SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 15, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

7212 Elizabeth Reich, et al., Ind. 159841/16
Plaintiffs-Appellants,

-against-

Belnord Partners, LLC, et al.,
Defendants-Respondents.

_____

Vernon & Ginsburg, LLP, New York (Darryl M. Vernon of counsel), for appellants.

Rosenberg & Estis, P.C., New York (Deborah Riegel of counsel), for respondents.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered September 14, 2017, which granted defendants' motion to dismiss the claim for rent overcharges and denied plaintiffs' cross motion for summary judgment pursuant to CPLR 3211(c), unanimously affirmed, without costs.

Plaintiffs' claim for rent overcharges based on defendants' failure to charge rent stabilized rents while receiving J-51 tax benefits was correctly dismissed pursuant to CPLR 213-a.

Consistent with both *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal* (164 AD3d 420, 425-426 [1st Dept 2018], *lv dismissed* __ NY3d __, 2018 NY Slip Op 90474) *and Taylor v 72A Realty Assoc., L.P.* (151 AD3d 95, 105-106 [1st Dept 2017]), there was no basis for considering the subject apartment's rental history more than four years before the commencement of the overcharge claim. In *Matter of Regina Metro. Co., LLC* (164 AD3d at 425-426), we held that fraud is the only exception to the four-year look back period to determine the legally regulated rent on the base date. There is no fraud here. In *Taylor v 72A Realty Assoc., L.P.* (151 AD3d at 105-106), we permitted a longer look back period under certain circumstances not necessarily indicative of fraud. Those circumstances are not present, where, as here, the tenant received a rent stabilized lease and the landlord registered the rent with DHCR more than four years before any rent overcharge complaint was filed.

In view of the dismissal of the rent overcharge claim, plaintiffs' motion for summary judgment on that claim and the dependent claims for treble damages and attorneys' fees was

correctly denied. Plaintiffs abandoned their application for summary judgment on the claims for declaratory and injunctive relief by failing to make any arguments in support thereof on appeal.

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

ENTERED: JANUARY 15, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Tom, Webber, Gesmer, JJ.

7899 The People of the State of New York, Ind. 1055/09
Respondent,

-against-

Jose Ortiz,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Ryan P. Mansell of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Caesar D. Cirigliano, J.), rendered August 2, 2011, convicting defendant, after a jury trial, of assault in the first degree and two counts of burglary in the first degree, and sentencing him, as a second violent felony offender, to concurrent prison terms of 20 years, unanimously reversed, on the law, and the matter remanded for a new trial.

This case involves allegations that defendant broke into the home of his girlfriend and stabbed her. Defendant was charged with attempted murder in the second degree, and related crimes.

During trial, the court permitted Jennifer Mercedes, a subpoena compliance agent with T-mobile, to testify that on the date of the attack two calls were made from defendant's cell

phone, which were transmitted to a cell tower at 2112 Starling Avenue in the Bronx. Mercedes opined that defendant's phone thus had to be within two miles of that tower, which was located a block from the victim's apartment. Counsel's objection to her testimony sufficiently preserved the issue, and the court erred in permitting her testimony.

"[T]estimony on how cell phone towers operate must be offered by an expert witness" because an analysis of the possible ranges of cell phone towers and how they operate is beyond a juror's day-to-day experience and knowledge (*United States v Natal*, 849 F3d 530, 536 & n 5 [2d Cir 2017], *cert denied* __ US __, 138 S Ct 276 [2017]). Mercedes was not an engineer and was not qualified, without an engineering background, to reach further conclusions about why defendant's cell phone hit the Starling Avenue tower, i.e. whether it was because it was closest or strongest (*compare People v Littlejohn*, 112 AD3d 67, 73 [2d Dept 2013], *lv denied* 22 NY3d 1140 [2014] [court providently exercised its discretion in concluding that a T-Mobile radio frequency engineer with 10 years of experience in the field was qualified to provide expert testimony regarding "deductions made from cell phone site data"]). Thus, her opinion about the two-mile coverage area of the tower required specialized

knowledge she did not have.

The trial court also permitted a police officer to testify twice, over defense objection, that the victim had identified her attacker as "male Hispanic, bald, by the name of Jose Ortiz." This too was error. "Testimony by one witness (e.g., a police officer) to a previous identification of the defendant by another witness (e.g., a victim) is inadmissible" (*People v Smith*, 22 NY3d 462, 466 [2013]; *see also People v Owens*, 127 AD3d 561, 563 [1st Dept 2015], *lv denied* 27 NY3d 1004 [2016] [characterizing testimony of witness that he received a phone call from victim naming defendant as the attacker as hearsay because it was an "out-of-court statement to [the witness] identifying defendant as his assailant – either by name or by an identifying description that allowed [the witness] to name [the defendant]").

Furthermore, in its charge to the jury, the court improperly highlighted the identification evidence favorable to the prosecution and told the jury that such testimony

> "which taken then also serves to establish the defendant is the actual perpetrator. In deciding whether the defendant is the ... actual perpetrator of the charged crimes, you must consider all the evidence you have heard in the case on that issue from whatever source, give particular attention to and examining with care the testimony of [the victim] regarding all of the circumstances surrounding the commission of the charged crime"

The court also improperly credited the victim's earlier identification of defendant when it told the jury that she had identified defendant when her "memory was fresher than at present." Generally, an unbalanced marshaling of the evidence will not constitute reversible error unless, viewing the charge as a whole, the imbalance results in prejudice to the defendant and deprives him of a fair trial (*People v Culhane*, 45 NY2d 757, 758 [1978], *cert denied* 439 US 1047 [1978]; *People v Martinez*, 100 AD3d 537, 538 [1st Dept 2012], *affd* 22 NY3d 551 [2014]). However, we must view this in light of the other errors regarding identification.

The court should have given a missing witness charge for two detectives the People had identified as its witnesses, and who had knowledge highly material to the case (*see People v Savinon*, 100 NY2d 192, 196 [2003]). These detectives were the lead detective on the case, who interviewed a witness who said he saw defendant leaving the victim's building, and another detective who interviewed the victim at the hospital.

Nor should the court have referenced defendant's failure to testify to the jury two times. This improperly highlighted defendant's silence, thereby prejudicing defendant.

The cumulative effect of these errors cannot be dismissed as

harmless. Defendant's main defense was that the witnesses were mistaken when they identified him and many of the errors concerned his identification. The combined effects of these errors served to deprive defendant of his fundamental right to a fair trial and require reversal of the judgment.

Moreover, during trial, a juror revealed that he had an interaction with a court officer that left him feeling "really ... violated, ... really disrespected," and "upset about the whole situation," even after speaking to the officer's superior, and the court acknowledged that he could see in the juror's face how upset he was. The court offered to adjourn proceedings for the rest of the day to give the juror an opportunity to process what happened, and relax, and to then advise the court the next day whether he could be fair to both parties. The record contains no discussion with the juror the following day to ensure that he could pay attention and be fair to both parties.

The court's inquiry left unresolved the question of whether the juror was grossly unqualified to serve due to any ongoing inability to be fair and focus on the case at hand. Thus it fell

short of a "probing and tactful" inquiry (*People v Sanchez*, 99 NY2d 622, 623 [2003] [internal quotation marks omitted]; *see also People v Teichman*, 66 AD3d 523, 524 [1st Dept 2009], *lv denied* 13 NY3d 942 [2010]; *People v Sipas*, 246 AD2d 408 [1st Dept 1998]). Accordingly, reversal is warranted.

In light of our determination, we find it unnecessary to reach defendant's remaining contentions.

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

ENTERED: JANUARY 15, 2019

CLERK

Sweeny, J.P., Richter, Kapnick, Gesmer, Kern, JJ.

8095 The People of the State of New York, SCI 5212N/15
Respondent,

-against-

Juan Alejo,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Luis Morales 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 (Richard M. Weinberg, J.), rendered March 4, 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: JANUARY 15, 2019

CLERK

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

Sweeny, J.P., Richter, Kapnick, Gesmer, Kern, JJ.

8096 Lidia Haraburda, Index 160021/14
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

_____

Sullivan & Brill, LLP, New York (James Healy of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondent.

_____

Order, Supreme Court, New York County (James E. d'Auguste, J.), entered June 16, 2017, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

On February 15, 2014, shortly before 6:00 p.m., plaintiff slipped on ice in a pedestrian walkway parallel to the sidewalk and landed on the pavement. Trace amounts of snow, totaling .04 inches, fell between 11:00 a.m and 6:00 p.m. on the date of the accident. However, the area received an accumulation of 10.9 to 12.5 inches of snow and ice during a storm that took place between February 13, 2014 at 12:30 a.m. and February 14, 2014 at 6:00 a.m, 35 hours before plaintiff's accident, according to the meteorologist's affidavit, which the court should have considered

(*see Guzman v Broadway 922 Enters., LLC*, 130 AD3d 431 [1st Dept 2015]).

Defendant has failed to establish its right to summary judgment based on the storm in progress doctrine as the record establishes that at the time of plaintiff's accident, there was no storm but rather only trace amounts of snow (*see Powell v MLG Hillside Assoc.*, 290 AD2d 345 [1st Dept 2002]).

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

ENTERED: JANUARY 15, 2019

CLERK

Sweeny, J.P., Richter, Kapnick, Gesmer, Kern, JJ.

8097-
8097A In re Josephine F.,
Petitioner-Appellant,

-against-

Rodney W.,
Respondent-Respondent.

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), attorney for the child.

Orders, Family Court, Bronx County (Jennifer S. Burtt, Referee), entered on or about October 5, 2017 and on or about September 21, 2017, which, after a hearing, denied petitioner mother's application for visitation and dismissed the petition, unanimously affirmed, without costs.

"[T]here is a rebuttable presumption that visitation by a noncustodial parent is in the child's best interest and should be denied only in exceptional circumstances" (*Matter of Ronald C. v Sherry B.*, 144 AD3d 545, 546 [1st Dept 2016], *lv dismissed* 29 NY3d 965 [2017]). "Although denial of visitation is a drastic remedy, it is warranted where compelling reasons and substantial evidence show that visitation would be detrimental to the child"

(*Matter of Harry S. v Olivia S.A.*, 143 AD3d 531, 531 [1st Dept 2016], *lv denied* 28 NY3d 910 [2016] [internal quotation marks omitted]).

The court's determination that visitation with petitioner would be detrimental to the child's emotional well-being has a sound and substantial basis in the record (*see Matter of Brandy V. v Michael P.*, 151 AD3d 618, 619 [1st Dept 2017]).[1] Prior orders of which the court took judicial notice demonstrate that petitioner has been found to have neglected her other nine children (*Matter of Rodney W. v Josephine F.*, 126 AD3d 605, 606 [1st Dept 2015], *lv dismissed* 25 NY3d 1187 [2015]), and that her parental rights to one child were terminated after she failed to visit the child and failed to cooperate with referrals for mental health services, individual counseling and parental skills training (*see Matter of Starlaylah C. [Josephine F.]*, 132 AD3d 556 [1st Dept 2015], *lv denied* 26 NY3d 916 [2016]). The record supports the court's conclusion that petitioner is "in complete

[1] Petitioner also raises evidentiary objections to the forensic's testimony. Rather than resolve those, we rely only on the other evidence in the record: the prior court orders, the testimony of respondent, and the testimony of petitioner, including her testimony that she completed a parenting program.

denial" and lacks insight into her own responsibility for her parenting failures.

Further, the father testified that caring for the child, who has serious developmental issues, is like caring for an infant. The child needs constant supervision, a strict routine, repetitive redirection and patience. Based on the evidence presented at the hearing, petitioner would be unable to provide the necessary stability to care for the child. Thus, considering the child's special needs, petitioner's prior history with her other children, and her failure to address her mental health issues, exceptional circumstances exist to support the court's decision to deny her visitation.

Petitioner's argument that the court abused its discretion in denying her counsel's request for an adjournment of one session of the hearing is unpreserved for appellate review (*see Matter of Loretta C.W. v Mark A.W.*, 77 AD3d 588 [1st Dept 2010]). Were we to consider the argument, we would conclude that the

court providently exercised its discretion in denying petitioner's request for an adjournment based on a claimed medical emergency (*see Cohen v Cohen*, 120 AD3d 1060, 1063-1064 [1st Dept 2014], *lv denied* 24 NY3d 909 [2014]).

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

ENTERED: JANUARY 15, 2019

CLERK

Sweeny, J.P., Richter, Kapnick, Gesmer, Kern, JJ.

8098 Laura V., etc., et al., Index 158102/13
Plaintiffs-Respondents,

-against-

Catamount Development Corporation, et al.,
Defendants-Appellants.

_____

Roemer Wallens Gold & Mineaux LLP, Albany (Matthew J. Kelly of counsel), for appellants.

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

_____

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered February 9, 2018, which denied defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, to grant the motion to the extent of dismissing the complaint as against the individual defendants, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Defendants Catamount Development Corporation and Catamount Ski Area (collectively Catamount) failed to establish entitlement to judgment as a matter of law on the basis that the doctrine of assumption of the risk bars plaintiffs' claims (*see Maddox v City of New York*, 66 NY2d 270, 279 [1985]; *Rigano v Coram Bus Serv.*, 226 AD2d 274, 275 [1st Dept 1996]). Although infant plaintiff's

ski instructor at the time of the accident testified that infant plaintiff fell out of the chairlift after she suddenly propelled herself out of the chair, infant plaintiff testified that the incident happened after she was accidently pushed off the lift (*see Hope v Holiday Mtn. Corp.*, 123 AD3d 1274, 1275-1276 [3d Dept 2014]; *de Lacy v Catamount Dev. Corp.*, 302 AD2d 735 [3d Dept 2003]). The conflicting testimony as to how the accident occurred precludes granting Catamount's motion for summary judgment (*see Nyala C. v Miniventures Child Care Dev. Ctr., Inc.*, 133 AD3d 467 [1st Dept 2015]).

However, dismissal of the complaint as against the individual defendants is warranted. That portion of defendants' motion was unopposed by plaintiffs, and there is no evidence that the individual defendants personally participated in any malfeasance or misfeasance constituting an affirmative tortious act that proximately caused infant plaintiff's injuries (*see Palomo v 175th St. Realty Corp.*, 101 AD3d 579 [1st Dept 2012]).

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

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

ENTERED: JANUARY 15, 2019

CLERK

Sweeny, J.P., Kapnick, Gesmer, Kern, JJ.

8099 Alice Brown, Index 24477/13
Plaintiff-Appellant,

-against-

Montefiore Medical Center, et al.,
Defendants-Respondents,

"John Does 1-100," et al.,
Defendants.

_____

Zlotolow & Associates, P.C., Sayville (Jason S. Firestein of counsel), for appellant.

Gordon & Silber, P.C., New York (Patrick Mevs of counsel), for Montefiore Medical Center, respondent.

Schiavetti, Corgan, DiEdwards, Weinberg & Nicholson, LLP, White Plains (Samantha E. Quinn of counsel), for Kings Harbor Health Services, LLC and Bronx Harbor Health Care Complex, Inc., respondents.

_____

Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered March 17, 2017, which denied plaintiff's motion to vacate a judgment, same court and Justice, entered on or about December 29, 2015, dismissing the complaint, based on plaintiff's failure to abide by a conditional preclusion order, same court and Justice, entered on or about September 28, 2015, which ostensibly granted defendant Montefiore Medical Center's motion and defendants Kings Harbor Health Services, LLC and Bronx Harbor Health Care Complex, Inc.'s cross motion for an order, pursuant

to CPLR 3126, precluding plaintiff from offering testimony or other evidence supporting her claims, or compelling plaintiff to provide a proper bill of particulars and other outstanding discovery, unanimously reversed, on the law and the facts, without costs, plaintiff's motion granted, the judgment vacated, and the complaint reinstated.

The court's September 28, 2015 order was predicated on the motion and cross motion by the defendants, the underlying issues of which had already been fully resolved by the parties' so-ordered stipulation, dated August 4, 2015, issued after a preliminary conference. At the time of the court's September 28th conditional preclusion order, there was no motion pending, and no request for any relief from the defendants. Given the circumstances, the court should have granted plaintiff's motion to vacate the judgment. However, this in no way condones plaintiff's counsel's clearly dilatory behavior, which, based on the pattern evinced by the record, was willful.

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

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

ENTERED: JANUARY 15, 2019

CLERK

Sweeny, J.P., Richter, Kapnick, Gesmer, Kern, JJ.

8100 The People of the State of New York, Ind. 4451/12
Respondent,

-against-

Angelo Hayes,
Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Eunice Lee of counsel), and Milbank, Tweed, Hadley & McCloy, LLP, New York (Gary A. Crosby II of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered January 21, 2015, convicting defendant, after a jury trial, of murder in the second degree and criminal possession of a weapon in the second degree (two counts), and sentencing him to an aggregate term of 25 years to life, unanimously affirmed.

The various evidentiary rulings challenged on appeal were provident exercises of discretion. In any event, none of them deprived defendant of a fair trial.

An approximately 22-minute video of defendant, the victim, and three others rapping was not evidence of uncharged crimes or bad acts despite the violent or offensive content of any of the

rap lyrics (*see People v Brewer*, 28 NY3d 271, 276 [2016]). Even if *Molineux* analysis were applicable, the court providently exercised its discretion in finding that the video's probative value outweighed any undue prejudice arising from defendant's lyrics. The video had strong probative value in support of the identification of defendant based on his use of a three-word derogatory phrase that was also used by the shooter in a videotape of the shooting, the admission of which is not challenged on appeal, given that no one else present used that phrase in the video at issue. This video also supported the credibility, and ability to identify defendant, of two witnesses who were present on the occasions of both the video and the homicide. In the video the two witnesses were able to deliver elaborate lyrics despite their use of marijuana and alcohol, which they had also been using shortly before the shooting. Moreover, those witnesses had met defendant only recently in connection with a criminal enterprise, and the video tended to show that the witnesses would be able to identify defendant.

A video showing defendant catcalling a woman on the street, and then calling her a "bitch" when she continued walking and did not respond, was properly admitted to show defendant's motive to kill the victim, in light of testimony showing that defendant was

upset with the victim for making belittling comments toward him and for having greater success than defendant in his romantic or sexual endeavors. Any prejudice arising from defendant's offensive conduct and language in that video was outweighed by its probative value.

We have considered and rejected defendant's remaining challenges to the court's evidentiary rulings, including his arguments that a video still of him was unduly prejudicial due to his menacing facial expression, and that various evidence providing background context for the uncharged criminal enterprise was excessive.

Defendant did not preserve his claim that the court should have issued limiting instructions regarding the videos, or any of his constitutional arguments, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

In any event, we find that any error in any of the evidentiary rulings raised on appeal was harmless in light of the

overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230, 242 [1975]).

Defendant's challenge to the sufficiency of the evidence supporting one of the weapon convictions is without merit.

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

ENTERED: JANUARY 15, 2019

CLERK

Sweeny, J.P., Richter, Kapnick, Gesmer, Kern, JJ.

8101 In re Steven Mann, Index 100369/16
Petitioner-Appellant,

-against-

The City of New York, Department of Finance, Parking Violations Bureau,
Respondent-Respondent.

_____

Steven Mann, appellant pro se.

Zachary W. Carter, Corporation Counsel, New York (Jason Anton of counsel) for respondent.

_____

Judgment, Supreme Court, New York County (Lucy Billings, J.), entered April 17, 2018, denying the petition to annul the determination of respondent, dated December 22, 2015, which affirmed the determination of the Administrative Law Judge to uphold the subject notice of parking violation, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The determination to uphold the notice of violation was not arbitrary and capricious and was rationally based (*see generally Matter of Nestle Waters N. Am., Inc. v City of New York*, 121 AD3d 124, 127 [1st Dept 2014]). Petitioner argues that the notice of violation should have been dismissed because it misdescribed the

place of occurrence, which is a required component of such a document (*see* Vehicle and Traffic Law § 238[2], [2-a][b]; 19 RCNY 39-02[a][1], [3]; *Matter of Ryder Truck Rental v Parking Violations Bur. of Transp. Admin. of City of N.Y.*, 62 NY2d 667 [1984]; *Matter of Wheels, Inc. v Parking Violations Bur. of Dept. of Transp. of City of N.Y.*, 80 NY2d 1014 [1992]). However, the notice of parking violation clearly described the place of occurrence as "Rockaway Park Mun Pkg Fld." Petitioner does not dispute that a parking lot exists by that name, or that he parked in that lot, and admits that the name is not sufficiently similar to the name of any other parking lot to cause confusion. Although the place of occurrence is not located within the precinct listed on the notice of violation, there is no statutory or regulatory requirement that a notice of violation identify the precinct in which the violation occurred (*see* Vehicle and Traffic Law § 238[2]; 19 RCNY 39-02[a][1]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: JANUARY 15, 2019

CLERK

Sweeny, J.P., Richter, Kapnick, Gesmer, Kern, JJ.

8102 Luis Sanchez, Index 155329/13E
Plaintiff-Respondent,

-against-

404 Park Partners, LP, et al.,
Defendants-Respondents-Appellants,

Cord Contracting Co. Inc.,
Defendant-Appellant-Respondent.

- - - - -

404 Park Partners, LP, et al.,
Third-Party Plaintiffs-Respondents-Appellants,

-against-

United Air Conditioning Corp. II,
Third-Party Defendant-Respondent-Appellant,

Cord Contracting Co. Inc.,
Third-Party Defendant-Appellant-Respondent.

- - - - -

[And a Second Third-Party Action]

_____

Mauro Lilling Naparty LLP, Woodbury (Seth M. Weinberg of counsel), for Cord Contracting Co., Inc., appellant-respondent.

Nicoletti Hornig & Sweeney, New York (Barbara A. Sheehan of counsel), for 404 Park Partners, LP and Sciame Construction, LLC, respondents-appellants.

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

Bader & Yakaitis, LLP, New York (Jesse M. Young of counsel), for Luis Sanchez, respondent.

_____

Order, Supreme Court, New York County (Robert D. Kalish,

J.), entered January 12, 2018, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment as to liability on the Labor Law § 240(1) and Labor Law § 241(6) claims against defendants 404 Park Partners, LP (404 Park) and Sciame Construction, LLC (Sciame) and defendant Cord Contracting Co. Inc. (Cord), denied Cord's cross motion for summary judgment dismissing the complaint as against it, and granted 404 Park and Sciame's cross motion for summary judgment to the extent of dismissing the common-law negligence and Labor Law § 200 claims as against 404 Park, and granting full contractual indemnification to 404 Park and partial contractual indemnification to Sciame from defendant/third-party defendant/second third-party plaintiff United Air Conditioning Corp. II (United) and contractual indemnification solely to 404 Park from Cord, unanimously modified, on the law, to grant conditional full contractual indemnification to Sciame from United, subject to the determination of the common-law negligence and Labor Law § 200 causes of action as against Sciame, and to grant conditional contractual indemnification to 404 Park and Sciame from Cord, to the extent of Cord's negligence, and otherwise affirmed, without costs.

Plaintiff was injured when he fell through an opening in the

floor where he was working in a building undergoing construction and landed on the floor below. 404 Park and Sciame are liable for plaintiff's injuries under Labor Law § 240(1) as the property owner and general contractor, respectively (*see Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 449-50 [1st Dept 2013]). Cord, a subcontractor, is also liable, because it "was charged with the duty to provide [c]overs over all floor openings, properly cleated to the floor," and thus "was an agent of the contractor, having been delegated the duties imposed by the statute upon the contractor" (*O'Connor v Lincoln Metrocenter Partners*, 266 AD2d 60, 61 [1st Dept 1999] [internal quotation marks omitted]; *see Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]).

404 Park, Sciame, and Cord are liable for plaintiff's injuries under Labor Law § 241(6), because, contrary to their contention, plaintiff established that the Industrial Code provisions on which his claim is predicated - 12 NYCRR 23-1.7(b)(1)(i), (ii), and (iii) – were violated and that the violations were a proximate cause of his accident (*see Alonzo*, 104 AD3d at 450).

As plaintiff's motion for summary judgment did not address his common-law negligence and Labor Law § 200 claims, the court

correctly declined to consider the parts of Cord's untimely cross motion that sought dismissal of those claims (*see Golubowski v City of New York*, 131 AD3d 900, 901 [1st Dept 2015]).

The court correctly denied 404 Park and Sciame's motion for summary judgment dismissing the common-law negligence and Labor Law § 200 claims as against Sciame, because issues of fact exist as to whether Sciame breached its duty to provide the construction workers with a safe place to work (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316-317 [1981]). Its contract with 404 Park delegated to Sciame the sole responsibility for, and control over, the means and methods of construction at the project site. In addition, Cord's foreman testified that he and a Sciame employee decided to use plywood boards with cleats to cover openings in the floor, instead of nailing the boards to the floor.

Sciame should have been awarded conditional full contractual indemnification from United, i.e., subject to the determination of its liability to plaintiff on the common-law negligence and Labor Law § 200 claims. Sciame's subcontract with United contemplates full indemnification if Sciame is held vicariously liable by reason of statute and partial indemnification if Sciame is found to have been negligent.

Based upon a plain reading of Sciame's subcontract with Cord, both 404 Park and Sciame are entitled to conditional contractual indemnification from Cord, to the extent plaintiff's injuries were caused by the negligent acts or omission of Cord or anyone directly or indirectly employed by it (*see Torres v Love Lane Mews, LLC*, 156 Ad3d 410, 411 [1st Dept 2017]).

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

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

ENTERED: JANUARY 15, 2019

CLERK

Sweeny, J.P., Richter, Kapnick, Gesmer, Kern, JJ.

8103 115-117 Nassau St., LLC, also known as 115-117 Nassau Street, LLC, et al., Plaintiffs-Respondents, Index 600991/08

-against-

Nassau Beekman, LLC, et al., Defendants-Appellants.

_____

Law Office of D. Paul Martin PLLC, New York (D. Paul Martin of counsel), for appellants.

Brill & Meisel, New York (Allen H. Brill of counsel), for respondents.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered August 16, 2016, which, after a nonjury trial, inter alia, granted judgment in favor of plaintiffs declaring that plaintiff Beekman Development, LLC was entitled to retain defendants' down payment as liquidated damages, and dismissed defendants' fourth, fifth and sixth counterclaims, unanimously affirmed, without costs.

This Court previously found that a triable issue of fact existed, precluding summary judgment for plaintiffs, as to whether the parties had entered the contract to purchase plaintiffs' air rights under a mutual mistaken belief that the air rights were available (*see* 74 AD3d 537 [1st Dept 2010]). At

trial, defendants failed to establish that there was a substantial mutual mistake existing at the time the parties entered into the contract warranting its rescission (*see Thor Props., LLC v Chetrit Group LLC*, 91 AD3d 476, 478 [1st Dept 2012]). The trial court properly determined that nothing in the contract or in the zoning law rendered the air rights conveyed to defendants unusable or unavailable to them.

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: JANUARY 15, 2019

CLERK

Sweeny, J.P., Richter, Kapnick, Gesmer, Kern, JJ.

8104 The People of the State of New York, Ind. 1085N/17
Respondent,

-against-

Jerill Felton,
Defendant-Appellant.

_____

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

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

_____

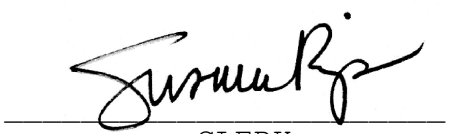
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Felicia Mennin, J.), rendered June 13, 2017,

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: JANUARY 15, 2019



CLERK

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

Sweeny, J.P., Richter, Kapnick, Gesmer, Kern, JJ.

8105 In re Jeremy B. and Others,

Dependent Children Under
Eighteen Years of Age, etc.,

Jeffrey B.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent,

Melissa N.,
Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jeremy W. Shweder of counsel), for respondent.

Dawne A. Mitchell, The Legal Aid Society, New York (Susan Clement of counsel), attorney for the children.

_____

Order, Family Court, Bronx County (Linda Tally, J.), entered on or about May 5, 2017, which determined, after a hearing, that respondent appellant father sexually abused the subject child Jalissa B., and derivatively neglected the other subject children, unanimously affirmed, without costs.

Family Court properly concluded that petitioner demonstrated by a preponderance of the evidence that appellant sexually abused the subject child Jalissa B. (*see* Family Ct Act § 1046 [b][i]) and derivatively neglected his biological son Jeremy B., and Rene

J.T., a child for whom he is legally responsible, based on Jalissa's out-of-court statements to the physician that attended her in the emergency room and the detective assigned to her case (*see* Family Ct Act § 1046 [a][vi]; *Matter of Nicole V.*, 71 NY2d 112, 117 [1987]), plus her medical records that corroborated her statements (*see Matter of Skylean A.P. [Jeremiah S.]*, 136 AD3d 515 [1st Dept 2016], *lv denied* 27 NY3d 907 [2016]; *Matter of Marelyn Dalys C.-G. [Marcial C.]*, 113 AD3d 569 [1st Dept 2014]). Having reviewed the record, we find no basis for disturbing the court's credibility determinations (*see Matter of Markeith G. [Deon W.]*, 152 AD3d 424, 424 [1st Dept 2017]).

A preponderance of the evidence supports the Family Court's determination that appellant derivatively neglected the other two children. Appellant's sexual abuse of Jalissa demonstrated such an impaired level of parental judgment as to create a substantial risk of harm to the children (*see Matter of Genesis A. [Candido A.]*, 150 AD3d 616, 617 [1st Dept 2017]; *Matter of Estefania S. [Orlando S.]*, 114 AD3d 453, 454 [1st Dept 2014]).

Appellant failed to preserve for appellate review his

argument that he was not a person legally responsible for Rene J.T. (*see Matter of Alijah S. [Daniel S.]*, 133 AD3d 555, 556 [1st Dept 2015], *lv denied* 26 NY3d 917 [2016]), and we decline to consider it.

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

ENTERED: JANUARY 15, 2019

CLERK

Sweeny, J.P., Richter, Kapnick, Gesmer, Kern, JJ.

8106 The People of the State of New York, Respondent, Ind. 2354/03 5938/03

-against-

Russell Alam, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Budd G. Goodman, J.), rendered February 27, 2004, convicting defendant, upon his plea of guilty, of robbery in the second degree, and sentencing him to a term of four years, unanimously affirmed.

Defendant, whose plea withdrawal motion was made on different grounds, failed to preserve his challenge to the plea colloquy, and it does not come within the narrow exception to the preservation requirement (*see People v Conceicao*, 26 NY3d 375, 382 [2015]). We decline to review defendant's claim in the interest of justice. As an alternative holding, we find that the record as a whole demonstrates that the plea was knowing, intelligent and voluntary. When defendant made a statement that could be viewed as negating the element of force, the plea court carefully ascertained that defendant was admitting that element.

The record here does not provide any basis to vacate the guilty plea based on defendant's mental status. We have considered and rejected defendant's remaining claims.

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

ENTERED: JANUARY 15, 2019

CLERK

Sweeny, J.P., Richter, Kapnick, Gesmer, Kern, JJ.

8107- Ind. 5170/14
8108 The People of the State of New York,
Respondent,

-against-

Russell Alam,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Melissa C. Jackson, J. at request to proceed pro se; Robert M. Stolz, J. at jury trial and sentencing), rendered June 14, 2016, convicting defendant of sexual abuse in the first degree (two counts) and endangering the welfare of a child, and sentencing him, as a second violent felony offender, to an aggregate term of seven years, and order, same court (Robert M. Stolz, J.), entered on or about May 3, 2010, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

The record, viewed as a whole, supports the conclusion that defendant abandoned his request to represent himself after his principal concern, a desire for new counsel, had been addressed

to his satisfaction and he continued with his new attorney without further complaint (*see People v Berrian*, 154 AD3d 486 [1st Dept 2017], *lv denied* 30 NY3d 1103 [2018]; *see also People v Pena*, 7 AD3d 259 [1st Dept 2004], *lv denied* 3 NY3d 645 [2004]).

The court providently exercised its discretion in denying defendant's CPL 440.10 motion without holding a hearing (*see People v Samandarov*, 13 NY3d 433, 439-440 [2009]; *People v Satterfield*, 66 NY2d 796, 799-800 [1985]). Defendant's ineffective assistance claims were unsubstantiated, or were refuted by the record.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 15, 2019

CLERK

Sweeny, J.P., Richter, Kapnick, Gesmer, Kern, JJ.

8109 In re Maria Mathew, Index 160702/16
Petitioner-Appellant,

-against-

Board of Education of the City School
District of the City of New York, et al.,
Respondents-Respondents.

_____

Law Office of Robert T. Reilly, New York (Oriana Vigliotti of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondents.

_____

Judgment (denominated an order), Supreme Court, New York County (Manuel J. Mendez, J.), entered July 21, 2017, denying the petition to annul respondents' determination, which terminated petitioner's probationary employment as a teacher, and granting respondents' cross motion to dismiss the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Although petitioner challenges the calculation of some of her ratings, there is no basis for finding that the termination of her probationary employment "was for a constitutionally impermissible purpose, violative of a statute, or done in bad

faith" (*Matter of Mendez v New York City Dept. of Educ.*, 28 NY3d 993, 994 [2016] [internal quotation marks omitted]; *see Matter of Brown v City of New York*, 280 AD2d 368, 370 [1st Dept 2001]). The evidence that petitioner received two "developing" annual overall ratings supports the conclusion that the determination was not made in bad faith, even though she received an "effective" rating in her last year (*see Matter of Leka v New York City Law Dept.*, 160 AD3d 497 [1st Dept 2018]; *Matter of York v McGuire*, 99 AD2d 1023 [1st Dept 1984], *affd* 63 NY2d 760 [1984]). Nor was petitioner entitled to notice of the possibility that her probationary employment would be terminated, beyond the required 60-day notice that was given (Education Law § 2573[1]). Furthermore, any deviations from certain procedures did not deprive petitioner of a substantial right or undermine the fairness and integrity of the rating process (*see Cooper v City of New York*, 158 AD3d 553, 554 [1st Dept 2018]).

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

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

ENTERED: JANUARY 15, 2019

CLERK

Sweeny, J.P., Richter, Kapnick, Gesmer, Kern, JJ.

8111 The People of the State of New York, Respondent, Ind. 925/14 3332/14

-against-

Richard Romo, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered August 12, 2015, 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: JANUARY 15, 2019

CLERK

Sweeny, J.P., Richter, Kapnick, Gesmer, Kern, JJ.

8112 The People of the State of New York, Ind. 1332/15
Respondent,

-against-

Anthony Barrett,
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 (Beth Fisch Cohen of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered October 27, 2015, convicting defendant, after a nonjury trial, of criminal trespass in the second degree, and sentencing him to a term of one year, unanimously affirmed.

The court properly denied defendant's suppression motion. Defendant approached a police officer and began a conversation, during which defendant volunteered facts that would support an inference that he had committed a larceny. Moreover, defendant's demeanor and evasive answers to the officer's questions raised the officer's level of suspicion. Accordingly, the officer had, at least, a founded suspicion of criminality that justified his common-law inquiry requesting additional information, including asking defendant to show the officer a package he had been

carrying (*see e.g. People v Perez*, 142 AD3d 410, 414-415 [1st Dept 2016], *affd* 31 NY3d 964 [2018]).

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

ENTERED: JANUARY 15, 2019

CLERK

Sweeny, J.P., Richter, Kapnick, Gesmer, Kern, JJ.

8113 In re Philippe Buhannic, Index 653624/16
Plaintiff-Appellant,

Patrick Buhannic,
Plaintiff,

-against-

Tradingscreen, Inc.,
Defendant-Respondent,

Pierre Schroeder, et al.,
Defendants.

_____

Philippe Buhannic, appellant pro se.

Morgan Lewis & Bockius LLP, New York (Peter Neger of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered on or about December 26, 2017, to the extent it denied plaintiff's motion for advancement of expenses incurred in this action, a Delaware action, and a corporate investigation, with leave to renew the parts of the motion seeking advancement of expenses incurred in bringing the instant motion and any renewal motion to determine his right to advancement and in the corporate investigation, unanimously affirmed, without costs.

Plaintiff seeks advancement of expenses under an indemnification agreement entered into between defendant

Tradingscreen, Inc., a Delaware corporation, and himself as chief executive officer and chairman of the board of Tradingscreen. Plaintiff is not entitled to expenses he incurred in the action brought against him by various directors of Tradingscreen pursuant to Delaware General Corporation Law § 225, because the action was not brought by reason of his corporate status. While there may have been an underlying board struggle over plaintiff's role as chief executive officer, the action did not seek to litigate the merits or substance of any such dispute but rather sought merely to declare invalid plaintiff's attempt to use his power as a shareholder to take control of the board. In any event, plaintiff is not entitled to expenses he incurred in that action, because he was not successful on the merits or otherwise; the action was dismissed as moot after plaintiff withdrew with prejudice the stockholder consents that he had presented to the board and any challenges to the board determination that prompted the action.

Except for the instant motion for advancement and any motion to renew permitted by the motion court, plaintiff is not entitled to advancement of expenses in this action, because he did not obtain board approval to commence the action.

Plaintiff has failed to demonstrate that the court erred in

requiring him to renew his motion, supported by further exhibits, insofar as it sought advancement for expenses incurred in making the instant motion and any authorized renewal motion and in the aforementioned corporate investigation.

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: JANUARY 15, 2019

CLERK

Sweeny, J.P., Richter, Kapnick, Gesmer, Kern, JJ.

8114 The People of the State of New York, Respondent, SCI 1967/16

-against-

Dave Tolbert, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Brittany N. Francis), for appellant.

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

_____

Judgment, Supreme Court, Bronx County (Shari R. Michels, J.), rendered June 21, 2017, convicting defendant, upon his plea of guilty, of attempted assault in the second degree and sentencing him, as a second felony offender, to a term of two to four years, unanimously affirmed.

We reject the People's argument that defendant's challenge to the facial sufficiency of the predicate felony offender statement required preservation (*People v Soto*, 138 AD3d 533 [1st Dept 2016], *lv denied* 28 NY3d 937 [2016]. However, any failure of the predicate felony statement to list all relevant periods of incarceration was harmless because the record on appeal, including documents relating to defendant's criminal history, indisputably establishes the necessary aggregate tolling period

(*see People v Kelly*, 65 AD3d 886, 889-890 [1st Dept 2009], *lv denied* 13 NY3d 860 [2009]; *compare People v Soto*, 138 AD3d at 534 [record did not permit determination of tolling period]).

Defendant made a valid waiver of his right to appeal (*see People v Bryant*, 28 NY3d 1094 [2016]), which forecloses review of his excessive sentence claim. Regardless of whether defendant validly waived his right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 15, 2019

CLERK

Sweeny, J.P., Richter, Kapnick, Gesmer, Kern, JJ.

8115 The People of the State of New York, Ind. 1348/09
Respondent,

-against-

Diego Carmona,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Lori Ann Farrington of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Caesar D. Cirigliano, J. at suppression hearing; John W. Carter, J. at jury trial and sentencing), rendered April 3, 2013, convicting defendant of attempted robbery in the second degree, and sentencing him to a term of 2½ years, unanimously affirmed.

The record supports the suppression court's determination that the lineup procedure was not unduly suggestive (*see generally People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]). Our review of photographs of the lineup reveals that the difference in ethnicity between defendant and the fillers was not reflected in their actual appearances, and that there was no significant disparity in appearances that would

single defendant out (*see People v Rodriguez*, 52 AD3d 399 [1st Dept 2008], *lv denied* 11 NY3d 834 [2008]; *People v Ahmed*, 173 AD2d 546, 547 [2d Dept 1991], *lv denied* 78 NY2d 1073 [1991]). Defendant's argument that the lineup was nevertheless suggestive from the victim's point of view is unsupported by the hearing record.

Defendant did not preserve his specific present challenges to the admission of the victim's lineup identification at trial under CPL 60.25, and we decline to review them in the interest of justice. As an alternative holding, we conclude that the People laid a sufficient foundation under that statute (*see People v Bayron*, 66 NY2d 77, 81 [1985]; *People v Mendoza*, 293 AD2d 326 [1st Dept 2002], *lv denied* 98 NY2d 678 [2002]), and the victim's testimony that he was sure of his identification at the time of the lineup was proper (*see People v Jamerson*, 68 NY2d 984, 986 [1986]).

Although the better practice in this case, where a single eyewitness identification was the only evidence linking defendant to this crime, would have been to grant defendant's request for an identification charge that discussed the weapon focus effect and memory decay as factors affecting the reliability of eyewitness identification, the trial court did not abuse its

discretion in failing to do so (*People v Boone*, 30 NY3d 521, 537 [2017]). We find that the court sufficiently instructed the jury on the subject of identification (*People v Lopez*, 1 AD3d 168, 169 [1st Dept 2003], *lv denied* 1 NY3d 598 [2004]; *see also People v Whalen*, 59 NY2d 273, 279 [1983]), particularly since the court generally followed the Criminal Jury Instructions (*see People v Vaughn*, 132 AD3d 456, 457 [1st Dept 2015], *lv denied* 26 NY3d 1151 [2016]).

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning identification and credibility. The evidence supports the conclusion that the victim had an adequate opportunity to observe defendant during the crime.

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

ENTERED: JANUARY 15, 2019

CLERK

Sweeny, J.P., Richter, Kapnick, Gesmer, Kern, JJ.

8116N James W. Thomas II, Index 650779/16
Plaintiff-Respondent,

-against-

Karen's Body Beautiful LLC, et al.,
Defendants-Appellants.

_____

Rafiq Kalam Id-Din, Brooklyn, appellant pro se and for Karen's Body Beautiful LLC, Damani Saunderson and Karren Tappin, appellants.

Greenberg Freeman LLP, New York (Sanford H. Greenberg of counsel), for respondent.

_____

Order, Supreme Court, New York County (Martin Schoenfeld, J.), entered December 22, 2017, which denied defendants' motion to vacate a default judgment against them, unanimously affirmed, without costs.

Because defendants do not dispute that the process server's affidavits constituted prima facie evidence of proper service, our review is limited to whether the affidavits submitted by defendants on their motion to vacate were sufficient to raise a triable issue of fact as to service, warranting a traverse hearing. We find that the motion court correctly determined that the affidavits constituted mere conclusory denials, which were insufficient to raise an issue of fact as to proper service.

(*Grinshpun v Borokhovich*, 100 AD3d 551, 552 [1st Dept 2012], *lv denied* 21 NY3d 857 [2013]; *Colebrooke Theat. LLP v Bibeau*, 155 AD3d 581, 581 [1st Dept 2017], *lv dismissed* 31 NY3d 1137 [2018]; *Reliable Abstract Co., LLC v 45 John Lofts, LLC*, 152 AD3d 429, 429 [1st Dept 2017], *lv dismissed* 30 NY3d 1056 [2018]).

The affidavits submitted by defendants failed to dispute any specifics contained in the process server's detailed affidavits. The affidavits did not dispute that the party served was accurately described by the process server or was present at the time of service. Moreover, the affidavits confirmed that the addresses of service were correct. Defendants' contention that the denials of having met the process server or anyone employed by the process serving company raised an issue of fact as to service are unavailing. There is no indication that the process server would have introduced himself by name or identified his employer when delivering the summons.

Because defendants failed to raise an issue of fact as to service, the motion court properly found that it had personal jurisdiction over defendants and denied vacatur under CPLR 5015(a)(4). The only excuse that defendants offered for their default was lack of service; as no issue of fact existed as to service, the motion court also properly found that defendants had

failed to offer a reasonable excuse for their default and denied vacatur under CPLR 5015(a)(1). With regard to CPLR 317, defendants failed to rebut the presumption of notice of the action created by the emails and proof of mailings submitted by plaintiff (*see Reliable Abstract Co.*, 152 AD3d at 430).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: JANUARY 15, 2019

CLERK

Sweeny, J.P., Richter, Kapnick, Gesmer, Kern, JJ.

8117N Hotel Carlyle Owners Corporation, Index 157070/12
Plaintiff-Appellant,

-against-

Murray Schwartz,
Defendant-Respondent.

_____

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

Murray Schwartz, respondent pro se.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered November 28, 2017, which, to the extent appealed from as limited by the briefs, upon granting defendant's motion to compel the return of certain funds paid to plaintiff, failed to credit plaintiff with certain statutory prejudgment interest or to award it certain attorneys' fees, unanimously modified, on the law, to credit plaintiff with the amount of $10,238.46 in interest against defendant, and otherwise affirmed, without costs.

The court should have credited plaintiff cooperative corporation with statutory prejudgment interest on all the maintenance payments that defendant former unit owner failed to make. Plaintiff correctly calculates, without double counting for interest accrued on a partial judgment issued earlier in the

action, that it is owed $10,238.46.

Plaintiff never moved for a determination of its attorneys' fees. Rather, it simply introduced evidence of the fees in an accounting called for sua sponte by the court to determine the application of monies collected by plaintiff. The court correctly held that if plaintiff wished to seek a determination of attorneys' fees, it should move for summary judgment (*see Tirado v Miller*, 75 AD3d 153, 158 [2nd Dept 2010]).

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

ENTERED: JANUARY 15, 2019

CLERK

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

8278N Faith In Action Deliverance Ministries, Plaintiff-Appellant, Index 21066/18E

-against-

3231 Associates, LLC, Defendant-Respondent.

_____

The Valentine Law Firm, PLLC, New York (Michael A. Valentine of counsel), for appellant.

Kenneth M. Bushell, Bronx, for respondent.

_____

Order, Supreme Court, Bronx County (Donald A. Miles, J.), entered May 3, 2018, which denied plaintiff's motion for a preliminary injunction staying expiration of a 30-day notice of termination and restraining defendant from taking any action to commence an eviction proceeding or to sell or encumber the premises, unanimously reversed, on the law, the facts and in the exercise of discretion, with costs, the motion granted, and defendant is restrained from taking any action to commence or continue a summary proceeding to terminate the month-to-month tenancy, or to convey or otherwise encumber the premises, pending determination of plaintiff's claims for a declaratory judgment, specific performance and breach of contract, on condition that plaintiff remains current in payment of use and occupancy in the

amount of $15,000 per month.

The motion court improvidently exercised its discretion in denying injunctive relief based on its finding that plaintiff's claims could be asserted as defenses in a Civil Court holdover proceeding, since Civil Court does not have authority to grant an injunction restraining sale of the property, or to grant the equitable relief sought by plaintiff, namely a declaratory judgment and specific performance (*see* City Civil Court Act §§ 208, 209[b], 212-a; *Wilen v Harridge House Assoc.*, 94 AD2d 123, 125 [1st Dept 1983]; *BLF Realty Holding Corp. v Kasher*, 299 AD2d 87, 90 [App Term, 1st Dept 2002]). Since Civil Court would not be able to afford complete relief to plaintiff, the motion court erred in invoking the general rule that Civil Court is the preferred forum for resolution of landlord-tenant disputes (*see e.g. Simens v Darwish*, 105 AD3d 686 [1st Dept 2013]).

In support of its application for a preliminary injunction, plaintiff submitted evidence demonstrating a probability of ultimate success on the merits, danger of irreparable injury in the absence of an injunction, and a balance of equities tipping in favor of the moving party (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; *1234 Broadway LLC v West Side SRO Law Project, Goddard Riverside Community Ctr.*, 86 AD3d

18, 23 [1st Dept 2011]).

Absent an injunction, plaintiff would suffer irreparable injury since it would lose the ability to specifically enforce its option under the lease to purchase the property for a specified price, after it had expended substantial sums renovating the property to suit its needs as a place of worship. The equities tip entirely in favor of plaintiff, since defendant has not asserted that an injunction would cause it any harm that cannot be avoided by directing payment of use and occupancy.

As for the likelihood of success on the merits, plaintiff demonstrated through its verified complaint and annexed exhibits that it has a likelihood of success on its claim that defendant breached the covenant of good faith and fair dealing. Defendant initially proffered a contract of sale consistent with the lease terms, which plaintiff signed, but then refused to sign any contract unless plaintiff agreed to pay a substantially higher price for the property, thereby preventing plaintiff from being able to obtain a mortgage commitment within the time provided by the lease. Defendant did not dispute plaintiff's factual showing, but contended that plaintiff's claim was barred by the statute of frauds because no contract was signed before the lease expired and the doctrine of promissory estoppel could not avoid

that requirement. However, defendant did not address plaintiff's claim that its conduct breached the implied covenant of good faith and fair dealing implied in every contract, which embraces a pledge that "'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract'" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]; *see F & S Pharm. v Dandra Realty Corp.*, 302 AD2d 204, 206 [1st Dept 2003]).

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

ENTERED: JANUARY 15, 2019

CLERK

CORRECTED OPINION - JANUARY 25, 2019

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, Jr., J.P.
Ellen Gesmer
Jeffrey K. Oing
Anil C. Singh, JJ.

7491 & M-4677
Index 151562/18

_____x

In re New York State Land
Title Association, Inc., et al.,
Petitioners-Respondents,

-against-

The New York State Department of Financial
Services, et al.,
Respondents-Appellants.

- - - - -

New York State Title Closer Association Inc.,
American Land Title Association **and Property**
Casualty Insurers Association of America,
Amic**i** Curiae.

_____x

Respondents appeal from an order of the Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about July 5, 2018, which granted the petition to annul Insurance Regulation 208, codified at 11 NYCRR 228 on October 18, 2017, effective December 18, 2017.

Barbara D. Underwood, Attorney General, New York (Steven C. Wu and Matthew William Grieco of counsel), for appellants.

Gibson, Dunn & Crutcher LLP, New York (Mylan L. Denerstein, Akiva Shapiro and Lee R. Crain of counsel), for respondents.

Zane and Rudofsky, New York (Edward S. Rudofsky and Eric S. Horowitz of counsel), for New York State Title Closer Association Inc., amicus curiae.

Herrick Feinstein, LLP, New York (Arthur G. Jakoby and Elena T. McDermott of counsel), for **American Land Title Association**, amicus curiae.

Greenberg Traurig, LLP, Albany (Henry M. Greenberg and Jennifer M. Gomez of counsel), for Property Casualty Insurers Association of America, amicus curiae.

SINGH, J.

The primary issues on this appeal are whether Insurance Law § 6409(d) is ambiguous as to the term "other consideration or valuable thing," and whether certain provisions of Insurance Regulation 208, promulgated by the Department of Financial Services (DFS) have a rational basis. Insurance Law § 6409(d) was enacted by the Legislature to explicitly prohibit the practice of kickbacks from insurers to title closers, attorneys, and other agents in the real estate market. The statute forbids insurers from giving, among other things, "other consideration or valuable thing" to "any person, firm, or corporation acting as agent, representative, attorney, or employee of the owner, lessee, mortgagee or of the prospective owner." Insurance Regulation 208 was promulgated to ensure proper and non-excessive rates for purchasers of title insurance[1] and reasonable charges for ancillary services, such as closer's fees.[2]

We find that Insurance Law § 6409(d) is unambiguous, and that, with the exception of two provisions, Insurance Regulation 208 has a rational basis as it echoes and further defines the legislative intent behind Insurance Law § 6409(d).

---

[1] 11 NYCRR 228.0, 228.2, 228.3, 228.4

[2] 11 NYCRR 228.5(d), 228.5(a)(1)-(3)

Background

The genesis of this dispute is a set of regulations of the title insurance industry promulgated by respondent DFS as Insurance Regulation 208, codified at 11 NYCRR 228, on October 18, 2017, and effective December 18, 2017.

"By definition, title insurance involves 'insuring the owners of real property . . . against loss by reason of defective titles and encumbrances thereon and insuring the correctness of searches for all instruments, liens or charges affecting the title to such property" (*L. Smirlock Realty Corp. v Title Guar. Co.*, 52 NY2d 179, 187 [1981]). "Essentially, . . . a policy of title insurance is a contract by which the title insurer agrees to indemnify its insured for loss occasioned by a defect in title" (*id.* at 188).

DFS was created to accomplish a number of goals including "[t]o promote the reduction and elimination of . . . unethical conduct by, and with respect to . . . insurance . . . institutions and their customers" (Financial Services Law § 102[k]). "Responsibility for administering the Insurance Law rests with the Superintendent" of DFS, "who has broad power to interpret, clarify, and implement the legislative policy" (*Matter of Medical Socy. of State of N.Y. v Serio*, 100 NY2d 854, 863-64 [2003] [internal quotation marks and citations omitted]). "[T]he

Superintendent's 'interpretation, if not irrational or unreasonable, will be upheld in deference to [her] special competence and expertise with respect to the insurance industry, unless it runs counter to the clear wording of a statutory provision'" (*id.* at 864).

Title insurers are required to file with DFS rate manuals, among other documents related to premium rates and the issuance of policies (Insurance Law § 6409[b]). In order to assess how the insurers were calculating premiums, DFS conducted an investigation of all licensed title insurers in New York State based on information from 2008 to 2012. On December 10, 2013, DFS held a public hearing, at which industry representatives and expert witnesses testified and provided written statements.

Following the investigation, DFS determined that some practices that resulted in higher premiums and closing costs for consumers, violate Insurance Law § 6409(d). DFS found that "insurers reported meal and entertainment expenses in the following categories: advertising, marketing and promotion, and travel, and 'other'" (Statement of Maria T. Vullo, Superintendent New York State DFS, Prepared for Delivery at Public Hearing: An Examination of Recent Title Insurance Regulation in New York, January 12, 2018) and expenses reported in the "other" category were "replete with excessive entertainment," often including

"wining and dining . . . of real estate professionals" (*id.*). For example, one insurer spent approximately $2.5 million to $5.4 million a year, amounting to about 5% to 14% of its charged premiums, on tickets to basketball, baseball, and tennis events for attorneys and other clients in a position to refer business to the insurer (*id.*). Some insurers paid for their clients to go to bars, strip clubs, and Hooters restaurants (*id.*). Insurers paid for "expensive designer goods" and "gift cards" for referral sources (*id.*). One insurer spent about 15% to 30% of premiums on entertainment and gifts for referral sources. Another insurer spent about 50% of its revenue on meals for referral sources. Insurers would report these expenses in the information submitted to DFS to support the premiums they charged (*id.*).

As a result of its investigation, DFS estimated that, on average, 5.3% of premiums charged statewide violated Insurance Law § 6409(d) from 2008 to 2012. To prevent such practices and to protect consumers from exorbitant costs, DFS promulgated Insurance Regulation 208.

Insurance Regulation 208

The statement of scope and purpose of Insurance Regulation 208 observed that "[c]onsumers of title insurance usually rely upon the advice of real estate professionals, including attorneys or real estate agents, who order the policy on their behalf," and

that "[c]onsumers also typically pay any invoice presented at the closing without seeking documentation or further clarification" (11 NYCRR 228.0[a]).

Insurance Regulation 208 states:

> "Pursuant to Insurance Law [§] 6409(d) [among other provisions], no [title insurer] or any other person acting for or on behalf of [one] . . . shall offer or make any rebate, directly or indirectly, or pay or give any consideration or valuable thing, to any applicant, or to any person, firm or corporation acting as an agent, representative, attorney or employee of the actual or prospective owner, lessee, mortgagee of the real property or any interest therein, as an inducement for, or as compensation for, any title insurance business, *including future title insurance business, and maintaining existing title insurance business, regardless of whether provided as a quid pro quo for specific business*" (11 NYCRR 228.2[a] [emphasis added]).

The Regulation specifies both impermissible (11 NYCRR 228.2[b]) and permissible practices (11 NYCRR 228.2[c]).

11 NYCRR 228.2 b) specifically prohibits an insurer from offering any of the following as an inducement, a list which "should not be considered as exclusive or exhaustive" (11 NYCRR 228.2[d]):

> "(1) Meals and beverages unless otherwise authorized under sub-division (c) of this section;
>
> "(2) entertainment, including tickets to sporting events, concerts, shows or artistic performances;
>
> "(3) gifts, including cash, gift cards, gift certificates, or other items with a specific monetary face value;
>
> "(4) outings, including vacations, holidays, golf, ski, fishing, and other sport outings, gambling trips, shopping trips, or trips to recreational areas, including country clubs;

> "(5) parties, including cocktail parties and holiday parties, open houses;
>
> "(6) providing assistance with business expenses of another person, including . . . rent, employee salaries, advertising, furniture, office supplies, . . . or automobiles, or leasing, renting, operating, or maintaining any of such items, for use by other than a[n insurer];
>
> "(7) use of premises, unless a fair rental fee is charged that is equal to the market value in the premises' geographical area;
>
> "(8) paying the fees or charges of any professional representing an insured as part of a real estate transaction, such as an attorney . . . appraiser . . . , or paying rent or . . . any part of the salary or other compensation of any employee or officer of any current or prospective customer; and
>
> "(9) providing or offering to provide non-title services, without a charge that is commensurate with the actual cost thereof" (11 NYCRR 228.2[b]).

However, the Regulation continues, "[s]ubject to subdivision (a) or (b) of" section 228.2, certain expenses, which are listed "as examples of permitted ... practices under Insurance Law 6409(d)" and "should not be considered as exclusive or exhaustive" (11 NYCRR 228.2[d]), are "permissible provided that they are without regard to insured status or conditioned directly or indirectly on the referral of title business, and offered with no expectation of, or obligation imposed upon, to refer, apply for or purchase insurance," and provided that they are "reasonable and customary, and not lavish or excessive" (11 NYCRR 228.2[c]):

"(1) Advertising or marketing in any publication, or media, at market rates;

"(2) Advertising and promotional items of a de minumus [sic] value that include a permanently affixed logo of a title insurance agent or title insurance corporation;

"(3) Promotional or marketing events including complementary [sic] food and beverages that are open to and attended by the general public;

"(4) Continuing legal education events including complementary [sic] food and beverages that are open to any member of the legal profession;

"(5) Complementary [sic] attendance offered by a title insurance corporation, title insurance agent as a host of a marketing or promotional event, including food and beverages available to all attendees so long as (a) title insurance business is discussed for a substantial portion of the event including a presentation of title insurance products and services, (b) such events are not offered on a regular basis or as a regular occurrence, and (c) at least twenty-five diverse individuals from different organizations not affiliated with the host attend or were, in good faith, invited to attend in person;

"(6) Charitable contributions made by negotiable instrument made payable only to the charitable organization in the name of the title insurance corporation or title insurance agent;

"(7) Political contributions" (11 NYCRR 228.2[c]).

DFS promulgated a related regulation prohibiting an insurer from including in expense schedules "any expenditure that is prohibited or exceeds any expenditure permitted under the Insurance Law or this Part" (11 NYCRR 228.3[a][1]). The regulation presents three options to insurers: (1) insurers could either certify a lack of any improper expenses in the past six

years; (2) submit new rates not based on any improper expenses; *or* (3) submit a uniform 5% reduction in its base rates (11 NYCRR 228.3[c]).

Additionally, 11 NYCRR 228.5(d) imposes an absolute ban on the collection of certain fees by in-house closers, who are employed by title insurers, but permits independent closers to collect those fees as long as the fees are reasonable and the requisite notice is provided to consumers.

Finally, DFS promulgated 11 NYCRR 228.5(a), which provides that an insurer "shall not charge an applicant in connection with a residential real property closing an ancillary or other discretionary fee more than" 200% of the insurer's out-of-pocket costs paid for "a Patriot search" (11 NYCRR 228.5[a][1]),[3] "a bankruptcy search" (*id.* 228.5[a][2]), or "municipal or departmental search" (*id.* 228.5[a][3]), unless the insurer does not pay any out-of-pocket costs for such a search, in which case the insurer shall not charge the applicant more than 200% of whichever is less: the amount charged by an affiliated third party, or the fair market value of the search as charged by a

[3] A "Patriot search" apparently relates to a search of a terrorist list under the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Pub L No 107-56, 115 Stat 272), commonly known as the USA Patriot Act or the Patriot Act.

non-affiliated third party (*id.* § 228.5[a][1-3]). 11 NYCRR 228.5(a)(1)-(3) caps fees for certain ancillary searches at 200% of the out-of-pocket costs of those searches, or 200% of certain other measures in the absence of any out-of-pocket costs. The regulations are intended to reduce "exorbitant" costs to consumers.

The CPLR Article 78 Proceeding

On February 20, 2018, petitioners commenced this CPLR article 78 proceeding seeking to annul Insurance Regulation 208, arguing, among other things, that its provisions are arbitrary and capricious, and that the regulation exceeds DFS's regulatory authority in violation of separation of powers.

Supreme Court granted the petition, and annulled Insurance Regulation 208 in its entirety. Specifically, the court concluded that the provision "other consideration or valuable thing" was ambiguous as to whether it embraced "marketing and entertainment expenses." The court reasoned that the legislative materials supporting Insurance Law § 6409(d) indicate that it was promulgated to "permit reduction in the cost of title coverage by barring payment of commissions to attorneys or real estate brokers by title insurers; prohibiting the receipt of any commission or rebate as an inducement for the placement of title insurance business," all of which do not encompass marketing and

entertainment expenses.

The court explained that it reached its conclusions by applying the principle that "the meaning of an ambiguous word" should be interpreted "in relation to the meanings of adjacent words" (*Matter of Kese Indus. v Roslyn Torah Found.*, 15 NY3d 485, 491 [2010]). It held that the statutory term "'other consideration or valuable thing' cannot embrace ordinary marketing and entertainment expenses because ordinary marketing and entertainment expenses are not akin to 'rebate,' 'fee,' 'premium,' 'charge' and 'commission,'" as such expenses were not intended to be barred by the Legislature. Rather, those terms, "when construed together, indicate that the Legislature sought to remedy the mischief of kickbacks." The court further observed that this interpretation is consistent with the title of Insurance Law § 6409: "Filing of policy forms; rates; classification of risks; *commissions and rebates prohibited*" (*id.* [emphasis added]). Accordingly, the court found that it must annul the regulation on inducements and its related regulations.

Additionally, Supreme Court held that DFS's rationale for its regulation on payments to closers was "irrational" and "internally inconsistent," as the distinction based on the closer's status as in-house or independent was arbitrary. It further found that the ancillary fee cap regulation was arbitrary

because "[t]he 8 affidavits submitted by [DFS] are . . . devoid of any economic or other analysis justifying the 200% caps imposed," and "the record provided is without any formulas or explanation begging the question as to whether 200% is just as arbitrary a figure as 300% or 150%."

Supreme Court concluded that the foregoing rules required annulling Insurance Regulation 208 in its entirety, to avoid excising so many provisions that the remaining provisions would be potentially inconsistent with what DFS intended in promulgating the regulations and the legislative intent underlying the enabling statutes. Alternatively, even if the foregoing regulations were severable, the court found that the ancillary fee caps should be annulled as arbitrary and capricious. DFS appeals.

Insurance Law § 6409(d)

We conclude, contrary to Supreme Court's determination, that Insurance Law § 6409(d) is unambiguous as to the term "other consideration or valuable thing." Generally, when interpreting a statute, courts "look first to the statutory text, which is the clearest indicator of legislative intent," since it is "fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature" (*Matter of Anonymous v Molik*, 32 NY3d 30, 37 [2018] [internal citations

omitted]). "[W]here the language of a statute is clear and unambiguous, courts must give effect to its plain meaning," as the "literal language of a statute is generally controlling unless the plain intent and purpose of a statute would otherwise be defeated" (*id.* [internal citations and quotation marks omitted]).

Statutory construction requires that "all parts of a statute . . . be given effect," since "a statutory construction which renders one part meaningless should be avoided" (*id.*). The statute's sections "must be considered together and with reference to each other" (*id.*). A court should only substitute its own interpretation of a statute where "the language is ambiguous or where literal construction would lead to absurd or unreasonable consequences that are contrary to the purpose of the [statute's] enactment" (*id.*).

Insurance Law § 6409(d) provides that

> "[N]o [insurer] or any other person acting for or on behalf of [one] . . . shall offer or make, *directly or indirectly*, any rebate of any portion of the fee, premium or charge made, or pay or give to any applicant, or to any person, firm, or corporation acting as agent, representative, attorney, or employee of the owner, lessee, mortgagee or the prospective owner, lessee, or mortgagee of the real property or any interest therein, *either directly or indirectly*, any commission, any part of its fees or charges, *or any other consideration or valuable thing*, as an *inducement* for, or as compensation for, *any title insurance business*, nor shall any applicant, or any person, firm, or corporation acting as agent, representative, attorney, or employee of the owner,

> lessee, mortgagee or of the prospective owner, lessee, or mortgagee of the real property or anyone having any interest in real property knowingly receive, *directly or indirectly*, any such rebate or other consideration or valuable thing" (emphasis added).

The plain text of Insurance Law § 6409(d) unambiguously prohibits an insurer from "offer[ing] or mak[ing], directly or *indirectly*, . . . any commission, any part of its fees or charges, *or any other* consideration or *valuable thing*, as an *inducement* for, or as compensation for, *any* title insurance business" (emphasis added). The statute repeatedly states that a proscribed exchange may be done "indirectly." After listing specific types of consideration such as commissions, the legislature elaborates and plainly expands the statute's parameters to "*any other* consideration *or valuable thing*, as an *inducement* for, *or* as compensation for, *any* title insurance business" (Insurance Law § 6409[d] [emphasis added]). The use of the word "any" unambiguously indicates that this legislative prohibition was intended to be broadly construed, allowing for DFS to define "any other consideration or valuable thing," provided, of course, it had a rational basis to do so. Moreover, the phrases "an inducement" and "any title insurance" need not refer to a quid pro quo concerning one specific act of doing business, but may reasonably be applied to a more longstanding arrangement in which insurers regularly spend vast

sums of money on extravagant gifts for referral sources, who are tacitly expected to return the favors by providing a reliable stream of referrals.

"[T]he Legislature may declare its will, and after fixing a primary standard, endow administrative agencies with the power to fill in the interstices in the legislative product by prescribing rules and regulations consistent with the enabling legislation" (*Matter of General Elec. Capital Corp. v New York State Div. of Tax Appeals, Tax Appeals Trib.*, 2 NY3d 249, 254 [2004] [internal quotation marks and citation omitted]). "In so doing, an agency can adopt regulations that go beyond the text of that legislation, provided they are not inconsistent with the statutory language or its underlying purposes" (*id.*). Such a regulation should be upheld as long as it "is consistent with its enabling legislation and is not so lacking in reason for its promulgation that it is essentially arbitrary" (*id.* [internal quotation marks and citation omitted]).

Here, DFS conducted an investigation of the title insurance industry covering a recent five-year period. It found that lavish gifts were routinely being offered in anticipation of receiving business from intermediaries such as lawyers, generally unbeknownst to and at the expense of consumers, who ultimately pay higher premiums as a result. DFS reasonably sought to put an

end to this ethically dubious scheme by clarifying that such practices are impermissible under Insurance Law § 6409(d). Supreme Court annulled section 228.2(a) on the ground that Insurance Law § 6409(d) is limited to quid pro quo exchanges for specific business. To be sure, Insurance Law § 6409(d) prohibits a direct exchange of kickbacks for specific business. However, this narrow interpretation of Insurance Law § 6409(d) failed to accord proper deference to DFS's rational interpretation of a statute within the field of its expertise (*see Matter of Medical Socy. of State of NY*, 100 NY2d at 863-864; *see also Matter of Consolation Nursing Home v Commissioner of N.Y. State Dept. of Health*, 85 NY2d 326, 331 [1995]).

Moreover, had the Legislature intended to limit this provision to the direct exchange of consideration for a specific referral or some other discrete business, the Legislature could have more clearly expressed such a relatively narrow prohibition by simply referring to "consideration as compensation for title insurance business." Instead, after listing specific consideration such as commissions, the Legislature referred more expansively to "*any other* consideration *or valuable thing*, as an *inducement* for, *or* as compensation for, *any* title insurance business" (Insurance Law § 6409[d]).

Further, the phrases "an inducement" and "any title

insurance" need not refer to a quid pro quo concerning one specific act of doing business, but can reasonably be applied to a more longstanding arrangement in which insurers regularly spend vast amounts of money on gifts to sources who are expected to provide a reliable stream of referrals in exchange (*id.*). We find that Insurance Regulation 208's ban on such practices is harmonious with the legislative language and intent to prevent consumers from being required to subsidize unscrupulous exchanges of valuable things for real estate professionals.

Petitioners' contention that 11 NYCRR 228.3(c) is impermissibly retroactive and otherwise arbitrary and capricious is without merit (*see Matter of Acevedo v New York State Dept. of Motor Vehs.*, 29 NY3d 202, 228-229 [2017]). The regulation does not penalize insurers for past conduct that was subsequently prohibited. It simply requires insurers to submit accurate information about their relevant expenses, in accordance with existing law including Insurance Law § 6409(d), as the basis for establishing future rates to be approved by DFS (*see id.*). It also gives them a fallback option to have a uniform 5% rate cut, which DFS supported with an affidavit explaining its formula and how it reached the 5% conclusion. Rather than violate insurers' due process rights, this procedure allows insurers to avoid having to explain and submit documentation of its previous

expense schedules, less the expenditures that violated Insurance Regulation 208 (11 NYCRR 228.3[c]).

Restrictions on Payments to Closers

Next, we turn to whether Supreme Court erred in annulling the restrictions on payments to closers. We agree with Supreme Court's conclusion that there is no rational basis for DFS to impose an absolute ban on the collection of certain fees by in-house closers while permitting independent closers to collect the same fees as long as the fees are reasonable and the requisite notice is provided to consumers (11 NYCRR 228.5[d]). DFS's assertion that if independent closers were not allowed to charge fees in excess of premiums they would likely leave the industry is speculative at best, and ultimately fails to reconcile DFS's contradictory positions about the legality of closer fees. As Supreme Court noted, DFS's rationale for this internally inconsistent regulation fails to justify the distinction between independent and in-house closers.

Ancillary Search Fees

Nor is there a rational basis for capping fees for certain ancillary searches at 200% of the out-of-pocket costs of those searches or 200% of certain other measures in the absence of any out-of-pocket costs (11 NYCRR 228.5[a][1]-[3]). DFS's argument that the 200% cap allows insurers to be adequately compensated

for the additional costs of conducting such searches while turning a reasonable profit is conclusory (*see New York State Assn. of Counties v Axelrod*, 78 NY2d 158, 167-168 [1991]). In the absence of further "empirical documentation, assessment and evaluation" to support this regulation, the 200% caps appear to be based on an "arbitrary, across-the-board percentage figure"; thus, section 228.5(a)(1)-(3) is "so lacking in reason for its promulgation that it is essentially arbitrary" (*id.* at 167-168 [internal quotation marks and citations omitted]).

Severability of Invalid Regulations

DFS contends that even if the court properly annulled any of the foregoing regulations, Supreme Court erred in annulling the remainder of Insurance Regulation 208 on the ground that the rules on inducements and closer fees were inseverable. We agree.

The test for whether statutory provisions are severable is "whether the Legislature would have wished the statute to be enforced with the invalid part exscinded" (*People v On Sight Mobile Opticians*, 24 NY3d 1107, 1109 [2014] [internal quotation marks and citations omitted]). Generally, if the provision is "at the core of the statute, and interwoven inextricably through the entire regulatory scheme," the entire statute may be invalidated (*id.* at 1110 [internal quotation marks and citation omitted]).

Here, the regulations on closer fees and ancillary fee caps, which were properly annulled, concern a "discrete regulatory topic" (*id.*) with little bearing on the validly promulgated rule against improper inducements. Petitioners have failed to show that any invalid regulations are inextricably intertwined with any other provisions of Insurance Regulation 208. Accordingly, we conclude that the invalid regulations are severable from the remainder of Insurance Regulation 208 so that the entire regulation need not be annulled in its entirety[4] (*see id.* at 1109-1110).

Separation of Powers

Finally, we reject petitioners' argument that Insurance Regulation 208 in its entirety violates the principle of separation of powers. An agency exceeds its regulatory mandate

[4] DFS argues that if this Court finds the 11 NYCRR 228.5(d) exception for independent closers to be invalid, the proper remedy is to extend the flat ban on in-house closers' additional fees to independent closers as well. But to do so would be "jurisprudentially unsound . . . since the product of such an effort would be a regulatory scheme that neither the Legislature nor the [DFS] intended" (*Boreali v Axelrod*, 71 NY2d 1, 14 [1987]). DFS promulgated section 228.5(d)(2) after a public hearing at which industry representatives raised concerns about the consequences of banning separate fees. DFS purportedly decided that the comments received at the hearing showed it to be unwise and unnecessary to ban certain closers from collecting any separate fees. If this Court were to annul only the independent closers exception, new regulations would be improperly judicially created without ever having been approved by the agency through the usual public hearing process.

and usurps the legislative role when it "reache[s] its own conclusions about the proper" balance of conflicting "political, social and economic" interests "without *any* legislative guidance" (*Boreali v Axelrod*, 71 NY2d 1, 6 [1987] [emphasis added]). Factors relevant to determining whether a regulation violates separation of powers include whether the agency "constructed a regulatory scheme laden with exceptions based solely upon economic and social concerns" (*id.* at 11-12); "did not merely fill in the details of broad legislation describing the over-all policies to be implemented" but instead "wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance" (*id.* at 13); "acted in an area in which the Legislature had repeatedly tried -- and failed -- to reach agreement in the face of substantial public debate and vigorous lobbying by a variety of interested factions" (*id.*); and considered "no special expertise or technical competence in the [relevant] field" (*id.* at 14). These factors are not present here.

Although we find that some of the provisions of Insurance Regulation 208 lack a rational basis, we cannot conclude that DFS simply created policy on a clean slate to balance conflicting interests in the absence of legislative guidance (*see id.* at 11-14). In our view, Insurance Regulation 208 represents a valid

exercise of DFS's general legislative authority and an appropriate elaboration of Insurance Law § 6409(d).

Petitioners state that some of the regulations are similar to legislation that has been expressly rejected by the Senate, and that the State Senate in January 2018 passed a bill to amend Insurance Law § 6409(d) to clarify that usual and customary inducements are permitted, but it has not advanced to the Assembly (2018 NY Senate Bill S6704). However, the recent passage of this bill by one house of the bicameral body falls short of demonstrating that the Legislature has been trying to change this policy (*see Matter of NYC C.L.A.S.H., Inc. v New York State Off. of Parks, Recreation & Historic Preserv.*, 27 NY3d 174, 182-184 [2016] [finding this factor "close" but not weighing against the challenged regulation where Legislature considered and rejected 24 bills of varying relevance, but only 3 were passed by one house]).

We remand to Supreme Court for review of any arguments for affirmative relief raised in the petition that the court declined to reach because its grant of the petition rendered them academic.

Accordingly, order of the Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about July 5, 2018, which granted the petition to annul Insurance Regulation 208, codified

at 11 NYCRR 228 on October 18, 2017, effective December 18, 2017, should be modified, on the law, to deny the petition except as to section 228.5(a)(1)-(3) and (d)(1)-(2), and the proceeding brought pursuant to CPLR article 78 remanded to Supreme Court for further proceedings consistent herewith, and, otherwise affirmed, without costs.

M-4677 - *N.Y. State Land Title Association, Inc. v N.Y. State Dept. of Financial Services*

Motion **by Property Casualty Insurers Association of America** to file amicus **curiae** brief granted, and **the** brief deemed filed.

All concur.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about July 5, 2018, modified, on the law, to deny the petition except as to section 228.5(a)(1)-(3) and (d)

(1)-(2), and the proceeding brought pursuant to CPLR article 78 remanded to Supreme Court for further proceedings consistent herewith and otherwise affirmed, without costs.

M-4677 - *N.Y. State Land Title Association, Inc. v N.Y. State Dept. of Financial Services*

Motion **by Property Casualty Insurers Association of America** to file amicus **curiae** brief granted, and **the** brief deemed filed.

Opinion by Singh, J. All concur.

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

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

ENTERED: JANUARY 15, 2019

CLERK