity to vacate his default, and no appeal lies from an order entered upon the aggrieved party's default," the appeal is

dismissed (see *Fatima K. v Ousmane F.*,___ AD3d ___ , 2018 NY Slip Op 08431 [1st Dept, Dec. 11, 2018]; *see also* CPLR 5511). Since the October 28, 2015 order had expired and there was a subsequent order concerning visitation, namely, the January 15, 2016 order, the appeal from the October 28, 2015 order is dismissed as academic (*see Matter of Monsunlola O.*, 231 AD2d 638 [2d Dept 1996], *lv denied* 89 NY2d 805 [1996]).

Were we to consider the merits, we would affirm. The father had a statutory right to counsel in these proceedings (*see* Family Ct Act § 262[a]), but also had the right to waive counsel and proceed pro se, provided he did so knowingly, intelligently, and voluntarily (*Matter of Massey v Van Wyen*, 108 AD3d 549, 550 [2d Dept 2013]). "Where a party unequivocally and timely asserts the right to self-representation, the court must conduct a searching inquiry to ensure that the waiver of the right to counsel is knowing, intelligent, and voluntary" (*Matter of Aleman v Lansch*, 158 AD3d 790, 792 (2d Dept 2018).

While there is no rigid formula to the court's inquiry, "there must be a showing that the party was aware of the dangers and disadvantages of proceeding without counsel" (*Matter of Belmonte v Batista*, 102 AD3d 682, 682-683 [2d Dept 2013]). The court below satisfied these standards.

The record before us shows that the court took great care to

remind the father, at every appearance and sometimes more than once during an appearance, of his right to assigned counsel and its ability to assign him counsel at no cost to him. Moreover, and contrary to the father's contentions, the court expressly warned him of the dangers and disadvantages of proceeding without counsel. In particular, it warned him that unfamiliar concepts would likely arise about which a lawyer could advise him, and warned him of the possibility that his petitions could be dismissed.

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

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

ENTERED: FEBRUARY 26, 2019

CLERK

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

8521 Eurotech Construction Corp., Index 157598/16
Plaintiff-Appellant,

-against-

Fischetti & Pesce, LLP,
Defendant-Respondent.

_____

FG McCabe & Associates, PLLC, New York (Gerard McCabe of counsel), for appellant.

Steinberg & Cavaliere, LLP, White Plains (Steven A. Coploff of counsel), for respondent.

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Order, Supreme Court, New York County (Robert R. Reed, J.), entered April 25, 2018, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment on the legal malpractice claim and for leave to renew defendant's motion to dismiss the breach of fiduciary duty claim, unanimously affirmed, without costs.

In support of its motion for leave to renew, plaintiff offered no new evidence that would change the prior determination that the breach of fiduciary duty claim was duplicative of the legal malpractice claim, which we affirmed in a prior appeal (*Eurotech Constr. Corp. v Fischetti & Pesce, LLP*, 155 AD3d 437 [1st Dept 2017]; CPLR 2221[e][2]).

Plaintiff failed to establish that there are no issues of fact as to its legal malpractice claim. The claim is that

defendant failed to timely communicate with plaintiff about information obtained from testimony or bills of particular in the underlying personal injury action, and that, as a result, plaintiff was unable to timely notify its excess insurance provider that its primary insurance coverage might be exhausted. Still unresolved are the type and timing of any communication required, which depends on the agreed-upon scope of defendant's representation of plaintiff, and the point at which defendant, in the exercise of the requisite professional skill and knowledge, should have realized that plaintiff's primary insurance coverage could be exhausted (*see Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 41-42 [2d Dept 2006], cited in *Eurotech Constr. Corp.*, 155 AD3d at 437). Expert testimony would have been helpful because the issues here involve professional standards beyond the ordinary experience of non-lawyers (*see Tran Han Ho v Brackley*, 69 AD3d 533, 534 [1st Dept 2010], *lv denied* 15 NY3d 707 [2010]).

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

ENTERED: FEBRUARY 26, 2019

CLERK

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

8524-
8525 The People of the State of New York,
Respondent,

-against-

Gregory Williams,
Defendant-Appellant.

Ind. 6663/88

_____

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

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

_____

Order, Supreme Court, New York County (Daniel P. FitzGerald, J.), entered on or about March 6, 2017, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion when it granted an upward departure (*see People v Gillotti*, 23 NY3d 841

[2014]). The mitigating factors cited by defendant were outweighed by the egregious and unchallenged aggravating factors upon which the court relied.

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

ENTERED: FEBRUARY 26, 2019

CLERK

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

8526 The People of the State of New York, Ind. 4913/15
Respondent,

-against-

Keiyon Gordon,
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 (Julia P. Cohen 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 H. Solomon, J.), rendered March 28, 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: FEBRUARY 26, 2019

CLERK

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

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

8527 Said Omaar, Index 306348/10
Plaintiff-Respondent,

-against-

Efrain Rodriguez, et al.,
Defendants-Appellants.

_____

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

Pecoraro & Schiesel, LLP, New York (Steven Pecoraro of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered November 9, 2019, which, inter alia, denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants building owners failed to establish entitlement to judgment as a matter of law in this action where plaintiff was injured when he fell down allegedly unlighted stairs leading to a basement in the subject building. Defendants failed to show that they did not create or have actual or constructive knowledge of the unlighted vestibule. Although defendant Efrain Rodriguez testified as to a general maintenance routine that he would engage in at the building, he did not specifically remember whether he inspected the area on the day before the accident (*see Vargas v Cadwalader Wickersham & Taft, LLP*, 147 AD3d 551, 552

[1st Dept 2017]; *Dylan P. v Webster Place Assoc., L.P.*, 132 AD3d 537, 538 [1st Dept 2015], *affd* 27 NY3d 1055 [2016]).

Even if defendants met their prima facie burden, plaintiff's opposition raised triable issues as to whether the building's vestibule area was dangerous and violated Multiple Dwelling Law § 37, because of the broken light fixture, and whether defendants were aware of the condition for a sufficient period of time to have remedied it. Plaintiff's brother and cousin, who was a resident of the building, stated that the fixture was broken for a week before the accident, and plaintiff's brother stated that Efrain acknowledged that he was aware of the problem. They also disputed defendants' claims that there were fixtures at the top of the staircase leading to the second floor, at the bottom of the staircase leading to the basement, and on the exterior of the building.

Furthermore, it is noted that the motion court ameliorated

any prejudice caused by plaintiff's failure to properly respond to discovery requests by vacating the note of issue and permitting defendants to depose the two belatedly identified witnesses.

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

ENTERED: FEBRUARY 26, 2019

CLERK

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

8528 Joseph Scott, Sr., Index 155362/16
Plaintiff-Appellant,

-against-

September 24th Street, LLC,
Defendant-Respondent,

101 West 24th Street Condominium,
Defendant.

_____

Cermele & Wood LLP, White Plains (Eric Lindquist of counsel), for appellant.

Pavia & Harcourt, LLP, New York (Brandon C. Sherman of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Erika M. Edwards, J.), entered August 29, 2017, which, to the extent appealed from as limited by the briefs, granted defendant September 24th Street LLC's motion for summary judgment reforming the contract of sale and ordering specific performance of the reformed contract, unanimously affirmed, with costs.

Defendant demonstrated by clear and convincing evidence that the price contained in the contract of sale was the result of a scrivener's error and did not reflect the price upon which the parties had agreed before reducing their agreement to writing (*see Nash v Kornblum*, 12 NY2d 42 [1962]). The affidavit by defendant's counsel's legal assistant shows the agreed-upon price

and that the price was incorrectly transcribed into the contract. Moreover, the record shows defendant's asking price, plaintiff's first offer, which was well above the price contained in the contract, the parties' negotiations, which all involved figures higher than that contained in the contract, and the deal sheet, which reflected the agreed-upon price.

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: FEBRUARY 26, 2019

CLERK

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

8529 Lisette Trinidad, etc., et al., Index 24417/13E
Plaintiffs-Respondents,

-against-

Parkash 3435 LLC, et al.,
Defendants-Appellants,

Giles Associates, LLC, et al.,
Defendants.
- - - - -
[And a Third Party Action]

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, Bronx County (Donna M. Mills, J.), entered on or about July 30, 2018,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated February 4,2019,

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

ENTERED: FEBRUARY 26, 2019

CLERK

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

8530 Janis Pastena, Index 162453/14
Plaintiff-Appellant,

-against-

61 West 62 Owners Corp.,
Defendant-Respondent.

_____

Morrison Law Offices of Westchester, PC, New York (Arthur Morrison of counsel), for appellant.

Braverman Greenspun, P.C., New York (Kelly A. Ringston of counsel), for respondent.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered July 21, 2017, which denied plaintiff's motion for summary judgment on the complaint for declaratory relief, and granted defendant's motion to dismiss the complaint, unanimously modified, on the law, to deny defendant's motion, and to declare that plaintiff is not a holder of unsold shares, and otherwise affirmed.

On this motion, Plaintiff has failed to provide sufficient documentary evidence demonstrating that she is a holder of unsold shares in the corporation (*see Kralik v 239 E. 79th St. Owners Corp.*, 5 NY3d 54, 59 [2005]; *Sassi-Lehner v Charlton Tenants Corp.*, 55 AD3d 74, 78-79 [1st Dept 2008]).

However, even if factual issues were presented by plaintiff's contract of sale, paragraph 38 of the proprietary

lease, which purportedly exempts holders of unsold shares from certain expenses and fees assessed by the landlord, is void as a matter of law (*see Spiegel v 1065 Park Ave. Corp.*, 305 AD2d 204 [1st Dept 2003]).

Upon finding that the documentation established that plaintiff was not entitled to the declaration she sought, the court should have declared in defendant's favor, rather than dismissing the action (*Rotblut v 150 E. 77th St. Corp.*, 79 AD3d 79 AD3d 532, 533 [1st Dept 2010]).

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

ENTERED: FEBRUARY 26, 2019

CLERK

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

8531 The People of the State of New York, Ind. 5640/14
Respondent,

-against-

James Barlow,
Defendant-Appellant.

_____

Justine M. Luongo, The Legal Aid Society, New York (Will A. Page of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Samuel Z. Goldfine 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 September 22, 2016,

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

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

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

ENTERED: FEBRUARY 26, 2019

CLERK

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

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

8532 Philip R. Shawe, Index 155890/14
Plaintiff-Respondent,

-against-

Elizabeth Elting,
Defendant-Appellant.

_____

Gerald B. Lefcourt, P.C., New York (Gerald B. Lefcourt of counsel), for appellant.

The Edelstein, Faegenburg & Brown, New York (Glenn K. Faegenburg of counsel), for respondent.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered on or about August 21, 2017, which to the extent appealed from as limited by the briefs, denied defendant's motion to dismiss this action pursuant to CPLR 3103 and 3126, unanimously reversed, on the facts and in the exercise of discretion, with costs, and the complaint dismissed with prejudice. The Clerk is directed to enter judgment accordingly.

This action, wherein plaintiff seeks damages for personal injuries allegedly sustained during a physical altercation with defendant, stems from three related actions in the Delaware Court of Chancery, which were joined for trial and disposition. In the post trial decision, the Delaware court found that plaintiff had engaged in "deplorable" misconduct by, inter alia, improperly accessing approximately 12,000 of defendant's privileged

attorney/client communications, intercepting defendant's mail, which included communications with her attorney (including communications related to this action), deleting relevant documents and lying under oath about his conduct (*In re Shawe v Elting LLC*, 2015 WL 4874733 at *12-14 [Del Ch 2015]). Additionally, after a hearing, the Chancellor issued a decision sanctioning plaintiff over $7 million dollars for engaging in egregious litigation misconduct (*In re Shawe v Elting LLC*, 2016 WL 3951339 [Del Ch 2016]). In affirming the post-trial decision, the Delaware Supreme Court recounted "some of the highlights" of plaintiff's malfeasance (*Shawe v Elting*, 157 A3d 152, 156-157 [Del 2017]).

Plaintiff is collaterally estopped from re-litigating the issue of whether he had improperly accessed defendant's privileged information and whether he has destroyed documents. This issue was litigated on the merits during the trial in the Delaware action, and it is not disputed that the action was between the same parties and that plaintiff had a full and fair opportunity to defend against the allegations of misconduct (*see Betts v Townsends, Inc.*, 765 A2d 531, 535 [Del 2000]; *Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 [1985]).

Plaintiff's improper and willful access of defendant's privileged communications and spoliation of evidence supports

dismissal of his claims in this action (CPLR 3103[c]; CPLR 3126[3]; *Lipin v Bender*, 84 NY2d 562 [1994] [dismissing the plaintiff's complaint because her improper taking of the defendant's attorney/client documents and work product caused prejudice to the defendant and irreparably tainted the litigation process]). Among the materials improperly accessed here was a privileged memorandum from defendant's counsel about his strategy concerning the incident underlying this action. Further, plaintiff's counsel referred to the contents of some of the privileged communications during motion practice in this litigation. Since "[p]laintiff's knowledge . . . can never be purged," and he would "carry [that knowledge] into any new attorney-client relationship," we find that dismissal of the complaint is "the only practicable remedy here" (*Lipin*, 84 NY2d at 572, 573).

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: FEBRUARY 26, 2019

CLERK

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

8533 The People of the State of New York, Respondent, Ind. 5139/16

-against-

Ricardo Reid, Defendant-Appellant.

_____

New York County Defender Services, New York (Brad Maurer of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Gilbert C. Hong, J.), rendered April 13, 2018, convicting defendant, after a jury trial, of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

The court provided a meaningful response to the deliberating jury's inquiry about the market value of a coat stolen from a store (*see People v Santi*, 3 NY3d 234, 248-249 [2004]; *People v Malloy*, 55 NY2d 296, 301 [1982] *cert denied* 549 US 847 [1982]). The court correctly instructed the jury that although a store's price tag ordinarily reflects the item's market value, the jury, as the finder of fact, could consider all of the evidence to come to its own conclusion as to market value (*see People v Irrizari*, 5 NY2d 142, 146 [1959]). The instruction made clear to the

jurors their role as factfinders in determining market value, even where there is a price tag, notwithstanding the court's omission of language in *Irrizari* (5 NY2d at 146) that the listed price of an item stolen from a department store is not "necessarily conclusive" of its market value.

In any event, there was no evidence to suggest that, although the coat was offered for sale at $2150, its actual market value was somehow less than $1000, the threshold for fourth-degree grand larceny. On the contrary, there was testimony that $2150 was already a deeply discounted sale price.

The court followed the procedures set forth in *People v O'Rama* (78 NY2d 270 [1991]) in responding to the jury note. Defense counsel received notice of the note and was given ample opportunity to suggest an appropriate response. The court also apprised counsel of the substance of its intended response (*id.* at 278), and it was not required to spell out the response verbatim.

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

ENTERED: FEBRUARY 26, 2019

CLERK

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

8535-
8536 Index 32293/16

HSBC Bank USA, N.A.,
Plaintiff-Respondent,

-against-

Hardy Mahadeo, etc.,
Defendant-Appellant,

Citibank (South Dakota) N.A. et al.,
Defendants.

_____

Hardy Mahadeo, appellant pro se.

Knuckels Komosinski & Manfro, LLP, Elmsford (Gregg L. Verrilli of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered on or about November 22, 2017, which granted plaintiff's motion for summary judgment on its foreclosure complaint, and denied defendant Mahadeo's cross motion for summary judgment dismissing the complaint as against him, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about January 12, 2018, which denied defendant's motion to reargue, unanimously dismissed, without costs, as taken from a nonappealable order.

Regardless of the timeliness of defendant's appeal from the 2017 order or the propriety of plaintiff's service of notice of the entry of the November 2017 order on him, on the merits,

defendant's argument that plaintiff lacks standing is unavailing. To establish standing, plaintiff was required to show either assignment of the mortgage note or physical delivery of the note before the foreclosure action was commenced (*see U.S. Bank N.A. v Askew*, 138 AD3d 402 [1st Dept 2016]). Plaintiff did both.

Although defendant styled his second motion as a motion to reargue/renew, he submitted no new facts. Therefore, the motion was a motion to reargue, and no appeal lies from the denial of reargument (*see Board of Directors of Windsor Owners Corp. v Platt*, 138 AD3d 500 [1st Dept 2016]).

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

ENTERED: FEBRUARY 26, 2019

CLERK

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

8537 Jamal Hunter, Index 301304/10
Plaintiff-Appellant,

-against-

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

_____

Law Offices of Wale Mosaku, P.C., Brooklyn (Wale Mosaku of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Tahirih Sadrieh of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered on or about March 7, 2018, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff asserts claims for false arrest, false imprisonment, malicious prosecution, and violation of constitutional rights under 42 USC § 1983. Inasmuch as the officer's observations established probable cause for arrest, defendants had a complete defense to the claims of false arrest, false imprisonment and malicious prosecution (*see Batista v City of New York*, 15 AD3d 304 [2005]; *Lui Yi v City of New York*, 227 AD2d 453 [1996]), notwithstanding the subsequent dismissal of the criminal charges (*see Arzeno v Mack*, 39 AD3d 341 [2007]). Plaintiff fails to establish bad faith by the officers with

respect to false arrest, or actual malice with respect to malicious prosecution (*see id.* at 342*; Jenkins v City of New York*, 2 AD3d 291 [2003]).

Defendants further established that defendant Detective Pena did not falsify evidence. Pena's testimony and the photographs and vouchers for the contraband demonstrate that the police did, in fact, recover a bag containing cocaine from behind a cushion of the couch, warranting the dismissal of the denial of a fair trial and failure to intervene claims.

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

ENTERED: FEBRUARY 26, 2019

CLERK

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

8538N Crossbeat New York, LLC, Index 652622/17
Plaintiff-Appellant,

-against-

LIIRN, LLC,
Defendant-Respondent.

_____

Guzov, LLC, New York (Anne W. Salisbury of counsel), for appellant.

Anderson Kill P.C., New York (Christopher Paolino of counsel), for respondent.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered October 5, 2018, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for leave to amend the complaint to add a cause of action for fraudulent inducement against defendant's CEO, George Swisher, in his individual capacity, unanimously affirmed, without costs.

"A request for leave to amend a complaint should be freely given, and denied only if there is prejudice or surprise resulting directly from the delay, or if the proposed amendment is palpably improper or insufficient as a matter of law" (*CIFG Assur. N. Am., Inc. v J.P. Morgan Sec. LLC*, 146 AD3d 60, 64-65 [1st Dept 2016] [internal quotation marks omitted]; CPLR 3025[b]). Here, plaintiff's proposed cause of action for fraudulent inducement against Swisher is duplicative of the

breach of contract cause of action asserted against the corporate defendant. Swisher's alleged promises that defendant would perform under the parties' agreements do not convert the alleged breach of contract into a tort (*Cronos Group Ltd. v XComIP, LLC*, 156 AD3d 54, 62-63 [1st Dept 2017]; *Cole, Schotz, Meisel, Forman & Leonard, P.A. v Brown*, 109 AD3d 764 [1st Dept 2013]).

Furthermore, the allegations do not support personal liability against Swisher as a matter of law for actions he took in his capacity as an officer of the corporate defendant (*Performance Comercial Importadora E Exportadora Ltda v Sewa Intl. Fashions Pvt. Ltd.*, 79 AD3d 673 [1st Dept 2010]).

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

ENTERED: FEBRUARY 26, 2019

CLERK

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

8539N Gregorio Sanchez, Index 303466/16
Plaintiff-Respondent,

-against-

1 Burgess Road, LLC,
Defendant-Appellant.

Harrington, Ocko & Monk, LLP, White Plains (Adam G. Greenberg of counsel), for appellant.

Gorayeb & Associates, P.C., New York (Martin J. Moskowitz of counsel), for respondent.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about August 9, 2018, which denied defendant's motion for a change of venue to Westchester County, unanimously affirmed, without costs.

The motion court properly denied defendant's motion for a change of venue as untimely (CPLR 511[a], [b]). Defendant waited three months to move after plaintiff admitted that, although he had placed venue in Bronx County at the commencement of the action on the basis of his residence, he actually resided in Westchester County at the relevant time (*see Collins v Glenwood Mgt. Corp.*, 25 AD3d 447, 449 [1st Dept 2006]; *Pittman v Maher*, 202 AD2d 172, 174-175 [1st Dept 1994]).

To the extent defendant argues, in the alternative, that a change of venue would serve the convenience of material witnesses

and the ends of justice (*see* CPLR 510), this argument is undermined by defendant's failure to annex affidavits by any such witnesses setting forth the nature of their proposed testimony and the manner in which they would be inconvenienced by a trial in Bronx County (*see Villalba v Brady*, 162 AD3d 533 [1st Dept 2018]).

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

ENTERED: FEBRUARY 26, 2019

CLERK

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

8722 Edward A. Amley, Jr., Index 307907/13
Plaintiff-Appellant,

-against-

XiXi Yin Amley,
Defendant-Respondent.

_____

Edward A. Amley, Jr., appellant pro se.

Xixi Yin Amley, respondent pro se.

_____

Order, Supreme Court, New York County (Laura E. Drager, J.), entered on or about October 27, 2016, which, after a trial, awarded the respondent mother sole custody of the parties' daughter, unanimously affirmed, without costs.

We defer to the trial court, which heard the testimony of both parties and other witnesses, evaluated the witnesses' credibility, and determined that the totality of the circumstances warranted granting the mother sole custody, as in the child's best interests, which is the paramount concern in making any custody determination (*Eschbach v Eschbach*, 56 NY2d 167, 171-172 [1982]). Relevant to the court's determination was the disclosure by the daughter's guardian ad litem (GAL) that the father had not seen his daughter since March 2016 due to his refusal to satisfy the court's precondition that he allow GAL to meet his girlfriend, an indication that he apparently cares more

about his own needs than those of his child (*see Friederwitzer v Friederwitzer*, 55 NY2d 89, 96 [1982]).

The court correctly set aside the parties' stipulations, which appear to have allocated arenas of decision-making to each parent, because the stipulations required cooperation and coordination between the parents, which the court correctly found impeded by intense animosity at this juncture.

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

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

ENTERED: FEBRUARY 26, 2019

CLERK