SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 26, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Renwick, J.P., Richter, Kahn, Gesmer, Singh, JJ.

7420 The People of the State of New York, Respondent, Ind. 3891/96

-against-

Lawrence Benjamin,
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 (David P. Stromes of counsel), for respondent.

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Order, Supreme Court, New York County (Edward J. McLaughlin, J.), entered on or about January 15, 2016, which denied defendant's CPL 440.20 motion to set aside a 1997 sentence, unanimously affirmed.

On a prior appeal by defendant under one of his other aliases (*People v Gould*, 131 AD3d 874 [1st Dept [2015]), this Court, based on concessions made by the People, vacated defendant's 1991 sentence (but not the underlying conviction) on the ground that he was incorrectly adjudicated a second felony offender rather than a second violent felony offender. We

expressed no opinion on "whether resentencing in this case would affect the sequentiality of the convictions supporting defendant's 1997 persistent violent felony offender adjudication" (*id.* at 874). Defendant, who was resentenced in 2016 on the 1991 conviction in accordance with our decision and order, now seeks to be relieved of his persistent violent felony offender status on the ground that the resentencing has upset the sequentiality of his convictions.[1] However, defendant's request is foreclosed by the Court of Appeals' recent decision in *People v Thomas* (__ NY3d __, 2019 NY Slip Op 01167 [February 19, 2019]). There, the Court squarely 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

[1] A defendant may be adjudicated a persistent violent felony offender only if he or she has previously been convicted of two or more predicate violent felony offenses (Penal Law § 70.08[1][a]). In determining whether a prior violent felony conviction qualifies as a predicate under section 70.08, the statute looks to "the criteria set forth in" Penal Law § 70.04(b) (Penal Law §70.08[1][b]). Section 70.04(b), in turn, provides that the "[s]entence upon such prior conviction must have been imposed before commission of the present felony" (Penal Law §70.04[1][b][ii]).

date for [predicate felony purposes]" (*Thomas*, __ NY3d at __, 2019 NY Slip Op 01167 at *1). Accordingly, we affirm the denial of defendant's CPL 440.20 motion.

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

ENTERED: MARCH 26, 2019

CLERK

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

8037 The People of the State of New York, Respondent, Ind. 4352/13

-against-

Clemente Rivera, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered January 22, 2016, as amended August 5, 2016, convicting defendant, after a jury trial, of burglary in the first degree, robbery in the second degree and assault in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 25 years, unanimously affirmed.

The court providently exercised its discretion in permitting two witnesses to give lay opinion testimony that defendant was the person depicted in photos from surveillance videotapes from areas in and around the building where the robbery occurred and at the shelter where defendant resided both several months prior to the robbery and at the time of the robbery. This testimony "served to aid the jury in making an independent assessment regarding whether the man in the [videos] was indeed the

defendant" (*People v Russell*, 79 NY2d 1024, 1025 [1992]), because there was "some basis for concluding that the witness[es] [were] more likely to correctly identify the defendant from the [videos] than [was] the jury" (*People v Sanchez*, 95 AD3d 241, 249 [1st Dept 2012], *affd* 21 NY3d 216 [2013]).

The People established that defendant's appearance had changed since the crime in several significant respects. Furthermore, the witnesses, who were sufficiently familiar with defendant, were able to recognize defendant's mannerisms and peculiar way of walking. In addition, the record establishes the poor quality of the photographic evidence.

The court also providently exercised its discretion in declining to hold a full evidentiary hearing on the admissibility of the lay opinions. The information before the court, including the witnesses' detailed grand jury testimony covering the relevant subjects, clearly established a proper foundation for

the evidence, and there was no factual issue requiring a hearing. We have considered and rejected defendant's remaining arguments in this regard.

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

ENTERED: MARCH 26, 2019

CLERK

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

8144 Reyna Diaz-Martinez, Index 304739/14
Plaintiff-Appellant,

-against-

King of Glory Tabernacle,
Defendant-Respondent.

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Pollack, Pollack, Isaac & DeCicco, LLP, New York (Jillian Rosen of counsel), for appellant.

Molod Spitz & DeSantis, P.C., New York (Salvatore J. DeSantis of counsel), for respondent.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson Jr., J.), entered on or about June 21, 2017, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Summary judgment was properly granted in favor of defendant, in this action where plaintiff was injured when, while picking up her son from defendant's after-school program, she allegedly slipped and fell on water at the bottom of a staircase. Defendant submitted evidence showing that it did not have notice of the condition, as two of its employees testified that no water or liquids were present on the stairs or in the vicinity at the time of or before plaintiff's fall (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; *see also Garcia v Delgado Travel Agency*, 4 AD3d 204 [1st Dept 2004]). There is no dispute

that it had been raining earlier in the day, and that defendant had placed wet floor warning signs at the top and the bottom of the stairs and a mat on the top floor in front of the main entrance. There is also no dispute that the mat and warning signs "were put out as a safety precaution and not in response to complaints regarding the condition of the floor where plaintiff fell" (*Snauffer v 1177 Ave. of the Ams. LP*, 78 AD3d 583, 583 [1st Dept 2010]). The defendant's "general awareness that the floor might become wet after inclement weather d[oes] not permit an inference of constructive notice" (*Asante v JPMorgan Chase & Co.*, 93 AD3d 429, 429 [1st Dept 2012] *lv denied* 19 NY3d 813 [2012], *cert denied* 571 US 942 [2013]; *see also Rodriguez v 520 Audubon Assoc.*, 71 AD3d 417 [1st Dept 2010]).

In opposition, plaintiff did not refute defendant's showing or otherwise raise a triable issue of fact (*see Philips v Bronx Lebanon Hosp.*, 268 AD2d 318, 319-320 [1st Dept 2000]).

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

ENTERED: MARCH 26, 2019

CLERK

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

8488 Francesco Ruggerino, et al., Index 156640/16
Plaintiffs-Respondents,

-against-

Prince Holdings 2012, LLC,
Defendant-Appellant,

9300 Realty, Inc., et al.,
Defendants.

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Rose & Rose, New York (James E. Bayley of counsel), for appellant.

Grimble & Loguidice, LLC, New York (Shaina Weissman of counsel), for respondents.

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Order, Supreme Court, New York County (Erika M. Edwards, J.), entered November 29, 2017, which, to the extent appealed from, granted plaintiffs' motion for partial summary judgment as to liability on their rent overcharge claim, unanimously reversed, on the law without costs, and the motion denied.

The court erred as a matter of law by granting the tenants partial summary judgment on their cause of action for rent overcharge because most of the arguments the motion court considered were raised for the first time in reply.

Rent Stabilization Code (9 NYCRR) § 2520.11(r)(10)(i) permits rent increases for post-vacancy individual apartment improvements (IAI). Furthermore, a vacancy increase can be

included when calculating legal rent for purposes of determining whether an apartment has reached the deregulation threshold amount (*Altman v 285 W. Fourth LLC*, 31 NY3d 178 [2018]).

In opposition to the tenants' motion, the landlord provided an affidavit from Steven Yow, the building's managing agent, retained by defendant Prince, the building owner, who averred that three apartments of roughly the same size were renovated at the same time at a total cost of $231,509.82, exclusive of appliances. The managing agent also identified the contractor whom Prince retained, made allegations as to how much the contractor was paid, and provided copies of checks and copies of applications filed with the New York City Department of Buildings.

In reply, the tenants acknowledged some work appears to have been done in the apartment, but challenged the reliability of the landlord's proof. The landlord will ultimately have to prove its entitlement to an IAI increase (*Matter of Ador Realty, LLC v Division of Hous. & Community Renewal*, 25 AD3d 128, 138 [2d Dept 2005]). However, the record on this motion raises genuine issues of fact as to whether the landlord's claimed expenditures, or any part of them, are sufficient to bring the legal rent of the

subject apartment above the luxury decontrol threshold, allowing the landlord to charge a free market rent (*Jemrock Realty Co., LLC v Krugman*, 13 NY3d 924, 926 [2010]; *Matter of Park v New York State Div. of Hous. & Community Renewal*, 150 AD3d 105, 113 [1st Dept 2017], *lv dismissed* 30 NY3d 961 [2017]).

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

ENTERED: MARCH 26, 2019

CLERK

Sweeny, J.P., Richter, Tom, Kapnick, Oing, JJ.

8775 The People of the State of New York, Ind. 945/08
Respondent,

-against-

Jermaine Dunham,
Defendant-Appellant.

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Christina A. Swarns, Office of the Appellate Defender, New York (Emma L. Shreefter of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (James J. Wen of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Joseph Dawson, J.), rendered May 13, 2011, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree and resisting arrest, and sentencing him to an aggregate term of seven years, unanimously affirmed.

The court properly denied defendant's suppression motion. The People met their burden of presenting evidence of the specific content of the description transmitted to the arresting officer, and evidence that defendant matched the description. Contrary to defendant's assertion, the arresting officer's direct testimony establishing these facts was not undermined on cross-examination, and in any event it was corroborated by inferences that could be drawn from the testimony of other officers. Even if the description was somewhat general, it

provided reasonable suspicion to stop defendant based on a combination of factors (*see e.g. People v Moise*, 165 AD3d 516 [1st Dept 2018], *lv denied* 32 NY3d 1127 [2018]), including the suspicious fact that defendant volunteered (falsely) to the officers that he had already been "checked."

The court properly denied defendant's application pursuant to *Batson v Kentucky* (476 US 79 [1986]). The record supports the court's finding that the nondiscriminatory reasons provided by the prosecutor for the challenges in question were not pretextual. This finding, based primarily on the court's assessment of the attorney's credibility, is entitled to great deference (*see Snyder v Louisiana*, 552 US 472, 477 [2008]; *People v Hernandez*, 75 NY2d 350 [1990], *affd* 500 US 352 [1991]). Each of the proffered nondiscriminatory reasons had a legitimate basis (*see People v Hecker*, 15 NY3d 625, 663-64 [2010]), and the record fails to support defendant's assertion that an isolated phrase employed by the prosecutor in explaining her jury selection strategy should be viewed as an actual concession of discriminatory intent. Defendant failed to preserve his claim of disparate treatment by the prosecutor of similarly situated panelists (*see e.g. People v Cunningham*, 21 AD3d 746, 748-49 [1st Dept 2005], *lv dismissed* 6 NY3d 775 [2006]), and we decline to review it in the interest of justice. As an alternative holding,

we find no disparity that would compel a finding of pretext. We have considered and rejected defendant's remaining *Batson* arguments.

The court providently exercised its discretion in admitting evidence of an uncharged crime. The charges upon which defendant was being tried included a gunpoint robbery, of which defendant was ultimately acquitted. At trial, defendant contended that he did not commit the robbery, and that he did not possess the silver-colored pistol allegedly found in his possession when he was arrested. Accordingly, a witness's testimony that defendant broke her car window with a silver metal object very shortly after the robbery was admissible. The testimony was not admitted to demonstrate defendant's criminal propensity, and it was highly probative of defendant's identity as the robber and possessor of the weapon, because it tended to prove, circumstantially, that he was in continuing possession of a particular pistol (*see People v Del Vermo*, 192 NY 470, 478-82 [1908]). This long-recognized method of proving identity does not depend on the existence of a unique modus operandi, and defendant's arguments addressed to the latter type of evidence are misplaced (*see People v Winkfield*, 98 AD2d 923 [1st Dept 2012], *lv denied* 20 NY3d 1066 [2013]).

By failing to object, or failing to request further relief after the court took curative actions, defendant failed to

preserve many of his challenges to the prosecutor's summation, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-120 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 26, 2019

CLERK

Sweeny, J.P., Richter, Tom, Kapnick, Oing, JJ.

8776 Roberto Hued, Index 152581/12
Plaintiff-Appellant,

-against-

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

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Hach & Rose, LLP, New York (Robert F. Garnsey of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Elina Druker of counsel), for respondents.

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Order, Supreme Court, New York County (Alexander M. Tisch, J.), entered December 12, 2017, which granted defendants' (together, the City) motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The City established that it lacked prior written notice of the subject condition by submitting affidavits by record searchers employed by the Department of Transportation and nonparty Department of Environmental Protection (DEP) concerning the searches they conducted of the records in their respective agencies' possession, which showed that the City received no written complaints about the subject sunken catch basin in the two years preceding the day of plaintiff's accident (*see Campisi v Bronx Water & Sewer Serv.*, 1 AD3d 166 [1st Dept 2003]; Administrative Code of City of NY § 7-201[c][2]).

Contrary to plaintiff's contention, the customer service reports (CSRs) dated August 18, 2011 and September 1, 2011, which were made telephonically through the City's 311 system, do not satisfy the prior written notice requirement (*see Kapilevich v City of New York*, 103 AD3d 548, 549 [1st Dept 2013]). Furthermore, the September 16, 2011 and September 26, 2011 work orders created by the City in response to the aforementioned CSRs do not raise an issue of fact whether the City issued a "written acknowledgment" of the allegedly defective catch basin (*see* Administrative Code 7-201[c][2]), because the area inspected and/or repaired, as reflected in the work orders, was at the southwest corner of the intersection, and it is undisputed that the accident happened on the east side of the intersection (*see Haulsey v City of New York*, 123 AD3d 606, 607 [1st Dept 2014]).

The City's awareness of one defect in the area is insufficient to constitute notice of another defect that caused the accident (*see Worthman v City of New York*, 150 AD3d 553, 554 [1st Dept 2017]). In any event, neither actual nor constructive notice of the defect may substitute for prior written notice (*Campisi*, 1 AD3d at 167).

Nor was a triable issue of fact whether the City issued a written acknowledgment of the alleged defect raised by DEP's witness's testimony about inspecting damaged catch basins in the

area during a site visit. Nothing in the record shows that the purported inspection of the accident location resulted in an intra-departmental report or a work order being issued to repair the subject catch basin. Plaintiff's contention that the September 1, 2011 CSR's description could have referred to the subject catch basin is unavailing, because the CSR states that it pertains to the basin located at the southwest corner of the intersection, not the east side of the intersection (*see Boniello v City of New York*, 106 AD3d 612 [1st Dept 2013]).

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

ENTERED: MARCH 26, 2019

CLERK

Sweeny, J.P., Richter, Tom, Kapnick, Oing, JJ.

8777 In re Jasna Mina W.,
Petitioner-Respondent,

-against-

Waheed S.,
Respondent-Appellant.

_____

Steven N. Feinman, White Plains, for appellant.

Leslie S. Lowenstein, Woodmere, for respondent.

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Order of protection, Family Court, New York County (Gail A. Adams, Referee), entered on or about March 30, 2018, against respondent-appellant, after a fact-finding determination that he committed the family offense of harassment in the second degree, unanimously affirmed, without costs.

Although the order of protection has expired, we address the merits of the appeal, since enduring consequences may flow from the adjudication that respondent has committed a family offense (*see Matter of Veronica P. v Radcliff A.*, 24 NY3d 668, 671-672 [2015]; *Matter of Ramona A.A. v Juan M.N.*, 126 AD3d 611 [1st Dept 2015]).

A fair preponderance of the evidence supports Family Court's finding that respondent committed the family offense of harassment in the second degree, warranting the issuance of an order of protection against him (*see* Family Ct Act §§ 812[1];

832, 842; Penal Law §240.26[1]). The Referee found petitioner's testimony to be credible, and there is no basis in the record to disturb this credibility determination (*see Matter of Omobolanle O. v Kevin J.*, 154 AD3d 442, 442 [1st Dept 2017]; *Matter of Chigusa Hosono D. v Jason George D.*, 137 AD3d 631, 632 [1st Dept 2016]). Petitioner's testimony described physical contact, including poking and pinching her in order to harass her into having sex, and also a course of conduct including persistent unwanted communications, name calling and threats, all of which were intended to and did cause her alarm or seriously annoy her, and which served no legitimate purpose (Penal Law 240.26[1], [3]; *see Matter of Reiss v Reiss*, 221 AD2d 280, 280 [1st Dept 1995], *lv denied* 89 NY2d 801 [1996]; *see Matter of Putnam v Jenney*, __ AD3d __, 2019 NY Slip Op 00012 [3d Dept 2019]).

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

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

ENTERED: MARCH 26, 2019

CLERK

Sweeny, J.P., Richter, Tom, Kapnick, Oing, JJ.

8778 Kusum Lynn, et al., Index 653901/16
Plaintiffs-Respondents-Appellants,

-against-

Marco Maida, et al.,
Defendants,

Jack Norris,
Defendant-Respondent,

Rebecca Bower,
Defendant-Appellant-Respondent.

_____

Gallet Dreyer & Berkey, LLP, New York (Adam M. Felsenstein of counsel), appellant-respondent.

Kornfeld & Associates P.C., New York (Randy M. Kornfeld of counsel), for respondents-appellants.

Cullen and Dykman LLP, Garden City (Elizabeth Usinger of counsel), for respondent.

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Order, Supreme Court, New York County (David B. Cohen, J.), entered on or about December 11, 2017, which, to the extent appealed from, granted defendants Marco Maida and Jack Norris's motion pursuant to CPLR 3211(a)(1) and (7) to dismiss the conversion and breach of fiduciary duty claims as against them, granted defendant Rebecca Bower's motion pursuant to CPLR 3211(a)(7) to dismiss those claims as against her, and denied her motion to dismiss the fraud claim as against her, unanimously affirmed, with costs.

Plaintiffs had contracts with nonparty 1 + 1 Management, LLC, which has filed for bankruptcy. Defendants in the instant action are members of 1 + 1. Plaintiffs Kusum Lynn and Tim Barber previously sued 1 + 1 for breach of contract.

Defendant Bower contends that plaintiffs' fraud claim should be dismissed because none of her representations were extrinsic to the contracts between plaintiffs and 1 + 1. However, none of the precedents Bower cites involved a contract claim against one defendant in one case and a fraud claim against a different defendant in another case. Indeed, in *Aldoro, Inc. v Gold Force Intl. Ltd.* (52 AD3d 223 [1st Dept 2008]), this Court allowed the plaintiff to replead fraud claims against the individual defendants, who were the principals of the insolvent corporate defendant, which owed a debt to the plaintiff.

The complaint itself fails to plead fraud with particularity against Bower (*see e.g. MP Cool Invs. Ltd. v Forkosh*, 142 AD3d 286, 291 [1st Dept 2016], *lv denied* 28 NY3d 911 [2016]; *ESBE Holdings, Inc. v Vanquish Acquisition Partners, LLC*, 50 AD3d 397, 398 [1st Dept 2008]). However, plaintiffs' affidavits in opposition to defendants' motion – which the court properly considered and accepted as true (*see e.g. Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]) – remedies that defect.

In reply, Bower contends that plaintiffs failed to plead

scienter, reliance, and damage. An argument raised for the first time on reply, when the adversary has no opportunity to respond, will not be considered. Were we to reach this argument, we would find it unavailing (*see Houbigant, Inc. v Deloitte & Touche*, 303 AD2d 92, 98-99 [1st Dept 2003]).

The conversion claim was correctly dismissed because plaintiffs never exercised ownership, possession, or control of the monies they are seeking – instead, clients sent checks to 1 + 1 (*see Soviero v Carroll Group Intl., Inc.*, 27 AD3d 276, 277 [1st Dept 2006]; *M.D. Carlisle Realty Corp. v Owners & Tenants Elec. Co. Inc.*, 47 AD3d 408, 409 [1st Dept 2008]; *Peters Griffin Woodward, Inc. v WCSC, Inc.*, 88 AD2d 883, 884 [1st Dept 1982]; *see also Interstate Adjusters v First Fid. Bank, N.J.*, 251 AD2d 232, 234 [1st Dept 1998] ["A conversion claim cannot be based only on the allegation that a defendant received money and failed to remit payment to the plaintiff"]).

The court also correctly dismissed the conversion claim on the ground that it is duplicative of the contract claim against 1 + 1 (*see M.D. Carlisle*, 47 AD3d at 409).

Plaintiffs contend that defendants owed them a fiduciary duty pursuant to the trust fund doctrine. This argument is unavailing. Assuming, arguendo, that the doctrine applies to the members of an insolvent limited liability company (as opposed to

the officers and directors of an insolvent corporation), "a simple contract creditor may not invoke the doctrine to reach transferred assets before exhausting legal remedies by obtaining judgment on the debt and having execution returned unsatisfied" (*Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541, 550 [2000]; *see also Aldoro*, 52 AD3d at 224).

Plaintiffs further contend that defendants owed them a fiduciary duty due to a special relationship. However, plaintiffs' contracts with 1 + 1 clearly state that 1 + 1 is not their agent, co-venturer, or representative. They also contain merger/integration clauses. To allow plaintiffs to rely on conversations with some of 1 + 1's members that pre-date the contracts to create a fiduciary relationship between themselves and 1 + 1's members would undermine the contracts. In any event, neither the fact that 1 + 1 represented plaintiffs vis-à-vis clients nor the fact that plaintiffs were friends with defendants

creates a fiduciary relationship (*see Dove v L'Agence, Inc.*, 250 AD2d 435 [1st Dept 1998]; *Benzies v Take-Two Interactive Software, Inc.*, 159 AD3d 629, 631 [1st Dept 2018]).

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

ENTERED: MARCH 26, 2019

CLERK

Sweeny, J.P., Richter, Tom, Kapnick, Oing, JJ.

8779 EPF International Limited, Index 153154/16
Plaintiff-Respondent,

-against-

Lacey Fashions Inc.,
Defendant-Appellant.

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Law Offices of Jason Lowe, New York (Jason Lowe of counsel), for appellant.

Bernard D'Orazio & Associates, P.C., New York (Bernard D'Orazio of counsel), for respondent.

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Judgment, Supreme Court, New York County (Kathryn E. Freed, J.), entered November 17, 2017, awarding plaintiff the principal sum of $59,050.42 on its claim for an account stated, unanimously affirmed, with costs.

The record establishes that plaintiff, a Hong Kong-based corporation in the business of selling, inter alia, wigs, demonstrated its entitlement to summary judgment on an account stated (*L.E.K. Consulting LLC v Menlo Capital Group*, LLC, 148 AD3d 527, 528 [1st Dept 2017]). Plaintiff established that it prepared and sent invoices to defendant in the ordinary course of its business, that defendant's partial payment confirmed it received them (*Kucker & Bruh, LLP v Sendowski*, 136 AD3d 475 [1st Dept 2016]), and that defendant did not object to the invoices in a timely fashion.

Defendant's argument that there is no evidence the invoices were sent and received, and that plaintiff's reply affirmation, which provided additional detail on its office procedures, should not have been considered, is unavailing. The function of reply papers is to address arguments made in opposition to the position taken by the movant, and not to permit the movant to introduce new arguments in support of, or new grounds for the motion (*Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992]). Here the reply affirmation of plaintiff's executive director responded to issues raised in defendant's opposition papers regarding the admissibility of plaintiff's business records (*Castano v Wygand*, (122 AD3d 476 [1st Dept 2014]; *see also Sanford v 27-29 W. 181st St. Assn.*, 300 AD2d 250 [1st Dept 2002]). It did not improperly raise new arguments or theories on which to base its motion.

Defendant's argument that plaintiff, a foreign corporation not licensed to do business in New York, is precluded from maintaining suit pursuant to Business Corporation Law (BCL) § 1312(a) is also unavailing. A defendant relying upon BCL § 1312(a) has the burden of proving that the foreign corporate plaintiff was "doing business" in New York without authority (*see*

S & T Bank v Spectrum Cabinet Sales, 247 AD2d 373 [2d Dept 1998]). Defendant has offered no such proof.

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

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

ENTERED: MARCH 26, 2019

CLERK

Sweeny, J.P., Richter, Tom, Kapnick, Oing, JJ.

8780 The People of the State of New York, Respondent, Ind. 5031/10

-against-

Manuel Arias, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Patricia M. Nuñez, J.), rendered April 17, 2014, convicting defendant, upon his plea of guilty, of criminal possession of marijuana in the third degree and sentencing him to time served, unanimously affirmed.

Defendant has not established that the narrow exception to the preservation requirement applies to his *Peque* claim (*see People v Peque*, 22 NY3d 168, 182-183 [2013], *cert denied* 574 US __, 135 S Ct 90 [2014]). The record establishes that defendant was informed of the potential for deportation when he was served with a notice of immigration consequences in the presence of his attorney long before his guilty plea (*see e.g. People v Delorbe* 165 AD3d 531, 531 [1st Dept, 2018], *lv granted* 32 NY3d 1125 [2018]; *People v Martinez*, 148 AD3d 422, 423 [1st Dept 2017], *lv denied* 29 NY3d 1130 [2017]).

We decline to review defendant's unpreserved claim in the interest of justice. In any event, the circumstances render it highly unlikely that defendant could make the requisite showing of prejudice (*see Peque*, 22 NY3d at 198-201).

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

ENTERED: MARCH 26, 2019

CLERK

Sweeny, J.P., Richter, Tom, Kapnick, Oing, JJ.

8781 The People of the State of New York, Respondent, Ind. 1930/13

-against-

Erwin Baize, Defendant-Appellant.

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

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Judgment, Supreme Court, Bronx County (William I. Mogulescu, J.), rendered October 24, 2014, 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 26, 2019

CLERK

Sweeny, J.P., Richter, Tom, Kapnick, Oing, JJ.

8782 Catherine Shyer, as Preliminary Executrix of the Estate of Robert Shyer, Plaintiff-Respondent, Index 651109/18

-against-

Christopher Shyer, et al., Defendants-Appellants.

_____

Kennedy Berg LLP, New York (James W. Kennedy of counsel), for appellants.

Farrell Fritz, P.C., New York (Joshua Herman of counsel), and Nicholas R. Weiskopf, New York, for respondent.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered July 23, 2018, which, insofar as appealed from as limited by the briefs, denied defendants' motion to dismiss the breach of contract cause of action as against the corporate defendant (the company) and the breach of fiduciary duty cause of action as against the individual defendants, unanimously modified, on the law, to grant the motion as to the breach of fiduciary duty cause of action, and otherwise affirmed, without costs.

The motion court correctly concluded that the complaint alleges an anticipatory breach of contract by the company in failing to properly compute the value of the decedent's (Robert) shares for the sale transaction after his death. Under the

parties' agreement, plaintiff had to tender the shares, and the company had to provide the insurance proceeds and promissory note in the proper amounts, based on the formula in the agreement. The complaint alleges that plaintiff was prepared to tender the shares, but the company improperly discounted the value of Robert's stock. These allegations, accepted as true on this motion to dismiss, coupled with the company's undisputed statement that its obligation to plaintiff was limited to paying the amount reflected in the calculation performed by its accountant, establish the company's potential repudiation of the agreement (*see Princes Point LLC v Muss Dev. L.L.C.*, 30 NY3d 127, 133 [2017]; *Liberty Capital Mgt. v McCall*, 198 AD2d 166, 167 [1st Dept 1993]).

The cause of action for breach of fiduciary duty asserted directly against the individual defendants must be dismissed because it alleges mismanagement and diversion of corporate assets, which are wrongs to the corporation (*see Yudell v*

Gilbert, 99 AD3d 108, 114 [1st Dept 2012]; *see also Serino v Lipper*, 123 AD3d 34, 40 [1st Dept 2014]).

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

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

ENTERED: MARCH 26, 2019

CLERK

Sweeny, J.P., Richter, Tom, Kapnick, Oing, JJ.

8783 Randi Larowitz, Index 308985/11
Plaintiff-Respondent,

-against-

Steven Lebetkin,
Defendant-Appellant.

_____

Deborah J. Blum, New York, for appellant.

Goldweber Epstein LLP, New York (Elyse S. Goldweber of counsel), for respondent.

_____

Judgment of divorce, Supreme Court, New York County (Laura E. Drager, J.), entered October 9, 2015, to the extent appealed from as limited by the briefs, valuing the marital residence at $1.6 million, awarding defendant husband 5% of the appreciation in value of the marital residence, and deeming plaintiff wife's Merrill Lynch account separate property, unanimously affirmed, without costs.

Defendant contends that the court abused its discretion in awarding him 5% of the appreciation in the value of the marital residence over the course of the marriage (*see* Domestic Relations Law [DRL] § 236[B][5][d]). However, the court's decision to credit plaintiff's testimony rather than defendant's about the parties' relative contributions to the residence and other assets is entitled to substantial deference (*see Todres v Freifeld*, 151

AD3d 569 [1st Dept 2017], *lv denied* 30 NY3d 912 [2018]).

Defendant argues that his contributions to the value of the property at 74 Grand Street should be deemed contributions to the appreciation on the marital residence because funds realized from the property were used to pay special assessments charged for capital improvements to the building in which the marital residence was located and these improvements enhanced the value of the residence. Defendant cites no authority to support this effort to reap a second reward from a contribution for which he was rewarded in the form of a 30% award in connection with 74 Grand Street. To the contrary, cases such as *Price v Price* (69 NY2d 8 [1986]) make it clear that a spouse should be recognized and awarded for indirect contributions that were otherwise uncompensated (*id.* at 14).

We reject defendant's argument that distributive awards as low as 5% are only for spouses who commit heinous domestic violence. The equitable distribution law requires courts to distribute marital property equitably between the parties, "considering the circumstances of the case and of the respective parties" (DRL § 236[B][5][c]). In determining an equitable disposition, courts are required to consider 13 defined factors and "any other factor which the court shall expressly find to be just and proper" (*id.* [d][14]). Moreover, 5% does not represent

defendant's entire distributive award; he received 30% of two other assets and 50% of a third asset.

Contrary to defendant's contention, it was not plaintiff's burden to show that the appreciation in value of her separate property also constituted her separate property; it was his burden to show that the appreciation on separate property constituted marital property (*see Naimollah v De Ugarte*, 18 AD3d 268, 271 [1st Dept 2005]; *see also Robinson v Robinson*, 133 AD3d 1185, 1187 [3d Dept 2015]; *Morales v Inzerra*, 98 AD3d 484 [2d Dept 2012]; *but see Zelnik v Zelnik*, 169 AD2d 317, 329 [1st Dept 1991]).

The court appropriately relied on the neutral expert's $1.6 million valuation of the marital residence. Defendant's trial testimony about comparable sales was unsupported by documentation. The expert considered the sale of Apartment 4A, cited by defendant, to be comparable, but not entirely, given its extensive renovations. Defendant contends, conclusorily, that the renovations were given inordinate weight. He does not explain why the renovations should be given less weight or why according them no weight at all – his approach – makes more sense.

Defendant argues that the court abused its discretion in deeming plaintiff's Merrill Lynch account her separate property.

This argument is unpreserved and in any event without merit. The account was not, as defendant claims, akin to plaintiff's UBS account, of which he was awarded 50%. Plaintiff attested on her net worth statement that the UBS account was opened in 1995, namely, after the marriage; thus, the statutory presumption attaches that that account is marital property (*see Fields v Fields*, 15 NY3d 158, 165 [2010]). In contrast, plaintiff attested on her net worth statement, and testified at trial, that the Merrill Lynch account was opened in 1982, well before the marriage, for her and her sister's benefit, and was funded by gifts from their father.

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

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

ENTERED: MARCH 26, 2019

CLERK

Sweeny, J.P., Richter, Tom, Kapnick, Oing, JJ.

8784 Charlene Weiss, as Administrator of the Estate of Mark L. Weiss,
Plaintiff-Respondent,

-against-

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

The New Fulton Fish Market Cooperative at Hunts Point, Inc.,
Defendant-Appellant.

Index 21372/12

_____

Cartafalsa, Turpin & Lenoff, New York (Carolyn Comparato of counsel), for appellant.

Law Office of Stefano A. Filippazzo, P.C., Brooklyn (Louis A. Badolato of counsel), for Charlene Weiss, respondent.

Zachary W. Carter, Corporation Counsel, New York (Elina Druker of counsel), for The City of New York, New York City Department of Correction and New York City Department Environmental Protection, respondents.

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about March 5, 2018, which, to the extent appealed from, denied the motion of defendant The New Fulton Fish Market Cooperative at Hunts Point, Inc. (Fulton) for summary judgment dismissing the complaint and all cross claims as against it, unanimously affirmed, without costs.

In this action where plaintiff's decedent alleged that he was injured when he tripped and fell over broken cement barriers strewn over the sidewalk and roadway owned by defendant City of

New York, Fulton failed to establish that maintenance of the accident location was not within its responsibilities under its lease with the City. Thus, Fulton did not demonstrate an absence of a duty of care owing to plaintiff's decedent (*see Abramson v Eden Farm, Inc.*, 70 AD3d 514 [1st Dept 2010]).

In view of Fulton's failure to meet its prima facie burden, plaintiff's opposition papers need not be considered (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). In any event, while there was no direct evidence as to who caused the dangerous condition, issues of fact were raised by the circumstantial evidence as to the liability of each of the defendants (*see e.g. Koeppel v City of New York*, 205 AD2d 402 [1st Dept 1994]).

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 26, 2019

CLERK

Sweeny, J.P., Richter, Tom, Kapnick, Oing, JJ.

8785 In re Camille L.,

A Child Under Eighteen Years of Age, etc.,

Dawn F.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Daniel R. Katz, New York, for appellant.

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

Dawne A. Mitchell, The Legal Aid Society, New York (Claire V. Merkine of counsel), attorney for the child.

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Appeal from a temporary order of protection, Family Court, Bronx County (Monica Shulman, J.), entered on or about December 20, 2017, which expired on April 27, 2018, and directed respondent mother Dawn F. to refrain from certain conduct against the subject child, unanimously dismissed, without costs, as moot.

The mother's appeal from the temporary order of protection is moot, since the order has expired by its own terms and was superseded by an order of fact-finding and disposition (*see Matter of Zoey A. [Felicia A.]*, 139 AD3d 528 [1st Dept 2016]; *Matter of Fawaz A. [Franklyn B.C.]*, 112 AD3d 550 [1st Dept 2013]). Contrary to the mother's argument, we find no exception

to the mootness doctrine (*see* Matter of Veronica P. v Radcliff A139. 24 NY3d 668 [2015]; *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Were we to review the expired order, we would find that Family Court did not abuse its discretion by issuing a temporary order of protection, because there was good cause shown (*see* Family Ct Act § 1029[a]). ACS brought the petition, alleging that the mother neglected the child by failing to provide her with proper supervision and guardianship, as a result of her unattended mental illness. According to the petition, the mother refused to take her medication for schizophrenia, and she disrupted the child's life by repeatedly filing false claims that the child was being sexually abused.

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

ENTERED: MARCH 26, 2019

CLERK

Sweeny, J.P., Richter, Tom, Kapnick, Oing, JJ.

8786-
8786A The People of the State of New York, Respondent,

Ind. 2577/10
2027/12

-against-

Miguel Nunez, also known as Miguel Nunez-Gibbs,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (John L. Palmer of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (James J. Wen of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (George R. Villegas, J. at hearing; Efrain Alvarado, J. at jury trial and sentencing), rendered December 20, 2013, convicting defendant of two counts of robbery in the second degree, and sentencing him to concurrent terms of five years, unanimously modified, on the law, to the extent of vacating the sentence and remanding for a youthful offender determination, and otherwise affirmed. Judgment, same court (Margaret L. Clancy, J.), rendered December 18, 2014, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree, and sentencing him to a consecutive term of three years, unanimously affirmed.

In the robbery case, the hearing court properly denied

defendant's motion to suppress a showup identification. Under the facts of this case, the People met their "initial burden of going forward to establish the reasonableness of the police conduct and the lack of any undue suggestiveness" (*People v Chipp*, 75 NY2d 327, 335 [1990], *cert denied* 498 US 833 [1990]), despite the absence of testimony from any officer who was with the identifying witnesses at the moment of the showup.

Within a few minutes of the robbery, the police conducted a canvass of the area, during which the witnesses pointed out defendant and the codefendant; defendant does not challenge this identification. The two men fled, and the officer who testified at the hearing got out of the police car and apprehended them after a chase, under circumstances leaving no doubt that they were the same two men the witnesses had just identified. The police car arrived with the witnesses, and the testifying officer received a radio message that the witnesses had again identified the two men.

Regardless of whether this atypical showup could be described as "confirmatory," it was essentially an immediate repetition of the unchallenged identification, of the same two suspects, that had just occurred (*see People v Gilford*, 65 AD3d 840, 841-842 [1st Dept 2009], *affd* 16 NY3d 864 [2011]; *People v Gilbert*, 295 AD2d 275, 276 [1st Dept 2002], *lv denied* 99 NY2d 558

[2002]). In these particular circumstances, any possibility that something occurred in the car that transformed this event into an unduly suggestive procedure is remote and speculative (*see Chipp*, 75 NY2d at 339). Accordingly, we find that there was sufficient evidence adduced at the *Wade* hearing to support the court's denial of suppression, and that defendant did not satisfy "the ultimate burden of proving that the procedure was unduly suggestive." (*id.* at 335).

As the People concede, defendant is entitled to an express youthful offender determination in the robbery case (*see People v Rudolph*, 21 NY3d 497 [2013]).

Regardless of whether defendant made a valid waiver of the right to appeal, we perceive no basis for reducing his sentence in the weapon possession case.

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

ENTERED: MARCH 26, 2019

CLERK

Sweeny, J.P., Richter, Tom, Kapnick, Oing, JJ.

8788 Empire Outlet Builders LLC, Index 656074/17
Plaintiff-Appellant,

-against-

Construction Resources Corp. of New York, et al.,
Defendants-Respondents.

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Silverman Shin & Byrne, New York (Andrew V. Achiron of counsel), for appellant.

Law Office of Donovan L. Wickline, P.C., Brooklyn (Donovan L. Wickline of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered July 16, 2018, which, insofar as appealed from as limited by the briefs, granted defendants' motion to dismiss the third through sixth, eighth, and ninth causes of action of the amended complaint pursuant to CPLR 3211(a)(1) and (7) and 3016(b), unanimously affirmed, without costs.

The court correctly dismissed the third cause of action (fraud against defendant Construction Resources Corp. of New York [CRC]) as duplicative of the first (breach of contract against CRC). Regardless of whether plaintiff sufficiently alleged breach of a duty independent of the Subcontractor Agreement, the fraud claim is duplicative because plaintiff will be fully compensated via the contract claim (*see MBIA Ins. Corp. v Credit*

Suisse Sec. [USA] LLC, 165 AD3d 108, 114 [1st Dept 2018]). Plaintiff can recover more on the contract claim (the benefit of its bargain) (*see id.*) than on the fraud claim, on which it is limited to out-of-pocket loss (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]).

Plaintiff contends that the fraud claim is not duplicative of the contract claim because it seeks rescission of part of the Subcontractor Agreement as an alternate remedy on the fraud claim. However, the equitable remedy of rescission is not available where there is an adequate legal remedy, and plaintiff does not explain why damages – a legal remedy – would be insufficient (*see Lantau Holdings Ltd. v General Pac. Group Ltd.*, 163 AD3d 407, 409 [1st Dept 2018]).

In addition to being duplicative of the first cause of action, the third cause of action – like the fourth (fraud against defendant Dawn Varrone, CRC's president) – was correctly dismissed for lack of reliance. The documentary evidence and plaintiff's own pleading show that plaintiff did not sign the Subcontractor Agreement in reliance on CRC's and Ms. Varrone's alleged misrepresentations that CRC's insurance complied with the Agreement; indeed, the documentary evidence contradicts plaintiff's allegation that Ms. Varrone – as opposed to CRC – made a misrepresentation (*see Biondi v Beekman Hill House Apt.*

Corp., 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]). Rather, plaintiff signed based on its insurance broker's erroneous assurance that the insurance met the Agreement's requirements (*see HSH Nordbank AG v UBS AG*, 95 AD3d 185, 207 [1st Dept 2012]; *Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495 [1st Dept 2006]; *Sisler v Security Pac. Bus. Credit*, 201 AD2d 216, 222 [1st Dept 1994], *lv dismissed* 84 NY2d 978 [1994]).

That Ms. Varrone did not make a misrepresentation, as noted above, is an additional reason for dismissing the fourth cause of action (*see e.g. Zanett*, 29 AD3d at 495).

Upon the dismissal of the fraud claims, the fifth and sixth causes of action (conspiracy to defraud and aiding and abetting fraud) must also be dismissed (*see e.g. Mosaic Caribe, Ltd. v AllSettled Group, Inc.*, 117 AD3d 421, 423 [1st Dept 2014] [conspiracy]; *McBride v KPMG Intl.*, 135 AD3d 576, 578 [1st Dept 2016] [aiding and abetting]). In any event, "conspiracy to commit a fraud is never of itself a cause of action" (*Brackett v Griswold*, 112 NY 454, 467 [1889]; *see Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 85 AD3d 457, 458 [1st Dept 2011]).

The court correctly dismissed the eighth cause of action (unjust enrichment against CRC) because there exists an actual agreement between the parties (*see Georgia Malone & Co., Inc. v*

Rieder, 19 NY3d 511, 516 [2012]; *Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012] ["unjust enrichment is not a catchall cause of action to be used when others fail"]). The court also correctly dismissed the ninth cause of action (unjust enrichment against Ms. Varrone and defendant Michael Varrone) (*see Corsello*, 18 NY3d at 790).

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

ENTERED: MARCH 26, 2019

CLERK

Sweeny, J.P., Richter, Tom, Kapnick, Oing, JJ.

8789 The People of the State of New York, Ind. 2484/16
Respondent,

-against-

Garry Pinkney,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Christopher M. Pederson of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Ralph Fabrizio, J. at plea and sentencing), rendered January 26, 2018,

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

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

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

ENTERED: MARCH 26, 2019

CLERK

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

Sweeny, J.P., Richter, Tom, Kapnick, Oing, JJ.

8790 The People of the State of New York, SCI 690/15
Respondent,

-against-

William Jones,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Kyle R. Silverstein of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Jeanette Rodriguez-Morick, J. at plea; Raymond L. Bruce, J. at sentencing), rendered December 15, 2016,

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

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

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

ENTERED: MARCH 26, 2019

CLERK

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

Sweeny, J.P., Richter, Tom, Kapnick, Oing, JJ.

8791-
8792 Index 350135/09

A---, M--, an Infant by His Mother and Natural Guardian, Ana J.,
Plaintiff-Appellant,

-against-

Mary Gratch, M.D., et al.,
Defendants-Respondents.

_____

The Fitzgerald Law Firm P.C., Yonkers (Mitchell Gittin of counsel), for appellant.

Mauro Lilling Naparty LLP, Woodbury (Katherine Herr Solomon of counsel), for Mary Gratch, M.D. and Anthony Njapa, D.O., respondents.

Garbarini & Scher, P.C., New York (Rita F. Aronov of counsel), for St. Barnabas Hospital, respondent.

_____

Judgment, Supreme Court, Bronx County (Joseph E. Capella, J.), entered April 4, 2017, dismissing the complaint as against defendant St. Barnabas Hospital, unanimously affirmed, without costs. Judgment, same court and Justice, entered April 5, 2017, on the verdict, against plaintiff in favor of defendants Mary Gratch, M.D. and Anthony Njapa, D.O., unanimously affirmed, without costs.

The sole question in this appeal is whether the language of the jury interrogatories was unduly misleading or prejudicial. We find that it was not. Contrary to plaintiff's contention, the

interrogatories did not improperly restrict the evidence that could be considered and were consistent with the expert testimony presented at trial.

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

ENTERED: MARCH 26, 2019

CLERK

Sweeny, J.P., Richter, Tom, Kapnick, Oing, JJ.

8794 In re Whiting-Turner Contracting Company,
Petitioner,

-against-

The Environmental Control Board of the City of New York,
Respondent.

Index 100489/15

_____

Peckar & Abramson, P.C., New York (Christopher M. Bletsch of counsel), for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Antonella Karlin of counsel), for respondent.

_____

Determination of respondent, dated November 20, 2014, finding petitioner in violation of the New York City Building Code (Administrative Code of City of NY) § 3301.2 and imposing a penalty of $2,400, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Alexander W. Hunter, J.], entered October 15, 2015), dismissed, without costs.

Respondent's determination that petitioner was the general contractor, and therefore responsible for instituting and maintaining safety measures at the mall construction site is supported by substantial evidence (NY City Building Code [Administrative Code of City of NY, tit 28, ch. 33] § BC 3301.2;

see generally Matter of Rock v Rhea, 114 AD3d 578, 580-581 [1st Dept 2014]). At the underlying hearing, petitioner's representative testified that petitioner was the supervisor of construction and primary contractor. Respondent submitted evidence establishing that a work permit had been issued to petitioner for the mall construction project. Petitioner did not dispute respondent's claim that petitioner was the general contractor, did not identify or submit any other documents at the hearing identifying a separate party as the general contractor or exclusively in charge of construction site safety measures. Petitioner's representative also acknowledged that a worker had been injured when his foot was run over by a delivery truck, and that following the accident petitioner, either on its own or in conjunction with a subcontractor, took remedial measures to ensure workers' safety.

Respondent also properly limited its administrative appellate review to the record established before the hearing officer (*see* 48 RCNY 6-19[f]; 48 RCNY 6-11[g]). The records petitioner sought to rely upon were not admitted into evidence during the administrative hearing, and petitioner made no showing of good cause as to why the government records should be admitted after the conclusion of the hearing (*see* 48 RCNY 6-11[f][2]).

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 26, 2019

CLERK

Sweeny, J.P., Richter, Tom, Kapnick, Oing, JJ.

8795N Leitner & Getz LLP, Index 156978/17
Plaintiff-Appellant,

-against-

Elise Cox,
Defendant-Respondent.

_____

Leitner & Getz LLP, New York (Gregory J. Getz of counsel), for appellant.

Elise Cox, respondent pro se.

_____

Order, Supreme Court, New York County (David Benjamin Cohen, J.), entered May 11, 2018, which, inter alia, granted defendant's motion to vacate a default judgment, unanimously affirmed, without costs.

In this action to collect attorneys' fees, the motion court providently exercised its discretion in granting defendant's motion to vacate where defendant's evidence established that she had grounds to believe her time to answer had been extended. In any event, defendant's delay in answering was minimal considering her change of attorneys at the time plaintiff filed this action, and her need to find counsel amenable to representing her in this fee dispute.

As to the merits of her defense, defendant sufficiently specified grounds challenging certain of the fees billed, and

plaintiff's answering papers failed to adequately refute defendant's identified fee complaints. Thus, on this record, defendant met her burden of showing a reasonable excuse and meritorious defense to the action justifying vacatur of the default judgment against her (*see generally* CPLR 5015[a]; *Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138 [1986]; Goldman v Cotter, 10 AD3d 289 [1st Dept 2004]).

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

ENTERED: MARCH 26, 2019

CLERK

Manzanet-Daniels, J.P., Gische, Gesmer, Singh, Moulton, JJ.

8797 Empire Erectors and Electrical Co., Inc., Plaintiff-Appellant, Index 305251/12

-against-

Mogul Media, Inc., individually and doing business as Mogul Media II, et al., Defendants-Respondents.

_____

Lopresto & Barbieri, P.C., Astoria (Guy Barbieri of counsel), for appellant.

Horing, Welikson & Rosen P.C., Williston Park (Richard T. Walsh of counsel), for respondents.

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Order, Supreme Court, Bronx County (Julia Rodriguez, J.), entered on or about November 13, 2017, which, to the extent appealed from, granted defendant Mohammad A. Malik's motion for summary judgment dismissing the complaint as against him individually, unanimously affirmed, without costs.

Even accepting plaintiff's position that the individual defendant (Malik) requested that plaintiff perform the work in question, the evidence shows this was only in Malik's corporate capacity (*see Salzman Sign Co. v Beck*, 10 NY2d 63, 67 [1961]). The few invoices plaintiff presented in opposition that were billed to the individual defendant related to other projects more than a decade prior, whereas the nearly 100 invoices addressed to

the corporate defendant were relevant to the project in question and were paid by the corporate defendant.

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 26, 2019

CLERK

Manzanet-Daniels, J.P., Gische, Gesmer, Singh, Moulton, JJ.

8798-
8799 In re Natalya M.,
Petitioner-Respondent,

-against-

Chanan M.,
Respondent-Appellant.

- - - - -

Natalya M.,
Petitioner-Respondent,

-against-

Chanan M.,
Respondent-Appellant.

_____

Larry S. Bachner, New York, for appellant.

The Mandel Law Firm, New York (Howard A. Gardner of counsel), for respondent.

_____

Order, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about August 11, 2017, which confirmed the determination, same court (Karen Kolomechuk, Support Magistrate), entered on or about July 14, 2017, that respondent father willfully violated the child support order entered upon his default, on or about October 13, 2016, and sentenced him to one year of probation, unanimously affirmed, without costs. Order, same court (Jane Pearl, J.), entered on or about September 27, 2017, which denied respondent father's objections to an order, same court (Karen Kolomechuk, Support Magistrate), entered on or

about July 14, 2017, which, after a hearing, denied his motion to vacate his default and his motion for a downward modification of child support, unanimously affirmed, without costs.

A party seeking to vacate a default order must demonstrate both a reasonable excuse and a meritorious defense (CPLR 5015(a)(1); *Matter of Bendeck v Zablah*, 105 AD3d 457 [1st Dept 2013]). Although this Court favors the determination of actions on their merits, in this case, the Family Court providently exercised its discretion in denying the father's motion to vacate his default (*see Matter of Fisherman v Zdeg*, 105 AD3d 566 [1st Dept 2013]) since he never apprised the Family Court or his counsel that he would be unable to appear at trial. Moreover, although the father claimed that a serious illness prevented him from attending the hearing, he did not miss a single visit with his daughter before or after the court date and even requested to see her on the day of trial. He also never sought to vacate the default order until the mother filed a violation petition and sought his incarceration.

The Family Court's finding that the father was in willful violation of the final order of child support was established by clear and convincing evidence. Section 454(3)(a) of the Family Court Act provides that failure to pay support as ordered constitutes "prima facie evidence of a willful violation." Once

nonpayment is established, the burden shifts to the non-custodial parent to come forward with "competent, credible evidence" of his inability to pay the sums awarded (*Matter of Powers v Powers*, 86 NY2d 63, 69-70 [1995]). While the father asserted that he was indigent, the Family Court found the account of his finances to be incredible (*Matter of Porcelain v Porcelain*, 143 AD2d 834, 835 [2d Dept 1988]), and this finding was supported by financial documentation.

The Family Court properly found that the father did not prove the existence of a substantial change in circumstances to warrant a downward modification of the child support order because of his capacity to generate income (*O'Brien v McCann*, 249 AD2d 92 [1st Dept 1998]). Although the father was earning minimum wage at the time of the hearing, he testified that he was an experienced trader with more than 20 years of experience and an even more experienced diamond dealer.

Most of the father's remaining claims have not been preserved for appellate review (*see Robillard v Robbins*, 78 NY2d 1105 [1991]), and we decline to review them in the interests of

justice. As an alternative holding, we find them to be without merit.

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

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

ENTERED: MARCH 26, 2019

CLERK

Manzanet-Daniels, J.P., Gische, Gesmer, Singh, Moulton, JJ.

8800 Giovanni G. Thompson, Index 26064/15E
Plaintiff-Appellant,

-against-

Coca-Cola Bottling Co., et al.,
Defendants-Respondents.

_____

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

Goldberg Segalla, White Plains (Jill C. Owens of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered December 18, 2017, which denied plaintiff's motion for partial summary judgment on the issue of liability, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff made a prima facie showing of negligence on the part of defendants by submitting a police report of the incident containing defendant Adorno's statement that he backed into plaintiff's vehicle, an admission against interest (*see Cruz v Skerrit*, 140 AD3d 554, 554 [1st Dept 2016]). Plaintiff also submitted his own affidavit, which stated, consistent with the police report, that his vehicle was stopped, and that defendant backed his tractor trailer into the front passenger side of plaintiff's vehicle as plaintiff continuously sounded his horn.

Defendant's submissions in opposition to the motion were

insufficient to raise a triable issue of fact, because defendant Adorno's affidavit contains a version of the facts which seems tailored to avoid the consequences of his prior admission to the police officer, is premised on speculation, and is inconsistent with the photographs of the damage to plaintiff's car (*Garzon-Victoria v Okola*, 116 AD3d 558 [1st Dept 2014]).

We note that plaintiff was not required to demonstrate his own freedom from comparative negligence in order to be entitled to summary judgment as to defendants' liability (*Rodriguez v City of New York*, 31 NY3d 312 [2018]).

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

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

ENTERED: MARCH 26, 2019

CLERK

Manzanet-Daniels, J.P., Gische, Gesmer, Singh, Moulton, JJ.

8801 Pamela Keld, Index 150289/17
Plaintiff-Appellant,

-against-

Giddins Claman, LLP, et al.,
Defendants-Respondents.

_____

Andrew Lavoott Bluestone, New York, for appellant.

Rivkin Radler LLP, Uniondale (Cheryl F. Korman of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Kathryn E. Freed, J.), entered April 3, 2018, dismissing the complaint, pursuant to an order, same court and Justice, entered March 15, 2018, which granted defendants' motion to dismiss the complaint, unanimously affirmed, with costs.

The retainer agreement entered into by plaintiff and defendant law firm constitutes documentary evidence which utterly refutes plaintiff's claims (*see generally Leon v Martinez*, 84 NY2d 83, 88 [1994]; CPLR 3211[a][1]). The scope of services defendant was to provide plaintiff in connection with her purchase of a condominium unit was clearly limited by the retainer agreement. The retainer agreement enumerated the legal services defendants would provide including the review, preparation, and/or negotiation of specific documents related to

the closing and the investigation and analysis of issues relating to title. Plaintiff's allegation that the agreement required defendants to manage all aspects of the purchase including advising on inspections for safety, quality of renovation and environmental issues is without merit. These duties are outside the scope of the retainer (*see AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 435 [2007]). Thus, plaintiff cannot maintain a legal malpractice claim against defendants.

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

ENTERED: MARCH 26, 2019

CLERK

Manzanet-Daniels, J.P., Gische, Gesmer, Singh, Moulton, JJ.

8802 Victor Anastasio, Index 31677/17E
Plaintiff-Respondent,

-against-

Port Authority of New York
and New Jersey,
Defendant-Appellant.

_____

Ansa Assuncao, LLP, White Plains (Thomas O. O'Connor of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered April 25, 2018, which, to the extent appealed from as limited by the briefs, denied defendant's motion to dismiss the complaint on forum non conveniens grounds, unanimously affirmed, without costs.

Plaintiff, a resident of Staten Island, properly commenced this action in the courts of this State against defendant, a resident of, among others, Bronx County (*see* McKinney's Uncons Laws of NY § 7106 [L 1950, ch 301, § 6]; *see also Bacon v Nygard*, 160 AD3d 565, 565 [1st Dept 2018]). Defendant has failed to tender proof, in admissible form, that nonparties would be inconvenienced by plaintiff's prosecution of this action in New York State, and defendant's own convenience is irrelevant (*see*

Stavredes v United Skates of Am., 87 AD2d 502, 502 [1st Dept 1982]). "Moreover, given the relative proximity of New York and New Jersey, . . . it is not likely that [defendant] will experience any undue hardship as a result of litigating in New York" (*Hall v Camacho*, 158 AD3d 422, 423 [1st Dept 2018]).

Ultimately, although plaintiff's accident occurred in New Jersey, and New Jersey is an available alternate forum, the balance of equities does not lie so strongly in defendant's favor as to justify disturbing plaintiff's choice of forum (*see Waterways Ltd. v Barclays Bank PLC*, 174 AD2d 324, 327 [1st Dept 1991]).

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

ENTERED: MARCH 26, 2019

CLERK

Manzanet-Daniels, J.P., Gische, Gesmer, Singh, Moulton, JJ.

8803 The People of the State of New York, Respondent, Ind. 1205/12

-against-

Emmanuel Cherry, Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered June 24, 2013, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him, as a second violent felony offender, to a term of seven years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the jury's credibility determinations, including its resolution of any discrepancies in the four eyewitnesses' testimony. Defendant's intent to cause physical injury could be readily inferred from his conduct.

Defendant's arguments concerning the People's summation are unpreserved (*see People v Romero*, 7 NY3d 911 [2006]; *People v Heide*, 84 NY2d 943, 944 [1994]), and we decline to review them in

the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]). Any improprieties in the challenged remarks by the prosecutor were not so egregious as to deprive defendant of a fair trial (*see People v D'Alessandro*, 184 AD2d 114 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

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

ENTERED: MARCH 26, 2019

CLERK

Manzanet-Daniels, J.P., Gische, Gesmer, Singh, Moulton, JJ.

8804 The People of the State of New York, Respondent, Ind. 2790/16

-against-

Jermell Johnson, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, Bronx County (William Mogulescu, J.), rendered January 11, 2017, 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 26, 2019

CLERK

Manzanet-Daniels, J.P., Gische, Gesmer, Singh, Moulton, JJ.

8805 Breeze National, Inc., Index 652611/16
Plaintiff-Respondent,

-against-

Century Surety Company,
Defendant-Appellant,

ACT Abatement Corporation,
Defendant.

_____

Hurwitz & Fine, P.C., Buffalo (Jennifer A. Ehman of counsel), for appellant.

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (John F. Watkins of counsel), for respondent.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered March 29, 2018, which denied defendant Century Surety Company's (Century) cross motion for summary judgment and granted plaintiff's motion for a declaration that Century is obligated to provide insurance coverage to plaintiff in the underlying wrongful death action, unanimously affirmed, with costs.

The language found in Century's additional insured endorsement, in which Century agreed to afford plaintiff Breeze National, Inc. (Breeze) coverage as an additional insured only with respect to liability "caused, in whole or in part, by" its named insured ACT Abatement Corporation's (ACT) acts or

omissions, applies to injury proximately caused by the named insured (*Burlington Ins. Co. v NYC Tr. Auth.*, 29 NY3d 313, 317 [2017]). Century's argument that ACT has never been adjudicated as negligent, and had no control over the means and methods of Wilk's work is misplaced, as the phrase "caused, in whole or in part, by" does not "compel the conclusion tat the endorsement incorporates a negligence requirement, but simply means more than "but for" causation (*id.* at 324). The act of window removal, combined with the failure to guard the windows, was sufficient to establish proximate causation. Thus, Century must defend Breeze in the underlying action.

Because the record evidence indicates issues of fact as to whether Breeze was solely responsible, or partially responsible for the accident (*see Indian Harbor Ins. Co. v Alma Tower, LLC*, 165 AD3d 549 [1st Dept 2018]), the issue of indemnification cannot be determined at this time (see *Vargas v City of New York*, 158 AD3d 523, 525 [1st Dept 2018]).

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

ENTERED: MARCH 26, 2019

CLERK

Manzanet-Daniels, J.P., Gische, Gesmer, Singh, Moulton, JJ.

8806-
8807 In re Kaylin P., and Another,

Children Under Eighteen Years of Age, etc.,

Derval S.
Respondent-Appellant,

Administration for Child Services,
Petitioner-Respondent.

_____

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

Zachary W. Carter, Corporation Counsel, New York (Antonella Karlin of counsel), for respondent.

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

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Appeal from order of disposition, Family Court, Bronx County (David J. Kaplan, J.), entered on or about May 3, 2018, which released respondent's biological son, Mason S., to the custody of his mother with court-ordered supervision for six months, released Kaylin P., a child for whom he was legally responsible, to her biological father for six months with court-ordered supervision, and directed respondent to comply with certain terms and conditions including that he complete a sex offender program and abide by a final order of protection, also dated May 3, 2018, that prohibits him from having any contact with Kaylin P. until

December 30 2019, her 18th birthday, unanimously dismissed, without costs. Appeal from a fact-finding order, same court and Judge, entered on or about September 27, 2016, which, inter alia, found that respondent sexually abused and neglected Kaylin P., and from a fact-finding order, same court and Judge, entered on or about April 19, 2018, which found Mason S., to be derivatively abused and neglected, unanimously dismissed, without costs, as abandoned.

The dispositional order was entered upon respondent's consent, after full and active participation at the proceeding, and thus he is not an aggrieved party within the meaning of CPLR 5511 (*Matter of Desmond S.*, 97 NY2d 693, 693 [2002]; *Matter of Nafees F.*, 162 AD3d 416 [1st Dept 2018]).

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

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

ENTERED: MARCH 26, 2019

CLERK

Manzanet-Daniels, J.P., Gische, Gesmer, Singh, Moulton, JJ.

8808 The People of the State of New York, Respondent, Ind. 2641/10

-against-

Joseph Spanarkel, Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered May 11, 2011, convicting defendant, upon his plea of guilty, of burglary in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 16 years to life, unanimously affirmed.

Defendant's challenge to the voluntariness of his plea does not come within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 665–666 [1988]), and we decline to review this unpreserved claim in the interest of justice. As an alternative holding, we reject it on the merits. Defendant's plea allocution establishes the voluntariness of the plea and contains nothing that casts any doubt on defendant's guilt (*see People v Toxey*, 86 NY2d 725 [1995]). To the extent defendant made a remark that may have

suggested the possibility of an intoxication defense and warranted further inquiry by the court, the court's inquiry was sufficient to establish that defendant understood he had the right to assert that his intoxication negated an element of the crime, and that he was nevertheless giving up such a claim.

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

ENTERED: MARCH 26, 2019

CLERK

Manzanet-Daniels, J.P., Gische, Gesmer, Singh, Moulton, JJ.

8809 Martin H. Levenglick, Index 350601/03
Plaintiff-Respondent,

-against-

JoAnna Levenglick,
Defendant-Appellant.

_____

JoAnna Leveng1ick, appellant pro se.

Mintz & Gold LLP, New York (Scott Klein of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lori S. Sattler, J.), entered January 22, 2018, which, to the extent appealable, granted plaintiff's motion for renewal and reargument and, upon renewal and reargument, vacated so much of an order, same court and Justice, entered August 25, 2017, as directed plaintiff to pay $22,576, plus any penalties, including late fees, and interest accrued, to the lending institutions holding the parties' daughter's student loans, and modified so much of the same order as directed plaintiff to pay $5,000 to defendant within 60 days so as to only require such payment upon presentation of proof that she had paid the $5,000, and denied as moot defendant's motion for enforcement of the order dated August 25, 2017, unanimously reversed, on the law, and the motion for renewal and reargument denied, and the motion for enforcement

remanded for consideration by the trial court.

It is undisputed that plaintiff was obligated to pay all charges from the parties' daughter's college account, which included tuition, flex account, and dining dollars, that he failed to do so, and that his failure caused his daughter to obtain student loans in an attempt to satisfy her outstanding college account balance. The first issue before this Court is whether there is sufficient evidence to determine the amount of loan money contributed by the daughter to her college account. Contrary to the motion court, we find that there is sufficient evidence.

The college account billing history shows payments identified as federal loans of $2,226 and $2,968 for the fall 2014 term, $2,226 and $2,968 for the winter 2015 term, and $5,442 and $6,926 for the winter 2016 term, for a total of $22,576. Plaintiff's argument that the college account billing history is insufficient because his daughter could have used the loan money for non-school-related purposes is without merit. The college billing records clearly establish that the daughter's loans were credited in her account history toward amounts due.

We also reject plaintiff's argument that the evidence does not establish that his daughter had an outstanding student loan balance of $22,756. He is responsible for that amount, plus all

accrued late fees, penalties and interest.

The second issue before this court is whether plaintiff has presented a valid reason to renew or reargue that portion of the court's August 25, 2017 order directing him to pay $5,000 to defendant. However, plaintiff neither presented any previously unavailable proof nor demonstrated that the motion court had misapprehended an issue of law, and accordingly, we reverse that portion of the motion court's order.[1]

In view of its partial grant of plaintiff's motion for renewal and reargument, the motion court denied defendant's motion for enforcement of the August 25, 2017 order as moot. In view of our reversal of the grant of the motion to renew and reargue, we reverse the denial of defendant's motion for enforcement as moot, and remand it to the motion court for further proceedings.

[1]There is no support in the record before us for plaintiff's counsel's claim in his appellate brief that plaintiff has since paid defendant the $5,000 he was directed to pay her in the August 25, 2017 order. Accordingly, that claim is not properly before us on this appeal.

We do not reach defendant's remaining contentions, which are directed towards an order from which she did not appeal or are improperly raised for the first time on appeal.

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

ENTERED: MARCH 26, 2019

CLERK

Manzanet-Daniels, J.P., Gische, Gesmer, Singh, Moulton, JJ.

8810 Timothy Cotton, Index 314883/12
Plaintiff-Respondent,

-against-

Teresa May Roedelbronn,
Defendant-Appellant.

_____

Law Office of Howard Benjamin, New York (Howard Benjamin of counsel), for appellant.

Bronstein Van Veen LLC, New York (Peter E. Bronstein of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Deborah A. Kaplan, J.), entered October 25, 2017, which to the extent appealed from as limited by the briefs, awarded defendant wife 10% of plaintiff husband's business interest valued at $19,942,898, and 40% of his interests in two other business entities valued at $3,280,150 and $655,943, respectively, and awarded defendant monthly maintenance of $20,000 for 36 months, unanimously affirmed, without costs.

The court properly accepted the Special Referee's findings as to the value of plaintiff's various business interests subject to equitable distribution since these values were within the range of the testimony presented at trial and were grounded on the credibility of plaintiff's expert witness and his valuation techniques (*see Peritore v Peritore*, 66 AD3d 750, 752 [2d Dept 2009]). Contrary to defendant's contention, the record supports

the finding that plaintiff's business assets were actively managed, and thus appropriately valued close to the date of commencement of the action (*see Heine v Heine*, 176 AD2d 77, 87 [1st Dept 1992], *lv denied* 80 NY2d 753 [1992]; Domestic Relations Law § 236[B][4][b]). Notably, defendant, who retained her own expert to appraise plaintiff's business interests during the pendency of the action, failed to call her expert as a witness.

Regarding the equitable distribution of the marital value of plaintiff's business assets, there is no support for defendant's claim that she was entitled to 50% of their marital value (*see Arvantides v Arvantides*, 64 NY2d 1033, 1034 [1985]). The court, after correcting a scrivener's error, properly accepted the Referee's recommendation that defendant receive 10% of the total value of certain entities valued at $19,942,898. The record shows that the value of these businesses was primarily derived from efforts made by plaintiff and his partners prior to the marriage, and that defendant made little, if any, contribution to the growth of these businesses. To the contrary, the evidence at trial indicated that defendant at times acted as a hindrance to plaintiff's business dealings. Accordingly, the court was not required to divide these marital assets equally (*see id.*).

Furthermore, there is no reason to disturb the distributive award of 40% of the marital value of two other business entities,

which plaintiff formed during the marriage using mostly marital funds. Despite evidence that defendant made no direct contribution to these business entities, the Referee awarded her a 40% distributive share based on a finding that she shared in the parties' restrained lifestyle that allowed these particular investments to grow. Under the circumstances, this was a provident exercise of discretion (*see Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 420 [2009]; *Arvantides* at 1034).

The court providently exercised its discretion in awarding defendant monthly maintenance of $20,000, as recommended by the Referee, but for an extended duration of 36 months. The only evidence of defendant's expenses was her net worth statement, which the Referee found riddled with misstatements, inaccuracies, and unsubstantiated expenses. Moreover, expert testimony at trial demonstrated that this amount and duration would be sufficient to meet defendant's needs and allow her to re-enter

the employment market (*see Anonymous v Anonymous*, 222 AD2d 305, 306 [1st Dept 1995]).

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

ENTERED: MARCH 26, 2019

CLERK

Manzanet-Daniels, J.P., Gische, Gesmer, Singh, Moulton, JJ.

8811 Nadine Brown, Index 303170/13
Plaintiff-Appellant,

-against-

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

The New York City Police Department,
et al.,
Defendants.

_____

Nazrali Law, New York (John Paul DeVerna and Charen Kim of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered on or about September 19, 2017, which, in this action alleging, inter alia, false arrest and malicious prosecution, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The record shows that plaintiff worked as a hair stylist in a salon that she owned and operated; that a confidential informant had made two buys of marijuana at the hair salon from a male employee of the salon and stated where the marijuana was stored; that upon entry pursuant to a search warrant to the salon where plaintiff and other employees were present, the officers found a number of ziploc bags of marijuana stored where the

confidential informant had advised; and that the officers then found larger amounts of marijuana in other areas of the salon, all of which was located in areas where any employee could readily access it (*see People v Marte*, 295 AD2d 102 [1st Dept 2002], *lv denied* 98 NY2d 769 [2002]). Accordingly, dismissal of the false arrest claim was proper since there was probable cause for plaintiff's arrest for constructive possession of marijuana (*see De Lourdes Torres v Jones*, 26 NY3d 742, 759 [2016]; *Veloz v City of New York*, 161 AD3d 668 [1s Dept 2018]).

The existence of probable cause is also fatal to plaintiff's malicious prosecution claims (*see Nadal v City of New York*, 105 AD3d 598 [1st Dept 2013], *lv denied* 21 NY3d 861 [2013]), as is the fact that the adjournment in contemplation of dismissal did not constitute a termination of the case in her favor (*see*

Hollender v Trump Vil. Coop., 58 NY2d 420, 425-426 [1983]; *Campbell v City of New York*, 159 AD3d 436 [1st Dept 2018).

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

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

ENTERED: MARCH 26, 2019

CLERK

Manzanet-Daniels, J.P., Gische, Gesmer, Singh, Moulton, JJ.

8812 Belinda Donnelly, et al., Index 154988/18
Plaintiffs-Appellants,

-against-

Hubert Neumann, etc.,
Defendant-Respondent.

_____

Judd Burstein, P.C., New York (Will Bartholomew of counsel), for appellants.

Itkowitz, PLLC, New York (Jay Itkowitz and Grady R. Southard of counsel), for respondent.

_____

Order, Supreme Court, New York County (Melissa Crane, J.), entered August 30, 2018, which granted defendant's motion for partial summary judgment on his counterclaim for ejectment and dismissing the first through fourth causes of action, and denied plaintiffs' cross motion for summary judgment on their seventh cause of action, alleging breach of fiduciary duty, unanimously affirmed, with costs.

In support of the breach of fiduciary duty cause of action, plaintiffs failed to establish that defendant's failure to pay the trusts rent for his use and occupancy of the house constituted misconduct (*see Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014]). Defendant is expressly empowered by article V, section 1(s) of the Amended and Restated Morton G. Neumann Trust Agreement known as the Morton G. Neumann Trust, dated May 15,

1980 (Trust Agreement), as trustee of the trust for his own benefit, to permit himself, in his capacity as beneficiary of the trust, to live in the house rent-free. Moreover, his doing so does not constitute a "distribution[] of income or principal" to himself, as trustee, as contemplated in article VI, section 4 of the Trust Agreement.

Defendant established prima facie that he is entitled to eject plaintiffs from the house (*see Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408, 410 [2d Dept 2009]; *Jannace v Nelson, L.P.*, 256 AD2d 385, 385-386 [2d Dept 1998]). It is undisputed that the trusts own the house and that plaintiffs have held over past the date set forth in the termination notice as the end of their tenancy.

Plaintiffs contend that an issue of fact exists whether defendant entered into an oral agreement to allow them and their children to live in the house for an indefinite period without paying rent. As plaintiffs argue, such an oral agreement would not be void as a matter of law pursuant to the statute of frauds (General Obligations Law §§ 5-701; 5-703), because there is a possibility that its terms would end within a year (*see Wang Jia v Kang*, 161 AD3d 463, 465 [1st Dept 2018]). However, any further issues of fact as to the terms of the oral agreement are not material, because defendant properly terminated plaintiffs'

tenancy. Contrary to plaintiffs' contention, defendant was not required to give them six months' notice of termination. The tenancy being of an indeterminate duration, it terminated by operation of law on the first October 1 after the possession commenced under the agreement (Real Property Law § 232). Since plaintiffs did not pay rent after termination of their tenancy of indeterminate duration, they became tenants at will (*Stauber v Antelo*, 163 AD2d 246, 248 [1st Dept 1990] [a person who enters upon property by permission of the owner for an indefinite period, even without the reservation of rent, is considered to be a tenant at will]). Accordingly, defendant would have been required to provide only 30 days' notice to terminate the tenancy (Real Property Law §§ 228), which he did.

In support of their cause of action for the imposition of a constructive trust, plaintiffs failed to establish that they transferred property in reliance upon a confidential relationship or that defendant was unjustly enriched (*see Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]). To the contrary, plaintiffs were permitted to live at the property rent-free for about six years (*cf. Kohan v Nehmadi*, 130 AD3d 429, 430 [1st Dept 2015] [issues of fact existed as to plaintiff's entitlement to constructive trust, where plaintiff claimed he received less property than he claimed he was promised, based on parties' close friendship and

defendants' superior expertise in real estate]; *Livathinos v Vaughan*, 121 AD3d 485, 486 [1st Dept 2014]).

In support of their causes of action for injunctive relief (the first through fourth), plaintiffs failed to establish irreparable harm that would result from defendant's exercise of his discretionary powers to remove them from the house (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839 [2005]; CPLR 6301).

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 26, 2019

CLERK

Manzanet-Daniels, J.P., Gische, Gesmer, Singh, Moulton, JJ.

8813- Ind. 6325N/09
8813A- 5390N/13
8813B The People of the State of New York, 1706/14
Respondent,

-against-

Curry Lee Walker,
Defendant-Appellant.

_____

Justine M. Luongo, The Legal Aid Society, New York (Laura Boyd 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 judgments of the Supreme Court, New York County (Anthony Ferrara, J. at plea under Ind. 6325N/09; Michael Obus, J. at pleas on Ind. Nos. 5390N/13 and 1706/14 and sentencing), rendered August 6, 2015,

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 judgments so appealed from be and the same are hereby affirmed.

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

ENTERED: MARCH 26, 2019

CLERK

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

Manzanet-Daniels, J.P., Gische, Gesmer, Singh, Moulton, JJ.

8814 & M-278 — Index 38061609

HSBC Bank USA, N.A., as Trustee for the Registered Holders of Renaissance Equity Loan Asset-Backed Certificates, Series 2007-03,
Plaintiff-Respondent,

-against-

Michael Hanchard,
Defendant-Appellant,

Joan Hamilton, et al.,
Defendants.

_____

Michael Kennedy Karlson, New York, for appellant.

Hinshaw & Culbertson LLP, New York (Brent M. Reitter of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on October 26, 2016, which, to the extent appealed from as limited by the briefs, denied defendant Michael Hanchard's motion to vacate a judgment of foreclosure entered upon his default, pursuant to CPLR 5015(a)(4), and dismiss the complaint for lack of jurisdiction, unanimously affirmed, with costs.

The court correctly found that jurisdiction had been obtained over defendant Michael Hanchard. Plaintiff established prima facie that defendant was properly served with process by showing, pursuant to CPLR 308(4), that on three separate occasions and times, the process server made efforts to serve

defendant at his last known address in Florida (*see Ayala v Bassett*, 57 AD3d 387 [1st Dept 2008]). Defendant's conclusory denial of service was insufficient to rebut the presumption of proper service created by the process server's properly executed affidavit (*see id.; U.S. Bank N.A. v Martinez*, 139 AD3d 548, 549 [1st Dept 2016]). While defendant alleged that he had never lived in Florida, the evidence showed the contrary. In 2011, defendant filed for bankruptcy, listing the Florida address as his residence. He failed to establish an alternative dwelling or usual place of abode where he could have been served (*see Martinez*, 139 AD3d at 549).

M-278 - *HSBC Bank USA, N.A. v Hanchard*

Motion for sanctions denied.

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

ENTERED: MARCH 26, 2019

CLERK

Manzanet-Daniels, J.P., Gische, Gesmer, Singh, Moulton, JJ.

8815 The People of the State of New York, Ind. 1540/14
Respondent,

-against-

Juan Valdez,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Abraham Clott, J.), rendered April 20, 2016,

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

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

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

ENTERED: MARCH 26, 2019

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

Manzanet-Daniels, J.P., Gische, Gesmer, Singh, Moulton, JJ.

8816N Sara Tecchia, et al., Index 652257/15
Plaintiffs-Appellants,

-against-

Bartolomeo Bellati doing business
"Minimal USA", et al.,
Defendants-Respondents,

Stefano Venier,
Defendant.

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Davidoff Hutcher & Citron LLP, New York (Joseph N. Polito of counsel), for appellants.

Muchmore & Associates PLLC, Brooklyn (Marwan F. Sehwail of counsel), for respondents.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered March 23, 2018, which, insofar as appealed from as limited by the briefs, denied so much of plaintiffs' motion for leave to amend its complaint as sought to include a third cause of action for fraud against defendant Bellati, unanimously reversed, on the law, with costs, to permit said amendment.

The proposed amended pleading adequately pleaded the

elements of a claim for fraudulent inducement, and was not palpably insufficient, clearly devoid of merit, or duplicative of the breach of contract claim (*see First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 291 [1st Dept 1999]).

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ENTERED: MARCH 26, 2019

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

8869- Index 150709/12
8869A-
8869B-
8869C Robert E. Shannon, Jr.,
Plaintiff-Respondent-Appellant,

-against-

The New York Times Building, LLC, et al.,
Defendants-Appellants-Respondents,

Fujitec America, Inc.,
Defendant-Respondent-Appellant.

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Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Roland T. Koke of counsel), for appellants-respondents.

Sullivan & Sullivan, LLP, Garden City (Robert G. Sullivan of counsel), for Robert E. Shannon, Jr., respondent-appellant.

Swartz Law Offices, New York (Gerald Neal Swartz of counsel), for Fujitec America, Inc., respondent-appellant.

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Orders, Supreme Court, New York County (Arlene P. Bluth, J.), entered September 13, 2018, which denied plaintiff's motion for summary judgment as to liability, denied defendant Fujitec America, Inc.'s motion for summary judgment dismissing the complaint and cross claims as against it, denied the New York Times and Ratner defendants' (the building defendants) motion for summary judgment dismissing the complaint and cross claims as against them and on their indemnification cross claims against Fujitec, and granted plaintiff's motion for leave to amend the complaint to add a demand for punitive damages, unanimously modified, on the law, to deny plaintiff's motion for leave to

amend the complaint to add a demand for punitive damages, and otherwise affirmed, without costs.

Plaintiff is suing for injuries he claims he sustained when the elevator in which he was riding malfunctioned. Issues of fact exist as to the nature and extent of the malfunction, including whether the elevator even went into a "free fall," causing the injuries that plaintiff claims. Defendants also dispute whether they had notice of a defect that led to a malfunction (*see Rogers v Dorchester Assoc.*, 32 NY2d 553, 559 [1973]; *Levine v City of New York*, 67 AD3d 510 [1st Dept 2009]). Four months before the accident, the City of New York had issued a violation relating to the elevator, in connection with which, a private elevator inspection company had advised the building defendants that they should monitor a "rouge" condition of the elevator hoist ropes, one of which broke on the date of the accident. Defendant Fujitec, which had a full-service elevator maintenance contract with the building defendants, denied being given the violation documents until one week before the accident, after its contract term had expired. In any event, whether or not the contract was still in effect – a fact contested by the parties - the duty of the building defendants to maintain their premises in a reasonably safe condition remained nondelegable (*see Mas v Two Bridges Assoc.*, 75 NY2d 680, 687 [1990]). Accordingly, the building defendants' motion for dismissal of the complaint was properly denied given the issues of fact regarding the nature and extent of the malfunction and whether it was a

proximate cause of the injuries alleged.

These same disputed issues warrant denial of summary judgment in plaintiff's favor. Plaintiff's reliance on *O'Leary v S&A Elec. Contr. Corp.* (149 AD3d 500 [1st Dept 2017]), in which the plaintiff was granted summary judgment under Labor Law § 246(1), is misplaced, as owners' and general contractors' liability under that statute is not dependent on their own negligence. Similarly unavailing is plaintiff's reliance on the doctrines of res judicata and collateral estoppel. The building defendants pleaded guilty before the Environmental Control Board to violation of Administrative Code of City of NY § 28-301.1, a general provision that states that "[a]ll buildings and all parts thereof and all other structures shall be maintained in a safe condition." They did not admit to notice of a defect that led to the alleged malfunction of the elevator (*see Pelzer v Transel El. & Elec. Inc.*, 41 AD3d 379, 380 [1st Dept 2007] ["care must be taken in identifying the precise issue necessarily decided in the first proceeding and comparing it to the issue involved in the second proceeding"] [internal quotation marks omitted]).

Fujitec contends that there was no defect in the elevator. However, plaintiff's testimony that the elevator began to free fall, if credited by a jury, is sufficient to prove negligence (*see Colon v New York City Hous. Auth.*, 156 AD3d 406 [1st Dept 2017]). Moreover, while Fujitec argues, as to notice, that the rouging observed by the independent inspector was not an indicator that the cables were worn, the fact is that one of the

cables broke. Notably, the cables were cut up and disposed of without any inspection being documented or photographs taken. Fujitec's further contention that none of plaintiff's injuries are attributable to the accident is belied by plaintiff's testimony and his physician's affirmations.

Issues of fact preclude summary resolution of the building defendants' claims for contractual and common-law indemnity against Fujitec (*see Podhaskie v Seventh Chelsea Assoc.*, 3 AD3d 361 [1st Dept 2004]). Fujitec contests that the indemnity provision was in effect at the time of the accident, arguing that the contract had expired. Moreover, the indemnitee listed in the contract is not one of the named defendants, and the contract expressly excludes third-party beneficiary status to any entity not named. To the extent Fujitec argues, in its reply brief on appeal, that the contractual indemnity claims should be dismissed in light of the expiration of the term and the named indemnitee, the argument is unpreserved, as it was not made in the motion to dismiss but only in Fujitec's subsequent partial opposition to the building defendants' motion. In any event, Fujitec failed to establish that the parties did not extend the term of the contract by their course of conduct or that their negligence did not occur during the term of the contract or that the building defendants are not agents of the indemnitee. As to the common-law indemnity claims, summary judgment is precluded by issues of fact as to defendants' negligence, in light of the evidence tending to show that they had notice of the violation before the

accident.

The court erred in granting plaintiff's motion for leave to amend the complaint to add a demand for punitive damages (*see Marinaccio v Town of Clarence*, 20 NY3d 506, 511 [2013]["punitive damages will be awarded only in exceptional cases"]). The allegations contained in plaintiff's amended complaint do not rise to the level of moral culpability necessary to support a claim for punitive damages, as they fail to allege conduct that can be viewed as conscious and deliberate disregard for the lives of others; not does the additional evidence found in the record support a finding that defendants acted so recklessly or wantonly as to justify a claim for punitive damages (*see Britz v Grace Indus., LLC,* 156 AD3d 533 [1st Dept 2017], lv dismissed, 32 NY3d 946 [2018]; *see also Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 25 [1st Dept 2003]).

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

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ENTERED: MARCH 26, 2019

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