SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 9, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Renwick, J.P., Richter, Tom, Kahn, Moulton, JJ.

8939 In re Lela G.,
Petitioner-Respondent,

-against-

Shoshanah B.,
Respondent-Appellant.

Cohen Clair Lans Greifer Thorpe & Rottenstreich LLP, New York (Dan Rottenstreich of counsel), for appellant.

Dobrish Michaels Gross, LLP, New York (Nina S. Gross of counsel), for respondent.

Karen Freedman, Lawyers For Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the child.

Order, Family Court, New York County (George L. Jurow, J.H.O.), entered on or about June 20, 2018, which, after a trial, to the extent appealed from, eliminated respondent's Wednesday overnight visits with the parties' child, and modified the parties' holiday and parenting schedule, unanimously affirmed, without costs.

While the better practice would have been for the Family Court to appoint a neutral forensic given the circumstances of this case, including the different views as to the reasons for

the child's psychological difficulties, it was not reversible error for the court to allow the child's treating psychiatrist to testify and make recommendations for modification of the access schedule (*see Matter of Rogan v Guida*, 143 AD3d 830, 831-832 [2d Dept 2016] [holding that a "court may [], as it deems appropriate, solicit input from the child's therapist or other mental health professionals to assist it in determining the best interests of the child"]; *Matter of Ni-Na C. [Xiao Q.C.]*, 134 AD3d 702 [2d Dept 2015] [upholding the court's determination to gather information from the children's therapist to assist it in determining the best interest of the children]). The treating psychiatrist had the relevant credentials, met with and interviewed both parents, and performed a thorough assessment of the child.

Respondent argues that the treating psychiatrist's neutrality was compromised because he had been retained by petitioner. Although the record indicates that the treating psychiatrist was retained, and paid by, the custodial parent, the court became aware of this fact during cross examination. There was also sufficient evidence in the record, in addition to the treating psychiatrist's testimony, to support the court's determination that Wednesday overnights were a cause of the child's symptoms. Moreover, the record supports the court's

conclusion that the child experiences heightened stress in connection with midweek changes to his routine. Notwithstanding such conclusion, the treating doctor expressed openness to the idea of gradual reintroduction of Wednesday overnights to help the child cope with his symptoms.

Although respondent's expert disagreed with, and criticized, the treating psychiatrist's separation anxiety diagnosis, his testimony was based solely on his review of trial transcripts, and he did not have the benefit of in-person interviews with the child or his parents. The recommendation by the treating psychiatrist to eliminate Wednesday overnights was not based solely on the separation anxiety diagnosis, but also on other possible issues with the child. In any event, given the court's ability to assess the credibility of both doctors, its determination to give greater weight to the treating psychiatrist's testimony is entitled to deference and should not be disturbed on appeal (*Matter of Ruth Joanna O.O. [Melissa O.]*, 149 AD3d 32, 43 [1st Dept 2017], *affd* 30 NY3d 985 [2017]).

The record does not support respondent's argument that the Judicial Hearing Officer (JHO) interfered with questioning to cure petitioner's "failure of proof." The JHO's clearly expressed goal, in keeping with this Court's prior directives, was to ensure that relevant testimony about Wednesday overnights

was elicited. His questions were phrased neutrally and did not suggest desired answers. We reject respondent's argument that the JHO erred in admitting evidence of events that postdated pleadings from 2014 and 2015. The trial was held pursuant to this Court's orders instructing that a hearing was required, and the latter of those orders was issued June 20, 2017 (*see Matter of Lela G. v Shoshanah B.*, 151 AD3d 593 [1st Dept 2017]). In any event, respondent herself relied on recent evidence about the child in support of her arguments.

Respondent failed to establish that this case should be assigned to a different JHO. While this Court has twice reversed his orders in this case, the reversals were based on the need to hold a hearing, which the JHO has since done.

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

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

ENTERED: MAY 9, 2019

CLERK

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

9244- Ind. 104/16
9244A The People of the State of New York, 1839/16
Respondent,

-against-

Mohamed Diaby,
Defendant-Appellant.

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

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

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Judgments, Supreme Court, New York County (Ellen N. Biben, J.), rendered June 13, 2017, as amended July 5, 2017, convicting defendant, upon his pleas of guilty, of robbery in the first degree and attempted robbery in the second degree, and sentencing him to consecutive terms of five years and two years, respectively, unanimously affirmed.

Defendant did not preserve his claim that the court misapprehended whether it had discretion to impose concurrent sentences (*see e.g. People v Hamlet*, 227 AD2d 203 [1st Dept 1996], *lv denied* 88 NY2d 1021 [1996]), and we decline to review it in the interest of justice. "While defendant characterizes his claim as one of unlawful sentencing, he is essentially arguing that a substantively lawful sentence was imposed by way

of a defective procedure, and such claims require preservation. As a result of the lack of preservation, the court was never called upon to clarify its statement as to sentence" (*People v Giacchi*, 154 AD3d 544, 545 [1st Dept 2017] [citation omitted]). As an alternative holding, we find that defendant's assertion that the court believed it was legally required to impose consecutive sentences rests on a speculative inference from the court's remarks. In any event, "remand for resentencing is unwarranted because the record fails to indicate any possible harm flowing from the court's alleged error" (*id.*).

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 9, 2019

CLERK

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

9246-
9247 In re George L.,
Petitioner-Respondent,

-against-

Karen L.,
Respondent-Appellant.

- - - - -

In re Karen L.,
Petitioner-Appellant,

-against-

George L.,
Respondent-Respondent.

_____

Daniel R. Katz, New York, for appellant.

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

Karen Freedman, Lawyers for the Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the children.

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Appeals from orders, Family Court, New York County (Gail A. Adams, Referee), entered on or about February 8, 2018, which dismissed, without prejudice, appellant mother's petition for custody, and, after an inquest, granted the father's petition, awarding him custody of the subject children, unanimously dismissed, without costs, as taken from nonappealable orders.

No appeal lies from either of the February 8, 2018 orders, because both were entered on default, and the petitioner-mother

made no motion to vacate either default (CPLR 5511; *see e.g. Matter of Daleena T.* [*Wanda W.*], 145 AD3d 628, 629 [1st Dept 2016]). Even if the mother had a meritorious challenge to the Referee's jurisdiction to hear and determine the matter in the absence of her consent, she was required her to move to vacate her default prior to raising that challenge (*see Matter of Newmann-Werth v Werth*, 165 AD3d 1147, 1148 [2d Dept 2018]).

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

ENTERED: MAY 9, 2019

CLERK

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

9248 In re Metropolitan Property and Casualty Insurance Company, Petitioner-Appellant, Index 31065/17E

-against-

Ronald Anthony, Respondent-Respondent.

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Bruno, Gerbino & Soriano, LLP, Melville (Nathan M. Shapiro of counsel), for appellant.

Yadgarov & Associates, PLLC, New York (Ronald S. Ramo of counsel), for respondent.

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Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered on or about September 13, 2018, which denied petitioner's motion to stay arbitration as untimely and dismissed the proceeding, unanimously affirmed, without costs.

Contrary to petitioner's contention, it was not permitted under North Carolina law to rescind the insurance policy ab initio after the accident involving an uninsured motorist had occurred. North Carolina insurance law prohibits rescission after an accident of any insurance "required" to be offered (*see* NC Gen Stat § 20-279.21[f][1]). This provision applies to prohibit rescission based on fraud in the application for insurance (*see Odum v Nationwide Mut. Ins. Co.*, 101 NC App 627 [1991], *review denied* 329 NC 499 [1991]). Uninsured motorist

coverage, which is required by statute to be included in all automobile insurance policies, is a "required" type of coverage (*see Bray v North Carolina Farm Bur. Mut. Ins. Co.*, 341 NC 678 [1995]).

Respondent's service of the demand for arbitration for a second time, more than a year after the original service, did not restart the 20-day period for petitioner to seek a stay of arbitration under CPLR 7503(c) (*cf. Matter of Travelers Indem. Co. v Fernandez*, 55 AD3d 746 [2d Dept 2008] [new demand for arbitration restarted arbitration and 20-day period, where petition for stay had been dismissed as untimely, insured had taken no further action with AAA, and AAA had closed the arbitration]).

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

ENTERED: MAY 9, 2019

CLERK

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

9249-
9250 RLI Insurance Company, Index 652471/11
153250/15
Plaintiff,

-against-

Navigators Insurance Company, et al.,
Defendants-Respondents,

State National Insurance Company,
Defendant-Appellant,

American Home Assurance Company,
et al.,
Defendants.

- - - - -

Scottsdale Insurance Company,
Plaintiff-Respondent,

-against-

RLI Insurance Company, et al.,
Defendants,

Navigators Insurance Company,
et al.,
Defendants-Respondents,

State National Insurance Company,
Defendant-Appellant.

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Lester Schwab Katz & Dwyer, LLP, New York (Aaron Brouk of counsel), for appellant.

Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York (Vanessa M. Corchia of counsel), for Navigators Insurance Company, Kulka Construction Corp. and Kulka Contracting, LLC, respondents.

Kennedys CMK LLP, New York (Max W. Gershweir of counsel), for Scottsdale Insurance Company, respondent.

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Order, Supreme Court, New York County (Melissa A. Crane, J.), entered January 17, 2018, which, to the extent appealed from as limited by the briefs, denied defendant State National Insurance Company's motion for summary judgment declaring that State National has no further duty to indemnify defendant Granite Building 2, LLC, Kulka Contracting, LLC, or FXR Construction, Inc. for damages in the underlying action and that it has no duty to pay pre- or postjudgment interest that accrued after August 19, 2016, unanimously reversed, on the law, with costs, the motion granted, and it is declared that State National has no further obligation to indemnify Granite, Kulka or FXR in the underlying action and has no obligation to pay prejudgment or postjudgment interest that accrued after August 19, 2016.

The insurance policy issued by State National had a per-occurrence limit of liability of $1,000,000. In accord with the plain language of the policy, State National's payment of the full amount of the policy limit on August 19, 2016 extinguished its obligation to pay any prejudgment interest that might accrue after that date. Moreover, State National's unconditional payment of the full amount of the policy limit to the plaintiffs in the underlying action before the entry of the judgment also extinguished its obligation to pay any postjudgment interest (*see Ragins v Hospitals Ins. Co., Inc.*, 22 NY3d 1019 [2013]). The

plain language of the policy provided that State National would be obligated to pay postjudgment interest that accrued before it paid that part of the judgment that did not exceed the policy limit.

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

ENTERED: MAY 9, 2019

CLERK

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

9251 Caliber Home Loans Inc., Index 35367/14E
Plaintiff-Respondent,

-against-

Xiu Lian Tang, et al.,
Defendants-Appellants.

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Law Offices of Vincent S. Wong, New York (Eugene Kroner of counsel), for appellants.

Stern & Eisenberg, P.C., Depew (Margaret J. Cascino of counsel), for respondent.

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Judgment of foreclosure and sale, Supreme Court, Bronx County (Ben R. Barbato, J.), entered September 22, 2017, unanimously affirmed, without costs.

Defendants waived the defense of lack of standing by failing to assert it in the answer or in a timely motion to dismiss (CPLR 3211[e]; *Bank of Am., N.A. v Brannon*, 156 AD3d 1, 7 [1st Dept 2017]). The defense of lack of personal jurisdiction fails in view of defendant Jian Shi Xu's pro se answer and the

subsequent appearance of counsel on behalf of both defendants (CPLR 321[a]; *National Loan Invs., L.P. v Piscitello*, 21 AD3d 537 [2d Dept 2005]).

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

ENTERED: MAY 9, 2019

CLERK

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

9252 Jujo U. Sanjana, et al., Index 153650/17
Plaintiffs-Appellants,

-against-

James King, et al.,
Defendants-Respondents.

_____

Thomas Weiss & Associates, P.C., Garden City (Thomas Weiss of counsel), for appellants.

Lewis Johs Avallone Aviles LLP, Islandia (Jennifer Hurley McGay of counsel), for respondents.

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Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered June 11, 2018, which denied plaintiffs' motion for summary judgment on their cause of action for return of a down payment, and granted defendants' cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Pursuant to the express terms of their real estate purchase contract with defendant sellers, plaintiff purchasers were obligated, if they had not obtained financing by a certain date, to cancel the contract within five business days of that date, in which event their down payment would be refunded to them, or seek an extension or find other financing. Although plaintiffs did none of these things, they argue that they are nonetheless entitled to the return of their down payment because the post-

contingency-period revocation of the mortgage commitment they had obtained was not attributable to any acts of bad faith on their part (*see Blair v O'Donnell*, 85 AD3d 954, 955 [2d Dept 2011]).

The motion court correctly found that plaintiffs did not obtain a mortgage commitment by the "Commitment Date," but obtained only a conditional loan approval (*see Eves v Bureau*, 13 AD3d 1004, 1005 [3d Dept 2004]; *Kressel, Rothlein & Roth v Gallagher*, 155 AD2d 587 [2d Dept 1989]). The lender's letter advised that plaintiffs had been "conditionally approved" for a loan, subject to the lender's receipt and approval of 18 separate items of documentation from them as well as its approval of items that it would obtain from various third parties. The letter said that on receipt of these items the lender would conduct a "final review," and that as soon as it issued a "final approval," the lender would contact plaintiffs. In the absence of a mortgage commitment, there is no occasion to inquire into bad faith on plaintiffs' part. They waived the contingency and were obligated

either to purchase the property with or without a mortgage or to forfeit their down payment.

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

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

ENTERED: MAY 9, 2019

CLERK

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

9253-
9254 Index 650530/15

Liberty on Warren LLC, et al.,
Plaintiffs-Appellants,

-against-

Dragon Estates Condo, et al.,
Defendants-Respondents.

_____

Lawrence A. Omansky, New York, for appellants.

Braverman Greenspun, P.C., New York (Andreas E. Theodosiou of counsel), for Dragon Estates Condo, Board of Directors of Dragon Estates Condo and Steven Harris, respondents.

Martin S. Kera, respondent pro se.

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered June 21, 2016, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion for summary judgment on its causes of action for tortious interference, fraud and negligent misrepresentation, and breach of contract, and granted defendants' cross motions for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs. Order, same court and Justice, entered August 18, 2017, to the extent it denied plaintiffs' motion for renewal, unanimously affirmed, without costs, and appeal therefrom otherwise dismissed as taken from a nonappealable order.

Plaintiff unit owners in defendant Dragon Estates Condo

brought this action against the condominium board of managers and its individual members after a prospective purchaser cancelled contracts of sale for their units.

The record demonstrates that neither the board of directors of the condominium nor its individual members intentionally procured the prospective purchaser's cancellation of the contracts of sale (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]). Plaintiffs argue that the board illegally sought to restrict the permitted uses for the units. However, the board merely asserted that the restrictions in the condominium declaration would prohibit the units' use as a rehearsal studio. Moreover, there is no evidence that individual board members breached their fiduciary duties to plaintiffs so as to permit judicial inquiry into the board's business judgment (*see Aridas v 244 E. 60th St. Owners Corp.*, 292 AD2d 325, 326 [1st Dept 2002]).

The record demonstrates that defendants cannot be held liable for fraudulent misrepresentation (*see Lama Holding Co.*, 88 NY2d at 421). Plaintiffs contend that certain alleged comments of the managing agent about the sponsor's principal were fraudulent or negligent and that the prospective purchaser relied on these comments in cancelling the contracts of sale. However, the comments were made before the prospective purchaser entered

into the contracts. On appeal, plaintiffs contend that the fraudulent misrepresentation was that the units could not be used as a dance studio, as proposed by the prospective purchaser. However, as indicated, the record shows that the board merely pointed out the prohibition in the condominium declaration against the units' use as a rehearsal studio – an accurate characterization of governing documents.

The record demonstrates that the board's refusal to incorporate plaintiffs' proposed changes to the application for the certificate of occupancy did not breach any of the governing documents but resulted from a good faith exercise of reasonable business judgment (*see Big Four LLC v Bond St. Lofts Condominium*, 94 AD3d 401, 403 [1st Dept 2012], *lv denied* 19 NY3d 808 [2012]). The record also shows that the governing documents did not require the board to permit the commercial unit owner's licensees to use the residential corridor.

On renewal, plaintiffs properly submitted new facts unavailable at the time of the original motion (*see* CPLR 2221[e][2]). However, the evidence that the board approved a lease between another unit and the same dance studio franchise that plaintiffs' prospective purchaser intended to operate does not change the prior determination (*id.*). The board submitted evidence that the other unit owner did not make the same request

for public assembly egress through the residential corridor that plaintiffs' prospective purchaser required or demand changes to the certificate of occupancy, as plaintiffs did, and that the restriction on operating a rehearsal studio was articulated to the other unit's tenant and the tenant agreed to the terms.

No appeal lies from an order that denies leave to reargue (see CPLR 5701[a][2][viii]).

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: MAY 9, 2019

CLERK

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

9255 The People of the State of New York, Ind. 2453/16
Respondent,

-against-

Shawn Ewell,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Waleska Suero Garcia of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Alberto Lorenzo, J.), rendered September 6, 2017, convicting defendant, upon his plea of guilty of attempted criminal possession of a controlled substance in the fifth degree, and sentencing him, as a second felony offender, to a term of two years, unanimously affirmed.

Regardless of whether defendant made a valid waiver of his right to appeal, we find, after our in camera view of sealed search warrant materials, that the warrant was supported by probable cause.

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

ENTERED: MAY 9, 2019

CLERK

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

9256 In re Myracle N.P.,

A Child Under Eighteen Years of Age, etc.,

Tyree L.B.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Anne Reiniger, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Carolyn Walther of counsel), for respondent.

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

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Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about May 22, 2018, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about February 20, 2018, which found that respondent father derivatively neglected the subject child, unanimously affirmed, without costs.

The finding of derivative neglect is supported by a preponderance of the evidence (*see* Family Ct Act § 1046[b][i]). The 2010 finding of neglect, which was based upon, inter alia, the father's sexual misconduct as to his older child, and his failure to take prescribed psychotropic medication and receive

appropriate mental health treatment, was sufficiently proximate in time to the instant proceedings to support the finding of derivative neglect (*see Matter of Essence J. [Shawn N.]*, 144 AD3d 593 [1st Dept 2016]; *Matter of Joseph P. [Cindy H.]*, 112 AD3d 553 [1st Dept 2013]).

The fact that the father has intermittently complied with services and participated in regular visitation with his other children before the commencement of this proceeding on behalf of the subject child does not preclude a finding of derivative neglect. The father's failure to acknowledge his past sexual misconduct and accept responsibility for his actions, as well as his unilateral decision to discontinue therapy and medication, which were ordered in the prior neglect case, demonstrates that he failed to take appropriate measures to address his mental health issues and has a faulty understanding of his parental duties (*see Matter of Jayden C.* [*Luisanny A.*], 126 AD3d 433 [1st Dept 2015]; *Matter of Keith H.* [*Logann M.K.*], 113 AD3d 555 [1st Dept 2014], *lv denied* 23 NY3d 902 [2014]).

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

ENTERED: MAY 9, 2019

CLERK

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

9257 The People of the State of New York, Respondent, Ind. 3865/16

-against-

Jamel Munroe, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Kelly L. Smith of counsel), for respondent.

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Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered April 25, 2017, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, criminal contempt in the second degree and unlawfully dealing with a child in the first degree, and sentencing him, as a second felony drug offender, to an aggregate term of 3½ years, unanimously affirmed.

Defendant forfeited appellate review of his motion to controvert a search warrant because he pleaded guilty before the court issued an order finally denying his suppression motion (*see* CPL 710.70[2]; *People v Fernandez*, 67 NY2d 686, 688 [1986]). "Even if the court's order can be viewed as deciding the particular issue defendant seeks to raise on appeal," the order was not a final denial of suppression "because it was contingent

on the outcome of a hearing" (*People v Wilson*, 167 AD3d 478, 478-479 [1st Dept 2018]).

In any event, regardless of whether defendant forfeited his challenge to the search warrant, we find that the application for the warrant established probable cause.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 9, 2019

CLERK

Sweeny, J.P., Gische, Tom, Gesmer, JJ.

9258 Interventure 77 Hudson LLC, et al., Index 653913/13
Plaintiffs-Appellants,

-against-

Falcon Real Estate Investment Co., LP,
now doing business as Falcon Real
Estate Investment Management Ltd., et al.,
Defendants-Respondents,

Whitney Investment Advisors, et al.,
Defendants.

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Kaplan Rice LLP, New York (Howard J. Kaplan and Daniel D. Edelman of counsel), for appellants.

Foran Glennon Palandech Ponzi & Rudloff, P.C., New York (Joseph W. Szalyga of counsel), for Falcon Real Estate Investment Co., LP, Howard E. Hallengren and Jack D. Miller, respondents.

Budd Larner, P.C., New York (Tod S. Chasin of counsel), for David A. Hill and International Real Estate Services, Inc., respondents.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about May 29, 2018, which, inter alia, granted in part defendant David Hill's motion for summary judgment, granted defendant International Real Estate Services's (IRES) motion for summary judgment, and denied the motion for partial summary judgment by plaintiffs Pinnacle Owner Corp., Pinnacle Tenant LLC, Westlake Three Owner Corp., Westlake Three Tenant LLC, Westlake Four Owner Corp., and Westlake Four Tenant LLC, unanimously affirmed, without costs.

The motion court correctly granted defendant Hill's motion for summary judgment dismissing all but the claim for breach of fiduciary duty, and granted defendant IRES's motion in its entirety, finding plaintiffs' claims time barred under the Delaware statute of limitations, and our application of New York's "borrowing statute" (CPLR 202; *see Oxbow Calcining USA Inc v American Indus. Partners*, 96 AD3d 646 [1st Dept 2012]; *Kat House Prods., LLC v Paul, Hastings, Janofsky & Walker, LLP*, 71 AD3d 580 [1st Dept 2010]). Plaintiffs hold commercial real estate across the country, and there is no evidence that they have a principal place of business in any one state. Accordingly, the motion court reasonably designated plaintiffs' residence as Delaware, their state of incorporation (*see Verizon Directories Corp v Continuum Health Partners*, 74 AD3d 416 [1st Dept 2010], *lv denied* 15 NY3d 716 [2010]; *Oxbow,* 96 AD3d at 650-651). In addition, given that plaintiffs' injury was purely economic, the place of their injury for purposes of the borrowing statue is normally deemed their residence, where the economic impact of defendants' conduct is sustained (*Global Fin. Corp. v Triarc. Corp.*, 93 NY2d 525, 529-530 [1999]; *see also Gordon & Co. v Ross*, 63 F Supp 2d 405, 408-409 [SD NY 1999]). Accordingly, the Delaware statute of limitations applies to this action.

The court correctly dismissed plaintiffs' fraud claim as

duplicative of the breach of fiduciary duty claim (*see Pai v Blue Man Group Publ, LLC*, 151 AD3d 456 [1st Dept 2017]), as plaintiffs' fraud allegations are subsumed in the allegations of wrongdoing that constitute the alleged breach of fiduciary duty.

Summary judgment on plaintiffs' breach of fiduciary duty claim was properly denied. In support of their motion, plaintiffs' claimed that certain "Aker" leasing fees were paid without their consent, but the only document supporting this contention was the affidavit of a member of plaintiff's ownership team, which is short on detail and arguably technically defective. Moreover, it was written after the fact, and the record contains no contemporaneous communications where that member, upon learning the lease would not be executed, demanded return of the fees he previously authorized. Nor does his affidavit address defendants' assertion that the member of the ownership team took $50,000 in fees for himself.

Even if the affidavit satisfies plaintiffs' initial burden, defendants came forward with sufficient proof to create fact issues as to whether they had the requisite authorization to take the leasing fees, and whether they were entitled to offset them against future earned fees. Nor do plaintiffs adequately explain why defendants cannot rely on the authorization or another agent of plaintiff's ownership team to show issues of fact that

precluded summary judgment. They argue this agent confessed to self-dealing, but the record suggests the admitted misconduct was in connection with an unrelated matter; even if it were related, plaintiffs do not show why defendants would have had reason, at the relevant time, to question the validity of the agent's authorization as to the Aker fees.

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

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

ENTERED: MAY 9, 2019

CLERK

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

9261 The People of the State of New York, Respondent, Ind. 4019/14

-against-

Darien Bailey, Defendant-Appellant.

Marianne Karas, Thornwood, for appellant.

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

Judgment, Supreme Court, New York County (Abraham Clott, J.), rendered December 23, 2015, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him, as a second 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]). Moreover, the multiple eyewitnesses provided overwhelming evidence of defendant's guilt. There is no basis for disturbing the jury's credibility determinations.

In this retrial following a mistrial, the court properly admitted a witness's testimony from the first trial pursuant to CPL 670.10(1)(a), "since there is no evidence that the People's failure to produce the witness was in any way due to indifference

or strategic preference" (*People v Carracedo*, 228 AD2d 199, 199 [1st Dept 1996], *affd* 89 NY2d 1059 [1997]). At a hearing, the People's investigator testified about his extensive efforts to locate the witness, establishing that the People were unable to do so with due diligence. Furthermore, defendant received a full opportunity to impeach the witness at the first trial. Accordingly, defendant was not deprived of his right of confrontation (*see People v Arroyo*, 54 NY2d 567 [1982], *cert denied* 456 US 979 [1982]).

Defendant did not preserve his claim that the court unduly limited his ability to impeach a police witness or any 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. We have considered and rejected defendant's ineffective assistance of counsel claims based on the lack of preservation.

We also find that any error in any of the trial rulings challenged on appeal was harmless in light of the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 9, 2019

CLERK

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

9263 Ashlee Merrill, Index 155587/15
Plaintiff-Appellant,

-against-

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

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Michael H. Zhu, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Blake Ahlberg of counsel), for The City of New York, respondent.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Louise Cherkis of counsel), for E.E. Cruz & Tully Construction Company, respondent.

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Order, Supreme Court, New York County (W. Franc Perry, J.), entered August 11, 2017, which granted the motions of defendants City of New York and E.E. Cruz & Tully Construction Company (C&T) for summary judgment dismissing the complaint, unanimously affirmed, without costs.

C&T established prima facie entitlement to judgment as a matter of law, in this action where plaintiff alleges that she was injured when she tripped and fell on two potholes in the roadway. C&T submitted, inter alia, the testimony of its employee that neither C&T nor its contractors performed any above-ground work near the site of plaintiff's accident. In opposition, plaintiff referred to road opening permits that were

issued to C&T, but this did not raise a triable issue since C&T's employee explained that the permits were used to establish a lay up area and C&T did not perform roadwork in the area of plaintiff's fall (*see Ingles v Architron Designers & Bldrs, Inc.*, 136 AD3d 605 [1st Dept 2016]; *Bermudez v City of New York*, 21 AD3d 258 [1st Dept 2005]).

Furthermore, in opposition to the City's showing that it did not have prior written notice of the subject potholes (*see* Administrative Code of City of NY § 7-201[c][2]), plaintiff failed to raise an issue of fact. The work orders and citizen complaint cited by plaintiff were insufficient since the complaint was made by telephone and there was no evidence that the potholes repaired pursuant to the work orders were the same potholes that caused plaintiff's fall (*see Stoller v City of New York*, 126 AD3d 452 [1st Dept 2015]; *Hausley v City of New York*, 123 AD3d 606 [1st Dept 2014]). Plaintiff failed to establish that the affirmative negligence exception to the Pothole Law applied, because she submitted no evidence that the City undertook any work that immediately resulted in the potholes (*see Yarborough v City of New York*, 10 NY3d 726, 728 [2008]).

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

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

ENTERED: MAY 9, 2019

CLERK

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

9264-
9265 OneWest Bank, FSB,
Plaintiff-Appellant,

-against-

Edgar Barbosa, et al.,
Defendants-Respondents,

New York State Department of
Taxation and Finance, et al.,
Defendants.

Index 381620/10

Leopold & Associates, PLLC, Armonk (Shawn A. Brenhouse of counsel), for appellant.

Brian McCaffrey, Jamaica, for respondents.

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered on or about July 24, 2017, which denied plaintiff's motion to vacate a March 1, 2017 order dismissing the action as against defendant Edgar Barbosa without prejudice, to restore the action to the active calendar, and to extend the time for plaintiff to effectuate service upon Barbosa pursuant to CPLR 306-b, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about April 19, 2018, which denied plaintiff's motion to reargue the July 2017 order, unanimously dismissed, without costs, as taken from an nonappealable paper.

The court dismissed the action as against Barbosa in March

2017, but plaintiff did not move until June to extend the time to serve him. As the court correctly found in the July 2017 order, "once the action was dismissed, plaintiff could no longer seek an extension of time to effect service" (*Jimenez v City of New York*, 13 AD3d 107 [1st Dept 2004]; *see also Sottile v Islandia Home for Adults*, 278 AD2d 482, 483 [2d Dept 2000]). Instead of simply opposing Barbosa's July 2016 motion to dismiss for lack of proper service, plaintiff should have – at least in the alternative – cross-moved to extend the time to serve him (*see Sottile*, 278 AD2d at 484).

As for the 2018 order, "[n]o appeal lies from an order denying reargument" (*Matter of Bianca v Frank*, 55 AD2d 642, 643 [2d Dept 1976], *affd on other grounds* 43 NY2d 168 [1977]).

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

ENTERED: MAY 9, 2019

CLERK

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

9266 Antwan Thompson, Index 161424/13
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

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

Zachary W. Carter, Corporation Counsel, New York (Zachary S. Shapiro of counsel), for respondent.

_____

Order, Supreme Court, New York County (Alexander M. Tisch, J.), entered January 10, 2018, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established prima facie entitlement to judgment as a matter of law, in this action where plaintiff was injured when he tripped and fell on broken and uneven pavement, by showing that it did not have prior written notice of the dangerous or defective condition (*see Jones v City of New York*, 159 AD3d 571 [1st Dept 2018]).

In opposition, plaintiff failed to raise an issue of fact. There is no evidence that defendant actually applied a cold patch instead of, as it claims, a hot patch when it cured the condition

approximately six months prior to plaintiff's accident (*see id.* at 572; *Abott v City of New York*, 114 AD3d 515 [1st Dept 2014]). Even if defendant had applied a cold patch, and only temporarily cured the condition, plaintiff has offered no evidence that doing so was inadequate, or that such allegedly inadequate repairs immediately resulted in the dangerous condition that caused his accident (*see Davison v City of Buffalo*, 96 AD3d 1516, 1518 [4th Dept 2012]; *see generally Yarborough v City of New York*, 10 NY3d 726, 728 [2008]). In any event, plaintiff has disclaimed this theory of liability on appeal.

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: MAY 9, 2019

CLERK

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

9267 Patricia Turso-Drasche, Index 151169/16
Plaintiff-Appellant,

-against-

Banana Republic, LLC, et al.,
Defendants-Respondents.

_____

Edelman & Edelman, P.C., New York (David M. Schuller of counsel), for appellant.

McAndrew, Conboy & Prisco, LLP, Melville (Michael J. Prisco of counsel), for respondents.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered July 6, 2018, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established their prima facie entitlement to judgment as a matter of law, in this action where plaintiff was injured in defendants' store, when she tripped over the foot of a sales associate, who had been talking to another employee and then turned around. Plaintiff testified that she saw the employee with his back turned towards her and that she had a path to walk around him. Defendants sufficiently established that it was unforeseeable that plaintiff would trip over the foot of their employee as he turned in the store aisle, and therefore did

not breach a duty of care owing to her (*see Greene v Sibley, Lindsay, & Curr Co.*, 257 NY 190 [1931]; *Pinero v Rite Aid of N.Y.*, 294 AD2d 251 [1st Dept 2002], *affd* 99 NY2d 541 [2002]; *Prado v City of New York*, 19 AD3d 674 [2d Dept 2005]).

Plaintiff's opposition failed to raise a triable issue of fact. The surveillance video and time-stamped stills of the accident do not show that plaintiff's injury was reasonably foreseeable.

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

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

ENTERED: MAY 9, 2019

CLERK

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

9268N Lyudmyla Konstantynovska, et al., Index 159883/16
Plaintiffs-Respondents,

-against-

Caring Professionals, Inc.,
Defendant-Appellant.

_____

Jackson Lewis P.C., Melville (Noel P. Tripp of counsel), for appellant.

Virginia & Ambinder, LLP, New York (LaDonna M. Lusher of counsel), for respondents.

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Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered July 5, 2018, which denied defendant's motion to compel arbitration and stay the action, unanimously modified, on the law, to grant the motion to compel arbitration and stay the action with respect to plaintiff Lyudmyla Konstantynovska's individual claims, and otherwise affirmed, without costs.

Plaintiff Lyudmyla Konstantynovska is bound by the arbitration provision in the memorandum of agreement (MOA) amendment to the collective bargaining agreement because the amendment was entered into on December 13, 2016 while she was still employed with defendant, even though it was not ratified until after her employment ended (*see Safonova v Home Care Servs. for Ind. Living, Inc.*, 165 AD3d 482, 483 [1st Dept 2018]). The MOA contained a clear, unequivocal arbitration provision stating

that statutory Labor Law claims were subject to mandatory arbitration.

However, plaintiff Natasha Severin and the other class members cannot be compelled to arbitrate their claims. It is well settled that "a court will not order a party to submit to arbitration absent evidence of that party's unequivocal intent to arbitrate the relevant dispute, and unless the dispute is clearly the type of claim that the parties agreed to refer to arbitration" (*Brady v Williams Capital Group, L.P.*, 64 AD3d 127, 131 [1st Dept 2009], *affd in part and mod in part* 14 NY3d 459 [2010] [internal quotation marks omitted]; *see Matter of Helmsley [Wien]*, 173 AD2d 280, 281 [1st Dept 1991]). In this case, the collective bargaining agreement which Severin and the class members were party to did not contain an arbitration clause that covered the claims alleged in the complaint.

Moreover, these parties were not bound by the MOA's arbitration provision. The record shows that Severin's employment ceased on July 12, 2016, and that the class was made up of defendant's former employees who were employed during the period of November 2010 until December 1, 2016 but ceased working for defendant on or before December 1, 2016. Neither Severin nor the class members may be bound by the MOA because they were no longer defendant's employees when it was executed, they were not

parties to that agreement, and there is no evidence that the Union was authorized to proceed on their behalf (*see Chu v Chinese-American Planning Council Home Attendant Program, Inc.*, 194 F Supp3d 221, 228 [SD NY 2016]; *see also Hichez v United Jewish Council of the E. Side*, 2018 NY Slip Op 32327[U], *2-3 [Sup Ct, NY County 2018]).

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

ENTERED: MAY 9, 2019

CLERK

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

9269-
9270N Index 24892/17E

Labinot Hakanjin, et al.,
Plaintiffs-Appellants,

-against-

Lincare, Inc., individually and doing business as Lincare Holdings, Inc., et al.,
Defendants-Respondents.

Parker Waichman LLP, Port Washington (Jay L.T. Breakstone of counsel), for appellants.

Morris Duffy Alonso & Faley, New York (Iryna S. Krauchanka of counsel), for respondents.

Order, Supreme Court, Bronx County (Donald Miles, J.), entered on or about February 22, 2018, which granted defendants' motion to change venue to Westchester County, and denied plaintiffs' cross motion to retain venue in Bronx County or, in the alternative, change venue to New York County, and order, same court and Justice, entered August 10, 2018, which, upon granting reargument of plaintiff's cross motion, adhered to its prior determination, unanimously affirmed, without costs.

On appeal, plaintiffs do not argue that venue was proper where the action was filed (in Bronx County); rather, they argue that the motion court erred in transferring the case to the venue requested by defendants (Westchester County) instead of the

alternative venue requested by them (New York County).

Plaintiffs did not forfeit their right to select venue by selection of an improper venue because they reasonably relied in making that selection on information contained in the official police accident report, which turned out to be outdated (*see Astillero v Abramov*, 92 AD3d 436 [1st Dept 2012]*; Discolo v River Gas & Wash Corp.*, 41 AD3d 126, 126 [1st Dept 2007]*; Vasquez v Sonin*, 259 AD2d 340, 341 [1st Dept 1999]).

However, the motion court's determination to transfer this case to Westchester County was nonetheless proper because plaintiffs failed to demonstrate that the action could properly have been commenced in New York County (*see Saxe by Saxe v OB/GYN Assoc.*, 86 NY2d 820, 822 [1995]). Under the version of CPLR 503(a) in effect when this action was commenced, the action could properly have been commenced in any county in which a party resided at the time of commencement. Plaintiffs failed to offer any evidence in support of their claim that they resided in New York County when the action was commenced (*see Key-Kanuteh v Kenia*, 288 AD2d 16 [1st Dept 2001]). By contrast, it is undisputed that at least one of the corporate defendants resided in Westchester County at that time.

Plaintiffs' argument that it would be more convenient for them to litigate in New York County is likewise unavailing.

Although plaintiffs named several potential medical witnesses, they "failed to set forth the probable nature of their testimony, or whether they were prepared to testify and in what other manner, if any, Westchester County would be an inconvenient forum" (*Lynch v Cyprus Sash & Door Co.*, 272 AD2d 260, 261 [1st Dept 2000]).

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

ENTERED: MAY 9, 2019

CLERK

Friedman, J.P., Renwick, Kapnick, Kahn, Oing, JJ.

9271 The People of the State of New York, Respondent, Ind. 230/14

-against-

Jovanny Paulino, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Robert M. Mandelbaum, J.), rendered August 5, 2016, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

Defendant's legal insufficiency claim is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the jury's credibility determinations. The totality of defendant's conduct supports the inference that, at least at the moment he stabbed the victim in the abdomen, he did

so with homicidal intent (*see e.g. People v Galarza*, 127 AD3d 407 [1st Dept 2015], *lv denied* 25 NY3d 1163 [2015]).

Defendant also failed to preserve his challenges to evidence that he had access at his workplace to knives of the type that could have been used in the homicide, and we decline to review them in the interest of justice. As an alternate holding, we find that the court's evidentiary rulings were correct (*see People v Del Vermo*, 192 NY 470, 478-482 [1908]).

We have considered and rejected defendant's ineffective assistance of counsel claims relating to the lack of preservation (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

We perceive no basis for a reduction of sentence.

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

ENTERED: MAY 9, 2019

CLERK

Renwick, J.P., Kapnick, Kahn, Oing, JJ.

9272 Citibank, N.A., etc., Index 810107/10
Plaintiff-Respondent,

-against-

Marc Scott Kallman,
Defendant-Appellant,

Board of Managers of 52 East End Avenue
Condominium Homeowners Association, et al.,
Defendants.

_____

Solomon Rosengarten, Brooklyn, for appellant.

Houser & Allison, APC, New York (Kathleen M. Massimo of counsel), for respondent.

_____

Appeal from order and judgment (one paper), Supreme Court, New York County (Lynn R. Kotler, J.), entered September 27, 2017, which, inter alia, granted plaintiff's motion to amend the judgment, nunc pro tunc, unanimously dismissed, without costs.

The original judgment of foreclosure and sale was entered upon defendant's default (the court struck his answer) which he

never remedied. No appeal lies from an order or judgment entered on default (CPLR 5511).

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

ENTERED: MAY 9, 2019

CLERK

Friedman, J.P., Renwick, Kapnick, Kahn, Oing, JJ.

9273 In re Giovanni H.B.,

A Child Under Eighteen
Years of Age, etc.,

Henry B.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent,

Orissa B.,
Respondent-Respondent.

_____

Andrew J. Baer, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Rebecca L. Visgaitis of counsel), for Administration for Children's Services, respondent.

Steven P. Forbes, Jamaica, for Orissa B., respondent.

John R. Eyerman, New York, attorney for the child.

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Order, Family Court, Bronx County (Fiordaliza A. Rodriguez, J.), entered on or about April 10, 2018, which, to the extent appealed from as limited by the brief, after a hearing, upon respondent father's request for visitation with the subject child (Giovanni), denied visitation at the correctional facility in which respondent is incarcerated and granted visitation via letters to be kept by petitioner agency, unanimously affirmed, without costs.

Respondent is incarcerated at the Coxsackie Correctional

Facility for the first-degree rape of his stepdaughter, Kayla, Giovanni's half-sister, in March 2014. Kayla was six years old at the time of the rape, and Giovanni, then approximately 18 months old, was in the home when the rape occurred. Respondent was sentenced to 12 years in prison, followed by 12 years of postrelease supervision, and a full stay-away order of protection through May 2034 was issued on Kayla's behalf.

Giovanni, who has not seen or spoken to his father since he was about two years old, has been diagnosed with autism spectrum disorder, and has cognitive and social deficits. Among other things, Giovanni becomes aggressive and defiant when there are changes to his routine. He has tantrums, tries to run away when taken out in public or on public transportation, is hyperactive, and suffers from anxiety.

Contrary to respondent's argument, the presumption that parental visitation is in the best interests of a child was overcome by the hearing evidence showing that visitation with respondent would not be in Giovanni's best interests (*see Matter of Granger v Misercola*, 21 NY3d 86, 90-91 [2013]). The evidence demonstrates that, in view of respondent's heinous crime, the impact that visitation would have on Kayla and, in turn, on the close sibling relationship Giovanni enjoys with her could cause

harm to Giovanni (*see e.g. Matter of Enrique T. v Annamarie M.*, 15 AD3d 310 [1st Dept 2005]; *Matter of Davis v Davis*, 265 AD2d 552 [2d Dept 1999]; *Matter of Rogowski v Rogowski*, 251 AD2d 827 [3d Dept 1998]).

We reject respondent's efforts to cast as irrelevant the likely effect that his visitation with Giovanni would have on Kayla. Even respondent argues that visitation determinations are based on the totality of the circumstances. Given the apparent significance of Giovanni's relationship with Kayla, the court properly considered the inevitably adverse effect on that relationship that would result from Giovanni's developing a relationship with Kayla's rapist.

Respondent asserts that he has taken steps to insure Kayla's best interests in connection with the visitation. However, the evidence demonstrates that the visitation itself would be severely adverse to Kayla's best interests. Moreover, the court appropriately took into account that certain aspects of this difficult situation were unknown or unknowable at the time of the hearing, and made the responsible decision to revisit the issue every six months.

Respondent's efforts to minimize the gravity of the physical and emotional disruption that Giovanni would suffer in connection with traveling to and from the correctional facility show a lack

of insight into Giovanni's special needs. Respondent's purported expertise comes from reading excerpts of the Merck Manual and pamphlets on autism. Respondent has not seen his son since Giovanni was a young toddler and, in contrast to the hearing witnesses, has no first-hand knowledge of the behavioral issues that Giovanni has manifested since that time. Accordingly, the court appropriately gave great weight to the other witnesses' testimony on this issue (*see e.g. Matter of Grimes v Pignalosa-Grimes*, 165 AD3d 796 [2d Dept 2018], *lv denied* 32 NY3d 914 [2019]; *see also Matter of Toshea C.J.*, 62 AD3d 587 [1st Dept 2009]).

Respondent's arguments premised on petitioner's visitation policy are belied by the policy's recognition that visitation should occur only when it is "safe" and the policy's creation of an exception to visitation with incarcerated parents, even where the permanency goal is reunification, when visitation would "pose a risk to the child's physical or emotional safety" (*see also* Family Court Act § 1030[c]).

Respondent contends that the court erred in saying that visitation would be creating rather than rehabilitating his relationship with Giovanni, although he does not dispute that he has not seen Giovanni for years. While there was testimony that Giovanni was aware that he had a father, it was not clear that he

understood that his father was respondent; moreover, witnesses testified that he never asked to see his father or inquired about his whereabouts. We reject respondent's attempt to blame the court system's delays for severing his relationship with Giovanni; it was, above all, his own, admitted criminal conduct that has precluded him from being involved in his son's life.

Respondent's arguments concerning letter visitation are also unavailing. The court did not actually deny letter visitation, but took the measured, reasonable approach of allowing respondent to continue to send letters that would be kept in agency files until more information from mental health professionals had been obtained. Nor was this an improper delegation of authority by the court. The order contemplates not that these professionals will decide whether respondent's correspondence should be read or given to Giovanni but that they will provide medical guidance to the court to enable it to decide the issue.

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

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

ENTERED: MAY 9, 2019

CLERK

Friedman, J.P., Renwick, Kapnick, Kahn, Oing, JJ.

9274 U.S. Bank National Association, as Trustee for Deutsche Alt-A Securities Inc. Mortgage Loan Trust, etc., Plaintiff-Respondent, Index 850341/14

-against-

Samuel Ehrenthal, Defendant-Appellant,

Mortgage Electronic Registration Systems, Inc., et al., Defendants.

_____

Menashe & Associates LLP, Montebello (Shoshana Schneider of counsel), for appellant.

Greenberg Traurig, LLP, New York (Steven Lazar of counsel), for respondent.

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Order, Supreme Court, New York County (George J. Silver, J.), entered March 22, 2018, which granted plaintiff's motion for leave to amend the complaint, and denied defendant Samuel Ehrenthal's cross motion to dismiss the complaint pursuant to CPLR 3215(c), unanimously affirmed, without costs.

The motion court providently exercised its discretion in granting plaintiff's motion for leave to amend its complaint (*see* CPLR 3025[b]) and in denying defendant's motion to dismiss the claim as abandoned (*see* CPLR 3215[c]).

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

ENTERED: MAY 9, 2019

CLERK

Friedman, J.P., Renwick, Kapnick, Kahn, Oing, JJ.

9275 INTL FCStone Markets, LLC formerly known as INTL Hanley, LLC, Plaintiff-Respondent, Index 653364/16

-against-

Corrib Oil Company Ltd., Defendant-Appellant.

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Sallah Astarita & Cox LLC, New York (Mark J. Astarita of counsel), for appellant.

DLA Piper LLP (US), New York (Marc A. Silverman of counsel), for respondent.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about April 9, 2018, which granted plaintiff's motion for summary judgment on its claim and dismissing the counterclaims, unanimously affirmed, with costs.

Defendant's claim that there was an investment advisory agreement between the parties is contradicted by the express terms of the ISDA (International Swaps and Derivatives Association, Inc.) master agreement, a fully integrated agreement governing the subject trades between the parties (*see Matter of G.K. Las Vegas Ltd. Partnership v Boies Schiller & Flexner LLP*, 96 AD3d 538, 540 [1st Dept 2012], *lv denied* 19 NY3d 812 [2012]). The disclaimers in the master agreement preclude a finding that

defendant relied on any "advice" from plaintiff (*see Republic Natl. Bank v Hales*, 75 F Supp 2d 300, 315 [SD NY 1999], *affd sub nom HSBC Bank USA v Hales*, 4 Fed Appx 15 [2d Cir 2001]).

Defendant also failed to raise an issue of fact as to whether plaintiff received any compensation for its alleged advisory services (*see* 15 USC § 80-2[b][11] [Investment Advisers Act of 1940]; 7 USC § 1a[12] [Commodity Exchange Act]).

In view of the foregoing, the counterclaims for negligence and breach of fiduciary duty, which were predicated solely on the alleged advisory agreement, were correctly dismissed (*see Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016]; *Castellotti v Free*, 138 AD3d 198, 209 [1st Dept 2016]).

The fraud counterclaims are barred by the express terms of the ISDA master agreement, which contains directly contrary representations, and by the trade confirmations, which contain the very information as to which defendant claims to have been deceived (*see JPMorgan Chase Bank, N.A. v Controladora Comercial Mexicana S.A.B. De C.V.*, 29 Misc 3d 1227[A], 2010 NY Slip Op 52066[U], *7-8 [Sup Ct, NY County 2010]; *Negrete v Citibank, N.A.*, 187 F Supp 3d 454, 466 [SD NY 2016], *affd* ___ Fed Appx ___, 2019 WL 80773 [2d Cir, Jan. 3, 2019]).

Defendant is a sophisticated business doing millions of dollars' worth of trades. Its claim that it did not understand

the trade confirmations is unavailing (*see Chemical Bank v Geronimo Auto Parts Corp.*, 225 AD2d 461, 462 [1st Dept 1996]).

As defendant concedes, its allegation that plaintiff was acting to increase its commissions revenue fails to establish a motive from which to infer a fraudulent intent, or scienter (*see Jonas v Natl. Life Ins. Co.*, 147 AD3d 610, 612 [1st Dept 2017]).

The allegations supporting the fraud claims also lack particularity, as, with minimal exceptions, they fail to identify who made the misrepresentations, when the misrepresentations were made, and the substance of the misrepresentations (*see E1 Entertainment U.S. LP v Real Talk Entertainment, Inc.*, 85 AD3d 561, 562 [1st Dept 2011]).

Because the elements of a claim for fraud under the Commodity Exchange Act (CEA) are substantially similar to the elements of common-law fraud, the counterclaim for fraud under the CEA was also correctly dismissed (*see Walrus Master Fund Ltd. v Citigroup Global Mkts., Inc.*, 2009 WL 928289, *3, 2009 US Dist LEXIS 35040, *7-8 [SD NY Mar. 30, 2009]).

Because the breach of contract counterclaim is predicated on a breach of the representation that plaintiff would comply with the Investment Advisers Act of 1940 and the CEA, and the fraud and other CEA counterclaims were correctly dismissed, the breach of contract counterclaim was also correctly dismissed. Nor can

plaintiff's express obligations be varied by the assertion of a claim of breach of the covenant of good faith and fair dealing (*see Natl. Union Fire Ins. Co. of Pittsburgh, Pa. v Xerox Corp.*, 25 AD3d 309, 310 [1st Dept 2006], *lv dismissed* 7 NY3d 886 [2006]).

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

ENTERED: MAY 9, 2019

CLERK

Friedman, J.P., Renwick, Kapnick, Kahn, Oing, JJ.

9276 The People of the State of New York, Respondent, Ind. 5770/02

-against-

Alfred M., Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Arthur H. Hopkirk of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Charles H. Solomon, J.), entered on or about November 9, 2016, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). We do not find that there was any overassessment of points for defendant's prior criminal history. The mitigating factors cited by defendant were adequately taken into account by the risk assessment instrument or were outweighed by aggravating factors, including the gravity of the underlying crimes, committed against children. Defendant has not

demonstrated that his age and employment history would prevent him from committing similar crimes.

The record fails to support defendant's claim that the court based its denial of a departure on matters outside the record.

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

ENTERED: MAY 9, 2019

CLERK

Friedman, J.P., Renwick, Kapnick, Kahn, Oing, JJ.

9277 The People of the State of New York, Ind. 486/16
Respondent,

-against-

Barry Boone,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael J. Obus, J.), rendered June 2, 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: MAY 9, 2019

CLERK

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

Friedman, J.P., Renwick, Kapnick, Kahn, Oing, JJ.

9282 In re Chon-Michael S., etc.,

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

Shanice A.,
Respondent-Appellant,

The New York Foundling Hospital,
Petitioner-Respondent.

_____

Geoffrey P. Berman, Larchmont, for appellant.

The New York Foundling Hospital Adoption and Legal Services, Long Island City (Daniel Gartenstein of counsel), for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the child.

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Order, Family Court, New York County (Emily Olshanksy, J.), entered on or about March 29, 2018, which, inter alia, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject child, and committed custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence supports the finding that the mother permanently neglected the child by failing to plan for his future, despite the agency's diligent efforts to encourage and strengthen the parental relationship (*see* Social Services Law §

384-b[7][a]). The mother failed to comply with the services the agency provided, including mental health treatment, anger management, random drug testing, and scheduled visitation. The agency attempted to maintain frequent contact with the mother to ensure her participation in the services and facilitate visitation, but she failed to cooperate, as she was unreachable or unresponsive, and repeatedly missed scheduled visits (*see Matter of De'Lyn D.W. [Liza Carmen T.]*, 150 AD3d 599 [1st Dept 2017]; *Matter of Imani Elizabeth W.*, 56 AD3d 318 [1st Dept 2008]).

A preponderance of the evidence supports the determination that termination of the mother's parental rights is in the best interest of the child (*see Matter of Star Leslie W.*, 63 NY2d 136, 147 [1984]). The child is well-cared for in his foster home and his foster parent wishes to adopt him. Moreover, the mother has failed to take any steps toward reunification, and she has not set forth a feasible plan to care for the child (*see e.g. Matter of Deime Zechariah Luke M. [Sharon Tiffany M.]*, 112 AD3d 535, 536-537 [1st Dept 2013], *lv denied* 22 NY3d 863 [2014]).

The court's denial of the mother's request, through counsel, for an adjournment of the dispositional hearing was a provident exercise of discretion. The mother routinely failed to appear at visitations with the child and at meetings connected to the

proceedings. She also arrived 30 minutes late to a fact-finding hearing and did not appear when the hearing was continued (*see Matter of Naethael Makai A. [Adwoa A.]*, 135 AD3d 438, 439 [1st Dept 2016]).

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

ENTERED: MAY 9, 2019

CLERK

Friedman, J.P., Renwick, Kapnick, Kahn, Oing, JJ.

9283 Ind. 1987/18
Index 451527/18
SCI 30124/18

In re The People of the State of New York, ex rel. Ariel Schneller, on behalf of Grant Hall,
Petitioner-Appellant,

-against-

Cynthia Brann, etc.,
Respondent-Respondent.

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Janet E. Sabel, The Legal Aid Society, New York (Elizabeth Bender of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Juan M. Maldonado of counsel), for respondent.

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Judgment (denominated an order), Supreme Court, New York County (Ellen N. Biben, J.), entered on or about August 2, 2018, denying the petition for a writ of habeas corpus and dismissing the proceeding, unanimously affirmed, without costs, reduction of bail pursuant to an interim order of a Justice of this Court revoked, and bail previously set in the amount of $40,000 bond or $30,000 cash reinstated.

Upon our review of the record, and considering the factors set forth in CPL 510.30(2)(a), we find that the bail court (Laura A. Ward, J.) did not abuse its discretion in increasing bail to the amount indicated, in light of the seriousness of the charges, the likelihood of conviction, the potential sentence, and

petitioner's lack of community ties (*see e.g. People ex rel. Kuby v Merritt*, 96 AD3d 607 [1st Dept 2012], *lv denied* 19 NY3d 813 [2012]). Apparently, petitioner moved to New York City from his home state of Georgia just a few weeks before his arrest, and was living out of his car before it was impounded.

We do not reach the question of whether a bail-setting court is constitutionally required to consider a defendant's ability to afford the bail, because the record indicates that the bail court considered ability to pay as a significant factor in this case (*see People ex rel. Kirschbaum v Schriro*, 100 AD3d 571 [1st Dept 2012]).

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

ENTERED: MAY 9, 2019

CLERK

Friedman, J.P., Renwick, Kapnick, Kahn, Oing, JJ.

9284 In re New York City Asbestos Litigation — Index 190150/14

- - - - -

George Benson, et al.,
Plaintiffs-Respondents,

-against-

A.O. Smith Water Products Co., et al.,
Defendants,

Barnes & Jones, Inc.,
Defendant-Appellant.

_____

McGivney, Kluger & Cook, P.C., New York (Erin N. Miter of counsel), for appellant.

Weitz & Luxenberg, P.C., New York (Pierre A. Ratzki of counsel), for respondents.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered September 18, 2018, which denied defendant Barnes & Jones's motion for summary judgment dismissing the complaint against it, unanimously affirmed, without costs.

Assuming Barnes & Jones established prima facie entitlement to summary judgment based on its executive's affidavit and its manufacturer catalogs indicating that none of its steam traps warrant the use of flanges such that they could not have contributed to plaintiff's injuries, plaintiff's deposition testimony, together with Barnes & Jones's interrogatory response,

admitting that some of its pre-1975 steam traps contained asbestos gaskets, raised an issue of fact as to whether plaintiff was in fact exposed to asbestos dust while working on Barnes & Jones steam traps. Plaintiff unhesitatingly recalls working with gaskets with the brand name Barnes & Jones that produced breathable dust when he cut or dislodged them during the course of his work (*Matter of New York City Asbestos Litig.*, 146 AD3d 700 [1st Dept 2017]).

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

ENTERED: MAY 9, 2019

CLERK

Friedman, J.P., Renwick, Kapnick, Kahn, Oing, JJ.

9285 The People of the State of New York, Respondent, SCI 1597/17

-against-

Glenn Deleon,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Kevin McGrath, J. at plea; Curtis Farber, J. at sentencing), rendered May 11, 2018, 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: MAY 9, 2019

CLERK

Friedman, J.P., Renwick, Kapnick, Kahn, Oing, JJ.

9287 Sander Jacobs, Index 154652/14E
Plaintiff-Appellant,

-against-

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

_____

Morelli Law Firm PLLC, New York (Sara A. Mahoney of counsel), for appellant.

Lewis Brisbois Bisgaard & Smith LLP, New York (James M. Strauss of counsel), for respondents.

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Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered April 13, 2018, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Summary judgment was properly granted in this action where plaintiff was injured while attempting to disembark a bus from the rear emergency door. The record shows that defendants satisfied the duty of a common carrier to provide a clear, direct

and safe path of egress, namely the front door of the bus (*see Abraham v Port Auth. of N.Y. & N.J.*, 29 AD3d 345, 347 [1st Dept 2006]; *Blye v Manhattan & Bronx Surface Tr. Operating Auth.*, 124 AD2d 106, 109 [1st Dept 1987], *affd* 72 NY2d 888 [1988]).

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

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

ENTERED: MAY 9, 2019

CLERK

Friedman, J.P., Renwick, Kapnick, Kahn, Oing, JJ.

9288 Chantal Uppstrom, Index 153180/14
Plaintiff-Appellant,

-against-

Peter Dillon's Pub, et al.,
Defendants-Respondents.

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Nguyen Leftt, P.C., New York (Stephen D. Chakwin Jr. of counsel), for appellant.

Gallo Vitucci Klar LLP, New York (Kimberly A. Ricciardi of counsel), for Peter Dillon's Pub, respondent.

Cartafalsa, Turpin & Lenoff, New York (Gail P. Pariser of counsel), for 353 Lexington Avenue, LLC, respondent.

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Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered on or about April 12, 2018, which, to the extent appealed from as limited by the briefs, granted the motion of defendant 353 Lexington Avenue (353 Lexington) for summary judgment dismissing the complaint as against it, and, upon a search of the record, awarded defendant Peter Dillon's Pub (Dillon's) summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Plaintiff was injured when she fell down a stairway inside Dillon's bar. 353 Lexington owned the premises, which was being occupied by Dillon's pursuant to a lease agreement.

The complaint was properly dismissed as against 353

Lexington, because plaintiff's deposition testimony establishes that she was unable to identify the cause of her accident (*see Telfeyan v City of New York*, 40 AD3d 372, 373 [1st Dept 2007]). She also cannot show that the stairway's condition at the time of the accident violated a specific statutory provision, or that the alleged violations proximately caused her injuries, which is necessary to impose liability upon an out-of-possession landlord such as 353 Lexington (*see Quinones v 27 Third City King Rest.*, 198 AD2d 23, 24 [1st Dept 1993]).

Administrative Code of City of NY § 27-375(f) states that stairs that are less than 44 inches wide are permitted to have one handrail, and it is undisputed the subject stairway is only about 33 inches wide and has a continuous handrail on its left-hand side. That the stairway's left-side handrail nonuniform finger clearance violated Administrative Code § 27-375(f) three steps down from where plaintiff fell is of no moment, because her deposition testimony establishes that the violation did not proximately cause the accident (*see Daniarov v New York City Tr. Auth.*, 62 AD3d 480 [1st Dept 2009]).

Plaintiff's contention that the stairway constituted a trap or snare because it was hidden cannot impose liability upon 353 Lexington, because she failed to show that the accident was proximately caused by a structural or design defect that violated

a specific statutory provision (*see Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 420 [1st Dept 2011). In addition, her claim that the accident location caused her optical confusion is unpreserved as it is raised for the first time on appeal, and in any event, there is no evidence that she was optically confused before the accident or that the stairway's condition violated the Building Code (*see Langer v 116 Lexington Ave., Inc.*, 92 AD3d 597 [1st Dept 2012], *lv denied* 24 NY3d 907 [2014]). Plaintiff's claim that the stairway was not properly illuminated cannot impose liability upon 353 Lexington, because inadequate lighting is not a structural or design defect (*see Bethea v Weston House Hous. Dev. Fund Co., Inc.*, 70 AD3d 470, 471 [1st Dept 2010]).

The appeal from that portion of the order awarding Dillon's summary judgment is taken from an appealable order because the court decided 353 Lexington's summary judgment motion which was made by notice of motion (*see* CPLR 5701[a][2]). The court did not err in dismissing the complaint as against Dillon's, because plaintiff testified that she did not know what caused her to fall and her claim that the stairway was a trap or snare due to the fact that she was confronted with a "visual experience" that prevented her from properly understanding that a stairway was there was not pled in the complaint or bill of particulars

(*see Siegfried v West 63 Empire Assoc.*, LLC, 145 AD3d 456 [1st Dept 2016]). Furthermore, she offered no evidence that her fall was precipitated by any hazard that she failed to see due to poor lighting (*see Jenkins v New York City Hous. Auth.*, 11 AD3d 358, 359 [1st Dept 2004]).

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

ENTERED: MAY 9, 2019

CLERK

Friedman, J.P., Renwick, Kapnick, Kahn, Oing, JJ.

9289 Global Liberty Ins. Co., Index 22588/17E
Plaintiff-Appellant,

-against-

Sloan Tyrell, et al.,
Defendants,

Dohor Chiropractic Services, P.C.,
et al.,
Defendants-Respondents.

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

Kopelevich & Feldsherova, P.C., Brooklyn (David Landfair of counsel), for respondents.

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Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered October 3, 2018, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment against defendants-respondents and a default judgment against the remaining defendants on its complaint seeking a declaration of noncoverage, and for leave to amend the complaint to add Yang Zhi Gang, MD and Jamron Colin as defendants, unanimously modified, on the law and the facts, to grant the motion for leave to amend, and otherwise affirmed, without costs.

Plaintiff seeks a declaration that defendant Sloan Tyrell failed to appear at duly noticed medical examinations (IMEs), which constitutes a failure of a condition precedent to receipt

of insurance benefits for the motor vehicle accident by any parties potentially entitled to benefits under Insurance Law § 5103 or their assignees (11 NYCRR 65-1.1[a]; *see generally Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011], *lv denied* 17 NY3d 705 [2011]). In support, plaintiff submitted an attorney's affirmation annexing documents and affidavits of its claims adjuster and an employee of a company that handles plaintiff's no fault notice mailings, and an affirmation of the doctor whom plaintiff designated to conduct the IME. Contrary to defendants' contentions, the court properly considered sworn statements bearing captions of other proceedings arising out of the same accident (*see* CPLR 2101[f]).

Plaintiff did not proffer sufficient evidence to establish prima facie that it provided the insured with proper notice of the location of the scheduled examinations, since the copies of the letters submitted through an attorney affirmation appear to show an address for the doctor's office that differed from the office address provided by the doctor in her affirmation. Plaintiff's effort to correct the deficiency by submitting "clearer" copies in reply was insufficient, since there is no evidence that the insured received a clear copy.

As for the motion for leave to amend, plaintiff submitted a proposed amended complaint setting forth a cognizable cause of

action against the proposed additional defendants, who allegedly provided the same claimant with services in connection with the same accident. Thus permissive joinder was appropriate (CPLR 1002[b]; *see Mount Sinai Hosp. v Motor Veh. Acc. Indem. Corp.*, 291 AD2d 536, 537 [2d Dept 2002]), and, absent any showing of prejudice or undue delay, leave to amend should have been freely granted (CPLR 3025[b]; *Fellner v Morimoto*, 52 AD3d 352, 354 [1st Dept 2008]).

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

ENTERED: MAY 9, 2019

CLERK

Friedman, J.P., Renwick, Kapnick, Kahn, Oing, JJ.

9290N In re Global Liberty Insurance Co., Index 29887/18E
Petitioner-Appellant,

-against-

Mark S. McMahon, M.D., as assignee of
Rudy Corniel,
Respondent-Respondent.

_____

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

Samandarov & Associates, P.C., Floral Park (Eli Shmulik of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered November 11, 2018, which denied Global Liberty Insurance Co.'s (Global) petition to vacate the master arbitrator's award, dated August 15, 2018, affirming the lower arbitrator's award in favor of respondent, dated April 17, 2018, dismissed the proceeding and confirmed the award, unanimously reversed, on the law, without costs, the petition granted, the award vacated, and the matter remanded to the lower arbitrator for a new arbitration to be conducted consistent with this decision.

Respondent submitted to Global a claim for payment under the No-Fault Law (Insurance Law, article 51) in the amount of $5,813,81 for arthroscopic surgery respondent had performed on Global's insured. Global approved the claim only up to the

amount of $2,980.44, basing its position on the American Medical Association's CPT Assistant newsletter.[1] After Global partially paid the claim, respondent commenced a no-fault arbitration, seeking payment of the $1,342.52 balance. The lower arbitrator, in rendering an award to respondent in that amount, refused to consider CPT Assistant, on which Global had relied, based on the arbitrator's view that CPT Assistant was "not authorized by statute or regulation applicable to the No-Fault Law." On Global's appeal, the master arbitrator affirmed the lower arbitrator's award. Thereafter, Supreme Court denied Global's petition to vacate the award. On Global's appeal, we reverse and grant the petition.

The Official New York Workers' Compensation Medical Fee Schedule, promulgated by the chair of the Workers' Compensation Board, directs users to "refer to the CPT book for an explanation of coding rules and regulations not listed in this schedule." The CPT book, in turn, expressly makes reference to CPT Assistant. By both statute and regulation, the fee schedules established by the chair of the Workers' Compensation Board are

[1]CPT is an acronym for Current Procedural Terminology.

expressly made applicable to claims under the No-Fault Law (*see* Insurance Law § 5108; 11 NYCRR 68.0, 68.1[a][1]; *see generally Government Empls. Ins. Co. v Avanguard Med. Group, PLLC*, 127 AD3d 60, 63-64 [2d Dept 2015], *affd* 27 NY3d 22 [2016]). Accordingly, because CPT Assistant is incorporated by reference into the CPT book, which is incorporated by reference into the Official New York Workers' Compensation Medical Fee Schedule applicable to this claim under the No-Fault Law, the award rendered without consideration of CPT Assistant is incorrect as a matter of law (*see* 11 NYCRR 65-4.10[a][4]). We therefore grant the petition to vacate the award and remand the matter to the lower arbitrator for a new arbitral proceeding, at which relevant portions of CPT Assistant shall be given due consideration.

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

ENTERED: MAY 9, 2019

CLERK

Friedman, J.P., Renwick, Kapnick, Kahn, Oing, JJ.

9291-
9292N Index 22765/14E

Crystal Evans,
Plaintiff-Appellant,

-against-

Dr. Henry Roman, M.D.,
Defendant,

Noakita Allen, R.N., et al.,
Defendants-Respondents.

_____

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

Drabkin & Margulies, New York (Robert W. Margulies of counsel), for Noakita Allen, R.N., Split Rock Rehabilitation and Health Care Center, LLC, and Split Rock Multi-Care Center, LLC, respondents.

Egan Law Firm, New York (Susan B. Egan of counsel), for RLD Medical Services, P.C., respondent.

_____

Order, Supreme Court, Bronx County (George J. Silver, J.), entered April 11, 2018, which granted defendants' motion to compel plaintiff to provide cell phone records and produce her cell phone for inspection by defendants, unanimously reversed, on the law and the facts, without costs, and defendants' motion denied. Appeal from order, same court and Justice, entered November 21, 2018, which, in effect, granted plaintiff's motion for reargument and, upon reargument, adhered to the prior determination, unanimously dismissed, without costs, as academic.

The court should not have directed plaintiff to produce her phone and all of the material stored on it because defendants failed to meet the threshold for disclosure by showing that their request for plaintiff's cell phone was reasonably calculated to yield information material and necessary to its defense (*see Forman v Henkin*, 30 NY3d 656, 664-665 [2018]; *AllianceBernstein L.P. v Atha*, 100 AD3d 499 [1st Dept 2012]).

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

ENTERED: MAY 9, 2019

CLERK

Friedman, J.P., Renwick, Kapnick, Kahn, Oing, JJ.

9293
[M-1050] In re Myron Roundtree, Ind. 4497/17
Petitioner, OP 178/19

-against-

Hon. Melissa Jackson, etc. et al.,
Respondents.

_____

Myron Roundtree, petitioner pro se.

Letitia James, Attorney General, New York (Melissa Ysaguirre of counsel), for Hon. Melissa Jackson, respondent.

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

_____

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

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

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

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

ENTERED: MAY 9, 2019

CLERK

Gische, J.P., Kahn, Gesmer, Singh, Moulton, JJ.

9332 Jane Carter, Index 651594/18
Plaintiff-Respondent,

-against-

Michael Long, et al.,
Defendants,

Quality King Distributors, Inc.,
Defendant-Appellant.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Barry R. Ostrager, J.), entered on or about January 8, 2019,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto filed April 24, 2019,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: MAY 9, 2019

CLERK