SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 11, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Richter, Tom, Oing, Moulton, JJ.

9850 The People of the State of New York, Ind. 4757/14
Respondent,

-against-

Clifford Taylor,
Defendant-Appellant.

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Christina Swarns, Office of The Appellate Defender, New York (Stephen R. Strother of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Neil E. Ross, J.), rendered July 11, 2016, convicting defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of four years, unanimously affirmed.

Defendant made a valid waiver of his right to appeal, which forecloses his suppression claims. The court's oral colloquy with defendant concerning the waiver exceeded the minimum

standards for such a colloquy (*see People v Bryant*, 28 NY3d 1094 [2016]), and it was supplemented by a detailed written waiver.

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

ENTERED: JULY 11, 2019

CLERK

Friedman, J.P., Richter, Tom, Oing, Moulton, JJ.

9851 ISmoke, LLC, Index 653158/15
Plaintiff-Appellant,

-against-

Axcentria Pharmaceuticals, LLC,
Defendant-Respondent.

Judd Burstein P.C., New York (G. William Bartholomew of counsel), for appellant.

CaneLaw LLP, New York (Peter Cane of counsel), for respondent.

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered May 25, 2018, which granted defendant's motion for summary judgment dismissing the complaint and on its counterclaims and awarding it reasonable attorneys' fees, unanimously modified, on the law, the motion denied as to dismissal of the complaint, and the principal sum of the award on the counterclaims reduced from $20,735 to $20,558, and otherwise affirmed, without costs.

Defendant failed to demonstrate as a matter of law that it did not breach the parties' 2014 contract pursuant to which it agreed to provide plaintiff with "Child-Resistant Cap[s]" for its liquid nicotine bottles. The term "Child-Resistant Cap" is ambiguous (*see Chimart Assoc. v Paul*, 66 NY2d 570, 572-573 [1986]; *see also Georgia Malone & Co., Inc. v E&M Assoc.*, 163

AD3d 176, 185 [1st Dept 2018]). While it would be reasonable to interpret this term according to its plain meaning, i.e., a cap that is difficult for a child to open, it would be equally reasonable to interpret the term according to its "trade" meaning, i.e., a cap designed to prevent children from opening a container in accordance with the standards set forth in the Poison Prevention Packaging Act of 1970 (15 USC § 1471 *et seq.*; *see* 16 CFR 1700.20; *see e.g. Zurakov v Register.Com, Inc.*, 304 AD2d 176, 179 [1st Dept 2003]; *Edison v Viva Intl.*, 70 AD2d 379, 383 [1st Dept 1979]). Even if the term were unambiguous, defendant would not be entitled to summary judgment, because it submitted no evidence demonstrating as a matter of law that its caps were in fact "Child-Resistant."

Upon our review of the record and Supreme Court filings referred to by defendant, we find that, as of June 15, 2015, plaintiff owed defendant $6,558 on its counterclaim for account stated, and not, as the motion court stated, $6,735. Accordingly, the total principal sum awarded on the counterclaims should be reduced from $20,735 to $20,558 to conform to the proof.

The motion court correctly determined that defendant is entitled to its collection costs with respect to the account stated claim.

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

ENTERED: JULY 11, 2019

CLERK

Friedman, J.P., Richter, Tom, Oing, Moulton, JJ.

9852 In re Latava P.,
Petitioner-Respondent,

-against-

Charles W.,
Respondent-Appellant.

_____

Charles A. Williams, Jr., appellant pro se.

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Order, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about January 23, 2018, which denied respondent father's objections to an order of support, same court (Anthony Lopez, Support Magistrate), entered on or about November 17, 2017, which, inter alia, directed him to pay child support, child care expenses, and a portion of the child's unreimbursed medical expenses, and set retroactive child support, unanimously affirmed, without costs.

As Family Court is vested by the State Constitution and the Family Court Act with exclusive original jurisdiction to adjudicate proceedings for paternity and support of a spouse or a child (*see* NY Const, art VI, § 13[b]; Family Court Act §§ 115[a][ii]; 411; 511), the Support Magistrate properly heard and determined all matters in the proceeding between these unmarried parties, including issuing an order of filiation and a final child support order. The fact that the parties appeared to be

embroiled in various legal actions, including a Housing Court case, petitions for custody, and a family offense petition, did not deprive the support magistrate of jurisdiction to hear and determine paternity and ultimately the child support matter (*see* Family Court Act §§ 439[a], [b]; 532[a]).

Contrary to respondent's arguments, the court providently exercised its discretion in denying his request for an adjournment (*see Matter of Alexis T. v Vanessa C.-L.*, 101 AD3d 436, 437 [1st Dept 2012]). Two earlier requests for adjournment had been granted because of the unavailability of respondent's counsel. The court properly concluded that another continuance would have been prejudicial to the child, who was not receiving support. Moreover, respondent failed to exercise his right to challenge the court's order directing him to submit to a DNA test.

Contrary to his contention, there is nothing in the record that suggests that respondent has been a custodial parent at any time since the commencement of the paternity action and is therefore entitled to receive child support from petitioner mother (*see Creem v Creem*, 121 AD2d 676 [2d Dept 1986]).

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

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

ENTERED: JULY 11, 2019

CLERK

Friedman, J.P. Richter, Tom, Oing, Moulton, JJ.

9853 Joel Thome, Index 152721/17
Plaintiff-Appellant,

-against-

The Alexander and Louisa Calder Foundation, et al.,
Defendants-Respondents.

_____

Law Office of Richard A. Altman, New York (Richard A. Altman of counsel), for appellant.

Patterson Belknap Webb & Tyler LLP, New York (Thomas W. Pippert of counsel), for respondents.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about May 9, 2018, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

Summary judgment was properly granted since there is a lack of evidence that defendants imparted any false or disparaging information to the gallery with whom plaintiff was planning to consign his art. The unrebutted evidence is that defendants only informed the gallery that litigation in the Southern District over the art had ended, and as part of that settlement, the pieces were issued registration numbers and an agreed-upon description of the works was formalized (*see Vigoda v DCA Prods. Plus*, 293 AD2d 265, 266-267 [1st Dept 2002]; *see also Thome v*

Alexander & Louisa Calder Found., 70 AD3d 88, 105-106 [1st Dept 2009], *lv denied* 15 NY3d 703 [2010]). Furthermore, the settlement description read to the gallery by an employee of defendant Foundation was the same description that had already been forwarded by plaintiff's sales agent to the gallery, and thus the element of causation necessarily fails (*see Retail Advisors Inc. v SLG 625 Lessee LLC*, 138 AD3d 425 [1st Dept 2016]; *Vigoda* at 267).

Plaintiff's argument that the motion should have been denied because there was a need for further discovery is unavailing since plaintiff only makes conclusory claims that unspecified evidence may be uncovered (*see Arelie F. v Cathedral Props., LLC*, 146 AD3d 710, 711 [1st Dept 2017], *lv denied* 29 NY3d 919 [2017]; *Bailey v New York City Tr. Auth.*, 270 AD2d 156, 157 [1st Dept 2000]). Although issue had just been joined when defendants moved for summary judgment, depositions had been taken of all witnesses involved in the discussions between defendants and the gallery.

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

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

ENTERED: JULY 11, 2019

CLERK

Friedman, J.P., Richter, Tom, Oing, Moulton, JJ.

9854 The People of the State of New York, Respondent, Ind. 3011/03

-against-

Anderson Stuckey, Defendant-Appellant.

_____

Christina Swarns, Office of the Appellate Defender, New York (Stephen R. Strother of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered on or about September 8, 2017, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion in declining to grant a downward departure (*see generally People v Gillotti*, 23 NY3d 841, 861 [2014]). Defendant's favorable prison disciplinary record and completion of treatment programs were adequately taken into account by the risk assessment instrument (*see e.g. People v Palmer*, 166 AD3d 536, 537 [1st Dept 2018] *lv denied* 32 NY3d 919 [2019]), and defendant had not demonstrated that family support reduced his particular likelihood of reoffense or danger to the community (*see People v Saintilus*, 169

AD3d 838, 839 [2d Dept 2019]). In any event, these mitigating factors were outweighed by the seriousness of defendant's underlying crimes as well as his criminal record.

We have considered and rejected defendant's remaining arguments, including his claim that a remand for further proceedings is necessary.

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

ENTERED: JULY 11, 2019

CLERK

Friedman, J.P., Richter, Tom, Oing, Moulton, JJ.

9855 In re Aubrey Victor, etc., Index 100890/15
Petitioner-Appellant,

-against-

New York City Office of
Trials and Hearings, et al.,
Respondents-Respondents.

- - - - -

New York Times Company,
Intervenor-Respondent-Respondent.

_____

Koehler & Isaacs LLP, New York (Liam L. Castro of counsel), for appellant.

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

Al-Amyn Sumar, New York, for The New York Times Company, respondent.

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Appeal from order and judgment (one paper), Supreme Court, New York County (Shlomo S. Hagler, J.), entered June 4, 2018, denying the petition to annul a decision of respondent New York City Office of Trials and Hearings (OATH), dated February 3, 2015, which denied petitioner's request that OATH redact his name and other personal information from any document it disclosed to the public and to direct the municipal respondents to keep confidential the OATH reports of petitioner and all others similarly situated, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously dismissed, without

costs, as moot.

Petitioner's claim that the report and recommendations issued by OATH is confidential under Civil Rights Law § 50-a is moot. For several years, the report has been publicly available from multiple sources, including the OATH and LEXIS websites. Because we cannot afford petitioner any meaningful relief, we dismiss the appeal as moot (*see Matter of Niagara Mohawk Power Corp. v New York State Dept. of Envtl. Conservation*, 169 AD2d 943, 944 [3d Dept 1991]).

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

ENTERED: JULY 11, 2019

CLERK

Friedman, J.P., Richter, Tom, Oing, Moulton, JJ.

9856 Gristede's Foods, Inc., Index 651811/15
Plaintiff-Appellant,

-against-

Madison Capital Holdings LLC, et al.,
Defendants-Respondents.

_____

Moses & Singer LLP, New York (David Lackowitz of counsel), for appellant.

Cole Schotz P.C., New York (Jason R. Melzer of counsel), for respondents.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered on or about August 9, 2017, which granted defendants' motion to dismiss the first, second and third causes of action, unanimously affirmed, with costs.

Defendant Madison Capital Holdings LLC purchased lease "designation rights," i.e., the right to designate one or more assignees, for a sub-sublease with plaintiff, from a bankruptcy estate. It then assigned the sub-sublease to defendant MC Long Term Holdings, LLC, an entity formed by Madison's principal, defendant J. Joseph Jacobson. MC Long Term defaulted on its obligations under the sub-sublease, and plaintiff brought this action asserting, as relevant on appeal, claims of fraudulent misrepresentation against Madison and Jacobson, negligent misrepresentation against Madison, and piercing the corporate

veil against all defendants.

In support of the fraudulent misrepresentation claim, the complaint alleges that the "adequate assurance" information about MC Long Term prepared by defendants and annexed as an exhibit to the bankruptcy court order approving the assignment of the sub-sublease to MC Long Term misled plaintiff into believing that Madison or Jacobson would provide financial stability to MC Long Term. Plaintiff appears to have inferred far more from this exhibit than the facts warrant. The information sheet merely states that MC Long Term is a limited liability company "owned and managed by the principals of Madison Capital," and gives Madison Capital's principal's (Jacobson's) contact information. Moreover, plaintiff could have discovered its misunderstanding about defendants' relationships, if any, through due diligence (*see Arfa v Zamir*, 76 AD3d 56, 59 [1st Dept 2010], *affd* 17 NY3d 737 [2011]).

The complaint fails to state a cause of action for negligent misrepresentation against Madison for the same reasons: no misrepresentation is alleged, and, in any event, reasonable reliance is not alleged (*see J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]).

We evaluate the claim for piercing the corporate veil under the law of Delaware, the state of Madison Capital's incorporation

(*Klein v CAVI Acquisition, Inc.*, 57 AD3d 376, 377 [1st Dept 2008]). Under Delaware law, the corporate veil may be pierced, "in the interest of justice, when such matters as fraud, contravention of law or contract, public wrong, or where equitable consideration among members of the corporation require it, are involved" (*Pauley Petroleum Inc. v Continental Oil Co.*, 239 A2d 629, 633 [Del 1968]). Plaintiff argues that a garden variety breach of contract can constitute the "injustice" element of this test. However, while "[a]ny breach of contract and any tort . . . is, in some sense, an injustice, [o]bviously this type of 'injustice' is not what is contemplated by the common law rule that piercing the corporate veil is appropriate only upon a showing of fraud *or something like fraud*" (*Mobil Oil Corp. v Linear Films, Inc.*, 718 F Supp 260, 268 [D Del 1989] [emphasis added]). As the motion court correctly dismissed the causes of action based upon alleged misrepresentations, and the only claim that remains is the breach of contract claim, the veil-piercing claim, too, was correctly dismissed.

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: JULY 11, 2019

CLERK

Friedman, J.P., Richter, Tom, Oing, Moulton, JJ.

9857 In re Caleah C.M.S.,
and Another,

Children Under Eighteen Years of Age, etc.,

Calvin S.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent,

Jasmin O.,
Respondent.

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Steven P. Forbes, Jamaica, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Eva L. Jerome of counsel), for respondent.

Law Offices of Randall S. Carmel, Jericho (Randall S. Carmel of counsel), attorney for the children.

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Order of fact-finding and disposition (one paper), Family Court, Bronx County (David J. Kaplan, J.), entered on or about April 27, 2018, insofar as it determined, after a hearing, that respondent father neglected the two subject children, unanimously modified, on the law and facts, to vacate the finding of neglect on the basis that respondent excessively abused alcohol, and otherwise affirmed, without costs.

Petitioner Administration for Children's Services (ACS) did not satisfy its burden of proving, by a preponderance of the evidence, that the father neglected the children based upon his

repeated abuse of alcohol, because there is no evidence that he lost self-control during repeated bouts of excessive drinking, and such evidence is necessary to trigger the presumption of neglect under Family Court Act § 1046(a)(iii) (*see Matter of Anastasia G.*, 52 AD3d 830, 831-832 [2d Dept 2008]; *Matter of Anna F.*, 56 AD3d 1197, 1198 [4th Dept 2008]; *Matter of Victoria CC.*, 256 AD2d 931, 933 [3d Dept 1998]; *see generally Matter of Nasiim W. [Keala M.]*, 88 AD3d 452, 453 [1st Dept 2011]). The Family Court's finding that the caseworker's fact-finding testimony and the children's out-of-court statements in the case notes cross-corroborate each other to show that the father and his then-girlfriend would regularly drink alcohol in excess and fight lacks a sound and substantial basis in the record, because the caseworker testified at the fact-finding hearing that the children told her that they never saw the father impaired. Although the record raises concern about the father having alcohol issues, the caseworker never spoke with the father about the allegations concerning his alcohol consumption.

However, the finding that the father neglected the children during the August 4, 2016 incident has a sound and substantial basis in the record and should be affirmed because the evidence adduced during the fact-finding hearing shows that his judgment was strongly impaired and that the children were exposed to a

risk of substantial harm as a result of his impairment (*see Matter of Kayla W.*, 47 AD3d 571, 572 [1st Dept 2008]). The father's fact-finding testimony shows that he was arrested and served a term of incarceration, because he had a firearm in his possession when the police arrived to stop the altercation he was having with his girlfriend, and that hospital staff indicated that he "smelled like alcohol" despite his being the children's sole caretaker at that time as alleged in paragraphs 2B and 2C of the petitions (*see Matter of Kaylee D. [Kimberly D.]*, 154 AD3d 1343, 1344 [4th Dept 2017]; *Matter of Pedro C. [Josephine B.]*, 1 AD3d 267, 268 [1st Dept 2003]). The Family Court declined to credit the father's effort to minimize or explain his behavior and its credibility determinations should not be disturbed, because they are supported by the record (*see Matter of Irene O.*, 38 NY2d 776, 778 [1975]).

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

ENTERED: JULY 11, 2019

CLERK

Friedman, J.P., Richter, Tom, Oing, Moulton, JJ.

9858- Ind. 3109/14
9859-
9860 The People of the State of New York,
Appellant,

-against-

Rafael Esquilin,
Defendant-Respondent.

- - - - -

The People of the State of New York,
Respondent,

-against-

Rafael Esquilin,
Defendant-Appellant.

_____

Cyrus R. Vance, Jr., District Attorney, New York (Sylvia Wertheimer and Dana Poole of counsel), for appellant/respondent.

Christina Swarns, Office of The Appellate Defender, New York (Kami Lizarraga of counsel), respondent/appellant.

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Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered October 22, 2015, convicting defendant, after a jury trial, of manslaughter in the first degree, assault in the first degree and gang assault in the first degree, and sentencing him to concurrent terms of 25 years, unanimously modified, on the law, to the extent of vacating the sentence and remanding for a persistent felony offender determination, and otherwise affirmed.

Defendant has not established that he was prejudiced by the People's midtrial decision to impeach defense evidence to a more

limited extent than the court and parties had originally contemplated. A separately tried and convicted codefendant, who did not testify at defendant's trial, had made a postarrest statement to the police that was somewhat exculpatory of defendant. At both of the codefendant's two trials (the first of which resulted in a partial verdict), the codefendant gave self-exculpatory testimony that tended to contradict his own postarrest statement. At the instant defendant's trial, the court granted defense counsel's request to introduce the codefendant's postarrest statement, and also granted the People's request to impeach that statement by way of the codefendant's testimony at both trials. However, the People ultimately used only the testimony from the codefendant's first trial, asserting that they had no need for the testimony at the second trial because it was lengthy and cumulative. Defense counsel objected to the People's omission of the testimony from the second trial, claiming that the People's cross-examination of the codefendant at the second trial based on the postarrest statement was more effective than at the first trial, so that the second cross-examination was helpful to the instant defendant because it tended to enhance the credibility of the postarrest statement, which, as noted, was somewhat exculpatory of defendant.

On appeal, defendant claims he relied to his detriment on

the People's original request to use the testimony from both trials. However, defendant has not shown that he took "irremediable steps in reliance on" the People's original choice of impeachment material, or that their modification of that choice "impede[d] the defense strategy" (*People v Cummings*, 31 NY3d 204, 209 [2018]). In the first place, the court only permitted, but did not require, the People to use the testimony from both trials, and the People never made an unequivocal or irrevocable promise to do so. Furthermore, defense counsel clearly wanted to introduce the postarrest statement, and at the time he requested permission to do so, there had been no discussion of any possible impeachment. Moreover, when the People ultimately announced that they were not going to use the testimony from the codefendant's second trial, defense counsel never suggested that had he known this would be the case, he would not have introduced the postarrest statement to begin with. We have considered and rejected defendant's remaining arguments on this issue, including his constitutional claims.

The court responded meaningfully to the jury's request for a readback of a specified portion of the cross-examination of a witness (*see People v Almodovar*, 62 NY2d 126, 131 [1984]; *People v Malloy*, 55 NY2d 296 [1982], *cert denied* 459 US 847 [1982]), and it properly declined to have the entire cross-examination read

back (which was the only relief requested). The court was not obligated to go beyond the jury's specific request (*see People v Nuckols*, 167 AD3d 473, 474 [1st Dept 2018], *lv denied* 32 NY3d 1208 [2019]), and there is no indication that the court's response to the note caused any prejudice (*see People v Lourido*, 70 NY2d 428, 435 [1987]; *People v Ingram*, 3 AD3d 437 [1st Dept 2004], *lv denied* 2 NY3d 801 [2004]).

The court providently exercised its discretion in admitting maps of cell site data, which tended to show the pattern of movement of participants in the crime and aided the jury in understanding the relevance of the cell phone records in evidence (*see generally People v Williams*, 148 AD3d 620 [1st Dept 2017], *lv denied* 30 NY3d 984 [2017]). The maps were not misleading, because the testimony of the authenticating witnesses, elicited on direct and cross-examination, clarified that the symbols on the maps referred to the locations of cell towers, rather than the locations of particular persons or phones.

Defendant's legal sufficiency claim is unpreserved, notwithstanding his postverdict motion, which had no preservation effect (*see People v Padro*, 75 NY2d 820, 821 [1990]), and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see*

People v Danielson, 9 NY3d 342, 348-349 [2007]). The testimony of an accomplice was amply corroborated, and there is no basis for disturbing the jury's credibility determinations. The evidence, including, among other things, the passing of a knife to the stabber in defendant's presence shortly before the crime, supports a reasonable inference that defendant, with at least the intent to cause serious physical injury, directed a gang subordinate to commit a revenge-motivated stabbing. We find unpersuasive defendant's suggestion that he may have only ordered some unspecified, less violent act of retaliation.

Except as already discussed, defendant did not preserve any of his additional arguments relating to the readback and the cell site data, as well as his challenges to testimony about gang activity, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. We have considered and rejected defendant's various arguments on the subject of preservation or lack thereof, including his claim that trial counsel rendered ineffective assistance by failing to preserve certain issues (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

On the People's cross appeal, we find that the sentencing court's application of *People v Catu* (4 NY3d 242 [2005]) as the

basis for disqualifying defendant's violent felony convictions as predicate felonies was invalidated by *People v Smith* (28 NY3d 191 [2016]). Accordingly, it was unlawful to sentence defendant, who appears to be a persistent violent felony offender, as a first felony offender on that invalid ground. Defendant's procedural arguments on this issue are unavailing.

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

ENTERED: JULY 11, 2019

CLERK

Friedman, J.P., Richter, Tom, Oing, Moulton, JJ.

9861 In re New York City Asbestos Litigation — Index 190041/18

- - - - -

Leonard Carriero, et al.,
Plaintiffs-Respondents,

-against-

Amchem Products, Inc., not known as Rhone Poulenc AG Company, etc., et al.,
Defendants,

Harris Corporation,
Defendant-Appellant.

_____

McGivney, Kluger & Cook, P.C., New York (Kerryann M. Cook of counsel), for appellant.

Weitz & Luxenberg, P.C., New York (Jason P. Weinstein of counsel), for respondents.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered January 28, 2019, which denied defendant Harris Corporation's motion for summary judgment dismissing the complaint and all cross claims as against it, unanimously affirmed, without costs.

Viewing the evidence in the light most favorable to plaintiffs as nonmovants (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]), we find that Harris Corporation failed to establish prima facie entitlement to summary judgment.

Defendant cannot meet its initial burden on summary judgment

by "merely point[ing] to perceived gaps in plaintiff[s'] proof, rather than submitting evidence showing why his claims fail" (*Ricci v A.O. Smith Water Prods. Co.*, 143 AD3d 516, 516 [1st Dept 2016]; *see also Koulermos v A.O. Smith Prods.*, 137 AD3d 575, 576 [1st Dept 2016]).

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

ENTERED: JULY 11, 2019

CLERK

Friedman, J.P., Richter, Tom, Oing, Moulton, JJ.

9862 The People of the State of New York, Ind. 1489N/16
Respondent,

-against-

Francisco Moreno,
Defendant-Appellant.

_____

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Neil Ross, J.), rendered February 14, 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: JULY 11, 2019

CLERK

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

Friedman, J.P., Richter, Tom, Oing, Moulton, JJ.

9863 Michael Bandler, Index 162450/15
Plaintiff-Appellant,

-against-

Gregory DeYonker, et al.,
Defendants-Respondents.

_____

Michael Bandler, appellant pro se.

Davidoff Hutcher & Citron LLP, New York (Joshua S. Krakowsky of counsel), for respondents.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered on or about June 27, 2016, which, inter alia, granted defendants' motion to dismiss the complaint, unanimously affirmed, with costs.

The court properly dismissed the complaint as untimely. The statute of limitations for tortious interference with contract and with prospective business relations is three years from the date of injury, which is triggered when a plaintiff first sustains damages (CPLR 214[4]; *Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]). Here, the November 2015 complaint alleges that plaintiff was terminated from his engagement with nonparty BPCM in February 2012, which is when he was injured and his causes of action accrued (*see Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 108 [1st Dept 2009], *lv denied* 15 NY3d 703 [2010]).

Contrary to plaintiff's argument, his injury did not accrue at the time his federal action against BPCM was dismissed in September 2014. The precedents that plaintiff relies upon in this vein involve actions seeking indemnity and have no applicability here (*see e.g. Vista Co. v Columbia Pictures Indus., Inc.*, 725 F Supp 1286, 1290 [SD NY 1989]).

Plaintiff's argument that his claim for unjust enrichment is subject to a six-year limitation period also fails. The unjust enrichment claims against defendants flow from alleged tortious conduct, and thus were barred by a three-year limitations period (*see e.g. Maya NY, LLC v Hagler*, 106 AD3d 583, 585 [1st Dept 2013]; *Board of Mgrs. of the Chelsea 19 Condominium v Chelsea 19 Assoc.*, 73 AD3d 581, 582 [1st Dept 2010]).

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: JULY 11, 2019

CLERK

Friedman, J.P., Richter, Tom, Oing, Moulton, JJ.

9864 311 West 43rd Venture, Index 650850/18
Plaintiff-Respondent,

-against-

Professional Sound Services, Inc.,
Defendant,

Richard H. Topham, Jr.,
Defendant-Appellant.

_____

The Law Offices of Geoffrey T. Mott, P.C., Woodbury (Samuel W. Miller of counsel), for appellant.

_____

Order, Supreme Court, New York County (Andrew Borrok, J.), entered July 26, 2018, which granted the motion of defendant Richard Topham, Jr. to dismiss the complaint on the basis of improper service only to the extent of granting plaintiff an extension of time to serve process, unanimously affirmed, without costs.

The court did not abuse its discretion in granting plaintiff an extension of time to serve process pursuant to CPLR 306-b (*see Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95 [2001]).

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

ENTERED: JULY 11, 2019

CLERK

Friedman, J.P., Richter, Tom, Oing, Moulton, JJ.

9867-
9868 The Church of Jesus Christ of Latter-Day Saints, Servant, etc.,
Plaintiff-Appellant,

-against-

Michael P. Kelly, et al.,
Defendants-Respondents.

- - - - -

The Church of Jesus Christ of Latter-Day Saints, etc.,
Plaintiff-Appellant,

-against-

Christopher J. Baum & Thomas Bailey, et al.,
Defendants-Respondents.

Index 301088/17
100946/17

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Xiu Jian Sun, appellant pro se.

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Order, Supreme Court, Bronx County (Donna Mills, J.), entered on or about May 1, 2018, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs. Order, Supreme Court, New York County (Gerald Lebovits, J.), entered April 30, 2018, which sua sponte dismissed the complaint, unanimously affirmed, without costs.

Construing the pleadings liberally, accepting all the facts alleged in the complaints to be true and according plaintiff the benefit of every possible favorable inference (*see generally Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), there are simply no causes

of action against defendants that are discernible from the complaints.

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

ENTERED: JULY 11, 2019

CLERK

Friedman, J.P., Richter, Tom, Oing, Moulton, JJ.

9869N Sarah Ashkenazi, Index 350014/17
Plaintiff-Respondent,

-against-

Eliyahu Ashkenazi,
Defendant.
- - - - -
Hoffer Kaback,
Nonparty Appellant.

_____

Hoffer Kaback, New York, for appellant.

The Nelson Law Office P.C., Baldwin (Kimberly I. Nelson of counsel), for respondent.

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Order, Supreme Court, New York County (Lori S. Sattler, J.), entered August 1, 2018, which, inter alia, denied the application of nonparty Hoffer Kaback, Esq., for pendente lite counsel fees, unanimously affirmed, without costs.

The court providently exercised its discretion by denying Kaback's request for additional counsel fees, purportedly incurred during his 11-month representation of defendant husband (*see* Domestic Relations Law § 237[a]; *DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881 [1987]). Plaintiff had already voluntarily paid $15,000 to Kaback, and the record shows that the marriage lasted less than three years; the legal issues addressed were not complex; the parties had just one court appearance; there were limited settlement negotiations; and there was no other motion

practice and scant discovery. Furthermore, Kaback's time records contain dubious entries (*see Johnson v Chapin*, 12 NY3d 461, 467 [2009]; *Tatum v Simmons*, 133 AD3d 550 [1st Dept 2015]).

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