SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

**MARCH 21, 2019**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Renwick, J.P., Richter, Mazzarelli, Webber, Kern, JJ.

8241 The People of the State of New York, Respondent, Ind. 6882/90

-against-

Bernell Gould,
Defendant-Appellant.

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

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

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Judgment of resentence, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered April 22, 2016, resentencing defendant upon an April 22, 1991 conviction, as a second violent felony offender, to a term of four to eight years, unanimously affirmed.

Defendant contends that his 1988 conviction of criminal possession of a weapon in the third degree, which was under the alias Gerald Francis, could not serve as a proper predicate for his second violent felony offender adjudication on the instant resentencing on his 1991 attempted first-degree robbery conviction, because the sentence on the 1988 conviction was

invalid as a matter of law. Specifically, he claims he was improperly adjudicated a first felony offender, when he should have been adjudicated a second felony offender. He urges this Court to vacate the current sentence, and remand the case for further resentencing.

Defendant's request is foreclosed by the recent decision of the Court of Appeals in *People v Thomas* (__NY3d__, 2019 NY Slip Op 01167 [February 19, 2019]). In *Thomas*, the Court held that "the date on which sentence was first imposed upon a prior conviction - not the date of any subsequent resentencings on that same conviction - is the relevant date for [predicate felony] purposes" (2019 NY Slip Op 01167, *1).

Moreover, defendant's contention regarding the 1988 conviction is at odds with his contention on a prior appeal (131 AD3d 874 [1st Dept 2015]), where he argued that, on the same 1991 conviction at issue here, he should be resentenced as a second *violent* felony offender, rather than a second felony offender, based on the 1988 conviction. He should not now be allowed to challenge the use of the 1988 conviction as a predicate, which was the basis for his prior successful appeal.

In any event, "a sentencing defect does not invalidate a prior conviction for purposes of adjudicating [a] defendant's subsequent felony offender status" (*People v Ashley*, 71 AD3d

1286, 1287 [3d Dept 2010], *affd on other grounds* 16 NY3d 725 [2011]; *see People ex rel. Emanuel v McMann*, 7 NY2d 342, 345 [1960]).

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

ENTERED: MARCH 21, 2019

CLERK

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

8714 The People of the State of New York, Respondent, Ind. 2010/14

-against-

Bernard Patterson, Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Siobhan C. Atkins of counsel), and Arnold & Porter LLP, New York (Palak Mayani Parikh of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Marianne Stracquadanio of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (William I. Mogulescu, J. at dismissal motion; Martin Marcus, J. at jury trial and sentencing), rendered June 7, 2016, convicting defendant of robbery in the first degree and burglary in the second degree, and sentencing him, as a second violent felony offender, to concurrent terms of 15 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Moreover, we find that the evidence was overwhelming. There is no basis for disturbing the jury's determinations concerning identification and credibility.

The victim, an employee of a sandwich shop, saw defendant in the store three or four times before the robbery. Each of

defendant's visits to the store lasted at least a half hour, during which time defendant primarily engaged in conversation with the victim's then-coworker, and the victim participated in the conversation to a limited extent. On one occasion, the victim gave defendant free food as an act of charity. At the time of the robbery, the victim recognized defendant as the person he knew from the other occasions, and engaged him in conversation. Notably, defendant asked about the coworker he had befriended, and when he learned she no longer worked there, he asked for her contact information. Defendant also asked for and received a free soda, and the victim offered him free food later in the incident. This entire interchange would make little sense unless the robber was the same person the victim knew from the other occasions; indeed, given the context of the conversation, the robber practically identified himself to the victim. Furthermore, a surveillance videotape shows a man whom the victim identified as defendant, engaging in a lengthy interaction with the victim before committing a robbery. Thus, the evidence overwhelmingly refuted defendant's claim of mistaken identity.

The trial court denied defendant's request for a charge on cross-racial identification. Since then, the Court of Appeals decided *People v Boone*, which held that "when identification is an issue in a criminal case and the identifying witness and

defendant appear to be of different races, upon request, a party is entitled to a charge on cross-racial identification" and the trial court must give the charge if a party requests it (30 NY3d 521, 526 [2017]). Since identification was an issue in this case and the victim and defendant were of different races, the motion court should have granted the request for the charge on cross-racial identification. However, we find the error harmless given that the video supports the victim's testimony about the incident and his familiarity with defendant. Further, the victim told police that the robber had an MTA connection, and defendant was arrested wearing an MTA jacket. The identification testimony was unusually strong and the evidence of defendant's guilt was overwhelming (*see People v Jiggetts*, 168 AD3d 507, 508 [1st Dept 2019]; *People v Johnson*, 57 NY2d 969, 970 [1982]). Also, there is no significant probability that defendant would have been acquitted but for this charge error (*People v Jordan*, 167 AD3d 1044, 1045 [2d Dept 2018]).

The motion court providently exercised its discretion when it denied defendant's motion to dismiss the indictment on the ground of improper joinder of offenses, and instead directed that the counts of the indictment at issue on this appeal be tried separately from other counts involving a different incident. The court's action cured any misjoinder of offenses, because any

prejudice to defendant was obviated by conducting separate trials (*see People v Torres*, 249 AD2d 19, 20 [1st Dept 1998], *lv denied* 92 NY2d 907 [1998]), and the indictment was no longer defective (*see* CPL 210.20[1][a]; 210.25[1]) once the misjoinder no longer existed. We find unpersuasive defendant's argument that the CPL does not permit misjoinder to be cured by severance. Nothing in the statute provides that misjoinder is incurable and requires dismissal. Defendant's reliance on CPL 200.70(2)(c), which states that an indictment may not be *amended* to cure misjoinder, is misplaced because here there was no amendment. The language of the indictment remained intact, and defendant was tried separately on two sets of valid counts. To the extent defendant is also claiming that he was prejudiced by the simultaneous presentation to the grand jury of separate offenses, we find that claim unavailing (*see generally People v Huston*, 88 NY2d 400, 409 [1996]).

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 21, 2019

CLERK

Friedman, J.P., Renwick, Webber, Kahn, Kern, JJ.

8753 The People of the State of New York, Respondent, Ind. 3515/12

-against-

William McAdams, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered October 8, 2015, convicting defendant, after a jury trial, of burglary in the first and second degrees and three counts of robbery in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 20 years, unanimously affirmed.

The testimony of an analyst that linked defendant's DNA to DNA found on a pistol recovered at the crime scene did not violate defendant's rights under the Confrontation Clause. The witness's testimony demonstrated her own "independent analysis of the raw data" to make the comparison, and the analysis was not merely "a conduit for the conclusions of others" (*People v John*, 27 NY3d 294, 315 [2016]; *see People v Rodriguez*, 153 AD3d 235, 246-247 [1st Dept 2017], *affd on other grounds* 31 NY3d 1067

[2018]).

In any event, any error in admitting the disputed testimony was harmless beyond a reasonable doubt (*see People v Crimmins*, 36 NY2d 230 [1975]). Independent of the contested DNA evidence, there was overwhelming evidence of defendant's guilt, including aspects of his own trial testimony. Furthermore, defendant presented an implausible defense.

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

ENTERED: MARCH 21, 2019

CLERK

Friedman, J.P., Renwick, Webber, Kahn, Kern, JJ.

8754 In re Mr. White, L.L.C., Index 155915/17
Petitioner-Respondent,

-against-

Pink Shirt Construction, Inc.,
Respondent-Appellant.

_____

White and Williams LLP, New York (Shruti Panchavati and Nicole A. Sullivan of counsel), for appellant.

Ronald Francis, New York, for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Arlene P. Bluth, J.), entered September 29, 2017, which granted petitioner's application to vacate and cancel respondent's mechanic's lien, unanimously affirmed, without costs.

It was a provident exercise of the court's discretion to vacate and cancel respondent's mechanic's lien, because respondent failed to commence an action to enforce the lien, as prescribed by Lien Law § 59, the section under which this proceeding was commenced. Validity of the lien, and any dispute as to whether respondent completed the work required by the contract, were to be established at trial of that foreclosure action, which respondent concedes it never commenced (*see S A F Sala Corp. v S & H 88th St Assoc.*, 138 AD2d 241, 242 [1st Dept

1988]).

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

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

ENTERED: MARCH 21, 2019

CLERK

Friedman, J.P., Renwick, Webber, Kahn, Kern, JJ.

8755 In re Toussaint Thoreau E.,

A Child Under the Age of
Eighteen Years, etc.,

Allen E.,
Respondent-Appellant,

The Children's Village,
Petitioner.

_____

Tennille M. Tatum-Evans, New York, for appellant.

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

_____

Order of disposition, Family Court, New York County (Karen I. Lupuloff, J.), entered on or about January 9, 2018, which, inter alia, terminated respondent father's parental rights to the subject child upon a finding of abandonment, unanimously affirmed, without costs.

A finding of abandonment is supported by clear and convincing evidence that the father did not visit with his son or communicate with the agency during the six months immediately preceding the filing of the termination petition, and the absence of evidence that he was unable to so visit or communicate, or was discouraged from doing so by the agency (Social Services Law § 384-b [4][b];[5][a]).

We reject the father's appellate contention that the court

erred in terminating his parental rights while the mother's parental rights remained intact. The termination petitions against the father and mother were predicated upon different sets of facts, and the father never requested that the final disposition of his case should be delayed while the mother's case was still pending. He did not oppose the entry of the order terminating his parental rights or seek to vacate it once the mother received a suspended judgment.

The father's constitutional claim was not raised before the Family Court, and is thus unpreserved for review (*see In re Latrice R.*, 93 AD2d 838 [2d Dept 1983], *lv denied* 59 NY2d 604 [1983]).

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

ENTERED: MARCH 21, 2019

CLERK

Friedman, J.P., Renwick, Webber, Kahn, Kern, JJ.

8756 Dulce Santana, Index 151364/15
Plaintiff-Appellant,

-against-

Metropolitan Transportation Company, et al.,
Defendants-Respondents,

City of New York, et al.,
Defendants.

_____

Law Office of Ryan S. Goldstein, P.L.L.C., Bronx (Ryan S. Goldstein of counsel), for appellant.

Lawrence Heisler, Brooklyn (Harriet Wong of counsel), for respondents.

_____

Order, Supreme Court, New York County (Lisa A. Sokoloff, J.), entered on or about February 21, 2018, which granted defendants-respondents' (collectively MTA) motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The motion court properly invoked the emergency doctrine in finding that no issues of fact exist as to the MTA's negligence given plaintiff's failure in opposition to adduce any evidence tending to show that the nonparty bus driver created the emergency or could have avoided a collision with a vehicle that suddenly moved into the bus's lane of travel by taking some action other than applying his brakes and turning slightly to the

right (*see Brooks v New York City Tr. Auth.*, 19 AD3d 162 [1st Dept 2005]). The sudden unexpected swerving of the car into the bus's path required the bus driver to take immediate action, and his reaction of pressing the brake with enough force to prevent a collision with the car and turning the bus slightly to the right was a reasonable response to the emergency, which was not of his own making (*see Wu Kai Ming v Grossman*, 133 AD3d 742, 743 [2d Dept 2015]).

Plaintiff's claim that a triable issue is raised by the fact that the car tried to enter the bus's lane at least once before the accident occurred is unavailing. The surveillance video shows that the car only drifted slightly towards the right lane and did not enter it until the bus reached the intersection when it suddenly turned right cutting off the bus (*see Jones v New York City Tr. Auth.*, 162 AD3d 476 [1st Dept 2018]; *Orsos v Hudson Tr. Corp.*, 111 AD3d 561 [1st Dept 2013]).

Furthermore, the court providently exercised its discretion in determining that it would consider the emergency doctrine affirmative defense even though it was not pleaded in the MTA's answer. The facts leading up to accident were within plaintiff's knowledge given the bus driver's deposition testimony

that he was "cut off" and the surveillance footage, which was exchanged during discovery (*see Mendez v City of New York*, 110 AD3d 421, 421-422 [1st Dept 2013]).

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

ENTERED: MARCH 21, 2019

CLERK

Friedman, J.P., Renwick, Webber, Kahn, Kern, JJ.

8757 Alprentice Gray, Sr., as Administrator of the Estate of Alprentice Gray, Jr., deceased, Plaintiff-Respondent, Index 306169/11

-against-

Stacyann Jackson, et al., Defendants,

Qualcon Construction LLC, et al., Defendants-Appellants.

_____

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for appellants.

Sullivan Papain Block McGrath & Cannavo P.C., New York (Brian J. Shoot of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Donna M. Mills, J.), entered on or about September 12, 2017, which denied the motion of defendants Qualcon Construction LLC and Consolidated Edison for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Summary judgment was properly denied in this action where plaintiff's decedent sustained fatal injuries when, while riding his bicycle, he was struck by a vehicle driven by defendant Jackson. Multiple triable issues of fact exist as to the specifics of the underlying incident, including whether a metal plate placed in the roadway by Qualcon in the course of a

construction project was a proximate cause of the accident (*see Rawls v Simon*, 157 AD3d 418 [1st Dept 2018]; *see also Sutherland v Comprehensive Care Mgt. Corp.*, 155 AD3d 414 [1st Dept 2017]).

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

ENTERED: MARCH 21, 2019

CLERK

Friedman, J.P., Renwick, Webber, Kern, JJ.

8758 The People of the State of New York, Ind. 701/14
Respondent,

-against-

Gloria Rodriguez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes 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 (Robert Stolz, 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.

ENTERED: MARCH 21, 2019

CLERK

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

Friedman, J.P., Renwick, Webber, Kahn, Kern, JJ.

8759 The People of the State of New York, Respondent, Ind. 5157/15

-against-

Raymond Ramos,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Neil Ross, J. at plea; Mark Dwyer, J. at sentencing), rendered June 14, 2016, 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: MARCH 21, 2019

CLERK

Friedman, J.P., Renwick, Webber, Kahn, Kern, JJ.

8760 Stryker Security Group Inc., Index 151183/13
Plaintiff-Respondent,

-against-

Elite Investigations Ltd.,
Defendant-Appellant.

- - - - -

Elite Investigations Ltd.,
Third-Party Plaintiff-Appellant,

-against-

William Mlynarick, et al.,
Third-Party Defendants-Respondents.

_____

Harris J. Zakarin, P.C., Melville (Harris J. Zakarin of counsel), for appellant.

Wrobel Markham LLP, New York (M. Katherine Sherman of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Robert R. Reed, J., and a jury), entered November 1, 2017, against defendant in favor of plaintiff, unanimously affirmed, without costs.

The jury verdict against defendant and in favor of third-party defendant Anthony Romano is not against the weight of the evidence. If the jury believed Romano and third-party defendant William Mlynarick instead of defendant's witnesses – as it was entitled to do (*James v Farhood*, 96 AD3d 503, 504 [1st Dept 2012]) – we cannot conclude that the evidence weighed so heavily in defendant's favor that the verdict could not have been reached

on any fair interpretation of the evidence (*see Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]).

Defendant did not object to the jury instructions; hence, it failed to preserve its argument that the court should have charged the jury that fraud was a defense to plaintiff's breach of contract claim (*see* CPLR 4110-b; *IGS Realty Co., L.P. v Brady*, 149 AD3d 524 [1st Dept 2017], *lv dismissed* 31 NY3d 1036 [2018]). Even if, arguendo, we were to consider this argument in the interests of justice (*see Peguero v 601 Realty Corp.*, 58 AD3d 556, 563 [1st Dept 2009]), we would reject it. A party who claims that he or she has been defrauded into entering a contract may assert fraud and rescission as a defense (*VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49, 56 [1st Dept 2013]). Defendant cannot rescind, because it cannot return that which it received and which plaintiff provided, viz., tens of thousands of hours of security guard services. Of course, defendant could – and did – counterclaim for damages from fraud (*see id.*), as discussed below.

It is unclear whether defendant preserved its argument that the court erred in directing a verdict in favor of plaintiff and Mlynarick; thus, we will consider it on the merits. The court correctly dismissed the fraud counterclaim and third-party claim against plaintiff and Mlynarick, respectively, because defendant

failed to prove the very first element of fraud, viz., a representation by plaintiff and Mlynarick as to a material fact (*Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 488 [2007]). Defendant also failed to prove pecuniary loss (*see id.*), since its president and chief executive officer admitted that it didn't lose a dime as a result of using plaintiff. Although defendant presented evidence that its profit margin decreased, under the out-of-pocket rule, it may not recover profits that would have been realized had there been no fraud (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]).

The court correctly dismissed the claim against Mlynarick for breaching the covenant of good faith and fair dealing, because Mlynarick, plaintiff's president and a shareholder, was not party to any contract with defendant (*see Duration Mun. Fund, L.P. v J.P. Morgan Sec. Inc.*, 77 AD3d 474 [1st Dept 2010]). While defendant argued that plaintiff's corporate veil should be pierced to reach Mlynarick, it failed to prove that Mlynarick was doing business in his individual capacity, shuttling his personal funds in and out of plaintiff without regard to formality and to suit his immediate convenience (*see Walkovszky v Carlton*, 18 NY2d 414, 420 [1966]).

Defendant's claim that plaintiff breached the covenant of good faith and fair dealing by soliciting and obtaining business

from Guess USA was correctly dismissed, because it requires that the covenant be construed so broadly as to nullify the contract's other express terms (*see Fesseha v TD Waterhouse Inv. Servs.*, 305 AD2d 268, 268 [1st Dept 2003]). The agreement between plaintiff and defendant says, "It is expressly agreed and understood between the parties hereto that: (i) this engagement is nonexclusive; (ii) nothing in this Agreement will in any way restrict [plaintiff's] right to render the same or similar services to or for the benefit of any third parties."

The court correctly dismissed defendant's claim against plaintiff and Mlynarick for tortiously interfering with its business relations with Guess, because defendant failed to prove that plaintiff and Mlynarick acted solely out of malice or used improper or illegal means amounting to a crime or an independent tort (*see Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 [1st Dept 2009], *lv dismissed in part, denied in part* 14 NY3d 736 [2010]).

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

ENTERED: MARCH 21, 2019

CLERK

Friedman, J.P., Renwick, Webber, Kahn, Kern, JJ.

8761 Orazio Petito, Index 153956/16
Plaintiff-Appellant,

-against-

Law Offices of Bart J. Eagle, PLLC,
et al.,
Defendants-Respondents,

Bart J. Eagle, Esq.,
Defendant.

_____

Andrew Lavoott Bluestone, New York, for appellant.

Kaufman Dolowich & Voluck, LLP, Woodbury (Brett A. Scher of counsel), for respondents.

_____

Order, Supreme Court, New York County (Andrea Masley, J.), entered March 28, 2018, which to the extent appealed from, granted the motion of the Law Offices of Bart J. Eagle PLLC, Fischer Porter Thomas & Reinfeld, P.C., and Joel Reinfeld, Esq. to dismiss the complaint, unanimously modified, on the law, to reinstate plaintiff's legal malpractice cause of action as against the Law Offices of Bart J. Eagle, PLLC, and otherwise affirmed, without costs.

The motion court properly dismissed plaintiff's breach of contract and breach of fiduciary duty causes of action (*Rivas v Raymond Schwartzberg & Assoc., PLLC*, 52 AD3d 401, 401 [1st Dept 2008]; *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short*

*Hills, Inc.*, 10 AD3d 267, 271 [1st Dept 2004]). Plaintiff's breach of contract cause of action was plainly based on the same facts as his legal malpractice cause of action. Plaintiff repeatedly referenced defendants' alleged negligence in support of his breach of contract cause of action, provided no specific allegations to support his improper billing claims, and alleged that he was damaged by paying defendants' bills in light of their negligence. Although included in his summons with notice, plaintiff failed to plead a cause of action for breach of fiduciary duty in his complaint. In any event, plaintiff did not allege any conflict of interest in defendants' representation which amounted to a substantial factor in his loss (*Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 10 [1st Dept 2008]).

As the documentary evidence submitted did not utterly refute plaintiff's allegations of proximate causation, the malpractice claim against defendant Law Offices of Bart J. Eagle, PLLC is reinstated. Nevertheless, it did establish that plaintiff's legal malpractice cause of action was barred by the statute of limitations as against Fischer Porter Thomas & Reinfeld, P.C. and Joel Reinfeld, Esq. (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *McCoy v Feinman*, 99 NY2d 295, 300-301 [2002]). The continuing representation doctrine does not apply.

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: MARCH 21, 2019

CLERK

Friedman, J.P., Renwick, Webber, Kahn, Kern, JJ.

8762 Howard J. Kaplan, et al., Index 656188/16
Plaintiffs-Appellants,

-against-

Ladenburg Thalmann & Co., Inc., et al.,
Defendants-Respondents,

Signature Bank,
Defendant.
- - - - -
Stanley S. Arkin, et al.,
Intervenor Defendants-Respondents.

_____

Kaplan Rice LLP, New York (Michelle A. Rice of counsel), for appellants.

Philip S. Ross P.C., New York (Philip S. Ross of counsel), for Ladenburg Thalmann & Co., Inc., Howard M. Lorber and Richard J. Lampen, respondents.

Schulte Roth & Zabel LLP, New York (Michael L. Cook of counsel), for Stanley S. Arkin and Arkin Kaplan Rice LLP, respondents.

_____

Appeal from order, Supreme Court, New York County (Andrea Masley, J.), entered on or about October 19, 2017, which, inter alia, granted defendants Ladenburg Thalmann & Co., Inc., Howard M. Lorber and Richard J. Lampen's and intervenor defendants Stanley S. Arkin and Arkin Kaplan Rice LLP's motions to dismiss the complaint as against them, deemed an appeal from the judgment, same court and Justice, entered November 20, 2017 (CPLR 5520[c]), dismissing the complaint as against said defendants and intervenors, and, so considered, said judgment unanimously

affirmed, with costs.

The complaint fails to state a cause of action. Plaintiffs do not identify any provision in the lease that was breached by their former landlord, defendant Ladenburg Thalmann & Co., Inc. (*see Transit Funding Assoc., LLC v Capital One Equip. Fin. Corp.*, 149 AD3d 23 [1st Dept 2017]). Nor does the draw-down on the letter of credit – the method by which the lease provided for the rent to be collected – constitute a fraudulent conveyance, conversion, or an act in furtherance of aiding and abetting a breach of fiduciary duty (*see Ladenburg Thalmann & Co. Inc. v Signature Bank*, 128 AD3d 36, 45 [1st Dept 2015]). In view of the foregoing, the declaratory judgment and tortious interference claims also fail.

Plaintiffs' argument that our prior orders enjoined the payment of rent from intervenor Arkin Kaplan Rice LLP accounts and barred the landlord from enforcing the lease's obligation against the firm are without merit, and the distribution of partnership shares among plaintiffs and their former partners will be determined in that related action (*see Arkin Kaplan Rice LLP v Kaplan*, 138 AD3d 415 [1st Dept 2016]; *Arkin Kaplan Rice LLP*

*v Kaplan*, 120 AD3d 422 [1st Dept 2014]).

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

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

ENTERED: MARCH 21, 2019

CLERK

Friedman, J.P., Renwick, Webber, Kahn, Kern, JJ.

8763 In re Crystal G. (Anonymous),
Petitioner-Respondent,

-against-

Marquis E.,
Respondent-Appellant.

_____

Larry S. Bachner, New York, for appellant.

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

_____

Appeal from order, Family Court, Bronx County (Tamara Schwarzman, Referee), entered on or about June 4, 2018, which granted temporary custody of the subject child to petitioner-respondent mother, unanimously dismissed, without costs, as moot.

Application by appellant father's attorney to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no nonfrivolous issues which could be raised on this appeal from the temporary order of custody, as it has been rendered moot by

the expiration of the terms of that order (*Matter of Geovany S. [Martin R.]*, 143 AD3d 578 [1st Dept 2016]; *Matter of Carl J. [Carl J., Sr.]*, 94 AD3d 473 [1st Dept 2012]).

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

ENTERED: MARCH 21, 2019

CLERK

Friedman, J.P., Renwick, Webber, Kahn, Kern, JJ.

8764 The People of the State of New York, Ind. 943/12
Respondent,

-against-

Anthony Gonzalez,
Defendant-Appellant.

_____

Justine M. Luongo, The Legal Aid Society, New York (William B. Carney of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Cassandra M. Mullen, J.), rendered February 1, 2013, convicting defendant, after a jury trial, of assault in the third degree, and sentencing him to time served, unanimously affirmed.

Defendant did not preserve his claim that the court erred in failing to excuse a prospective juror for cause, because his counsel did not join in the challenge for cause to that juror made by another defendant's attorney (*see People v Toledo*, 101 AD3d 571 [1st Dept 2012], *lv denied* 21 NY3d 947 [2013]). That attorney never stated that he was speaking for all three defendants as to challenges for cause, and his later statement that, as to peremptory challenges, he was speaking for all three did not preserve defendant's arguments about the challenge for cause (*see id.*).

We decline to review defendant's claim in the interest of justice. As an alternative holding, we find that the court providently exercised its discretion in denying the challenge for cause. Although the prospective juror at issue replied affirmatively to an isolated, general question about whether the police are more truthful than others, she said nothing that "raise[d] a red flag" or "cast significant doubt" on her ability to assess the evidence in this particular case in a fair and impartial manner (*People v Harris*, 26 NY3d 321, 325 [2015]). Moreover, there were numerous other questions concerning the panelists' ability to be fair and impartial, including whether they accepted that the People had the burden of proving the defendants guilty beyond a reasonable doubt and would give no greater weight to police witnesses than to other witnesses, and these questions received no negative or equivocal responses from anyone on the panel (*see People v Dunkley*, 61 AD3d 428, 428-29 [1st Dept 2009], *lv denied* 12 NY3d 914 [2009]).

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

ENTERED: MARCH 21, 2019

CLERK

Friedman, J.P., Renwick, Webber, Kahn, Kern, JJ.

8765 In re Global Liberty Insurance Company,
Petitioner-Appellant,

-against-

Medco Tech, Inc. as assignee of Coreen Josiah,
Respondent-Respondent.

Index 260656/15

Law Office of Jason Tenenbaum, P.C., Garden City (Jason Tenenbaum of counsel), for appellant.

Israel, Israel & Purdy, LLP, Great Neck (William M. Purdy of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered August 29, 2016, against petitioner in favor of respondent, and bringing up for review an order, same court and Justice, entered January 12, 2016, which denied petitioner's motion to vacate an arbitral award and remand to the lower arbitrator for a de novo hearing, and granted respondent's motion to confirm the award, unanimously reversed, on the law, without costs, the judgment vacated, petitioner's motion granted, and respondent's motion denied.

Respondent seeks from petitioner no-fault insurance benefits for medical equipment that respondent provided to its assignor, who was involved in a motor vehicle accident. In denying respondent's claim, petitioner relied on a peer review report

that concluded, based on a review of the medical records, that the assignor's condition was degenerative in nature and not post-traumatic and therefore that the surgery undergone by the assignor was "not medically necessary *in relation to the accident*" (emphasis supplied). The arbitral award must be vacated and a de novo hearing held, because, on the record before us, as argued, it would be irrational to conclude that the need for the subject medical equipment was causally related to the accident (*see Matter of Smith [Firemen's Ins. Co.]*, 55 NY2d 224, 232 [1982]; *Mount Sinai Hosp. v Triboro Coach*, 263 AD2d 11, 18-19 [2d Dept 1999]; *Shahid Mian, M.D., P.C. v Interboro Ins. Co.*, 39 Misc 3d 135[A], 2013 NY Slip Op 50589[U] [App Term, 1st Dept 2013]).

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

ENTERED: MARCH 21, 2019

CLERK

Friedman, J.P., Renwick, Webber, Kahn, Kern, JJ.

8766 Taquana Jones, Index 306689/12
Plaintiff,

-against-

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

Step Mar Contracting Corp.,
Defendant-Respondent,

Tri-Messine Construction Company, Inc.,
Defendant-Appellant.

_____

Burke, Conway & Dillon, White Plains (Michael Conway of counsel), for appellant.

Cartafalsa, Turpin & Lenoff, New York (David S. Pasternak of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about September 21, 2017, which to the extent appealed from as limited by the briefs, granted defendant Step Mar Contracting Corp.'s motion for summary judgment dismissing all cross claims against it, unanimously reversed, on the law, without costs, the motion denied, and the cross claims reinstated.

Defendant Tri-Messine Construction Company, Inc., a contractor hired by defendant Con Edison to lay pavement over portions of the roadbed that had been excavated and backfilled by a subcontractor hired by defendant contractor Step Mar

Contracting Corp., contends that the defects in the roadbed on which plaintiff tripped were a result of Step Mar's subcontractor's work. As a defendant with a right to seek contribution from a codefendant, Tri-Messine has standing to bring this appeal (*Stone v Williams*, 64 NY2d 639, 641 [1984]). Moreover, Tri-Messine is aggrieved by the dismissal of its cross claims against Step Mar (*see Cruz v Kamlis Dresses & Sportswear Co.*, 238 AD2d 103 [1st Dept 1997]).

Step Mar established prima facie that the hazardous condition on which plaintiff tripped was not caused by any negligence on its part by submitting evidence that Con Edison had formally approved its work as satisfactorily completed, testimony indicating that the photographic exhibits demonstrated no deficiencies in its subcontractor's performance of the excavation and backfilling work, and plaintiff's expert's opinion that the photographic evidence of the alleged hazardous roadbed condition suggested no negligence on Step Mar's contractor's part but negligence only on the parts of Tri-Messine, the finishing paver, and Con Edison, the party that inspected and approved the paving work. However, upon drawing all reasonable inferences from this evidence and other testimony, we find that issues of fact,

including credibility, exist as to the causes that gave rise to the hazardous condition (*see generally Rodriguez v Parkchester S. Condominium*, 178 AD2d 231 [1st Dept 1991]).

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

ENTERED: MARCH 21, 2019

CLERK

Friedman, J.P., Renwick, Webber, Kahn, Kern, JJ.

8767 In re HMC Holding Corp., Index 650499/14
Petitioner-Respondent,

-against-

539 Gates, LLC, et al.,
Respondents-Appellants.

_____

Mancinelli & Associates P.C., New York (Steven Mancinelli of counsel), for appellants.

Schneider Law Group, New York (Allan R. Freedman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about November 23, 2017, which denied respondents' motion to vacate a January 16, 2015 judgment ordering respondents to return certain funds to an account in the name of 539 Gates LLC, unanimously reversed, on the law and the facts, without costs, and the motion granted.

The purpose of the escrow granted in the first arbitration award was to preserve 539 Gates's funds until an accounting could determine how those funds were to be distributed. Although the January 16, 2015 judgment, confirming the award, granted an accounting, the accounting was never completed until the second arbitration award and its judicial confirmation. The second arbitration award stated: "This Award is in full settlement of all claims and counterclaims submitted to this arbitration."

Petitioner appealed, and on February 26, 2018, the New Jersey Appellate Division affirmed the trial court's confirmation of the award in the second arbitration (*539 Gates, LLC v HMC Holding Corp.*, 2018 WL 1040527, 2018 N.J. Super. Unpub. LEXIS 433 [NJ App Div Feb. 26, 2018]). This constituted "sufficient reason" to vacate the January 16, 2015 judgment "in the interests of substantial justice" (*Goldman v Cotter*, 10 AD3d 289, 293 [1st Dept 2004], citing *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003] [other citations omitted]).

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

ENTERED: MARCH 21, 2019

CLERK

Friedman, J.P., Renwick, Webber, Kahn, Kern, JJ.

8768 The People of the State of New York, Ind. 4167/15
Respondent,

-against-

Dwight Brown,
Defendant-Appellant.

_____

Justine M. Luongo, The Legal Aid Society, New York (Heidi Bota 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 (Thomas Farber, J.), rendered June 28, 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.

ENTERED: MARCH 21, 2019

CLERK

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

Friedman, J.P., Renwick, Webber, Kahn, Kern, JJ.

8769 Lush Dacaj, Index 151523/12
Plaintiff-Respondent,

-against-

New York City Transit Authority, et al.,
Defendants-Appellants.

_____

Lawrence Heisler, Brooklyn (Timothy J. O'Shaughnessy of counsel), for appellants.

Morgan Levine Dolan, P.C., New York (Glenn P. Dolan of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Manuel J. Mendez, J.), entered March 30, 2018, upon a jury verdict, which, to the extent appealed from as limited by the briefs, awarded plaintiff $1.2 million for past pain and suffering, $1 million for future pain and suffering over 10 years, $255,582 for future medical expenses, and $250,000 for future loss of earnings, and bringing up for review an order, same court and Justice, entered on or about April 6, 2017, which denied defendant's motion to set aside the verdict, unanimously modified, on the law, the facts and in the exercise of discretion, to vacate the awards for past pain and suffering and future pain and suffering, and to remand the matter for a new trial on damages for past pain and suffering and future pain and suffering, unless plaintiff stipulates, within 30 days after entry of this order, to reduce the awards for past

pain and suffering to $1,000,000 and for future pain and suffering to $675,000, and to the entry of an amended judgment in accordance therewith, and otherwise affirmed, without costs.

Missing witness charges were properly given with regard to defendant's expert orthopedist and radiologist, who failed to testify at trial (*see Devito v Feliciano*, 22 NY3d 159, 165-166 [2013]; *People v Gonzalez*, 68 NY2d 424, 427 [1986]). Defendant's neurologist admitted during cross-examination that he was not an orthopedist, plaintiff's claimed injuries were orthopedic in nature, and he could not offer any orthopedic opinions. Accordingly, the testimony of defendant's expert orthopedist would not have been cumulative of defendant's neurologist's testimony, since she would have been in a position to offer such opinions. Regarding defendant's expert radiologist, his testimony would have borne on a material issue in the case, namely, the presence of degenerative disc disease in the affected areas of plaintiff's cervical spine, and so the missing witness charge was properly given as to him as well.

Contrary to defendant's argument, "there is a rational view of the evidence that supports the jury's award for future medical expenses. Moreover, the jury's award for future medical expenses was based upon a fair interpretation of the evidence, and thus, was not contrary to the weight of the evidence" (*Roman v Brooklyn*

*Navy Yard Dev. Corp.*, 63 AD3d 1136, 1137 [2d Dept 2009][internal citations omitted]).

Similarly, the jury's award for future loss of earnings was not so "utterly irrational" as to be against the weight of the evidence (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]; *see Tassone v Mid-Valley Oil Co.*, 5 AD3d 931, 932 [3d Dept 2004], *lv denied* 3 NY3d 608 [2004]; *Calo v Perez*, 211 AD2d 607, 608 [2d Dept 1995]).

To the extent indicated, we find that the jury's awards for past pain and suffering and future pain and suffering for the 69-year-old plaintiff deviated materially from what would be reasonable compensation (*see* CPLR 5501[c]; *Donlon v City of New York*, 284 AD2d 13, 18 [1st Dept 2001]; *compare Diaz v West 197th St. Realty Corp.*, 290 AD2d 310 [1st Dept 2002], *lv denied* 98 NY2d 603 [2002] [$900,000 for past pain and suffering for herniated disc requiring spinal fusion surgery] *with Miranda v New Dimension Realty Co.*, 278 AD2d 137 [1st Dept 2000] [$400,000 for past pain and suffering for multilevel spinal fusion surgery]; *compare also Mata v City of New York*, 124 AD3d 466 [1st Dept 2015] [$2 million over 50 years (amounting to $40,000 per year) for plaintiff who underwent spinal fusion surgery] *with Gonzalez*

*v Rosenberg*, 247 AD2d 337 [1st Dept 1998] [$750,000 for future pain and suffering where plaintiff sustained a herniated disc that was the subject of two operations]).

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

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

ENTERED: MARCH 21, 2019

CLERK

Friedman, J.P., Renwick, Webber, Kahn, Kern, JJ.

8770 In re John Broussard, Index 152428/17
Petitioner-Appellant,

-against-

New York City Department of Housing Preservation & Development,
Respondent-Respondent.

_____

Vernon & Ginsburg, LLP, New York (Bari Wolf of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Carol R. Edmead, J.), entered August 8, 2017, denying the petition to annul the determination of respondent, dated December 7, 2016, which denied petitioner succession rights to the subject Mitchell-Lama apartment, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The determination has a rational basis in the record and was made in accordance with lawful procedure (*see generally Matter of Pietropolo v New York City Dept. of Hous. Preserv. & Dev.*, 39 AD3d 406 [1st Dept 2007]; CPLR 7803[3]). Contrary to petitioner's contention, being listed on the income affidavits for the relevant time period does not by itself establish his entitlement to succession rights to the apartment (*see Matter of*

*Jian Min Lei v New York City Dept. of Hous. Preserv. & Dev.*, 158 AD3d 514 [1st Dept 2018]). Petitioner failed to provide credible documentation showing that the apartment was his primary residence between March 2015 and March 2016, sufficient to establish entitlement to succession rights (28 RCNY 3-02[p][3]). Although petitioner submitted his 2014 and 2015 tax returns, he did not submit any of the suggested proofs of primary residency, such as bank statements, voter registration statements, or bills addressed to him at the apartment (*see e.g. Matter of Jacobowitz v New York City Dept. of Hous. Preserv. & Dev.*, 160 AD3d 417 [1st Dept 2018]). Furthermore, other documents that petitioner did submit, as well as the letters prepared by petitioner's neighbors and by his mother's doctors, did not conclusively establish primary residency during the relevant time period.

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: MARCH 21, 2019

CLERK

Friedman, J.P., Renwick, Webber, Kahn, Kern, JJ.

8771 Warner Wolf, Index 151440/18
Plaintiff-Appellant,

-against-

Don Imus, et al.,
Defendants-Respondents.

_____

Wigdor LLP, New York (Kenneth Walsh of counsel), for appellant.

Offit Kurman, P.A., New York (Martin Garbus of counsel), for Don Imus, respondent.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., New York (Aaron Warshaw of counsel), for Chad Lopez, Mike McVay and Craig Schwalb, respondents.

_____

Order, Supreme Court, New York County (James E. d'Auguste, J.), entered September 27, 2018, which, to the extent appealed from, granted defendants' motions to dismiss the complaint, unanimously affirmed, without costs.

Supreme Court properly dismissed plaintiff's age discrimination claims brought under the City and State Human Rights Laws, because the impact on plaintiff from the termination of his employment occurred in Florida, where he lived and worked (*see e.g. Hoffman v Parade Publs.*, 15 NY3d 285, 290-292 [2010]; *Shah v Wilco Sys., Inc.*, 27 AD3d 169, 175-176 [1st Dept 2005], *lv dismissed in part and denied in part* 7 NY3d 859 [2006]). "Whether New York courts have subject matter jurisdiction over a

nonresident plaintiff's claims under the HRLs turns primarily on her [or his] physical location at the time of the alleged discriminatory acts" (*Benham v eCommission Solutions, LLC*, 119 AD3d 605, 606 [1st Dept 2014]).

Plaintiff's claim for tortious interference with contractual relations, also arising from the termination of his employment, was not viable because the documentary evidence demonstrates that his employer did not breach his employment contract, but declined to exercise its contractual right to renew the contract for an additional year (*see American Preferred Prescription v Health Mgt.*, 252 AD2d 414, 417 [1st Dept 1998]; *see also Willis Re Inc. v Hudson*, 29 AD3d 489, 490 [1st Dept 2006]).

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

ENTERED: MARCH 21, 2019

CLERK

Friedman, J.P., Renwick, Webber, Kahn, Kern, JJ.

8772 The People of the State of New York, Respondent, Ind. 2990N/15

-against-

Kelvin N., Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Robert M. Mandelbaum, J.), rendered March 17, 2016, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, adjudicating him a youthful offender and sentencing him to a term of three years' probation, unanimously affirmed.

Defendant made a valid waiver of his right to appeal, which forecloses review of his suppression claims. The court's oral colloquy with defendant concerning the waiver separated the right to appeal from the rights normally forfeited upon a guilty plea, and the court specifically explained that defendant would ordinarily have the right to appeal to a higher court, but was giving up that right for a beneficial plea bargain (*see People v Bryant*, 28 NY3d 1094 [2016]). Furthermore, the oral colloquy was

supplemented by a detailed written waiver that also distinguished the right to appeal from the rights forfeited by pleading guilty.

Regardless of whether defendant validly waived his right to appeal, we find that the court properly denied his suppression motion. The police observation of a text message in plain view on an open screen on defendant's phone and the ensuing strip search were both lawful.

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

ENTERED: MARCH 21, 2019

CLERK

Friedman, J.P., Renwick, Webber, Kahn, Kern, JJ.

8773N Elisabetta Nicotra, et al., Index 655841/17
Plaintiffs-Appellants,

-against-

Tricia Dignam, et al.,
Defendants-Respondents.

_____

Brennan Law Firm PLLC, New York (Kerry A. Brennan of counsel), for appellants.

Edmonds & Co., P.C., New York (Neil G. Marantz of counsel), for respondents.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered on or about January 17, 2018, which, inter alia, denied plaintiffs' motion to strike defendants' answer, unanimously affirmed, without costs.

The court properly denied plaintiffs' motion to strike the answer, because plaintiffs failed to demonstrate that a substantial right was prejudiced by the verification that was signed by only one defendant. Moreover, each defendant has submitted an affidavit stating that they adopted the allegations

of the answer that was verified by one defendant with their authorization (*see Duerr v 1435 Tenants Corp.*, 309 AD2d 607 [1st Dept 2003]).

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

ENTERED: MARCH 21, 2019

CLERK

Friedman, J.P., Renwick, Webber, Kahn, Kern, JJ.

8774 In re John Walden, Ind. 3190/15
[M-522] Petitioner, OP 173/19

-against-

Hon. Arlene Goldberg, et al.,
Respondents.

_____

John Walden, petitioner pro se.

Letitia James, Attorney General, New York (Charles F. Sanders of counsel), for Hon. Arlene Goldberg, respondent.

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

_____

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

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

ENTERED: MARCH 21, 2019

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

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

7336
Index 6798/07

_____x

Wayne Roberts,
Plaintiff-Appellant,

-against-

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

Plaintiff appeals from an order of the Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about May 23, 2017, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing plaintiff's claims for false arrest and imprisonment and malicious prosecution.

McManus Ateshoglou Aiello & Apostolakos PLLC, New York, (Steven Ateshoglou of counsel), and The Law Office of John R. Kelly, Monticello (John R. Kelly of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (MacKenzie Fillow and Jane L. Gordon of counsel), for respondents.

TOM, J.

This action to recover damages for false arrest and imprisonment and for malicious prosecution arose from plaintiff Wayne Robert's arrest and prosecution for the murder of Jamie Richetti, who was shot and killed at a social gathering on November 3, 2002. Plaintiff had been indicted by a grand jury on August 14, 2003 on two counts of murder in the second degree and other charges, and a criminal jury trial followed. Ultimately, plaintiff was acquitted on February 2, 2006.

Certain facts pertinent to the shooting are undisputed. For the subsequent civil action, plaintiff's strategy has focused on disputing the identification of him as the shooter. The record, including numerous police reports and statements by witnesses, reflects that the shooting outside of a well attended social event caused significant confusion as witnesses were alerted from various vantage points while many attendees remained inside. Some participants in a physical confrontation preceding the shooting apparently had not been invited and likely were unknown by attendees. Nevertheless, plaintiff's various attempts to dispute his identification as well as disparage the credibility of police and identification witnesses do not withstand a close analysis with respect to establishing the requisite elements of the civil claims. When the speculative challenges to probable

cause and the propriety of the prosecution are cleared away, we are left with a record of the criminal investigation and prosecution that is factually compelling, warranting dismissal of the civil claims relevant to this appeal.

On November 2, 2002, the victim, Richetti, had attended a birthday party in the community center at the Soundview Housing Projects in the Bronx. At around 1:00 a.m. a large fight began outside the center, and at least one person fired a gun. Richetti was shot in the head and died in Jacobi Hospital a few days later.

Police officers responded to the scene and took statements that did not, however, ripen at that time into strong leads as to the identification of the shooter. Detective Gilbert Ramirez of the 43rd precinct was assigned to investigate. The Unusual Occurrence Form prepared at the precinct following the shooting reflected that the victim had been shot twice in the head, that three .38 caliber copper jacketed spent shell casings were recovered nearby and that a witness, George Lopez, stated that four black men wearing black clothing had been involved and that the group had been unknown to him as well as the victim. A report dated November 4, 2002 reflected that the victim's father called Ramirez from the hospital and stated that he had heard that "Pee-wee," who possibly lived in the "Castlehill projects,"

might have been responsible for the shooting.

The DD-5 report reflected that Angel Milan, the victim's friend who had attended the party in the company of the victim and George Lopez, related in his statement at the precinct on November 14, 2002 that someone named "Terry," who lived in the same building as the victim, was fighting with another individual, and that the victim also began to fight that unknown person. Milan related during the precinct interview that during the scuffle, another "kid" fired shots in the air, causing people to scatter, but when the victim kept fighting, his antagonist broke away and also pulled out a gun. As the victim turned to run, Milan related that he, himself, ducked behind a car, from where he heard several shots being fired. Milan stated that when he looked out, he saw the victim bleeding on the ground and the shooter running with others towards Story Avenue. Milan described the person wielding the gun as a black male with dark skin and short hair about 5'10" to 6' in height and weighing approximately 170 pounds, wearing a black jacket with a hood. Milan also related that, upset, he was walking home rapidly afterward and came upon Terry who was saying on his cell phone, "You killed one of mine, now one of yours got to go."

On May 2, 2003, Detective Ramirez arrested Harry Adams in connection with an unrelated crime. At the time of his arrest,

Adams was at his sister's house with his pregnant 17-year-old girlfriend, Crystal Westbrook, who was also brought to the precinct. According to Detective Ramirez, police officers interviewed Adams, who said he knew who was responsible for the shooting at the community center and that he was looking for a deal with the District Attorney's office. In his signed statement on May 12, 2003, Adams related that he had been invited to the party and was there with Westbrook when some kind of "fight broke out" in the community center. At one point an argument broke out with "Wayno (Pee-Wee)" which he heard was "over a chain snatch," and it resulted in a "couple of guys" having fist fights. He saw Wayno pull out a handgun and fire a shot at the crowd, and saw somebody directly in front of Wayno drop to the ground. Wayno was about to shoot again, when he was grabbed and his arm was pushed into the air, and then some others began to fire shots. Wayno then ran away. Adams had known Wayno for years, and described him as "crazy," "very intoxicated," "a dangerous dude" and wearing a "box" jacket at the time of the shooting. "I saw Wayno pull out the gun and shoot the kid, no reason whatsoever."

Following Adams's interview, the police questioned Westbrook. She told police that she was also at the party, saw two guys fighting over a "chain snatch," and the fighting

continued outside. She saw a black man who she knew as Wayno pull out a gun, point it at another guy, and fire one shot. She also saw the victim fall to the ground and not move again. At that point, she related, more people began to shoot and run in various directions, and Wayno ran away.

Detective Ramirez showed both Adams and Westbrook a photo array from the NYPD's Photo Imaging System that included a photo of plaintiff. He asked each of them if they recognized anyone as "Pee-Wee" or "Wayno," and they both identified plaintiff. Detective Ramirez said that they informed him they knew him because they grew up together in the same neighborhood.

Based on these statements, the DA's office authorized the police to arrest plaintiff. Upon his arrest, plaintiff spontaneously said he was the victim at the party, where he was punched in the face. Plaintiff then gave written statements saying that he was at the community center party on the night of the shooting, got into a fight inside the hall over a girl, and was sucker punched, causing a gash in his eyebrow. He claimed he went home to clean up and stayed there.

Thereafter, in August 2003, a grand jury indicted plaintiff on two counts of murder in the second degree, one count of manslaughter in the first degree, and one count of criminal possession of a weapon.

Sometime in July 2005, before the criminal trial, Westbrook informed the Bronx DA's Office that plaintiff had called her and that she was recanting her statement and grand jury testimony. ADA Christine Scaccia asked the court to declare Westbrook an unavailable witness due to plaintiff's misconduct and to permit her grand jury testimony to be admitted at trial. The court appointed an attorney for Westbrook, and a hearing on this issue was held on January 11, 2006.

At the hearing, Detective Ramirez testified that a suspect's name, "Pee-wee," had been "floating around." Ramirez then testified to the statements previously provided by Adams and Westbrook. Ramirez testified that whereas Adams was in the precinct because he was being arrested, Westbrook explained that she was there because she "had nowhere to go" but that she was kept in a room separate from Adams. After Adams provided his statement, Westbrook was interviewed separately from Adams, and she provided the statement related above. Each statement was documented in a DD-5. Only after Westbrook provided a statement were she and Adams allowed to be together for about two minutes while they shared a cigarette. With respect to Westbrook's recantation, Ramirez testified that Westbrook had informed him during July 2005 that someone had gone to her building looking for her because she was a witness to a homicide. Then, after

plaintiff contacted her by phone, she told Ramirez that she had "made it all up" to help Adams avoid jail. Ramirez testified that Westbrook claimed to have been left alone with Adams for a lengthy period of time in the precinct, during which time Adams told her what to say. Ramirez testified that this was inaccurate, since Adams, who was secured in an interview room as an arrestee, and Westbrook, who was in his office, had never been left alone prior to their separate statements.

Westbrook testified at the hearing that she had known plaintiff, whom she identified in court, for about eight or nine years and had gone to school with him. Against her attorney's advice to invoke her Fifth Amendment privilege, she stated that she had lied to the police because she was "madly in love" with Adams. Specifically, she asserted that she had been kept with Adams in the same room at the precinct, that everything in her statement was what Adams had told her to say earlier that day when he was arrested for attempted murder, and that she had lied in her statement. In fact, she maintained she had never heard about the incident or the party before that day. She testified that plaintiff contacted her by phone in early summer 2005, saying that he heard that she was testifying against him and asking her how she could be testifying when she was not at the party. Westbrook told him, "[Y]ou are right, I wasn't," and

blamed one of Adams's other girlfriends. Westbrook was shocked to hear from plaintiff but denied being afraid of him.

ADA Scaccia, the supervising ADA of the homicide investigation, testified at the hearing that during the investigation she had found Westbrook to be a very credible witness concerning the shooting because of the detail she gave when describing the incident. Moreover, Scaccia testified that during an interview in the District Attorney's Office Adams had even discouraged Westbrook from testifying against plaintiff but Westbrook insisted that it was the right thing to do. Scaccia also noted that during Westbrook's testimony to the grand jury, she recounted many details that Adams had not provided and was very emotional. Scaccia testified that she never had the impression that Westbrook was testifying regarding anything that she had not personally seen, especially given the depth of detail with which she described the incident. In fact, Scaccia testified, Westbrook's value in testifying before the grand jury was that her account was more detailed than Adams's.

At the criminal trial, Adams and Detective Ramirez testified on behalf of the People. The People also called Westbrook to testify, but she invoked her Fifth Amendment privilege and declined to give substantive testimony.

Milan testified for plaintiff at the criminal trial in a

manner inconsistent with his earlier statements as documented in the police report. Significantly, he now denied that anyone named Terry was present at the scene. He also testified that he saw the victim fighting with someone, other than plaintiff, that this person had a gun, and that he never saw the gunman fire. Plaintiff, as noted, was acquitted.

Plaintiff commenced this action in 2007 against the City of New York, New York City Police Department, and various John Doe police officers, setting forth claims for false arrest and imprisonment and malicious prosecution. Supreme Court granted defendants' motion for summary judgment dismissing the complaint. This appeal followed.

Whether the present civil claims should proceed to trial or warrant dismissal is governed, in the main, by two issues: whether the arrest was unlawful, and whether the prosecution was improperly motivated as measured against the standards discussed below. The fact that the criminal defendant - the present civil plaintiff - was acquitted at the criminal trial, a jury decision that could have been based on any number of factors about which we cannot now speculate, should not be used retrospectively to guide our analysis of these relevant inquiries for the civil case.

A plaintiff alleging a claim for false arrest or false

imprisonment "must show that the defendant intended to confine the plaintiff, that the plaintiff was conscious of the confinement and did not consent to it, and that the confinement was not otherwise privileged" (*Hernandez v City of New York*, 100 AD3d 433, 433 [1st Dept 2012], *lv dismissed* 21 NY3d 1037 [2013]). The existence of probable cause to arrest "serves as a legal justification for the arrest" (*Martinez v City of Schenectady*, 97 NY2d 78, 85 [2001]) and "is a complete defense to such claims" (*Hernandez*, 100 AD3d at 433).

As defined by the Court of Appeals, "The elements of the tort of malicious prosecution are: (1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the accused, (3) the absence of probable cause for the criminal proceeding and (4) actual malice" (*Broughton v State of New York*, 37 NY2d 451, 457 [1975], *cert denied* 423 US 929 [1975]).

The civil defendant moving for summary judgment in such cases must establish a defense to the plaintiff's malicious prosecution and false arrest claims as a matter of law by submitting sufficient evidence to eliminate any material issues of fact (*De Lourdes Torres v Jones*, 26 NY3d 742, 762-763 [2016]). Once a prima facie showing for dismissal has been made, the burden shifts to the party opposing the motion to raise a

material issue of fact. Notwithstanding surmise about inferences a jury might draw, "the court on a summary judgment motion must indulge all available inferences of the absence of probable cause and the existence of malice" (*De Lourdes Torres*, 26 NY3d at 763).

The false arrest and imprisonment claims require an initial analysis of whether the arrest was predicated on probable cause. As will be demonstrated by recitation to the relevant record evidence below, dismissal of the claims is required because of the absence of any triable issues as to whether the police had probable cause to arrest plaintiff. Nor does the record allow any inferences to be drawn that the legality of the arrest was defective. It is well established that in order to establish probable cause to arrest, proof beyond a reasonable doubt is not required "but merely information sufficient to support a reasonable belief that an offense has been . . . committed" (*People v Bigelow*, 66 NY2d 417, 423 [1985]). Dismissal is required when "the facts leading up to the arrest, and the inferences to be drawn therefrom, [are] not in dispute" (*Agront v City of New York*, 294 AD2d 189, 189 [1st Dept 2002]). It is undisputed that two witnesses, who had known plaintiff for years, identified plaintiff to the police as the person who shot Richetti. The facts available to the police at the time of the arrest neither conflicted with the identification nor cast doubt

on the witnesses. Nor did Adams's and Westbrook's accounts, which corresponded to the information available to police at the time, conflict with each other. Moreover, it is tellingly significant that their accounts were corroborated by plaintiff's own admission that he had been present at the party and involved in a fight. While not inculpatory with respect to the shooting, plaintiff thus enhanced the reliability of the identification evidence presented to police in connection with the resulting arrest. Nor was the identification evidence seriously undermined by statements from other witnesses, including conjecture that the shooter had come from a housing complex other than plaintiff's, which can be understood as vague details provided in the context of a traumatic and confusing event. We focus here on the reliable evidence, corroborated as just noted, available to police at the time of the arrest.

Plaintiff tries to locate factual uncertainty in what he describes as materially impeaching circumstances arising from the identifications by Adams and Westbrook such as would cause a reasonable person to doubt their reliability or credibility. Specifically, he selects aspects of Westbrook's deposition testimony that contradicted Ramirez's testimony wherein she asserts that she remained in a precinct room alone with Adams after he was arrested. There, plaintiff contends, Adams

convinced her to corroborate his false accusation, and she did so by identifying plaintiff as Richetti's murderer, with Adams still in the room with her. Plaintiff further surmises that since Westbrook was Adams's 17-year-old pregnant girlfriend, they were both potentially motivated to identify plaintiff to mitigate Adams's own risks in facing prosecution.

The record, however, does not support plaintiff's speculative contentions. To the contrary, there is ample evidence of probable cause. Initially, Adams's identification of defendant and Westbrook's initial signed statement possess persuasive indicia of reliability. There is no reasonable basis under the circumstances of this case to controvert probable cause at the inception on the basis of Westbrook's later statement, after having been contacted by the murder suspect, that her identification had been a lie. Moreover, there is no nonspeculative basis to conclude that the police investigation otherwise was deficient in any manner such as would vitiate the probable cause leading to plaintiff's arrest. Numerous witnesses were interviewed, even if unproductively, and some understandably indefinite descriptions by bystanders after a fleeting but frightening event would not detract from the probable cause later predicated on the identifications by Adams and Westbrook. The conclusion supported by the record is that police acted

diligently in interviewing witnesses and trying to establish leads. However, even if we were to accept Westbrook's later recantation testimony as true for the sake of argument, and to thus accord plausibility to plaintiff's argument, the possibility that Adams and Westbrook may have been privately motivated to minimize Adams's own punishment was not a valid reason for the police to doubt their credibility or the accuracy of their identifications. It bears repeating that they had known plaintiff for years, and that their detailed recollections corresponded with other information possessed by the police. In other words, whatever Westbrook's motivation, this was not a sufficient basis to undermine the witnesses' statements establishing probable cause. To the contrary, there is no sound basis on the evidence presented to propose that the police were "aware of 'materially impeaching circumstances' or grounds for questioning the [witnesses'] credibility" (*Medina v City of New York*, 102 AD3d 101, 104 [1st Dept 2012]), the basis proposed by plaintiff to defeat summary judgment.

Furthermore, even assuming, again for argument's sake, that additional police investigation could somehow have uncovered evidence that conflicted with the witnesses' statements, that evidence might have been relevant to the issue of reasonable doubt at the criminal trial at the back end of the prosecution.

However, it would have provided no sound basis to controvert probable cause to arrest plaintiff at the front end of the criminal investigation predicated on the information and accusations provided to police by witnesses who had been present during the shooting and who were personally familiar with plaintiff (*see Agront*, 294 AD2d at 190).

This case stands in stark contrast to the cases relied on by plaintiff for upholding a false arrest claim. For example, in *Sital v City of New York* (60 AD3d 465 [1st Dept 2009], *lv dismissed* 13 NY3d 903 [2009]), the arresting officer admittedly had doubts about the credibility of the complainant who had accused the plaintiff of a fatal shooting, and the identification was arguably contradicted by physical evidence at the crime scene that was consistent with the conflicting statement of an independent eyewitness. Similarly, in *Roundtree v City of New* York (208 AD2d 407, 407 [1st Dept 1994]), the investigating officer

> "admitted that he had harbored serious doubts about the witness' identification of plaintiff as the murderer, based upon several discrepancies in the witness' statements, bloody items found in the witness' apartment, the witness' sole access to the basement area where the victim had been found, and statements of several other witnesses to the effect that the witness had had a number of disputes with the victim."

There are no similar circumstances here, such as conflicting

physical evidence or statements by other witnesses, that raised valid doubts about the witnesses' credibility or their identification of plaintiff as the shooter. To the contrary, Detective Ramirez as well as ADA Scaccia explained the circumstances upon which they found Westbrook's initial statement to be especially reliable.

Although the dissent concludes that the police should have doubted the mutually consistent, detailed statements by the identifying witnesses, it is hard to see, excepting unsupported speculation, what credible suspicions should have been harbored by police at the time the statements were given. We can confidently eliminate that contention. The dissent's contention that Westbrook's later recantation should, in effect, be applied retroactively to create a factual issue about the legality of the arrest overlooks the information available to police at the time of his arrest: as noted above, two identification witnesses personally familiar with plaintiff provided detailed statements consistent in all material respects about the murder and the shooter, which were not inconsistent with other information available to police, at an event where plaintiff admitted having been involved in an altercation. These facts easily established probable cause. *Latif v Eugene Smilovic Hous. Dev. Fund Co., Inc.* (147 AD3d 507 [1st Dept 2017]), cited by the dissent, where

we found that factual issues involving constructive notice in a trip and fall case evaded summary disposition, has no bearing on the circumstances of this case.

Turning now to the malicious prosecution claim, plaintiff's indictment created a presumption of probable cause for the criminal proceeding (*Colon v New York*, 60 NY2d 78, 82-83 [1983]; *see also De Lourdes Torres*, 26 NY3d at 761]). The presumption "may be overcome only by evidence establishing that the police witnesses have not made a complete and full statement of facts either to the Grand Jury or to the District Attorney, that they have misrepresented or falsified evidence, that they have withheld evidence or otherwise acted in bad faith" (*Colon*, 60 NY2d at 82-83). This record does not evince any such improprieties. Moreover, even if a plaintiff rebuts the presumption of probable cause, he or she still must establish as a jury issue that the defendant acted with malice, i.e., that the defendant "'must have commenced the prior criminal proceeding due to a wrong or improper motive, something other than a desire to see the ends of justice served'" (*De Lourdes Torres*, 26 NY3d at 761, quoting *Nardelli v Stamberg*, 44 NY2d 500, 503 [1978]). Malice, too, is not evident in this record.

Although false arrest and malicious prosecution are "kindred actions" (*Broughton v State of New York*, 37 NY2d at 456, "the

unique elements of malicious prosecution typically present a greater obstacle to recovery than the elements of false arrest" (*De Lourdes Torres* at 760). Unlike *De Lourdes Torres*, where factual issues existed regarding a coerced confession, an officer's possibly misleading account to the plaintiff about her polygraph test, the possibility that police officers may have withheld DNA and other evidence, and the dismissal of the criminal charges on the District Attorney's motion, supportable indications of such bad faith are not manifest in this record. Moreover, as that decision cautioned, it did not "signal that every allegation of the falsification of material evidence is a talisman shielding a plaintiff from summary judgment. It remains the law that a plaintiff's vague and conclusory assertions that the police fabricated evidence are insufficient to enable false arrest and malicious prosecution claims to survive a summary judgment motion" particularly where the plaintiff's claim of fabricated evidence "does not eliminate all questions as to probable cause" (*De Lourdes Torres* at 771). That caveat to the reinstatement of the civil claims in that case is especially applicable herein. The dissent's reliance on *Ramos v City of New York* (285 AD2d 284 [1st Dept 2001]), is similarly misplaced. The Ramos prosecution evinced prosecutorial recklessness in the extreme, with substantial and virtually undisputed undertones of

malice. In that 42 USC § 1983 action premised on false arrest and malicious prosecution in a child sexual abuse prosecution, exculpatory evidence was ignored and suppressed, the young child's claims had the appearances of fabrication, and the medical expert who ruled out child sexual abuse relayed that conclusion to the District Attorney but he was not called as a witness nor was that information disclosed to the plaintiff. These and other glaring defects in the investigation and prosecution vitiated the conviction for which the plaintiff had spent several years incarcerated as a sexual predator before Supreme Court vacated the conviction pursuant to CPL 440.10. Our court found ample grounds for the subsequent civil action. *Ramos* has no applicability to the facts of this case.

Any notion of malice propelling the prosecution forward is further dispelled in view of Detective Ramirez's deposition testimony establishing the continuing validity of the probable cause, notwithstanding Westbrook's recantation, predicated on Adams's continual and emphatic insistence that he had witnessed plaintiff shoot and kill Richetti, coupled with the reasonable belief by police that Westbrook's recantation was motivated by fear of plaintiff after he called her prior to the trial. Hence, probable cause was well established for the reasons already discussed above, and plaintiff has failed to raise a triable

issue regarding malice as an element of malicious prosecution. Rather, plaintiff merely engages in groundless speculation that police withheld information from the District Attorney's office during the prosecution.

Plaintiff next turns to Milan's deposition testimony in an attempt to establish the requisite malice. Milan testified, contrary to his statement to police, that he had unequivocally informed Detective Ramirez during his interview that he knew plaintiff but had not seen him at the party, that plaintiff was not present during the homicide, and that plaintiff was not the shooter. Milan also stated that Detective Ramirez showed him a photograph of plaintiff, and had him draw a circle around plaintiff's picture. Milan, nonetheless, admitted that he did not see the shooting. Rather, as noted above, Milan had earlier related to police that when a "kid" fired shots into the air he ducked behind a car, after which he heard 7 to 10 shots. When he looked out, he saw Richetti, who had been fighting with another person, lying on the ground bleeding from his head. Interestingly, plaintiff had placed himself at the scene in a physical altercation, another factor that fatally diminishes Milan's belated attempted exculpation of plaintiff employed now in the civil action for purposes of establishing malicious prosecution.

However, even assuming - again for the sake of argument - that Milan had exculpated plaintiff in his police interview, police still had a reasonable basis to rely on Adams and Westbrook, who had provided contrary information inculpating plaintiff as the shooter preceding the arrest and prosecution. In a confusing street scene such as occurred here, the police were not required to resolve all uncertainties or conflicting evidence for purposes of establishing probable cause at the inception of the criminal investigation; that task, evaluating reasonable doubt, was for the jury in the criminal trial.

In any event, it is evident that Milan's testimony, that the police withheld information in their report, lacks indicia of reliability. The record does not support a contention that the "investigation was conducted in a manner which deviated so egregiously from proper police procedure as to indicate intentional or reckless action by the lead detective" (*Williams v City of New York*, 114 AD3d 852, 854 [2d Dept 2014]). Nor does plaintiff provide anything to support a reasonable inference that Detective Ramirez acted with an improper motive, or had any motive other than discharging his professional responsibilities. The record is devoid of any inference evincing the requisite malice consisting of a "total lack of probable cause" or that the civil defendants or law enforcement "intentionally provid[ed]

false information" (*Cardoza v City of New York*, 139 AD3d 151, 164 [1st Dept 2016]). Once the unsupported surmises proposed by plaintiff are eliminated, it is apparent that the record is bereft of any unresolved factual issues.

Accordingly, the order of the Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about May 23, 2017, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing plaintiff's claims for false arrest and imprisonment and malicious prosecution, should be affirmed, without costs.

All concur except Sweeny, J.P. and Gesmer, J.
who dissent in an Opinion by Gesmer, J.

GESMER, J. (dissenting)

I respectfully dissent.

Plaintiff was arrested and indicted for murder in the second degree in connection with the death of Jamie Richetti, who was shot fatally on November 3, 2002 outside a party at the community center of the Soundview Houses in the Bronx. Plaintiff was later acquitted. He commenced this action against the City of New York and several individual police officers for, inter alia, false arrest and imprisonment and malicious prosecution. The motion court granted summary judgment to all defendants and dismissed the complaint. I would reverse that order since, in my view, plaintiff has raised triable issues of fact sufficient to defeat summary judgment.

The record reveals the following. After the shooting, Detective Gilbert Ramirez was assigned to the homicide investigation, and police canvassed the area. The investigation did not recover a weapon, fingerprints, or DNA. Witnesses interviewed by the police gave descriptions of the shooter that varied as to his height, age, and skin tone. Several witnesses stated that they believed that the shooter had come from the Castle Hill Houses.

Angel Milan, a friend of the victim, was among the people interviewed by the police. Detective Ramirez documented in a DD-

5 report that he spoke to Milan at the precinct on November 3, 2002, and that Milan claimed that he had been at the party at the community center and then left. When Milan returned, he saw a fight break out that led to gunfire, and he hid behind a car. When Milan got up from behind the car, Richetti had been shot and was on the ground. When Milan was deposed in this action, he testified that, at the precinct, he explicitly informed the police that plaintiff was not the shooter. This information does not appear in the DD-5.

On May 2, 2003, Detective Ramirez traveled to the home of Henry Adams to arrest Adams for an unrelated shooting. Adams's girlfriend, Crystal Westbrook, who was then 17 years old and pregnant, was present at the time of the arrest. Detective Ramirez brought both Adams and Westbrook to the 43rd Precinct.

At the precinct, Adams informed police that he was interested in making a deal with the District Attorney's office and claimed that he had information related to the Richetti homicide.[1] Adams made a statement to the police in which he reported that he and Westbrook were at the party when a fight broke out over a "chain snatch." The fight spilled outside.

[1] At his deposition, Detective Ramirez acknowledged that arrestees who provide information about serious or violent crimes "are looking to get out of jail."

"Wayno," also known as "Pee-Wee," allegedly pulled out a handgun and fired into the crowd, striking a "kid" who fell to the ground.[2]

The events following Adams's statement are in dispute. Detective Ramirez testified that, after Adams gave his statement, he separately interviewed Westbrook in an interrogation room where she gave a statement in which she also claimed to have been at the party and witnessed a fight over a chain snatch. Detective Ramirez testified that Westbrook claimed that a man known to her as "Wayne" pulled out a gun and fired a shot at another man who fell to the ground and did not move again. He also testified that Westbrook and Adams were not alone together at the precinct before he interviewed each of them.

According to Detective Ramirez, he showed Adams and Westbrook a photograph of plaintiff and the two said that they knew him because they had grown up in the same neighborhood. He also noted that their statements matched some information the police had already received, since other witnesses had claimed

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[2] On July 1, 2004, after plaintiff's arrest, Adams entered into a cooperation agreement with the District Attorney's office. The cooperation agreement provided that if Adams, inter alia, fully cooperated in plaintiff's prosecution, Adams would receive a plea to a reduced charge and a recommendation from the District Attorney's office that he receive a sentence of probation.

that a fight broke out at the party and that someone known as "Pee-Wee" may have been involved.[3] Notably, Detective Ramirez testified that Adams's and Westbrook's stories were "not made up," because "[t]hey were both interviewed separately and they pretty much had the same story. It is not like they had time to rehearse it unless they did prior to [Adams] being arrested. It's kind of a big story to come up with when he was arrested. She is in one room and he is in a different area. She says pretty much the same thing." By contrast, Westbrook has maintained that she and Adams were allowed to be in the same room at the precinct before she gave her statement and that her statement was a lie that Adams coached her to tell.

Before plaintiff's trial, Westbrook informed the District Attorney's Office that she did not want to testify because she had not seen the incident and that she had previously lied. At a hearing held on whether Westbrook could be declared an unavailable witness, Westbrook testified that when she went to the precinct, she believed that she was "under arrest." She said that she told Detective Ramirez what Adams had told her to say.

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[3] One police document in the record indicates that "Pee-Wee" is a nickname used by a man named Duvall Blake. Another document indicates that, while Richetti's father believed that "Pee-Wee" may have been responsible, "Pee-Wee" lived in the Castle Hill Houses.

She explained that, at the time, she was "madly in love" with Adams and that he was "try[ing] to snitch," and "tried to put [her] in it." She said that she was unaware of the incident and had only learned about it after Adams had gotten "locked-up." Westbrook testified that she and Adams had never spoken about the party before May 2, 2003. Westbrook also testified that she and Adams were allowed to be together "all night" at the precinct, and that Detective Ramirez and Adams were in the room when she gave her statement. While Westbrook had testified for the District Attorney's office in the grand jury, she testified at the hearing that her grand jury testimony was a lie and that she was not present at the shooting.

At her deposition taken in connection with this matter, Westbrook reiterated that she was allowed to be in the same room with Adams, that Adams had coached her to tell a lie, and that Westbrook made her statement to Detective Ramirez with Adams in the room.

It is undisputed that, after obtaining the statements of Adams and Westbrook, Detective Ramirez received authorization from the District Attorney's office to arrest plaintiff.

Where a defendant moves for summary judgment as to false arrest and malicious prosecution claims, the facts must be viewed in the light most favorable to the plaintiff, and "even if the

jury at a trial could, or likely would, decline to draw inferences favorable to the plaintiff on issues of probable cause and malice, the court . . . must indulge all available inferences of the absence of probable cause and the existence of malice" (*De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]).

Regarding the false arrest and imprisonment cause of action, I would hold that the evidence demonstrates that there is a triable issue of fact as to whether the police had probable cause for plaintiff's arrest.[4] The police's sole basis for probable cause was the statements made by Adams and Westbrook identifying plaintiff as the person who shot and killed Richetti. "[T]he fact that an identified citizen accused an individual who was known to her of a specific crime, while generally sufficient to establish probable cause, does not necessarily establish it" (*Medina v City of New York*, 102 AD3d 101, 104 [1st Dept 2012]). Here, plaintiff has raised a triable issue of fact as to whether those two statements gave police probable cause to arrest him by presenting evidence that the statements may have been made under "materially impeaching circumstances" (*id.* [internal quotation

[4] The elements of a cause of action for false arrest and imprisonment are: "the defendant intended to confine the plaintiff . . . the plaintiff was conscious of the confinement . . . the plaintiff did not consent to the confinement and . . . the confinement was not privileged" (*De Lourdes Torres*, 26 NY3d at 759). An act of confinement is not privileged if it stems from an unlawful arrest unsupported by probable cause (*id.*).

marks and emphasis omitted]; *see People v Gonzalez*, 138 AD2d 622, 623 [2d Dept 1988], *lv denied* 71 NY2d 1027 [1988]) in four respects.

First, plaintiff submitted deposition testimony showing that the statements were not sufficiently reliable (*see Sital v City of New York*, 60 AD3d 465, 466 [1st Dept 2009], *lv dismissed* 13 NY3d 903 [2009]; *Fausto v City of New York*, 17 AD3d 520, 521-522 [2d Dept 2005]). One statement came from Adams, an individual under arrest and facing unrelated assault charges, who was eager to obtain a cooperation agreement to avoid jail and who did not come forward until six months after the incident and only when it was in his interest to do so. The other statement came from his 17-year-old pregnant girlfriend, Westbrook, who testified that she was alone with Adams after he was arrested, he convinced her to corroborate his accusations against plaintiff, and she provided her statement to police identifying plaintiff as the murderer with Adams in the room. A reasonable jury could find that these were materially impeaching circumstances, as both individuals were motivated to have Adams avoid punishment for assault by providing testimony against plaintiff for a more serious crime.

Second, the testimony of Westbrook and that of Detective Ramirez are directly contradictory as to whether Adams and

Westbrook had been left alone together in the precinct, and whether Westbrook delivered her statement to Detective Ramirez with Adams in the room. Detective Ramirez specifically identified the alleged separation of Adams from Westbrook as a basis for believing their statements. If a jury were to credit Westbrook's version of the events, the jury might very well conclude that defendants acted unreasonably by relying on the statements to supply probable cause (*cf. Smith v Nassau*, 34 NY2d 18, 24-25 [1974] [where reasons existed for officer to doubt complainant's identification, reasonable people could differ as to the reasonableness of the officer's reliance on that identification and the issue could not be decided as a matter of law]).[5]

Third, no other witness identified plaintiff as the shooter, and no physical evidence connected plaintiff to the shooting. Since no other evidence identified plaintiff, the police's failure to conduct any further investigation to corroborate or otherwise probe the accuracy of Adams's and Westbrook's

[5] Accordingly, I disagree with the majority's efforts to suggest that, as a matter of law, the police could not be faulted for believing Westbrook's statement at the precinct. It is impossible to reach such a conclusion without crediting Detective Ramirez and discrediting Westbrook, a credibility issue that we cannot resolve on this motion (*see e.g. Latif v Eugene Smilovic Hous. Dev. Fund Co., Inc.*, 147 AD3d 507, 508 [1st Dept 2017] ["(C)redibility issues are not appropriately resolved on a summary judgment motion"]).

statements calls into question the reasonableness of the police's reliance on those statements to supply probable cause (*see Sital*, 60 AD3d at 466; *Roundtree v City of New York*, 208 AD2d 407, 407 [1st Dept 1994]).[6]

Fourth, there is evidence in the record affirmatively suggesting that plaintiff was not the shooter. The shooter was identified as being from the Castle Hill Houses, but plaintiff did not live in that housing project.[7] In addition, Milan testified that he informed the police that plaintiff was not the shooter but this information did not appear in the DD-5.[8]

I turn now to the malicious prosecution cause of action. "The elements of the tort of malicious prosecution are: (1) the commencement or continuation of a criminal proceeding by the

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[6] The majority argue that this case is distinguishable from *Sital* (60 AD3d at 465) and *Roundtree* (208 AD2d at 407), since in each of those cases police had reasons to doubt their witnesses but nonetheless failed to conduct further investigation. However, the record in this case also suggests that the police had reasons to have doubted Adams and Westbrook.

[7] At the time of the shooting, plaintiff lived with his grandmother at the Soundview Houses, across the street from the community center.

[8] While the majority highlight certain inconsistencies in Milan's testimony, those inconsistencies go to Milan's credibility, which is for the jury to determine (*Latif*, 147 AD3d at 508). Moreover, on this motion, we must view the evidence in the light most favorable to plaintiff and afford him the benefit of every favorable inference as to the absence of probable cause, even if a jury would decline to draw the same inference at trial (*see De Lourdes Torres*, 26 NY3d at 763).

defendant against the plaintiff, (2) the termination of the proceeding in favor of the accused, (3) the absence of probable cause for the criminal proceeding and (4) actual malice" (*De Lourdes Torres*, 26 NY3d at 760 [internal quotation marks omitted]). Plaintiff was indicted and subsequently acquitted; thus, there is no question that a criminal proceeding was commenced against him that terminated in his favor. As to the remaining elements, plaintiff has, in my view, raised triable issues of fact.

Although plaintiff's indictment creates a presumption of probable cause (*Colon v New York*, 60 NY2d 78, 82-83 [1983]; *see also De Lourdes Torres*, 26 NY3d at 761), plaintiff presented sufficient evidence to rebut this presumption and raise a question of fact as to whether "'the police witnesses have not made a complete and full statement of facts . . . to the District Attorney, that they have misrepresented or falsified evidence, [and] that they have withheld evidence or otherwise acted in bad faith'" (*De Lourdes Torres*, 26 NY3d at 762, quoting *Colon*, 60 NY2d at 82-83).

At some point after he took the statements of Adams and Westbrook, Detective Ramirez sought and obtained authorization from the District Attorney's office to arrest plaintiff. Since, as discussed in the context of plaintiff's false arrest and

imprisonment cause of action, an issue exists as to whether Adams and Westbrook made their statements under materially impeaching circumstances, I would hold that the record raises a question of fact as to whether Detective Ramirez obtained authorization from the District Attorney's office either by failing to give a complete statement of the facts or by misrepresenting the circumstances under which the statements were made (*De Lourdes Torres* at 762-763). In addition, since Milan's statement that plaintiff was not the shooter did not appear in the DD-5, this alleged omission further raises a question of fact as to whether the police either failed to make a full showing of the facts or misrepresented them.

Plaintiff has also raised a triable issue as to the malice element of malicious prosecution. This element "is seldom shown by direct evidence of an ulterior motive, but is usually inferred from the facts and circumstances of the investigation" (*Ramos v City of New York*, 285 AD2d 284, 300-301 [1st Dept 2001]). I would hold that, based on the materially impeaching circumstances identified in my discussion of the false arrest and imprisonment cause of action, the record raises triable issues as to whether

the police "show[ed] a reckless or grossly negligent disregard for [plaintiff's] rights" (*Ramos*, 285 AD2d at 300) by relying upon Adams's and Westbrook's statements to furnish probable cause and by failing to conduct further investigation into their veracity.

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about May 23, 2017, affirmed, without costs.

All concur except Sweeny, J.P. and Gesmer, J. who dissent in an Opinion by Gesmer, J.

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

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

ENTERED: MARCH 21, 2019

CLERK