SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 28, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Renwick, J.P., Manzanet-Daniels, Oing, Moulton, JJ.

8400N In re Dauly Mercedes, Index 154882/17
Petitioner-Appellant,

-against-

City of New York,
Respondent-Respondent.

_____

Mitchell Dranow, Sea Cliff, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Cassandra Rohme of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Arlene P. Bluth, J.), entered November 14, 2017, which denied petitioner's application for leave to serve a late notice of claim and dismissed the proceeding, unanimously reversed, on the law, the facts, and in the exercise of discretion, without costs, the application reinstated and granted, and the notice of claim deemed timely filed nunc pro tunc.

In support of his application, filed about three months after the 90-day statutory period elapsed, petitioner submitted an affidavit averring that he was injured by the sudden malfunction of weight lifting equipment in a recreation center

owned by the City, and that an employee of the center assisted him and prepared an accident report, which petitioner signed. Through a clerical oversight, petitioner's attorneys did not immediately mark petitioner's case as one for which a notice of claim was a prerequisite.

In considering whether to grant an application for leave to file a late notice of claim under General Municipal Law § 50-e (5), courts are required to consider whether the public corporation "acquired actual knowledge of the essential facts constituting the claim within [90 days] or within a reasonable time thereafter," and "all other relevant facts and circumstances," including "whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits," the length of the delay, and whether there was a reasonable excuse for the delay (*id.*; *see Matter of Townson v New York City Health & Hosps. Corp.*, 158 AD3d 401 [1st Dept 2018]). The purposes of a notice of claim are "on the one hand protecting municipal defendants from stale or frivolous claims, and on the other hand, ensuring that a meritorious case is not dismissed for a ministerial error" (*Goodwin v New York City Hous. Auth.*, 42 AD3d 63, 66 [1st Dept 2007] [internal quotation marks omitted]). In light of the policies underlying General Municipal Law § 50-e(5), the statute

is to be liberally construed to achieve its remedial purposes (*Matter of Thomas v City of New York*, 118 AD3d 537, 538 [1st Dept 2014]).

Assuming that the law firm's clerical error was not a reasonable excuse, "'[t]he absence of a reasonable excuse is not, standing alone, fatal to the application,'" where the municipal respondent had actual notice of the essential facts constituting the claim and was not prejudiced by the delay (*Matter of Dominguez v City Univ. of N.Y.*, 166 AD3d 540, 541 [1st Dept 2018]; *Renelique v New York City Hous. Auth.*, 72 AD3d 595, 596 [1st Dept 2010]). Here, petitioner's affidavit stating that he signed an incident report prepared by respondent's employee shortly after the accident, and that the weightlifting equipment was repaired a few months later, demonstrate prima facie that respondent received actual notice of the pertinent facts underlying his claim, if not the negligence claim itself, which supports a "plausible argument" that the City will not be substantially prejudiced in investigating and defending the claim (*see Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 466 [2016]; *Renelique*, 72 AD3d at 596; *Matter of Toro v New York City Hous. Auth.*, 182 AD2d 358, 358 [1st Dept 1992]).

The burden thus shifted to the City, which possesses the relevant information concerning its own knowledge, to make "a

particularized evidentiary showing" that it would be substantially prejudiced if the late notice were allowed (*Newcomb*, 28 NY3d at 467). Here, the City did not deny the existence of the incident report or submit any evidence, but simply asserted that the delay will prejudice its investigation due to fading memories and the possible changed condition of the equipment, which is insufficient to demonstrate prejudice (*see Matter of Thomas*, 118 AD3d at 538; *Renelique*, 72 AD3d 596; *Braiman v New York City Hous. Auth.*, 169 AD2d 450 [1st Dept 1991]). Accordingly, in light of the relatively short delay in giving notice of claim and the absence of any record evidence showing that the City would be substantially prejudiced in defending and investigating the claim, we exercise our discretion to grant the application (*see Matter of Newcomb*, 28 NY3d at 465; *see generally Gecaj v Gjonaj Realty & Mgt. Corp.*, 149 AD3d 600, 602 [1st Dept 2017]).

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

ENTERED: FEBRUARY 28, 2019

CLERK

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

8540 The People of the State of New York, Respondent, Ind. 5023/15

-against-

Patrick McMullan, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Robert M. Mandelbaum, J.), rendered June 15, 2017, convicting defendant, after a jury trial, of assault in the third degree, and endangering the welfare of a child, and sentencing him to concurrent sentences of one year and time served, unanimously affirmed. The matter is remitted to Supreme Court for further proceedings pursuant to CPL 460.50(5).

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 evidence warranted the inference that the victim's injuries went beyond mere "petty slaps, shoves, kicks and the like" (*Matter of Philip A.*, 49 NY2d 198, 200 [1980]), and that they caused "more than slight or

trivial pain" (*People v Chiddick*, 8 NY3d 445, 447 [2007]; *see also People v Guidice*, 83 NY2d 630, 636 [1994]). Defendant's acquittal of another charge does not warrant a different conclusion (*see People v Rayam*, 94 NY2d 557 [2000]). The evidence also established the elements of endangering the welfare of a child, including knowledge. Penal Law § 260.10(1) is not unconstitutionally vague, either on its face, or as applied to defendant (*see People v Snead*, 302 AD2d 268, 269 [1st Dept 2003]; *see also People v Stuart*, 100 NY2d 412, 420 [2003]).

In this domestic violence case, the court providently exercised its discretion in admitting evidence, limited to only one of several incidents, of defendant's past abuse of the victim. This background information was highly relevant to particular issues raised by defendant at trial, including the victim's failure to call the police, and the uncharged incident tended to place the events in question in a believable context (*see People v Leeson*, 12 NY3d 823, 827 [2009]; *People v Dorm*, 12 NY3d 16, 19 [2009]; *People v Steinberg*, 170 AD2d 50, 72-74 [1st Dept 1991], *affd* 79 NY2d 673 [1992]). The probative value of this evidence exceeded any prejudicial effect, which was minimized by the court's instructions.

Defendant did not preserve his claim that photographs and medical records related to the earlier, dismissed case should

have been excluded as having been obtained in violation of the sealing requirements of CPL 160.50, and we decline to review it in the interest of justice.

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 28, 2019

CLERK

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

8541 Wells Fargo Bank, N.A., Index 30527/08
Plaintiff-Respondent,

-against-

Sheyla A. Munoz,
Defendant-Appellant,

Flushing Savings Bank,
et al.,
Defendants.

_____

Lonuzzi & Woodland, LLP, Brooklyn (John Lonuzzi of counsel), for appellant.

Hogan Lovells US LLP, New York (Chava Brandriss of counsel), for respondent.

_____

Upon transfer from the Second Department, order, Supreme Court, Kings County (Debra Silber, J.), entered January 30, 2017, which, upon reargument, adhered to the original determination denying defendant's motion to dismiss the foreclosure complaint and to vacate the order of reference, unanimously affirmed, without costs.

It is undisputed that defendant transferred the subject property to a corporation in 2014. Thus, when she claimed for the first time nearly a year later that she had not been properly served in this action in 2008, she no longer had an interest in the property, and lacked standing to contest the judgment of

foreclosure (*see NYCTL 1996-1 Trust v King*, 13 AD3d 429, 430 [2d Dept 2004]; *Bancplus Mtge. Corp. v Galloway*, 203 AD2d 222, 223 [2d Dept 1994]).

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

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

ENTERED: FEBRUARY 28, 2019

CLERK

CORRECTED ORDER - MARCH 18, 2019

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

8542-
8543 In re Deandre C., and Others,

Children Under Eighteen Years of Age, etc.,

Luis D.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Salihah R. Denman, **Harrison**, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jessica Miller of counsel), for respondent.

Tennille M. Tatum-Evans, New York, attorney for the children Deandre C. and Danny C.

Dawne A. Mitchell, The Legal Aid Society, New York (John A. Newbery of counsel), for the child Shayla D.

_____

Order of disposition, Family Court, New York County (Jane Pearl, J.), entered on or about April 5, 2017, to the extent it determined that respondent had neglected the subject children, unanimously affirmed, without costs. Appeal from fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The court correctly determined that respondent was a person legally responsible for the care of his non-biological children Deandre C. and Danny C. within the meaning of Family Ct Act §

1012(g), as he was the "functional equivalent of a father," living with them sporadically for over five years, cooking for them, watching them after school, helping with their homework, and, after he moved out of the family home, regularly visiting and staying overnight (*see Matter of Yolanda D.*, 88 NY2d 790, 796-797 [1996]; *Matter of Keniya G. [Avery P.]*, 144 AD3d 532 [1st Dept 2016]).

A preponderance of the evidence supports the finding that respondent neglected Shayla D. and Deandre C. by engaging in acts of domestic violence, which involved choking their mother, kicking her, slapping her face, and throwing garbage at her in their presence (*see Matter of Isabella S. [Robert T.]*, 154 AD3d 606 [1st Dept 2017]). The evidence also supports the court's determination that respondent neglected Deandre C. by subjecting him to excessive corporal punishment, including pushing him into a bathtub, where the child hit his head (*see Matter of Antonio S. [Antonio S., Sr.]*, 154 AD3d 420, 420 [1st Dept 2017]). The evidence of respondent's neglect of Shayla D. and Deandre C.

demonstrates an impaired level of parental judgment creating a substantial risk of harm to any child in his care, supporting the finding that respondent also derivatively neglected Danny C. (*see* Family Ct Act § 1046[a][i]).

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

ENTERED: FEBRUARY 28, 2019

CLERK

Kapnick, J.P., Webber, Oing, Singh, JJ.

8545 In re David James Murphy, Index 655455/17
Petitioner-Appellant,

-against-

Citigroup Global Markets, Inc., et al.,
Respondents-Respondents.

_____

David James Murphy, appellant pro se.

Proskauer Rose LLP, New York (Joseph Baumgarten of counsel), for respondents.

_____

Order, Supreme Court, New York County (Shlomo Hagler, J.), entered March 13, 2018, which denied the petition to vacate an arbitration award that dismissed petitioner's claims against his former employer, and granted respondents' cross motion to confirm the award, unanimously affirmed, without costs.

The hearing evidence demonstrates a reasonable basis for the panel's award denying petitioner's claims against his former employer (*see Matter of Uram v Garfinkel*, 16 AD3d 347, 349 [1st Dept 2005], *lv denied* 5 NY3d 717 [2005]; *D.H. Blair & Co., Inc. v Gottdiener*, 462 F3d 95, 110 [2d Cir 2006]). The panel's reference to petitioner's age and marital status did not demonstrate a discriminatory bias against his case. "[B]ias must

be clearly apparent based upon established facts" (*Bronx-Lebanon Hosp. Ctr. v Signature Med. Mgt. Group*, 6 AD3d 261, 261 [1st Dept 2004]), and here, petitioner himself intertwined his age and martial status in the issues that were before the panel to such a degree that the panel could not disregard their pertinence to the issues to be decided.

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 28, 2019

CLERK

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

8546 The People of the State of New York, Respondent, Ind. 3425N/15

-against-

Ivett Cruz, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered July 5, 2016, convicting defendant, upon her plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing her to a term of two years, unanimously affirmed.

Defendant's challenge to the imposition of a six-month enhancement over her promised sentence is unpreserved, and was expressly waived when she declined the court's offer to conduct a further inquiry on the issue of whether she violated a term of her plea agreement (*see People v Mills*, 149 AD3d 559 [1st Dept 2017], *lv denied* 29 NY3d 1083 [2017]). The court made clear that, if defendant were so inclined, it would not impose any enhanced sentence without further proceedings to determine whether she had actually violated a condition of the plea, and

the record fails to support defendant's present argument to the contrary. We decline to review this claim in the interest of justice. As an alternative holding, we find that the record supports the court's finding that defendant violated the plea condition requiring her to truthfully discuss the facts of her crime during the presentence interview.

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

ENTERED: FEBRUARY 28, 2019

CLERK

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

8547 Oludotun Akinde, Index 153641/16
Plaintiff-Appellant,

-against-

New York City Health and Hospitals Corporation,
Defendant-Respondent.

_____

Levine & Blit, PLLC, New York (Matthew J. Blit of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Julie Steiner of counsel), for respondent.

_____

Order, Supreme Court, New York County (Alexander M. Tisch, J.), entered October 24, 2017, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff's claims of discrimination and hostile work environment under the State and City Human Rights Laws are based on alleged conduct that occurred more than three years before this action was commenced in April 2016 and therefore were correctly dismissed as time-barred (CPLR 214[2]; Administrative Code of City of NY § 8-502[d]). The alleged discriminatory acts are discrete acts that provide no basis for finding a continuing hostile work environment or pattern of unlawful conduct (*see National R.R. Passenger Corp. v Morgan*, 536 US 101, 113-114 [2002]).

Plaintiff's claim that defendant retaliated against him for engaging in protected activity, namely, filing complaints with the New York State Division of Human Rights, was correctly dismissed for failure to state a cause of action (CPLR 3211[a][7]). In support of such claim, plaintiff fails to allege facts sufficient to establish a causal connection between the protected activities and the conduct alleged to be retaliatory (*see Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 967 [1st Dept 2009], *lv denied* 14 NY3d 701 [2010]).

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

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

ENTERED: FEBRUARY 28, 2019

CLERK

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

8548 Joshua Rizack, etc., Index 653920/14
Plaintiff-Appellant,

-against-

Signature Bank, N.A.,
Defendant-Respondent.

_____

Robinson Brog Leinwand Greene Genovese & Gluck, P.C., New York (Fred B. Ringel of counsel), for appellant.

Westerman Ball Ederer Miller Zucker & Sharfstein, LLP, Uniondale (Jeffrey A. Miller of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered April 20, 2017, which granted defendant's motion to dismiss plaintiff's second amended complaint with prejudice, unanimously affirmed, without costs.

In September 2007, West End Financial Advisors LLC entered into a $200 million credit and security agreement with the German Bank then known as WestLB AG. Two months later, as provided for in the credit agreement, WestLB entered into an interest reserve account agreement (IRA agreement) with defendant Signature Bank. Plaintiff alleges that, from early 2008 to January 2009, defendant permitted West End's principal to make transfers out of the interest reserve account in breach of the IRA agreement.

In 2011, WestLB entered into an assignment agreement with West End where it appeared to assign all claims it held "in

connection with" the credit agreement "and the other Transaction Documents" as defined in the credit agreement. This assignment, however, was explicitly amended and restated in a 2014 assignment. The 2014 assignment limited the claims actually assigned to those held "in connection with" the credit agreement. The language of this 2014 assignment unambiguously limits the claims transferred to the credit agreement (*see Vanship Holdings Ltd. v Energy Infrastructure Acquisition Corp.*, 65 AD3d 405, 409 [1st Dept 2009]; *FCI Group, Inc. v City of New York*, 54 AD3d 171, 177 [1st Dept 2008], *lv denied* 11 NY3d 716 [2009]), and there is no evidence in the assignment language that the parties intended to transfer any of WestLB's claims under the IRA agreement. Accordingly, plaintiff did not possess or have any legal rights to the IRA agreement claim when he filed the original complaint in December 2014. Therefore, he lacked standing at the commencement of the case.

In July 2015, realizing that the 2014 assignment did not transfer the IRA agreement breach of contract claim, the parties explicitly transferred this claim. Plaintiff's lack of standing at the commencement of this action was not cured by this

subsequent assignment of the claim (*see Varga v McGraw Hill Fin., Inc.*, 147 AD3d 480, 481 [1st Dept 2017], *lv denied* 29 NY3d 908 [2017]).

Moreover, the six-year statute of limitations for all claims alleging breach of the IRA agreement expired in January 2015. As such, the allegations in the second amended complaint were time-barred (*see Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402-403 [1993]).

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

ENTERED: FEBRUARY 28, 2019

CLERK

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

8549 Judith Mejia, Index 150228/14
Plaintiff-Appellant,

-against-

T.N. 888 Eighth Avenue LLC Co.
doing business as Cosmic Diner,
et al.,
Defendants-Respondents,

ABC Corporations #1-10, et al.,
Defendants.

_____

Nesenoff & Miltenberg, LLP, New York (Megan S. Goddard of counsel), for appellant.

Morrison Law Offices of Westchester, P.C., New York (Arthur Morrison of counsel), for respondents.

_____

Order, Supreme Court, New York County (Robert D. Kalish, J.), entered December 30, 2016, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Actions for discrimination under the New York State Human Rights Law (State HRL) and the City Human Rights Law (City HRL) must be commenced within three years after the alleged unlawful discriminatory practice or act of discriminatory harassment (CPLR 214[2]; Administrative Code of City of NY § 8-502[d]). Here, in support of her claim of sexual harassment creating a hostile work environment, plaintiff cited with specificity only one alleged

incident in 2009, which included a cook's sexual jokes, groping, and suggestions that she go to a motel with him, but these alleged actions occurred more than three years before commencement of the action. Plaintiff also stated that she was regularly exposed to such conduct until she left her employment at defendant diner in 2013, but she could not specify any incidents after 2009, and thus failed to raise a triable issue of fact as to whether any act occurred within the statute of limitations to constitute a continuing violation (*National RR. Passenger Corp. v Morgan*, 536 US 101 [2002]; *cf. Sier v Jacobs Persinger & Parker*, 236 AD2d 309, 309 [1st Dept 1997]). Accordingly, the cause of action was properly dismissed as time-barred.

The motion court applied the correct standard of review, and properly granted defendants' motion for summary judgment dismissing plaintiff's remaining claims of hostile work environment on account of her sex, race/national origin or age under the State and City HRLs (Executive Law § 296[1][a]; Administrative Code § 8-107[1][a]).

Plaintiff's supervisor's stray remark about her age did not raise any triable issue of a hostile work environment (*Mete v New York State Off. of Mental Retardation & Dev. Disabilities*, 21 AD3d 288, 294 [1st Dept 2005]). Plaintiff could not recall with

any specificity the times that she was referred to as a "drug dealer" or criminal, based on her nationality, nor was she able to raise any triable issue as to whether Greek waiters were given preferential treatment over Hispanic waiters. Moreover, while plaintiff stated that her supervisor leered at her and referred to women in a derogatory manner, she failed to cite any non-conclusory facts including any details of when the alleged conduct occurred. Thus, plaintiff failed to raise a triable issue of a hostile work environment based on her sex (*id.*).

As plaintiff failed to raise a triable issue regarding her hostile work environment claims, she failed to raise a triable issue concerning whether she was constructively discharged due to that hostile work environment (*see Gaffney v City of New York*, 101 AD3d 410, 411 [1st Dept 2012], *lv denied* 21 NY3d 858 [2013]; *Mascola v City Univ. of N.Y.*, 14 AD3d 409, 410 [1st Dept 2005]).

Furthermore, the court correctly determined that plaintiff had no viable retaliation claim under the State and City HRLs (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312-313 [2004]; *Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 [1st Dept 2012]; Executive Law § 296[7]; Administrative Code § 8-107[7]). Plaintiff failed to specify any instances, dates or times of those complaints she made of unlawful discrimination, other than her verbal complaint to a customer who was an off duty police

officer in 2009, which occurred approximately four years earlier than her alleged constructive discharge, and thus was too remote in time to raise a triable issue of retaliation. She also failed to raise an issue as to whether defendants' commencement of a lawsuit against her for theft in 2013, was retaliation for any alleged complaints of discrimination made on unspecified dates.

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 28, 2019

CLERK

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

8550 The People of the State of New York, SCI 1668/09
Respondent,

-against-

Ricardo Scott,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, Bronx County (Miriam R. Best, J.), rendered July 29, 2009, unanimously affirmed.

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

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

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

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

ENTERED: FEBRUARY 28, 2019

CLERK

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

8551-
8552 SFT Realty LLC, Index 24185/15E
Plaintiff-Respondent,

-against-

Banner Realty Company, LLC, et al.,
Defendants-Appellants.

_____

Samuel E. Kramer, New York, for appellants.

SLG PC, New York (David Spiegelman of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered February 2, 2017, which granted plaintiff's motion for summary judgment on its cause of action for specific performance of a contract to purchase real estate, and order, same court and Justice, entered February 5, 2018, which, upon renewal, adhered to the original determination, unanimously reversed, on the law, without costs, and plaintiff's motion denied.

Defendants may raise a legal challenge to plaintiff's prima facie showing on the issue of its ability to close on the sale for the first time on appeal (*Bank of Am., N.A. v Thomas*, 138 AD3d 523 [1st Dept 2016]).

Plaintiff concedes that it had to finance the purchase of the property. However, it did not support its motion with a mortgage commitment (*cf. Piga v Rubin*, 300 AD2d 68, 69 [1st Dept

2002], *lv dismissed in part, denied in part* 99 NY2d 646 [2003]).

While defendants argue the point only in passing, we note that the motion court correctly found that defendants were under no duress to agree to sell to plaintiff, given that plaintiff made no threat to take unlawful action (*see Chase Manhattan Bank v State of New York*, 13 AD3d 873, 874 [3d Dept 2004]).

Nor was plaintiff guilty of unclean hands, even assuming that it structured the contract for tax avoidance purposes, because defendants were "willing wrongdoers" (*see Tai v Broche*, 115 AD3d 577, 578 [1st Dept 2014] [internal quotation marks omitted]).

Defendants failed to raise an issue of fact whether the checks for the deposit were for some purpose other than the deposit. The checks both reference the deposit on the property, albeit each by a different address (the lot is known by two different addresses).

The court correctly found that defendants could not defeat plaintiff's right to specific performance by willingly

encumbering the property after the contract was executed (*see Goldstein v Held*, 63 AD3d 881, 882 [2d Dept 2009]).

We leave it to the motion court's discretion to decide what if any further discovery should be permitted.

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

ENTERED: FEBRUARY 28, 2019

CLERK

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

8553-
8554 A&W Egg Co., Inc., Index 302231/15
Plaintiff-Respondent,

-against-

Tufo's Wholesale Dairy, Inc.,
Defendant-Appellant.

_____

Treybich Law, P.C., New York (Michael Treybich of counsel), for appellant.

Law Offices of Bernard D'Orazio & Associates, P.C., New York (Steven G. Yudin of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered February 2, 2018, in favor of plaintiff and against defendant in the principal sum of $112,252.90, and bringing up for review an order, same court and Justice, entered on or about January 29, 2018, which granted plaintiff's motion for summary judgment on its causes of action for goods sold and delivered, and account stated and denied defendant's cross motion to compel discovery, unanimously affirmed, with costs. Appeal from aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff satisfied its prima facie burden by submitting packaging slips and invoices which showed that defendant placed orders for eggs on the dates at issue, the eggs were delivered to

defendant and defendant accepted delivery, and defendant did not make any objections to the invoices or to the product (*see Morrison Cohen Singer & Weinstein, LLP v Waters*, 13 AD3d 51 [1st Dept 2004]; *Sunkyong Am. v Beta Sound of Music Corp.*, 199 AD2d 100 [1st Dept 1993]). Defendant failed to preserve its evidentiary objections to plaintiff's documentary submissions for appellate review (*see Verizon N.Y. Inc. v City of New York*, 159 AD3d 443 [1st Dept 2018]). In any event, plaintiff provided sufficient foundation to consider the invoices and most of the other documents submitted as business records (CPLR 4518[a]; *see Viviane Etienne Med. Care, P.C. v Country-Wide Ins. Co.*, 25 NY3d 498, 508 [2015]).

Defendant's conclusory affidavit in opposition to the motion was insufficient to raise a triable issue as to whether plaintiff's statement of account was in fact disputed by defendant, or whether defendant had made any payments on any of the outstanding invoices (*see M&R Constr. Corp. v IDI Constr. Co.*, 4 AD3d 130 [1st Dept 2004]). Since defendant could have opposed the motion based on its own documents, and "point[ed] to

no facts essential to [its] opposition that are in plaintiff's control," the motion was not prematurely decided before discovery (*Goldmuntz v Schneider*, 99 AD3d 544, 545 [1st Dept 2012]; *see* CPLR 3212[f]).

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

ENTERED: FEBRUARY 28, 2019

CLERK

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

8555 Board of Managers of the Lore Condominium, Index 154877/16

Plaintiff-Respondent-Appellant,

-against-

Gateway IV LLC, et al.,

Defendants-Appellants-Respondents.

_____

Bartels & Feureisen, LLP, White Plains (Suzanne B. Calabrese of counsel), for appellants-respondents.

Schwartz Sladkus Reich Greenberg Atlas LLP, New York (Rachael G. Ratner of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered December 29, 2017, which to the extent appealed from, denied defendants' motion to dismiss the breach of contract causes of action as asserted against the individual defendants, and to the extent cross-appealed from as limited by the briefs, granted dismissal of the causes of action for fraudulent inducement, constructive fraudulent conveyance and intentional fraudulent conveyance, unanimously modified, on the law, to dismiss the first and second causes of action, for breach of contract, as against the individual defendants, and reinstate the fourth and fifth causes of action, for constructive fraudulent conveyance, and otherwise affirmed, without costs.

Plaintiff alleges numerous defects in the construction of

the condominium building, asserting claims against the sponsor and its principals.

The complaint does not support liability against the individual defendants based solely on their execution of the sponsor's certification (*Board of Mgrs. of 184 Thompson St. Condominium v 184 Thompson St. Owner LLC*, 106 AD3d 542, 544 [1st Dept 2013]; *see also 20 Pine St. Homeowners Assn. v 20 Pine St. LLC*, 109 AD3d 733, 735 [1st Dept 2013].

The fraudulent inducement cause of action was correctly dismissed as duplicative of the breach of contract causes of action (*see Cronos Group Ltd. v XComIP, LLC*, 156 AD3d 54 [1st Dept 2017]).

The causes of action for constructive fraudulent conveyance pursuant to Debtor & Creditor Law (DCL) §§ 273 and 274 are not subject to the particularity requirement of CPLR 3016 and should not have been dismissed on that basis (*Ridinger v West Chelsea Dev. Partners LLC*, 150 AD3d 559, 560 [1st Dept 2017]). Plaintiff has otherwise sufficiently stated claims under DCL §§ 273 and 274 (*ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 228 [2011]).

The cause of action for intentional fraudulent conveyance was properly dismissed. While plaintiff alleges that defendants made the fraudulent conveyances with the actual intent to hinder, delay or defraud it (DCL § 276), there are insufficient badges of

fraud pled (*Wall St. Assoc. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999]). For instance, plaintiff alleges that the conveyances were distributed to the individual defendants as pro rata proceeds of their equity interests in the sponsor, but does not allege that the transfers were not made in the normal course or that defendants were aware of plaintiff's claim and were unable to pay for it (*cf. Matter of Wimbledon Fin. Master Fund, Ltd. v Bergstein*, 166 AD3d 496 [1st Dept 2018]). The allegations also lack the particularity required under CPLR 3016(b).

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 28, 2019

CLERK

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

8556 The People of the State of New York, Ind. 3790/14
Respondent,

-against-

Kevin Darden,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Beth R. Kublin of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (William Mogulescu, J.), rendered November 10, 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 28, 2019

CLERK

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

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

8557-
8558 The People of the State of New York, Ind. 4830/15
Respondent, 3607/15

-against-

Michael Seador,
Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Katherine M.A. Pecore of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Mark Dwyer, J.), rendered August 18, 2016, as amended August 25, 2016, convicting defendant, after a nonjury trial, of burglary in the second degree and grand larceny in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of five years, and judgment, same court and Justice, rendered September 29, 2016, convicting defendant, upon his plea of guilty, of burglary in the second degree, and sentencing him, as a second felony offender, to a consecutive term of five years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Initially, we find no basis for

disturbing the court's credibility determinations.

The evidence as a whole, "including proof adduced by the defense" (*People v Hines*, 97 NY2d 56, 61 [2001]), establishes that defendant knew that his entry into his former employer's basement warehouse was unlawful. Even accepting defendant's testimony that he never saw an email terminating his employment, and that he had previously been given a key to the basement warehouse when he worked there before his team moved, the evidence, including his own testimony, establishes that he was aware that he was not licensed or privileged to be in the warehouse at the time of the theft (*see People v Gonzalez*, 151 AD3d 540 [1st Dept 2017], *lv denied* 29 NY3d 1127 [2017]; *People v Powers*, 138 AD2d 806, 807-808 [3d Dept 1988]). Defendant admitted that he knew he had no permission to be in the basement without a business purpose, and that he had no business reason to be there at the time. Furthermore, the fact that he entered through the freight entrance, as opposed to checking in through the front desk, in accordance with standard practice, also supports the inference that he was aware he was not authorized to be in the warehouse. The leisurely pace of his actions captured in the surveillance videos can be explained by the fact that he was in fact not aware of the cameras, despite his testimony otherwise.

The evidence also established the value element of fourth-degree grand larceny. Although the retail clothing items that defendant attempted to steal from his former employer were no longer offered for sale and were being given away as gifts for business-related purposes, they still had a "market value" (Penal Law § 155.20[1]; *see People v Colasanti*, 35 NY2d 434 [1974]). Based on the original price tags reflecting a total retail price of $8,582 (*see People v Giordano*, 50 AD3d 467, 468 [1st Dept 2008], *lv denied* 10 NY3d 959 [2008]), along with other factors such as that the items were still brand new and were not so outdated as to even be worthless as business gifts, the court, as factfinder, could have reasonably inferred that the items no longer had the market value reflected in their original selling prices, but still had a market value of at least $1,000 at the time of the theft (*see People v Stein*, 172 AD2d 1060 [4th Dept 1991], *lv denied* 78 NY2d 975 [1991]).

We perceive no basis for directing that the sentences on the plea and trial convictions be served concurrently.

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

ENTERED: FEBRUARY 28, 2019

CLERK

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

8559 Wendell Hedian, Index 155473/17
Plaintiff-Respondent,

-against-

MTLR Corp., et al.,
Defendants,

Jack L. Spraker doing business
as Glove City Transportation,
et al.,
Defendants-Appellants.

Dwyer & Taglia, New York (Gary J. Dwyer of counsel), for appellants.

Wingate, Rusotti, Shapiro & Halperin, LLP, New York (Noah Katz of counsel), for respondent.

Order, Supreme Court, New York County (Adam Silvera, J.), entered March 14, 2018, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for summary judgment on liability as against defendants-appellants Jack L. Spraker d/b/a Glove City Transportation and Randy L. Parese and to dismiss their affirmative defenses premised upon plaintiff's purported comparative fault, unanimously modified, on the law, to deny the motion as to defendants-appellants' liability, and otherwise affirmed, without costs.

While plaintiff is correct that he demonstrated his own absence of negligence in connection with the accident and Supreme

Court properly dismissed defendants-appellants' affirmative defenses premised upon his purported comparative fault, Supreme Court should have denied his motion to the extent that it sought summary judgment on the issue of defendants-appellants' negligence, because Parese's affidavit demonstrates that there are triable issues of fact as to which defendant driver was responsible for the accident (*see Rodriguez v City of New York*, 31 NY3d 312, 324 [2018]*; Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Poon v Nisanov*, 162 AD3d 804, 807-808 [2d Dept 2018]; *Oluwatayo v Dulinayan*, 142 AD3d 113, 120 [1st Dept 2016]*; Moreno v Golden Touch Transp.*, 129 AD3d 581 [1st Dept 2015]). The record shows that a T-bone accident occurred between defendants' and defendants-appellants' vehicles and it is possible that the jury could find that Parese had the green traffic signal when the impact between the two vehicles occurred and had acted reasonably and prudently under the circumstances (*see Mack v Seabrook*, 161 AD3d 704, 705 [1st Dept 2018]; *Merino v Tessel*, 166 AD3d 760, 760-761 [2d Dept 2018]).

Lastly, we decline to review plaintiff's arguments regarding

the Vehicle and Traffic Law made for the first time on appeal, since they require additional facts to determine their applicability.

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

ENTERED: FEBRUARY 28, 2019

CLERK

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

8560 Emic Corp. formerly known as Apple Mortgage Corp., Index 153977/16
Plaintiff-Appellant,

-against-

Richard Barenblatt, et al.,
Defendants-Respondents.

_____

Berger & Webb, LLP, New York (Jonathan Rogin of counsel), for appellant.

Tarter Krinsky & Drogin LLP, New York (Richard C. Schoenstein of counsel), for respondents.

_____

Order, Supreme Court, New York County (Carmen Victoria St. George, J.), entered February 7, 2018, which granted defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(5), unanimously reversed, on the law, without costs, and the motion denied.

Neither claim preclusion nor issue preclusion bars this state court action. Claim preclusion does not apply because the federal court judgment was not on the merits (*see Landau, P.C. v LaRossa, Mitchell & Ross*, 11 NY3d 8, 13 [2008]), and issue preclusion does not apply because the issues were not identical (*see Jeffreys v Griffin*, 1 NY3d 34, 39 [2003]). To the extent that the motion court found that the amendment to the purchase agreement did not cure plaintiff's lack of standing, the court

should not have raised that issue sua sponte (*see Andron v City of New York*, 117 AD3d 526, 527 [1st Dept 2014]; *Greene v Davidson*, 210 AD2d 108, 109 [1st Dept 1994], *lv denied* 85 NY2d 806 [1995]).

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

ENTERED: FEBRUARY 28, 2019

CLERK

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

8561N JPMorgan Chase Bank, N.A., Index 381702/08
Plaintiff-Respondent,

-against-

Maharaj Seema,
Defendant-Appellant,

NYC Environmental Controls Board,
et al.,
Defendants.

_____

The Rosenfeld Law Office, Lawrence (Avi Rosenfeld of counsel), for appellant.

Shapiro, DiCaro & Barak, LLC, Rochester (Alex Cameron of counsel), for respondent.

_____

Appeal from order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered on or about June 28, 2017, which denied defendant Maharaj's motion to vacate a judgment of foreclosure and sale and to dismiss the complaint, unanimously dismissed, without costs, as taken by a nonaggrieved party.

Only an "aggrieved" party, meaning one who has a "direct interest in the controversy which is affected by the result," may appeal from a judgment or order (*State of New York v Philip Morris Inc.*, 61 AD3d 575, 578 [1st Dept 2009], *appeal dismissed* 15 NY3d 900 [2010] [internal quotation marks omitted]; CPLR 5511). Here, defendant Maharaj lacks a direct interest in the controversy because, before she moved to vacate the judgment of

foreclosure, she had conveyed her interest in the subject property to a third party (*see NYCTL 1996-1 Trust v King*, 304 AD2d 629, 630-631 [2d Dept 2003], *lv dismissed* 100 NY2d 614 [2003]). Although Maharaj contends that she continues to have a potential interest in the foreclosure proceeding as a debtor on the underlying mortgage, it is undisputed that the foreclosure sale took place and the Referee delivered the deed in February of 2018, while the appeal was pending. Since more than 90 days have passed since the foreclosure sale and delivery of the deed, plaintiff is now precluded from pursuing a deficiency judgment against Maharaj (RPAPL 1371[2],[3]). Accordingly, the order appealed from does not impact any existing right of Maharaj (*see 270 N. Broadway Tenants Corp. v Round Oaks Props., LLC*, 116 AD3d 1035, 1037 [2d Dept 2014]).

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

ENTERED: FEBRUARY 28, 2019

CLERK

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

8562N-
8562NA Free People of PA LLC, Index 650654/17
Plaintiff-Appellant-Respondent,

-against-

Delshah 60 Ninth, LLC,
Defendant-Respondent-Appellant.

_____

Drinker Biddle & Reath LLP, Philadelphia, PA (William M. Connolly, of the bar of the Commonwealth of Pennsylvania and the State of New Jersey, admitted pro hac vice, of counsel), for appellant-respondent.

Rosenberg & Estis, P.C., New York (Bradley S. Silverbush and Richard Corde of counsel), for respondent-appellant.

_____

Orders, Supreme Court, New York County (Barry R. Ostrager, J.), entered October 18, 2017 and November 21, 2017, which, after a nonjury trial, awarded plaintiff $650,000 in damages, plus statutory interest from March 6, 2016, denied the parties' respective requests to be deemed the prevailing party, and granted defendant's request pursuant to CPLR 3220 for expenses, including reasonable attorneys' fees, associated with trying the issue of damages, unanimously affirmed, without costs.

The trial court correctly determined, giving due consideration to the nature of the contract and the circumstances, that the rent credits provision in the parties'

lease constituted an unenforceable penalty (*see JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 379-380 [2005], citing *Truck Rent-A-Ctr. v Puritan Farms 2nd*, 41 NY2d 420, 424-425 [1977]; *see also Bates Adv. USA, Inc. v 498 Seventh, LLC*, 7 NY3d 115, 120 [2006]). The rent credit sought by plaintiff as liquidated damages under the lease agreement was grossly disproportionate to its estimated and actual loss, creating a windfall for plaintiff, and the damages flowing from the breach were readily ascertainable at the time the parties entered into the lease.

The record supports the court's damages determination, which rests in large measure on considerations relating to the credibility of the witnesses (*see Nightingale Rest. Corp. v Shak Food Corp.*, 155 AD2d 297 [1st Dept 1989], *lv denied* 76 NY2d 702 [1990]).

Considering the true scope of the dispute litigated and what was achieved within that scope, the court properly determined that neither party was entitled to prevailing party attorneys' fees (*see Excelsior 57th Corp. v Winters*, 227 AD2d 146 [1st Dept 1996]).

The court correctly awarded defendant its expenses,

including attorneys' fees, incurred in trying the issue of damages from the date of its offer pursuant to CPLR 3220 to settle the action (*see Abreu v Barkin & Assoc. Realty, Inc.*, 115 AD3d 624 [1st Dept 2014]).

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

ENTERED: FEBRUARY 28, 2019

CLERK

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

8563N 1591 Second Avenue LLC, et al., Index 161539/15
Plaintiffs-Respondents,

-against-

Metropolitan Transportation Authority, et al.,
Defendants-Appellants.

_____

Smith, Mazure, Director, Wilkins, Young & Yagerman, P.C., New York (Marcia K. Raicus of counsel), for appellants.

Greenberg, Trager & Herbst, LLP, New York (Richard J. Lambert of counsel), for respondents.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered on or about August 28, 2017, which denied defendants' motion to compel discovery and for sanctions, unanimously affirmed, without costs.

Supreme Court did not abuse its discretion in concluding that the requested materials were prepared in anticipation of litigation (*see* CPLR 3101[d][2]), or in failing to conduct an in camera inspection of the subject materials. Furthermore, given that defendants failed to contest that their experts inspected the allegedly damaged properties, they failed to show a substantial need for the report and the materials incorporated into it that was prepared by plaintiffs' experts, and that they would be unable to obtain the substantial equivalent without

undue hardship (*see id.; see also Gama Aviation Inc. v Sandton Capital Partners, L.P.*, 99 AD3d 423, 424 [1st Dept 2012]).

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

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

ENTERED: FEBRUARY 28, 2019

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, Jr., J.P.
Peter Tom
Troy K. Webber
Marcy L. Kahn
Cynthia S. Kern, JJ.

8367
Ind. 2969/13

_____x

The People of the State of New York,
Respondent,

-against-

Alexis Tatis,
Defendant-Appellant.
_____x

Defendant appeals from a judgment of the Supreme Court, Bronx County (John W. Carter, J.), rendered March 24, 2016, convicting him, after a jury trial, of attempted assault in the first degree (two counts), criminal possession of a weapon in the second degree, and unlawful possession of ammunition, and imposing sentence.

Robert S. Dean, Center for Appellate Litigation, New York (Scott H. Henney of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Robert C. McIver and Rafael Curbelo of counsel), for respondent.

KERN, J.

One of the issues that must be determined on this appeal is whether certain exclusionary language contained in New York City Administrative Code § 10-131(i)(3) constitutes an exception or a proviso. There are no appellate decisions which have addressed this issue. Section 10-131(i)(3) provides that "[i]t shall be unlawful for any person *not authorized to possess a pistol or revolver within the city of New York* to possess pistol or revolver ammunition, provided that a dealer in rifles and shotguns may possess such ammunition" (emphasis added). We find that the relevant language in section 10-131(i)(3), which makes it a crime to possess pistol or revolver ammunition unless authorized to possess a pistol or revolver, constitutes an exception and not a proviso. Consequently, it was the People's burden to prove that the defendant was not authorized to possess a pistol or revolver within the City of New York. As the People failed to do so, defendant's conviction under section 10-131(i)(3) must be vacated and that count dismissed.

In order to determine whether a statute defining a crime contains "an exception that must be affirmatively pleaded as an element in the accusatory instrument" or "a proviso that need not be pleaded but may be raised by the accused as a bar to prosecution or a defense at trial," one must look to the language

of the statute itself (*People v Santana*, 7 NY3d 234, 236 [2006]). Indeed, "[i]f the defining statute contains an exception, the indictment must allege that the crime is not within the exception. But when the exception is found outside the statute," it is termed a proviso and "generally is a matter for the defendant to raise in defense" (*People v Kohut*, 30 NY2d 183, 187 [1972]). "Legislative intent to create an exception [whose existence must be negated by the prosecution] has generally been found when the language of exclusion is contained entirely within" the statute itself (*Santana*, 7 NY3d at 237). In contrast, where the language of the exclusion depends on a source outside the statute, courts will infer that the language functions as a proviso (*see id.*).

"The main goal of the interpretive rules governing exceptions and provisos is to discover the intention of the enacting body," *People v Davis*, 13 NY3d 17, 31 [2009], and the "distinction between a proviso and an exception will be wholly disregarded, if necessary to give effect to the manifest intention of" such enacting body (McKinney's Cons Laws of NY, Book 1, Statutes § 211, Comment at 369). *Davis* involved a Parks Department rule that prohibited people from being in city parks after their posted closing times (13 NY3d at 21). Although the rule contained qualifying language stating that a person may

disregard a park sign "upon order by a Police Officer or designated Department employee," the information that charged the defendant with a violation of the rule did not state whether that exclusionary language applied to the defendant (*id.*). The Court of Appeals held that the relevant phrase was a proviso, even though the exclusion was contained within the rule itself, because "as a matter of common sense and reasonable pleading," the Parks Department could not have intended to impose a pleading and proof requirement that involved "information . . . uniquely within a defendant's knowledge" and would impose an unreasonably onerous burden on the People to negate the existence of permission from "innumerable . . . officers and employees in the area during the date in question" (*id.* at 31-32).

We find that the relevant language in section 10-131(i)(3) constitutes an exception and not a proviso. Section 10-131(i)(3) clearly sets forth an exception which would allow possession of ammunition for persons who are "authorized to possess a pistol or a revolver within the city of New York," thereby constituting an essential element of the offense that the People were required to negate. The language of the exception is contained entirely within section 10-131(i)(3) and is not dependent on a source outside the statute. There is also no evidence that the legislature intended to create a proviso rather than an

exception.

The exception articulated in *Davis*, that an exclusion contained entirely within a statute can sometimes be construed as a proviso, is inapplicable here. In this case, whether the defendant was authorized to possess a pistol or revolver is information that is in the government's control and is not "uniquely within [the] defendant's knowledge" (*Davis*, 13 NY3d at 31-32). Thus, placing the burden on the People to prove that defendant was unauthorized to possess a pistol or revolver is not at odds with reasonableness or common sense and would not be "unreasonably onerous" (*id.*).

Finally, as the People acknowledge, the sole court to address the issue of whether the relevant language contained in section 10-131(i)(3) constitutes an exception or a proviso found that it constitutes an exception (*see People v Lammy*, 29 Misc 3d 1222[A] [Sup Ct, NY County 2010]).

The People's assertion that the relevant language in section 10-131(i)(3) should be construed as a proviso because the legislature intended it to be construed as such is without merit. Specifically, the People assert that because the legislative intent underlying section 10-131(i)(3) reflects a belief that the ammunition it targets presents a "grave threat" to law enforcement and the public, the legislature intended for it to be

the defendant's burden to prove that the possession of such dangerous ammunition was authorized and not the People's burden to disprove. However, the People have failed to explain why general safety concerns underlying section 10-131(i)(3) support a construction of the statute contrary to its wording and ordinary meaning.

The People's assertion that the relevant language in section 10-131(i)(3) should be construed as a proviso in order to maintain consistency with state law is also without merit. The People point to Penal Law section 265.20, which is a catalogue of exemptions to various Penal Law weapon provisions, including one for "[p]ossession of a pistol or revolver by a person to whom a license therefor has been issued . . ." (Penal Law § 265.20[a][3]). These exemptions must be raised by a defendant in the first instance before the prosecution is required to disprove them beyond a reasonable doubt (*see People v Psilakis*, 148 AD2d 475, 476 [2d Dept 1989]), *lv denied* 73 NY2d 981 [1989] ["it is incumbent upon the defendant to go forward in the first instance, with evidence that he possesses an appropriate firearms license"]; William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, Book 39, Penal Law § 265.20 [the exemptions "are in the nature of a defense," which the defendant is required to raise before the prosecution is required to disprove]). However,

the People's reliance on Penal Law section 265.20 and such exemptions is unavailing as that section is distinguishable from the statute at issue in this case. Because the exemptions in Penal Law section 265.20 are found outside the particular Penal Law provisions to which they apply, interpreting them to require an initial showing by a defendant is consistent with the interpretive principles traditionally used to differentiate between exceptions and provisos (*see Kohut*, 30 NY2d at 187; *Santana*, 7 NY3d at 237). The same is not true in this case, where the exclusionary language is contained entirely within section 10-131(i)(3) itself and, under a plain reading, forms an element of the offense which the People were required to disprove.

However, we find that defendant's conviction for attempted assault in the first degree should be upheld. Evidence is legally sufficient if, "after viewing the evidence in the light most favorable to the prosecution . . . *any* rational trier of fact could have found essential elements of the crime beyond a reasonable doubt" (*People v Schulz*, 4 NY3d 521, 529 [2005][citation omitted]). "[W]eight of the evidence review requires a court first to determine whether an acquittal would not have been unreasonable. If so, the court must weigh conflicting testimony, review any rational inferences that may be

drawn from the evidence and evaluate the strength of such conclusions. Based on the weight of the credible evidence, the court then decides whether the jury was justified in finding the defendant guilty beyond a reasonable doubt" (*People v Danielson*, 9 NY3d 342, 348 [2007]).

In order for a defendant to be convicted of attempted assault in the first degree, the People are required to prove that a defendant specifically intended to cause serious physical injury to his victim and that he did cause such injury by means of a deadly weapon or a dangerous instrument (Penal Law § 120.10[1]). "'Serious physical injury' means physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ" (Penal Law § 10.00[10]). "[I]ntent can be inferred from the act itself" and also "from the defendant's conduct and the surrounding circumstances" (*People v Bracey*, 41 NY2d 296, 301 [1977]).

We find that defendant's conviction for attempted assault in the first degree was supported by legally sufficient evidence and was not against the weight of the evidence. Defendant was charged with two counts of attempted assault in the first degree based on allegations that after a fight between defendant and the

victim, defendant intentionally shot the victim and accidentally shot a passerby during the same incident. Defendant argues that his conviction was not supported by legally sufficient evidence and was against the weight of the evidence because the evidence adduced at trial indicated that he "shot at the ground" and that he did not intend to shoot at the victim. However, the jury could have reasonably concluded that defendant was aiming his gun at the victim with intent to cause him serious physical injury based on the eyewitness testimony and physical evidence adduced at trial. Indeed, the evidence indicated that defendant, who was apparently furious with the victim after a fight, fired numerous shots at the victim's lower extremities while just three feet away from the victim and that he intended to hit the victim, even if he did so only once, in the lower leg. We have held that lower body injuries meet the definition of serious physical injury and support a first-degree assault conviction (*see People v Wong*, 165 AD3d 468, 468 [1st Dept], *lv denied* 32 NY3d 1116 [2018] ["(t)here was ample medical testimony and other evidence to support the conclusion that the victim's injury, a shattered kneecap, met the definition of serious physical injury, which does not require permanent injury"] [citation omitted]; *People v Garcia*, 202 AD2d 189, 190 [1st Dept 1994] [multiple gunshot wounds to the legs of the victim sufficient to satisfy the

serious physical injury element of the assault in the first degree counts]).

Finally, we perceive no basis for reducing the sentences on the felony convictions.

Accordingly, the judgment of the Supreme Court, Bronx County (John W. Carter, J.), rendered March 24, 2016, convicting defendant, after a jury trial, of attempted assault in the first degree (two counts), criminal possession of a weapon in the second degree, and unlawful possession of ammunition, and sentencing him to an aggregate term of 15 years, should be modified, on the law, to the extent of vacating the possession of ammunition conviction and dismissing that count, and otherwise affirmed.

All concur.

Judgment, Supreme Court, Bronx County (John W. Carter, J.), rendered March 24, 2016, modified, on the law, to the extent of vacating the unlawful possession of ammunition conviction and dismissing that count, and otherwise affirmed.

Opinion by Kern, J. All concur.

Sweeny, J.P., Tom, Webber, Kahn, Kern, JJ.

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

ENTERED: FEBRUARY 28, 2019

CLERK