SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 21, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Richter, Manzanet-Daniels, Webber, Kern, JJ.

9345 The People of the State of New York, Ind. 3518/13
Respondent,

-against-

Andrew Scott,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Allison N. Kahl of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Emily Anne Aldridge counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Margaret L. Clancy, J.), rendered April 9, 2015, convicting defendant, after a jury trial, of four counts of murder in the second degree and two counts of robbery in the first degree, and sentencing him to an aggregate term of 50 years to life, unanimously affirmed.

There was no violation of defendant's right to be present at a hearing on the admissibility of uncharged crimes evidence (*see People v Spotford*, 85 NY2d 593, 596-597 [1995]). After a hearing in defendant's presence, where he had an opportunity for

meaningful input, there was an exchange of emails among counsel and the court that essentially constituted posthearing written submissions, and did not require defendant's personal involvement (*see People v Liggins*, 19 AD3d 324 [2005], *lv denied* 5 NY3d 853 [2005]). The proposed evidence set forth in the emails did not differ in any material way from what the People had proffered at the initial proceeding, so as to require defendant's presence. Any differences either involved minor details, or evidence that was never actually introduced at trial.

Defendant's challenge to the prosecutor's summation comment regarding purported concessions by defense counsel is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we find that the comment was improper (*see People v Levy*, 202 AD2d 242, 245 [1st Dept 1994]), but harmless in light of the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230 [1975]). 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]).

The court's summary denial of the branch of defendant's suppression motion seeking to suppress his statements as the

fruit of an allegedly unlawful arrest (*see Dunaway v New York*, 442 US 200 [1979]) was not error. Defendant made only a conclusory claim that there was no probable cause for his arrest, and failed to set forth any allegations to raise a factual dispute on that subject (*see* CPL 710.60[1]; *People v Mendoza*, 82 NY2d 415, 425-429 [1993]). Contrary to his contention, this is not a case where a "complete lack of information" (*People v Wynn*, 117 AD3d 487, 488 [1st Dept 2014]) prohibited him from setting forth specific allegations. At the time of his motion, defendant was aware of some of the bases of his arrest, and defendant had the "burden to supply the motion court with any relevant facts he did possess" (*People v Jones*, 95 NY2d 721, 729 [2001]). Before trial, the court providently exercised its discretion in denying defendant's request for new counsel after conducting a sufficient inquiry. Defendant did not demonstrate good cause for a substitution (*see generally People v Linares*, 2 NY3d 507, 510 [2004]), and, in any event, defendant effectively withdrew his request and voluntarily agreed to continue with the same counsel.

The court providently exercised its discretion when it declined to consider defendant's pro se CPL 330.30 motion to set aside the verdict. Defendant was represented by counsel, and had no right to hybrid representation (*People v Rodriguez*, 95 NY2d

497, 501-503 [2000]). The court did not reject the motion based on a blanket policy of not considering pro se motions, but on the ground that defense counsel declined to adopt this motion. Defendant argues that because the motion alleged, in pertinent part, ineffective assistance of counsel, it would normally be made pro se, it was natural for counsel to decline to adopt it, and there was a conflict of interest requiring assignment of new counsel. However, in this case, the pertinent claims referred to the pretrial request for new counsel, which, as noted, was meritless and withdrawn, and certain other claims of ineffectiveness that were not cognizable in a record-based CPL 330.30(1) motion and are not pursued on appeal. Accordingly, under these circumstances, we find no denial of defendant's right to conflict-free representation.

The loss of certain videotapes received in evidence at trial did not deprive defendant of effective appellate review. Nothing in the videos would shed light on the appellate arguments he is now raising. In any event, the contents of the videos could be gleaned from the record (*see People v Yavru-Sakuk*, 98

NY2d 56, 59-60 [2002]), and the videos themselves are not necessary to our above-stated holding that the summation comment at issue was harmless error.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 21, 2019

DEPUTY CLERK

Acosta, P.J., Richter, Manzanet-Daniels, Webber, Kern, JJ.

9346 Gail Frederick, Index 20484/14E
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

_____

Belovin Franzblau & Associates, P.C., Bronx (David A. Karlin of counsel), for appellant.

Herzfeld & Rubin, P.C., New York (Linda M. Brown of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Llinet Rosado, J.), entered January 9, 2018, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff was injured when, while descending the lobby stairs in defendant's building, she slipped and fell on urine. Defendant established its prima facie entitlement to judgment as a matter of law by submitting evidence showing that it did not have actual or constructive notice of the hazardous condition. Regarding actual notice, the superintendent of the building testified that tenants were given a phone number to notify defendant about any problems with the building, he was unaware of any ongoing issue with urine being on the lobby's steps, no

complaints were made about the condition of the stairs before plaintiff fell, and there were no accidents in that area before the accident. The building's caretaker also testified that she received no complaints about the lobby before the accident (*see Gomez v J.C. Penny Corp., Inc.*, 113 AD3d 571 [1st Dept 2014]). As for constructive notice, the caretaker stated that the janitorial schedule required that the lobby's steps be inspected once in the morning and again between 4:00 and 4:15 p.m., and she would promptly remove anything found during her inspections (*see Rodriguez v New York City Hous. Auth.*, 102 AD3d 407 [1st Dept 2013]).

In opposition, plaintiff failed to raise a triable issue of fact. Viewing the record in a light most favorable to plaintiff, defendant had less than 30 minutes to find the urine before the caretaker left work for the night. This is an insufficient period of time to charge defendant with having constructive notice (*see Pagan v New York City Hous. Auth.*, 121 AD3d 622, 623 [1st Dept 2014]).

Furthermore, defendant demonstrated that urine on the lobby stairs was not an ongoing condition that was routinely left unaddressed. The building's caretaker testified that she inspected the accident location twice and cleaned the area at

least once on the day that plaintiff fell (*see Pfeuffer v New York City Hous. Auth.*, 93 AD3d 470, 472 [1st Dept 2012]). The fact that the caretaker stated that she saw urine on the floor about "once every two weeks" does not establish that defendant routinely left the condition unaddressed (*see Raposo v New York City Hous. Auth.*, 94 AD3d 533, 534 [1st Dept 2012]).

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

ENTERED: MAY 21, 2019

DEPUTY CLERK

Acosta, P.J., Richter, Manzanet-Daniels, Webber, Kern, JJ.

9348-
9348A In re Crisnell F., and Others,

Children Under Eighteen Years
of Age, etc.,

Fermin V.,
Respondent,

Dennis V.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Steven P. Forbes, Jamaica, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Deborah E. Wassel of counsel), for respondent.

Dawne A. Mitchell, The Legal Aid Society, New York (Marcia Egger of counsel), attorney for the children Crisnell F., Michelle F. and Hansel F.

Aleza Ross, Patchogue, attorney for the child Jade V.

_____

Order of disposition, Family Court, Bronx County (Sarah P. Cooper, J.), entered on or about July 3, 2018, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about June 27, 2018, which found that respondent stepfather sexually abused the subject child, Crisnell F., and derivatively neglected the subject children, Michelle F., Hansel F. and Jade V., unanimously affirmed, without costs. Appeal from

fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

A preponderance of the evidence supports the court's determination that the stepfather sexually abused his stepdaughter Crisnell F. and derivatively neglected the remaining children in the home (see Family Court Act §§ 1012[e][iii]; 1046[b][i]). Crisnell's out-of-court statements were sufficiently corroborated by the testimony of her mother, which was consistent with that of agency caseworker, to whom the child had described the abuse, as well as hospital records, and the stepfather's direct admission to the mother that he had in fact committed sexual abuse (*see Matter of Nicole V.*, 71 NY2d 112, 118-119 [1987]; *Matter of Christina G. [Vladmir G.]*, 100 AD3d 454 [1st Dept 2012], *lv denied* 20 NY3d 859 [2013]). There exists no basis to disturb the court's credibility determinations (*Matter of Irene O.*, 38 NY2d 776, 777 [1975]).

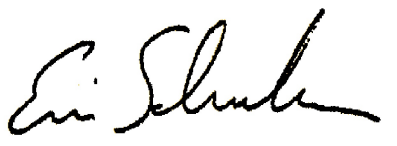
Contrary to the stepfather's argument, improperly raised for the first time on appeal, the record fails to demonstrate that his counsel, who actively participated in the case on his behalf, was ineffective (*see Matter of Aaron Tyrell W.*, 58 AD3d 419 [1st

Dept 2009]).

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

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

ENTERED: MAY 21, 2019



DEPUTY CLERK

Acosta, P.J., Richter, Manzanet-Daniels, Webber, Kern, JJ.

9349 Alfred McDowell, Index 305542/13
Plaintiff,

-against-

Xand Holdings, LLC,
Defendant-Respondent,

JCI Construction Corporation,
Defendant-Appellant,

Costa Electrical Contractors, Corp.,
Defendant.

_____

Congdon, Flaherty, O'Callaghan, Reid, Donlon, Travis & Fishlinger, Uniondale (Kathleen D. Foley of counsel), for appellant.

Weiser & McCarthy, New York (David P. Weiser of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered on or about October 30, 2018, which, to the extent appealed from as limited by the briefs, denied JCI Construction Corporation's (JCI) motion for summary judgment, unanimously affirmed, without costs.

The court properly found issues of fact as to whether JCI launched a force or instrument of harm while performing its contract at the construction site (*see generally Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). The testimony

of JCI's principal, viewed in the light most favorable to plaintiff, raised an issue of fact as to whether JCI met its alleged oral obligations to place caution tape around, or plywood over, the trench it contracted to excavate, into which plaintiff fell (*see Farrugia v 1440 Broadway Assoc.*, 163 AD3d 452, 453 [1st Dept 2018]; *cf. Miller v City*, 100 AD3d 561 [1st Dept 2012]).

Moreover, there are triable issues of fact as to whether plaintiff's conduct of walking to the edge of the trench, where he lost his footing and fell, was the sole proximate cause of his accident, as the record does not permit resolution as a matter of law of whether the hazard was open and obvious (*see Farrugia*, 163 AD3d 454, 455).

We have considered JCI's remaining claims and find them unavailing.

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

ENTERED: MAY 21, 2019

DEPUTY CLERK

Acosta, P.J., Richter, Manzanet-Daniels, Webber, Kern, JJ.

9350-
9350A The People of the State of New York,
Respondent,

-against-

Jaquan Tucker,
Defendant-Appellant.

Ind. 1487/15
3422/14

_____

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

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

_____

Judgments, Supreme Court, Bronx County (John Moore, J. at plea; Nicholas Iacovetta, J. at sentencing), rendered December 12, 2017, unanimously affirmed.

Although we find that defendant did not make a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: MAY 21, 2019

DEPUTY CLERK

Acosta, P.J., Richter, Manzanet-Daniels, Webber, Kern, JJ.

9351 Luz M. Ramirez, Index 300321/11
Plaintiff,

-against-

Global Home Improvements, Inc., et al.,
Defendants,

The City of New York,
Defendant-Respondent,

El Sol Contracting and Construction Corp.,
Defendant-Appellant.

_____

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

Zachary W. Carter, Corporation Counsel, New York (Claibourne Henry of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered on or about September 11, 2018, which denied defendant El Sol Contracting and Construction Corp.'s motion to renew its motion for summary judgment dismissing the complaint and all cross claims as against it, unanimously affirmed, without costs.

Defendant's submissions on its motion to renew do not constitute "new facts" (CPLR 2221[e][2]; *see Tishman Constr. Corp. of N.Y. v City of New York*, 280 AD2d 374, 376-377 [1st Dept 2001]). The authenticated photographs merely depict what plaintiff described in her deposition testimony, which was taken

before defendant moved for summary judgment (*see Cammeby's Equity Holdings LLC v Mariner Health Care, Inc.*, 106 AD3d 563, 564 [1st Dept 2013]). Nor do the affidavits by defendant's project manager and foreman constitute new facts; they are based on information in defendant's possession. Moreover, defendant failed to provide a reasonable justification for its failure to obtain the photographs and affidavits before moving for summary judgment (CPLR 2221[e][3]); *see Sokoli v Quality Carton*, 286 AD2d 277 [1st Dept 2001]; *see also Gordon v 476 Broadway Realty Corp.*, 161 AD3d 417, 418 [1st Dept 2018], *lv dismissed* 32 NY3d 1078 [2018]).

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

ENTERED: MAY 21, 2019

DEPUTY CLERK

Acosta, P.J., Richter, Manzanet-Daniels, Webber, Kern, JJ.

9352 Oscar Hernandez, Index 301487/14
Plaintiff-Appellant-Respondent,

-against-

601 West Associates,
Defendant-Respondent-Appellant.

_____

Gorayeb & Associates, P.C., New York (John M. Shaw of counsel), for appellant-respondent.

Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York (Vanessa M. Corchia of counsel), for respondent-appellant.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about April 23, 2018, which, to the extent appealed from as limited by the briefs, denied defendant's motion for summary judgment dismissing the Labor Law § 240(1) claim and the Labor Law § 241(6) claim predicated on Industrial Code (12 NYCRR) § 23-6.1(d), and denied plaintiff's motion to the extent it sought summary judgment on his Labor Law § 240(1) claim and granted the motion to the extent it sought to amend the bill of particulars to allege a violation of 12 NYCRR 23-6.1(d), unanimously modified, on the law, to grant defendant's motion, and to deny plaintiff's motion to amend, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint.

Plaintiff seeks damages for injuries he sustained when a refrigerator he was pushing up the stairs from the basement of a restaurant fell on him after the rope that tied the refrigerator to a hand-truck being pulled up by another individual broke. Notwithstanding the work being performed in other parts of the premises, and contrary to his own characterization of his work as demolition, plaintiff, whose task was to remove debris and garbage, including the refrigerator, from the basement, was not engaged in an activity protected by Labor Law § 240(1) or 241(6) at the time of his accident (*see generally Martinez v City of New York*, 93 NY2d 322, 326 [1999]; *Toro v Plaza Constr. Corp.*, 82 AD3d 505 [1st Dept 2011], *lv denied* 18 NY3d 801 [2011]).

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

ENTERED: MAY 21, 2019

DEPUTY CLERK

Acosta, P.J., Richter, Manzanet-Daniels, Webber, Kern, JJ.

9353-
9354-
9355-
9356 In re Ziah X.C., And Others,

Children Under the Age of Eighteen Years, etc.,

Kevin C.,
Respondent-Appellant,

Saint Dominic's Home,
Petitioner-Respondent,

Laurel McC.,
Respondent.

_____

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

Carrieri & Carrieri, P.C., Mineola (Ralph R. Carrieri of counsel), for respondent.

Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), attorney for the child Ziah X.C.

Bruce A. Young, New York, attorney for the child Damani C.

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Orders of disposition, Family Court, Bronx County (Joan L. Piccirillo, J.), entered on or about March 15, 2018, which, inter alia, upon findings of permanent neglect, terminated respondent father's parental rights to the subject children, and committed custody and guardianship of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption,

unanimously affirmed, without costs.

The determination that the agency exercised diligent efforts to support reunification of the father with the children was supported by clear and convincing evidence (*see* Social Services Law § 384-b[7]). The agency provided the father with a service plan and referrals tailored to his needs, including a parenting program for special needs children, marriage and individual counseling, as well as domestic violence counseling. Despite his completion of the recommended services, the father was unable to demonstrate the necessary parenting skills and failed to adequately plan for the children because of his inability to separate from the mother, who continued to suffer from untreated alcoholism (*see Matter of Leroy Simpson M. [Joanne M.]*, 122 AD3d 480 [1st Dept 2014]; *Matter of Kie Asia T. [Shaneene T.]*, 89 AD3d 528 [1st Dept 2011]; *Matter of John G., Jr. [John G.]*, 70 AD3d 419 [1st Dept 2010]).

A preponderance of the evidence supports the determination that termination of the father's parental rights was in the best interests of the children (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). A suspended judgment was not warranted under the circumstances, given the father's lack of insight into the children's special needs and his own behavior, and his

decision to move three hours away from them. The children have lived with the foster mother for most of their lives, have bonded with her, and she is equipped to handle their special needs and wishes to adopt them (*see Matter of Angelica D. [Deborah D.]*, 157 AD3d 587 [1st Dept 2018]).

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

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

ENTERED: MAY 21, 2019

DEPUTY CLERK

Acosta, P.J., Richter, Manzanet-Daniels, Webber, Kern, JJ.

9357- Ind. 1/13
9358-
9359-
9360-
9361 The People of the State of New York,
Respondent,

-against-

Andre Dennis, also known as Denise Dennis,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, Bronx County (Margaret L. Clancy, J.), rendered November 25, 2013, as amended August 19, 2016 and July 7, 2017, convicting defendant, upon her plea of guilty, of attempted assault in the second degree, and sentencing her, as a second felony offender, to a term of two to four years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to 1½ to 3 years, and otherwise affirmed.

Although defendant was not advised of the postrelease supervision component of her sentence, her 2000 burglary conviction in Onondaga County was not unconstitutionally

obtained, and it thus qualifies as a predicate felony conviction. Defendant is not entitled to a hearing on whether she would have pleaded guilty had she been so advised.

In 2016, defendant's original sentence on the instant conviction was vacated based on then-controlling law, under which the automatic vacatur rule of *People v Catu* (4 NY3d 242 [2005]) was deemed retroactive. The 2000 conviction was disqualified as a predicate, and defendant was resentenced as a first felony offender. After the Court of Appeals held in *People v Smith* (28 NY3d 191 [2016]) that *Catu* was not retroactive, the People successfully moved pursuant to CPL 440.40 to vacate defendant's resentence, and defendant was thereafter resentenced, once again as a second felony offender, to her original term.

Defendant's argument has become barred by collateral estoppel. After the briefs were filed in the instant appeal, this Court decided *People v Dennis* (168 AD3d 644 [1st Dept 2019]), where the same defendant argued that a resentencing court in New York County in 2018 improperly relied on the same 2000 Onondaga conviction in adjudicating her a predicate felon. In that case, the court granted defendant's request for a hearing and determined that defendant failed to demonstrate that she had been prejudiced by the failure of the plea court and her attorney

to inform her of the PRS component of her sentence in 2000. This Court affirmed on that ground, while declining to address the issue of whether a hearing should have been granted in the first place. In light of that decision, "both requisite criteria [of collateral estoppel], the identicality and decisiveness of the issues and the opportunity for a full and fair hearing have been satisfied" (*Ryan v New York Tel. Co.*, 62 NY2d 494, 502 [1984]).

We find that defendant did not make a valid waiver of her right to appeal, and we find the sentence excessive to the extent indicated.

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

ENTERED: MAY 21, 2019

DEPUTY CLERK

Acosta, P.J., Richter, Manzanet-Daniels, Webber, Kern, JJ.

9362 Eric Jones, Index 21019/13E
Plaintiff-Appellant,

-against-

3417 Broadway LLC,
Defendant-Respondent,

Best of Midtown Food, Inc.,
et al.,
Defendants,

Subway Restaurant, et al.,
Defendants-Respondents.

_____

Scott Baron & Associates, P.C., Yonkers (Michael Stieglitz of counsel), for appellant.

O'Toole Scrivo Fernandez Weiner Van Lieu LLC, New York (Stephanie C. Mishler of counsel), for 3417 Broadway LLC, respondent.

Law Offices of Lori D. Fishman, Tarrytown (Silvia C. Souto of counsel), for Subway Restaurant, Subway Real Estate Corp. and Subway Real Estate II, LLC, respondents.

_____

Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered May 30, 2108, which granted the motions of defendants 3417 Broadway LLC and Subway Restaurant, Subway Real Estate Corp. and Subway Real Estate II, LLC, a/k/a Subway Real Estate LLC (collectively defendants) for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Defendants established their prima facie entitlement to

judgment as a matter of law by submitting evidence showing that the hole in the sidewalk that caused plaintiff's fall was within 12 inches from a metal grate owned by the City of New York, and therefore they were not responsible for maintaining or repairing the sidewalk at that location (34 RCNY 2-07 [b][1], [2]; *see Storper v Kobe Club*, 76 AD3d 426, 427 [1st Dept 2010]; *Hurley v Related Mgt. Co.*, 74 AD3d 648, 649 [1st Dept 2010]).

In opposition, plaintiff failed to raise an issue of fact. Plaintiff submitted his attorney's affirmation, in which counsel purported to derive measurements from photographs depicting where plaintiff fell, which were not supported by factual proof or expert testimony and were of no probative value (*see e.g. Lewis v Safety Disposal Sys. of Pa., Inc.*, 12 AD3d 324, 325 [1st Dept 2004]).

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 21, 2019

DEPUTY CLERK

Acosta, P.J., Richter, Manzanet-Daniels, Webber, Kern, JJ.

9363 Citimortgage, Inc., Index 382209/10
Plaintiff-Respondent

-against-

Lachmin Sahai,
Defendant-Appellant,

Mohanram B. Sahai, et. al.,
Defendants.

_____

Shiryak, Bowman, Anderson, Gill & Kadochnikov, LLP, Kew Gardens (Mark Anderson of counsel), for appellant.

Gross Polowy, LLC, Westbury (Alexandria Kaminski of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about July 31, 2018, which denied defendant's CPLR 3215(c) motion to dismiss the complaint, unanimously affirmed, without costs.

An action is deemed abandoned where a default has occurred and a plaintiff has failed to take proceedings for the entry of a judgment within one year thereafter unless plaintiff has shown "sufficient cause . . . why the complaint should not be dismissed" (CPLR 3215[c]). Sufficient cause requires a showing of an excuse for a plaintiff's delay in seeking default *and* a meritorious claim (*see Hoppenfeld v Hoppenfeld*, 220 AD2d 302, 303

[1st Dept 1995][emphasis added]). We find that the motion court did not abuse its discretion when it denied defendant's motion to dismiss the complaint under CPLR 3215(c) (*see LaValle v Astoria Constr. & Paving Corp.*, 266 AD2d 28 [1st Dept 1999]).

Plaintiff's excuse for its delay in moving for a default judgment under CPLR 3215(c) was due to defendant's bankruptcy petition, which stayed the foreclosure action (*see U.S. Bank N.A. v Joseph*, 159 AD3d 968, 970 [2d Dept 2018]; *Levant v National Car Rental, Inc.*, 33 AD3d 367 [1st Dept 2006]). After the stay was lifted, plaintiff submitted sufficient evidence that the parties engaged in settlement negotiations (*see e.g. JPMorgan Chase Bank, Natl. Assn. v Salvage*, 2019 NY Slip Op 02486, * 1 [1st Dept 2019]; *see also Iorizzo v Mattikow*, 25 AD3d 762, 764 [2d Dept 2006]).

As to the meritorious nature of the claim, plaintiff submitted evidence of the promissory note issued on January 10, 2006 in the amount of $429,000. The note was assigned to plaintiff on October 19, 2010. Documentary evidence was submitted where defendant admitted that it could not afford to make any of the monthly payments. Therefore, plaintiff demonstrated that its complaint is potentially meritorious (*see Brooks v Somerset Surgical Assoc.*, 106 AD3d 624, 625 [1st

Dept 2013]). Further, the record shows that defendant was not prejudiced by the delay, since he attempted to negotiate a settlement on several occasions (*see HSBC Bank USA v Lugo*, 127 AD3d 502, 503 [1st Dept 2015]).

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

ENTERED: MAY 21, 2019

DEPUTY CLERK

Acosta, P.J., Richter, Manzanet-Daniels, Webber, Kern, JJ.

9364 Reyna Martinez Vargas, Index 303184/13
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

_____

Budin, Reisman, Kupferberg & Bernstein, LLP, New York (Gregory C. McMahon of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about March 19, 2018, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established its prima facie entitlement to judgment as a matter of law, in this action where plaintiff alleges that she was injured when her bicycle hit a hole in the road, causing her to fall. Defendants submitted evidence showing that it lacked prior written notice of the alleged defect (*see* Administrative Code of City of NY § 7-201[c][2]; *Jones v City of New York*, 159 AD3d 571 [1st Dept 2018]).

In opposition, plaintiff failed to raise a triable issue of fact. Her claim that defendant's alleged negligent repair of

other defects on the same road raised an issue of fact as to whether it had prior notice of the subject defect is unavailing, since "[t]he awareness of one defect in the area is insufficient to constitute notice of a different particular defect which caused the accident" (*Roldan v City of New York*, 36 AD3d 484, 484 [1st Dept 2007]). There was also no evidence that an allegedly negligent repair of the road immediately caused the defect that led to plaintiff's injuries, and plaintiff's claim to the contrary is speculative (*see Martin v City of New York*, 158 AD3d 527 [1st Dept 2018]).

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

ENTERED: MAY 21, 2019

DEPUTY CLERK

Acosta, P.J., Richter, Manzanet-Daniels, Webber, Kern, JJ.

9365 Jose Ortiz, Index 301456/16
Plaintiff-Respondent,

-against-

Joel J. Turney, LLC, et al.,
Defendants-Appellants.

_____

Joel J. Turney, LLC, New York (Joel J. Turney of counsel), for appellants.

Joseph A. Altman, P.C. Bronx (Joseph A. Altman of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about January 16, 2018, which, in this action alleging legal malpractice, granted plaintiff's motion for summary judgment on the issue of liability and remanded the matter for a trial on damages, unanimously affirmed, without costs.

Defendants' letter to plaintiff, in which they admit that plaintiff's underlying property damage action was not timely commenced and state that they will "willingly compensate [him] for all actual damages subject to proof and interest since the time of the loss," constitutes an admission of defendants' negligence and that it was the proximate cause of plaintiff's loss (*see Marchi Jaffe Cohen Crystal Rosner & Katz v All-Star*

Video Corp., 107 AD2d 597 [1st Dept 1985]; *see generally Leder v Spiegel*, 31 AD3d 266, 267-268 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied* 552 US 1257 [2008]). Contrary to defendants' contentions, the language of the letter cannot be interpreted in any other manner.

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: MAY 21, 2019

DEPUTY CLERK

Acosta, P.J., Richter, Manzanet-Daniels, Webber, Kern, JJ.

9366 In re David Gould, As Co-Executor of the Estate of Harry Rodman, Deceased.

- - - - -

David Gould, etc., Petitioner-Respondent,

-against-

Alan Bronstein, et al., Respondents-Appellants.

File 947G/08

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Bleakley Platt and Schmidt, LLP, White Plains (Vincent W. Crowe of counsel), for appellants.

Sweeney, Reich & Bolz, LLP, Lake Success (Michael Reich of counsel), for respondent.

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Decree, Surrogate's Court, Bronx County (Nelida Malave-Gonzalez, S.), entered September 17, 2018, insofar as appealed from as limited by stipulation, awarding petitioner statutory prejudgment interest, unanimously affirmed, without costs.

The Surrogate correctly awarded petitioner statutory prejudgment interest based on the finding that respondents breached the contract embodied in the promissory note (*see* CPLR 5001[1]). Respondents need not have derived some benefit from petitioner to be required to pay statutory interest; interest is merely compensation of the wronged party for the loss of its money (*J. D'Addario & Co., Inc. v Embassy Indus., Inc.*, 20 NY3d

113, 117 [2012]).

Respondents' argument that the award of statutory interest based on the unpaid interest due under the promissory note constitutes an improper compounding of interest on interest has been rejected by the Court of Appeals (*see NML Capital v Republic of Argentina*, 17 NY3d 250, 266-267 [2011]; *Spodek v Park Prop. Dev. Assoc.*, 96 NY2d 577, 580-581 [2001]). The application of statutory interest on unpaid interest properly provides compensation to petitioner for a distinct injury - respondents' failure to make timely interest payments (*see NML*, at 266-267).

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

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

ENTERED: MAY 21, 2019

DEPUTY CLERK

Acosta, P.J., Richter, Manzanet-Daniels, Webber, Kern, JJ.

9367N Mary Doyle, Index 20242/13
Plaintiff-Respondent,

-against-

Temco Service Industries, Inc.,
et al.,
Defendants-Appellants.

Lester Schwab Katz & Dwyer, LLP, New York (Paul M. Tarr of counsel), for appellants.

Jaroslawicz & Jaros PLLC, New York (David Tolchin of counsel), for respondent.

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about December 21, 2017, which denied defendants' motion to compel plaintiff to provide copies of all passports held after the accident and access to any social media accounts maintained after the accident, unanimously reversed, on the law and the facts, without costs, and the motion granted to the extent indicated herein.

Private social media information can be discoverable to the extent it "contradicts or conflicts with [a] plaintiff's alleged restrictions, disabilities, and losses, and other claims" (*Patterson v Turner Constr. Co.*, 88 AD3d 617, 618 [1st Dept 2011]). Here, plaintiff alleges that injuries she sustained as

the result of a slip and fall at her place of work have caused her to suffer, among other things, a loss of enjoyment of life. Defendants are entitled to discovery to rebut plaintiff's claims (*see* CPLR 3101; *Forman v Henkin*, 30 NY3d 656, 663-664 [2018]), however, defendants' discovery demand seeking access to all of plaintiff's postaccident social media accounts is overbroad (*Forman*, 30 NY3d at 664-665).

In their reply brief, defendants limit their demand to seek "only plaintiff's post-accident social media records regarding social and recreational activities that she claims have been limited by her accident." Accordingly, the motion to compel should be granted to that extent, which is consistent with the principles set forth in *Forman*. To the extent plaintiff's social media accounts contain "sensitive or embarrassing materials of marginal relevance," plaintiff can seek a protective order (*Forman*, 30 NY3D at 665).

As for defendants' request for copies of all of plaintiff's passports held after the accident, we find that such demand was reasonable and relevant to plaintiff's claim that her injuries have restricted her from traveling long distances (*see* CPLR 3101; *see generally Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). Thus, plaintiff should be directed to comply with this

discovery demand.

We have considered the parties' remaining contentions and either find them unavailing or academic in light of our determination.

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

ENTERED: MAY 21, 2019

DEPUTY CLERK

Acosta, P.J., Richter, Manzanet-Daniels, Webber, Kern, JJ.

9368N Deya Aldalali,
Plaintiff,

-against-

Sungold Associates Limited Partnership, et al.,
Defendants.

- - - - -

Sungold Associates Limited Partnership,
Third-Party Plaintiff-Respondent,

-against-

HKSM G.C. Co. Inc.,
Third-Party Defendant-Appellant.

- - - - -

Sungold Associates Limited Partnership,
Second Third-Party Plaintiff,

-against-

Saba Live Poultry Corp, doing business as Saba (2) Live Poultry (Halal), et al.,
Second Third-Party Defendants.

- - - - -

Sungold Associates Limited Partnership,
Third Third-Party Plaintiff-Respondent,

-against-

Henry Kessler,
Third Third-Party Defendant-Appellant.

Index 25776/14E
43140/15E
43212/16E
43195/17E

_____

White & McSpedon, P.C., New York (Joseph W. Sands of counsel), for appellants.

Gallo Vitucci Klar LLP, New York (Kimberly A. Ricciardi of counsel), for respondent.

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Appeal from order, Supreme Court, Bronx County (Donna Mills, J.), entered August 28, 2018, which, inter alia, denied the motion of third-party defendant HKSM G.C. Co. Inc. (HKSM) and third third-party defendant Henry Kessler to renew and reargue a prior motion for partial summary judgment, unanimously dismissed, without costs, as taken from a nonappealable paper.

Although denominated a motion to renew and reargue, HKSM and Kessler's motion only sought reargument of their prior summary judgment motion, and no appeal lies from the denial of a motion to reargue (*see Northern Assur. Co. of Am. v Holden*, 179 AD2d 569 [1st Dept 1992]).

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

ENTERED: MAY 21, 2019

DEPUTY CLERK

Friedman, J.P., Gische, Oing, Singh, Moulton, JJ.

8070N In re Ana Rodriguez, Index 152230/18
Petitioner-Appellant,

-against-

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

Geoffrey Schotter, Brooklyn, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Shannon Colabrese of counsel), for respondents.

Order, Supreme Court, New York County (Alexander M. Tisch, J.), entered April 17, 2018, which denied petitioner's motion for leave to serve a late notice of claim upon respondent, unanimously reversed, on the law, the facts, and in the exercise of discretion, without costs, the motion granted, and the notice of claim deemed timely filed nunc pro tunc.

Petitioner, a medical technician for nonparty New York City Health and Hospitals Corporation (HHC) alleges that she was assaulted by an inmate in the custody of Department of Correction (DOC) while that inmate was being treated at Bellevue Hospital. Petitioner maintains that the inmate punched her in the chest and slapped her twice in the face after she approached him to advise him that he should get dressed for a family visit.

In support of her application, filed about seven months after the 90-day statutory period elapsed, petitioner submitted an affidavit averring that on the very same day of the alleged assault, she had two conversations with Captain Monday Obigumeda, a DOC employee. She explains that she spoke to Obigumeda twice that day, once before seeking medical attention and again after she returned from the Bellevue Hospital emergency room. Petitioner avers that he "took pictures of my face and asked me how I was hurt and asked me if I intended to sue the City of New York Department of Correction over the injuries I sustained from the assault that day. I described the assault." After she returned from the emergency room, petitioner explains that Obigumeda was "still there" and "he again asked me how I was hurt and asked me if I intended to sue . . . . I again described the assault to Captain Obigumeda and told him that I did indeed intend to pursue legal action." DOC did not submit any evidence to Supreme Court to dispute these factual allegations.

In considering whether to grant leave to file a late notice of claim, courts consider whether the public corporation "acquired actual knowledge of the essential facts constituting the claim within [90 days] or within a reasonable time thereafter," and "all other relevant facts and circumstances,"

including "whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits," the length of the delay, and whether there was a reasonable excuse for the delay (General Municipal Law § 50-e[5]).

Preliminarily, Supreme Court correctly found that petitioner failed to establish that respondent had actual knowledge of the essential facts constituting the claim based on the documentation that petitioner submitted to the Workers' Compensation Board. The documentation does not establish that respondent obtained timely actual notice of her claims, because it fails to set forth any facts that suggest her injuries were caused by respondent's negligence or that respondent received her workers' compensation claim. The fact that the City's Law Department acted as counsel for petitioner's employer HHC during a workers' compensation proceeding regarding the injuries that she allegedly sustained does not establish that respondent obtained timely notice of her negligence claims because respondent has no control over the HHC, which is a separate and distinct statutory entity (*see Skelton v City of New York*, 176 AD2d 664 [1st Dept 1991]).

However, Supreme Court erred in rejecting petitioner's argument that the investigation provided respondent with actual

notice, concluding only that her argument was "unavailing." Supreme Court presumably agreed with respondent's argument that it lacked notice because petitioner never specified that she had told Obigumeda the manner in which DOC was negligent (namely, by failing to ensure that a correction officer was present when she spoke with the inmate). We disagree.

To the extent that petitioner did not establish actual notice because she did not specify that her description of the assault included a recitation of who was in the room, "municipal authorities have an obligation to obtain the missing information if that can be done with a *modicum of effort*" (*Goodwin v New York City Hous. Auth.*, 42 AD3d 63, 69 [1st Dept 2007]). Here, negligence is the only theory of liability that could be implied by petitioner's conversations with Obigumeda and, in any event, he could have determined who was in the room during the course of his investigation with "a modicum of effort." To hold otherwise would turn the statute into a sword, contrary to its remedial purpose (*see Lomax v New York City Health & Hosps. Corp.*, 262 AD2d 2, 4 [1st Dept 1999]).

Supreme Court also erred in applying the incorrect legal standard when evaluating the issue of substantial prejudice. Supreme Court relied on *Matter of Kelley v New York City Health &*

Hosps. Corp. (76 AD3d 824, 829 [1st Dept 2010]) instead of *Matter of Newcomb v Middle Country Cent. Sch. Dist.* (28 NY3d 455 [2016]). Applying the *Newcomb* standard, as we must, compels a determination that respondent was not substantially prejudiced by the delay.

Under *Newcomb,* the burden initially rests on the petitioner to make a showing that the late notice will not substantially prejudice the respondent and that showing "need not be extensive" (28 NY3d at 466). Petitioner easily met her initial burden of providing "some evidence or plausible argument" regarding the lack of substantial prejudice by pointing to the investigation (*id.*). Thus, the burden shifted to respondent, which failed to rebut petitioner's showing with the particularized evidence required under *Newcomb* (*id.* at 467). Indeed, respondent never provided Supreme Court with any evidence to substantiate that it was prejudiced by the mere passage of time. Instead, respondent made "[g]eneric arguments and inferences" which cannot establish substantial prejudice "in the absence of facts in the record to support such a finding" (*id.* at 466).

While petitioner did not demonstrate a reasonable excuse for service of her late notice of claim, the lack of excuse is not fatal here (*see Matter of Dominguez v City Univ. of N.Y.*, 166

AD3d 540, 541 [1st Dept 2018]).

Finally, we bear in mind that the purpose of the statute is to give the municipality the opportunity to investigate the claim (see *Brown v City of New York*, 95 NY2d 389, 393 [2000]). Here, respondent actually investigated the claim on the very same day that it arose, thereby fulfilling the statute's purpose.

The Decision and Order of this Court entered herein on January 10, 2019 (168 AD3d 481 [1st Dept 2019]) is hereby recalled and vacated (*see* M-813, decided simultaneously herewith).

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

ENTERED: MAY 21, 2019

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Kahn, Gesmer, Oing, JJ.

9038 In re A. Trenkmann Estate, Inc., OP 177/19
[M-730] Petitioner,

-against-

Hon. Milton A. Tingling, Jr., etc., et al.,
Respondents.

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David A. Kaminsky & Associates, P.C., New York (Ron Kaplan of counsel), for petitioner.

John W. McConnell, New York (Shawn Kerby of counsel), for Hon. Milton A. Tingling, Jr., respondent.

Flaster & Willis, P.C., New York (Lori Willis of counsel), for Kenneth Swezey, respondent.

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Application pursuant to Judiciary Law § 509(a) seeking an order directing the Commissioner of Jurors, New York County, to disclose the home and mailing addresses and dates of jury service of a particular individual, denied, and the petition dismissed, without costs.

Respondent Kenneth Swezey applied for Loft Law protection under the Multiple Dwelling Law in a building owned by petitioner and located at 407 Broome Street, New York, New York. To benefit from the protections of the Multiple Dwelling Law, Swezey had to demonstrate that the premises sought to be covered were occupied for residential purposes as a residence or home during the period

commencing January 1, 2008 and ending December 31, 2009 (Multiple Dwelling Law § 281[5]). During the proceedings before the Office of Administrative Trials and Hearings (OATH), Swezey testified, on cross-examination by petitioner's counsel, that he resided at the premises from 2008 to 2009. He also testified that he served on two juries and that the jury summonses were mailed to the premises. Petitioner brought this original proceeding, pursuant to Judiciary Law § 509(a), seeking an order directing the Commissioner of Jurors for New York County to disclose Swezey's home and mailing addresses, as well as the dates of jury service listed in the records maintained by the Commissioner. Petitioner contends that the records maintained by the Commissioner are relevant to the OATH proceedings since Swezey testified to receiving the juror summonses at the premises for which he is seeking Loft Law protection. Petitioner also argues that Swezey's utilization of a Post Office box on his driver's license and vehicle registration casts doubt on Swezey's actual home address.

Judiciary Law § 509(a) requires that juror "questionnaires and records shall be considered confidential and shall not be disclosed except to the county jury board or as permitted by the appellate division." The purpose of the statute is to "provide a

cloak of confidentiality for the information which the [juror] questionnaires contain" and to shield all information from disclosure in order to protect a juror's privacy interest and/or safety (*Matter of Newsday, Inc. v Sise*, 71 NY2d 146, 152 [1987], *cert denied* 486 US 1056 [1988]). This blanket rule bars an individual from seeking any juror records unless the individual "present[s] some factual predicate which would make it reasonably likely that the records would provide relevant evidence" (*People v Guzman*, 60 NY2d 403, 415 [1983], *cert denied* 466 US 951 [1984]).

Here, petitioner failed to provide the necessary factual predicate to obtain these confidential records. Petitioner's sole reason for requesting Swezey's juror records is to impeach his testimony at the OATH Proceeding. However, disclosure for the purpose of impairing someone's credibility has been expressly rejected by the Court of Appeals in *People v Guzman*. In *Guzman*, the defendant moved to dismiss the indictment because he believed that Hispanics were purposely underrepresented in the Grand Jury pool. The defendant requested the jurors' fingerprint cards and questionnaires so that he could effectively cross-examine the Commissioner of Jurors. The Court of Appeals rejected this argument because when the defendant made the request, "he gave no

reason to believe that these records would turn up anything relevant other than to provide possible information with which to impeach the commissioner's credibility during the People's direct case" (*Guzman*, 60 NY2d at 415). Similarly, here, petitioner does not provide any evidence, nor does it point to any extraneous source, to suggest that Swezey did not live at the premises during 2008 and 2009.

Swezey also did not affirmatively introduce on his direct case the information about his jury service. Rather, it was petitioner, via his attorney, who asked Swezey if he was ever called to serve on a jury in New York State and if he remembered where he received the notice to appear for a jury. Swezey simply responded to the questions asked. Petitioner is seeking his juror records solely to unearth possible information to impair his credibility and merely speculates that the juror summons might indicate a different address. That was the exact situation that the Court of Appeals was confronted with in *Guzman* and we find no reason to depart from the holding in that case. Notwithstanding, petitioner's assertion that Swezey put his home address at issue is not a proper basis to grant disclosure because the fact "that some of the information sought may have been orally revealed during [Swezey's testimony], cannot alter

the effect of Judiciary Law § 509(a) in categorically prohibiting the public disclosure of any records containing information obtained from the juror questionnaires" (*Newsday*, 71 NY2d at 153). Moreover, Swezey's listing of a Post Office box as the address on his driver's license and vehicle registration does not alter the result. It is not inconsistent with his position in this litigation because it simply indicates his mailing address, not where he resides.

The dissent contends that the privacy and safety concerns present in *Newsday* are not present here because the information sought would not pose a threat to Swezey's safety and privacy. However, Swezey had an expectation of privacy at the time he completed the questionnaire and had a right to rely on the fact that any information he provided would remain confidential. It bears emphasizing that "the Legislature exempted *all* information contained in the questionnaires regardless of its nature and the possible effect on privacy or safety interests which disclosure might cause" (*Newsday*, 71 NY2d at 152). The dissent also argues that there is a strong likelihood that prospective jurors are required to disclose their actual home address when summoned for jury service and cites Judiciary Law § 510(1) in support. However, the Commissioner of Jurors for New York County, who is

in the best position to know the content of his office's records, stated in his affidavit that "jurors may utilize Post Office boxes as mailing addresses, or other addresses that are not a home address" on the questionnaires. Given the Commissioner's assertion, the dissent's argument is without merit.

The dissent's position would mean that civil litigants would open the door to frequent requests for jury records to use during cross-examination, or in any other manner, simply by asserting that the information they seek is relevant to some aspect of their case. Contrary to the dissent's argument, the situation here is not rare. Indeed, there are numerous cases where testimony about an individual's residence may be at issue. For example, a jury summons might be sought to challenge the credibility of a party's testimony that he or she did not live at the address where the process server alleges service was made, or in a case in which venue was contested. This would vitiate the legislature's intent in promulgating the statute, which is to

shield from disclosure all information maintained by the Commissioner of Jurors.

Accordingly, the application is denied and the petition dismissed.

All concur except Kahn, J. who dissents in a memorandum as follows:

KAHN, J. (dissenting)

Petitioner A. Trenkmann Estate, Inc. (Trenkmann) brings this original proceeding pursuant to Judiciary Law § 509(a) for disclosure of the records of respondent Commissioner of Jurors, New York County, as to the home and mailing addresses and dates of jury service of respondent Kenneth Swezey for purposes of an ongoing New York City Loft Board proceeding by the Office of Administrative Trials and Hearings (OATH proceedings) in which they are both involved. Based on the particular facts before us, I believe that the limited information sought should be disclosed to petitioner. Accordingly, I respectfully dissent.

The purpose of Judiciary Law § 509(a) is to "provide a cloak of confidentiality" for personal information about jurors and prospective jurors, including such "private details" as jurors' "spouses' names, the names and ages of their children, their home telephone numbers, occupations, educational backgrounds, and criminal records, if any — which the statute is designed to protect from public disclosure" (*Matter of Newsday, Inc. v Sise*, 71 NY2d 146, 152 [1987], *cert denied* 486 US 1056 [1988]).

Application of Judiciary Law § 509(a) and the case law thereunder mandates denial of applications for disclosure where the privacy and security interests of prospective jurors are of

paramount concern, or where a need for disclosure of the confidential juror information based upon a reasonable likelihood of its relevance has not been shown. For example, in *Newsday*, the Court of Appeals affirmed the denial of disclosure to a newspaper of the names and home addresses of the jurors in a highly publicized murder trial, concluding that, in that case, the privacy and safety interests of the jurors outweighed the need for disclosure (*see Newsday*, 71 NY2d at 152). Similarly, in *People v Guzman* (60 NY2d 403 [1983], *cert denied* 466 US 951 [1984]), the Court of Appeals denied disclosure of jurors' fingerprint cards and qualification questionnaires, reasoning that the request for disclosure was based not upon any "factual predicate which would make it reasonably likely that the records would provide relevant evidence," but only upon mere conjecture. The Court of Appeals there found that the need for confidentiality outweighed the need for disclosure (*Guzman*, 60 NY2d at 415, citing *People v Gissendanner*, 48 NY2d 543, 550 [1979]).

Section 509(a), however, also authorizes this Court to permit disclosure of such confidential juror information, provided that, as the Court of Appeals has stated, "a proper showing" of need for such disclosure is made (*Newsday*, 71 NY2d at

152). An application for disclosure of juror information may be granted where the movant sufficiently establishes a factual predicate making it reasonably likely that the records sought would provide relevant evidence (*see People v Janota*, 547 NYS2d 610 [3d Dept 1989]). Thus, in enacting section 509(a), the legislature empowered this Court to permit disclosure of jury selection records under appropriate circumstances while endeavoring to prevent unwarranted, open-ended searches to root through confidential personal information.

In this case, Swezey is the petitioner in underlying OATH proceedings in which he seeks Loft Law coverage for the premises he claims was his residence in 2008 and 2009. In order for the premises to be qualified for such coverage as an "interim multiple dwelling," he is required to establish that he and at least two other residential tenants independently resided in the premises during the 2008-2009 window period set forth in Multiple Dwelling Law § 281(5). In the OATH proceedings, Swezey has testified to all of the information sought by Trenkmann, including his name, his home address in 2008 and 2009, and his jury service after 2008. Furthermore, Swezey testified that he received jury notices at 407 Broome Street, which was his home address as well as his mailing address. As the location of

Swezey's residence in 2008 and 2009 is key to his claim that the premises in question qualify for Loft Law coverage, the disclosure of the information derived from his juror questionnaires and maintained by the Office of the Commissioner of Jurors, including his address and the dates of his jury service, would certainly be relevant to that issue. Therefore, in this case, Swezey's testimony sufficiently establishes that there is a factual predicate making it reasonably likely that disclosure of the information sought by Trenkmann would provide relevant evidence.

In the particular circumstances presented here, moreover, the privacy and safety concerns in *Newsday* are not present, as the information sought here would pose no threat to the safety or privacy concerns of Swezey or any other juror.

Although the majority correctly relies upon *Newsday* in stating that by enacting Judiciary Law § 509(a), the legislature protected the confidentiality of all jury questionnaire information, including information that would not affect jurors' privacy or safety concerns if disclosed (*see Newsday*, 71 NY2d at 152), the majority ignores that neither Judiciary Law § 509(a) nor *Newsday* imposes an absolute prohibition of disclosure of information derived from jury questionnaires. As the *Newsday*

Court explained, "The Legislature has permitted an application for a court order, upon a proper showing, that particular information contained in the questionnaires should be made public," adding that "jurors' privacy and safety interests is a factor that the court must balance" (*id.*). Here, where no privacy or safety concerns are present, Trenkmann has made a "proper showing" that disclosure of the particular limited information sought from Swezey's juror questionnaires is warranted.

Furthermore, in contrast to *Guzman*, no balancing of the need for confidentiality against the need for disclosure under *Gissendanner* is required, because Swezey has already waived confidentiality and disclosed in his testimony the information sought by Trenkmann. Moreover, even if *Gissendanner* balancing were required, the circumstances of this case would certainly favor disclosure, as there are no confidentiality concerns present here.

The majority relies on a representation made in this case by the Commissioner of Jurors of New York County, who takes no position on Trenkmann's petition, that the information in the Commissioner's database may only reflect Swezey's mailing address or a post office box mailing address, and not necessarily his

residential address. Although the precise information elicited by the questionnaire has not been provided to this Court, there is a strong likelihood that prospective jurors are required to disclose, when summoned for jury service, their actual residence address (see Judiciary Law § 510[1] ["In order to qualify as a juror a person must [be] . . . a resident of the county"; Rules of the Chief Administrator of the Courts [22 NYCRR] § 128.4 [defining "resident of a county or municipality" as "a person who maintains a fixed permanent and principal home within that county or municipality to which such person, wherever temporarily located, always intends to return"]), to assure their qualification for service in the county in which they are summoned. The slight possibility that the information sought by Trenkmann may not be dispositive of the OATH proceedings does not compel denial of the petition, as Swezey has testified that both his mailing and residence address were at the subject premises.

Relying on *Guzman*, the majority concludes that disclosure of Swezey's juror questionnaire information is barred because Trenkmann seeks it for the sole purpose of mere general impeachment of Swezey's credibility. In drawing that conclusion, the majority fails to consider the entirety of the standard governing disclosure of confidential records set forth in *People*

v Gissendanner (48 NY2d 543 [1979], *supra*), but instead seizes upon only one aspect of that standard as applied in *Guzman*. Under the *Gissendanner* standard, in order for a party to be entitled to disclosure of confidential records, that party must make a preliminary showing that the evidence sought "if known to the trier of fact, could very well affect the outcome of the [proceeding]" (*Gissendanner*, 48 NY2d at 548). Put otherwise, the evidence sought should "bear peculiar relevance to the circumstances of the . . . case" (*id.* at 549). Furthermore, in order to make the requisite preliminary showing, the party seeking disclosure need not "make a . . . showing that the record actually contains [relevant] information" (*id.* at 550). Rather, that party must "put[] forth in good faith . . . some factual predicate which would make it reasonably likely" that the records sought contain such information (*id.*).

On the other hand, under the *Gissendanner* standard, "requests to examine records . . . motivated by nothing more than impeachment of [a witness'] general credibility" are treated as within the category of "extrinsic proof of matters collateral to the issues" at hand (*Gissendanner*, 48 NY2d at 548). Thus, confidential records must not be sought merely for the purpose of "general credibility impeachment" (*id.* at 550).

Here, the majority disregards the aspect of the *Gissendanner* standard pertaining to disclosure of evidence relevant to issues that could affect the outcome of the proceeding and considers only the "general credibility impeachment" aspect of the *Gissendanner* standard. The "general credibility impeachment" aspect of *Gissendanner* does not apply here, however, in that Trenkmann does not seek the juror questionnaire information at issue merely for impeachment purposes. Rather, Trenkmann's primary reason for seeking that information is that it could have peculiar relevance to the central issue in the OATH proceedings, namely, where Swezey resided during the 2008-2009 window period, and could very well affect the outcome of those proceedings. Moreover, for the reasons already discussed, Judiciary Law § 510(1) and 22 NYCRR 128.4 set forth a factual predicate making it reasonably likely that the juror questionnaire information sought by Trenkmann would reflect Swezey's actual residence address.

By contrast, in *Guzman*, the Court upheld the denial of the defendant's application for disclosure, as the defendant presented no factual predicate of reasonable likelihood, but only his mere conjecture, that the grand jury pool member fingerprint cards and questionnaire information he sought would contain information relevant to the central issue in that case, namely,

whether the defendant's equal protection rights (US Const Amend XIV) were violated by an intentionally discriminatory systematic exclusion of Hispanics from the grand jury pool (*see Guzman*, 60 NY2d at 415).

Therefore, I would find that Trenkmann has made the requisite preliminary showing that it is entitled to disclosure of Swezey's juror questionnaire information.

The majority's concern that granting the instant petition would open the floodgates to frequent requests for jury records to be used during cross-examination is misplaced. The rare circumstances presented here, involving disclosure of evidence pertaining to the central issue of where Swezey resided during the 2008-2009 window period set forth in Multiple Dwelling Law § 281(5) and his right under the Loft Law to continued residence based on such evidence, is not likely to recur outside of situations such as the one presented here.

Accordingly, based upon the particular circumstances

presented in this case, I would grant the petition and would direct the Office of the Commissioner of Jurors to disclose to Trenkmann any information maintained in its records regarding respondent Swezey's home and mailing addresses and dates of jury service during 2008 and 2009.

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

ENTERED: MAY 21, 2019

DEPUTY CLERK

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

9259 Bradley C. Birkenfeld, Index 154000/17
Plaintiff-Appellant,

-against-

UBS AG, et al.,
Defendants-Respondents.

_____

Fick & Marx, Boston, MA (Nancy Gertner of the bar of the Commonwealth of Massachusetts, admitted pro hac vice, of counsel), for appellant.

Cahill Gordon & Reindel LLP, New York (Charles A. Gilman of counsel), for respondents.

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Order, Supreme Court, New York County (Sherry Klein Heitler, J.), entered January 12, 2018, which granted defendants' motion to dismiss the complaint, unanimously affirmed.

Plaintiff pled guilty in the U.S. District Court for the Southern District of Florida to one count of conspiracy to defraud United States authorities. As part of his plea agreement, plaintiff admitted to illegal conduct, including, inter alia, that he "prepared false and misleading IRS Forms" and assisted "wealthy U.S. clients in concealing their ownership of the assets held offshore." These admitted facts support the conclusion that defendants' quoted statements, published subsequently in the New York Post and Bloomberg BNA, that

plaintiff was "convicted in the US for, among other things, having lied to the US authorities," were, at a minimum, substantially true, if not absolutely true. Since truth is a complete defense to a defamation claim, dismissal of the complaint was warranted (*Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]; *see Stepanov v Dow Jones & Co.*, 120 AD3d 28, 34 [1st Dept 2014]).

We reject plaintiff's argument that the statements were defamatory by implication (*Stepanov*, 120 AD3d at 37-38). Both articles in which the statements were published addressed plaintiff's conviction in detail and made clear that plaintiff was convicted for his conduct in the tax fraud scheme, not that he lied to the government during his conduct as a whistleblower (*see Stepanov*, 120 AD3d at 38).

Having determined that the statements were substantially true, we do not reach the issue of whether they are also

protected by the statutory privilege of Civil Rights Law § 74.

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

ENTERED: MAY 21, 2019

DEPUTY CLERK

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

9369 The People of the State of New York, Ind. 4025/13
Respondent,

-against-

Hector Cuevas,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Allison N. Kahl of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes of counsel), for respondent.

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Judgment, Supreme Court, New York County (Arlene D. Goldberg, J. at suppression hearing; Juan M. Merchan, J. at jury trial and sentencing), rendered June 2, 2016, convicting defendant of burglary in the first degree and robbery in the first and second degrees, and sentencing him to an aggregate term of 12 years, unanimously affirmed.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. Defendant made a reliable confession that was circumstantially corroborated by other evidence, including DNA evidence on a cap found at the crime scene and a videotape.

The hearing court properly denied the motion to suppress defendant's statements as involuntarily made. The detective who interviewed defendant testified about defendant's waiver of his *Miranda* rights and the absence of coercive circumstances at the time of the interview. The People were not required to produce officers who interacted with defendant before the detective elicited the confession, because defendant presented no "bona fide factual predicate" to demonstrate that the uncalled officers possessed material evidence on the question of voluntariness (*People v Witherspoon*, 66 NY2d 973, 974 [1985]). The issues that defendant raises about the detective's testimony fall short of constituting the necessary factual predicate.

Defendant failed to preserve his challenges to the scientific validity and probative value of the DNA evidence, 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. The existing record does not establish that defense counsel rendered

ineffective assistance by failing to preserve these issues (*see People v Speaks*, 28 NY3d 990, 992 [2016]; *see also Strickland v Washington*, 466 US 668 [1984]).

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 21, 2019

DEPUTY CLERK

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

9370 Hereford Insurance Company, Index 152680/16
Plaintiff-Appellant,

-against-

Forest Hills Medical, P.C., et al.,
Defendants,

Art of Healing Medicine, P.C., et al.,
Defendants-Respondents.

_____

Goldberg, Miller & Rubin, P.C., New York (Harlan R. Schreiber of counsel), for appellant.

The Rybak Firm, PLLC, Brooklyn (Maksim Leyvi of counsel), for respondents.

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Order, Supreme Court, New York County (Shlomo Hagler, J.), entered June 13, 2018, which granted the motion of defendants VP Chiropractic Adjustment, P.C., Acuneed, LLC, and Art of Healing Medicine, P.C. (collectively, movant defendants) to vacate the default judgment entered against them August 9, 2016, unanimously reversed, on the law and the facts, without costs, and the motion to vacate denied.

Although movant defendants' motion to vacate was timely (CPLR 2103[b][2]), "(a) defendant seeking to vacate a default under [CPLR 5015(a)(1)] must demonstrate a reasonable excuse for its delay in appearing and answering the complaint and a

meritorious defense to the action" (*Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]). Here, movant defendants' excuse of law office failure for failing to timely answer because the proposed answer was inadvertently filed with another action was unsubstantiated and insufficient (*see Fernandez v Santos*, 161 AD3d 473 [1st Dept 2018]; *Galaxy Gen. Contr. Corp. v 2201 7th Ave. Realty LLC*, 95 AD3d 789 [1st Dept 2012]).

Moreover, movant defendants failed to demonstrate a meritorious defense. The failure by the occupants of the vehicle to subscribe and return the transcripts of their examinations under oath violated a condition precedent to coverage and warranted denial of the claims (*see Hertz Vehs., LLC v Gejo, LLC*, 161 AD3d 549 [1st Dept 2018]).

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

ENTERED: MAY 21, 2019

DEPUTY CLERK

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

9371 In re Jeremy B., and Others,

Children Under the Age of Eighteen Years, etc.,

Jeffrey B.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent,

Melissa N.,
Respondent.

_____

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

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

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

_____

Order of disposition, Family Court, Bronx County (Valerie A. Pels, J.), entered on or about June 27, 2018, to the extent it ordered respondent to complete certain programs and comply with certain directives, unanimously affirmed, without costs, and the appeal therefrom otherwise dismissed, without costs, as moot.

As the order of fact-finding upon which the order of disposition is based has been affirmed by this Court (*Matter of Jeremy B. [Jeffrey B.]*, 168 AD3d 494 [1st Dept 2019]),

respondent's present challenge to the fact-findings is moot.

Respondent's sole contention as to the disposition, that he was entitled to a suspended judgment, is unpreserved (*see Matter of Omar Saheem Ali J. [Matthew J.]*, 80 AD3d 463 [1st Dept 2011]), and we decline to review it in the interest of justice.

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

ENTERED: MAY 21, 2019

DEPUTY CLERK

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

9272-
9373 &
M-1941 Index 153592/18

Denise Trojan,
Plaintiff-Appellant,

-against-

Cipolla & Company, LLC, et al.,
Defendants-Respondents.

_____

Larsen Advocates, Brooklyn (Kristian K. Larsen of counsel), for appellant.

Kaiser Saurborn & Mair, P.C., New York (David N. Mair of counsel), for Cipolla & Company, LLC and Joseph P. Cipolla, Jr., respondents.

Schnader Harrison Segal & Lewis LLP, New York (Theodore L. Hecht of counsel), for American Arbitration Association and Daniel Kolb, respondents.

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Orders, Supreme Court, New York County (Gerald Lebovits, J.), entered October 4, 2018, which, to the extent appealed from as limited by the briefs, granted defendants' motions to dismiss the complaint and to compel arbitration, unanimously affirmed, with costs.

In a prior action, Supreme Court determined that the plaintiff had entered into a binding and enforceable agreement to first mediate, then arbitrate, all disputes concerning the forensic valuation services rendered to her by defendants Cipolla

& Company, LLC and Joseph P. Cipolla, Jr. in connection with her divorce proceeding. Supreme Court also determined that defendants American Arbitration Association and arbitrator Daniel Kolb are immune from liability for acts performed in their arbitral capacity. Plaintiff attempts to relitigate these issues in this action, but is precluded from doing so under the doctrine of collateral estoppel (*see Conason v Megan Holding, LLC*, 25 NY3d 1, 17 [2015]; *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349-350 [1999]).

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

M-1941 - *Denise Trojan v Cipolla & Co., LLC*

Motion to take judicial notice of a Supreme Court order staying arbitration in a related proceeding and to declare said stay to be in full force and effect, denied.

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

ENTERED: MAY 21, 2019

DEPUTY CLERK

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

9374 Virupaksha Raparthi, et al., Index 654875/16
Plaintiffs-Appellants,

-against-

Michael Joseph Clarke,
Defendant-Respondent.

_____

O'Brien, LLP, New York (A.J. Monaco of counsel), for appellants.

Reisman Rubeo & Altman, LLP, Hawthorne (Mark I. Reisman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered November 2, 2018, which, insofar as appealed from as limited by the briefs, denied plaintiffs' motion to dismiss defendant's counterclaim for defamation, unanimously reversed, on the law, without costs, and the motion granted.

The statements on which the defamation counterclaim is based were made in a uniform termination notice for the securities industry (Form U-5), and are therefore protected by an absolute privilege (*Rosenberg v Metlife, Inc.*, 8 NY3d 359 [2007]). Defendant's allegation that plaintiff Raparthi, in completing the compulsory form on behalf of his firm and explaining the reasons for defendant's termination, acted outside the scope of his official capacity or authority or exploited his official position

in furtherance of a private pursuit unrelated to the business is conclusory and in any event would not provide a basis for sustaining the counterclaim (*see Stega v New York Downtown Hosp.*, 31 NY3d 661, 669 [2018] [absolute privilege "entirely immunizes an individual from liability in a defamation action, regardless of the declarant's motives"]).

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

ENTERED: MAY 21, 2019

DEPUTY CLERK

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

9375 The People of the State of New York, Ind. 965/16
Respondent,

-against-

Florence Walker,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sabrina Margret Bierer 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 (Laura A. Ward, J. at plea; Juan Merchan, J. at sentencing), rendered October 10, 2017,

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

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

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

ENTERED: MAY 21, 2019

DEPUTY CLERK

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

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

9376-
9377 Index 652750/17

Berkshire Hathaway Specialty Insurance Company, et al.,
Plaintiffs-Respondents,

-against-

H.I.G. Capital, LLC
Defendant-Appellant.

_____

Hunton Andrews Kurth LLP, New York (Michael S. Levine of counsel), for appellant.

Wiley Rein LLP, Washington, DC (Gary P. Seligman of the bar of the District of Columbia, admitted pro hac vice, of counsel), for Berkshire Hathaway Speciality Insurance Company, respondent.

Ropers, Majeski, Kohn & Bentley, P.C., New York (Andrew L. Margulis of counsel), for Zurich American Insurance Company, respondent.

Kennedys CMK, New York (Thomas R. Orofino of counsel), for Executive Risk Indemnity Inc., respondent.

Stroock & Stroock & Lavan LLP, New York (Laura Besvinick of the bar of the State of Florida, admitted pro hac vice, of counsel), for Starr Indemnity & Liability Company, respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered April 12, 2018, which, to the extent appealed from as limited by the briefs, granted plaintiffs' motion for summary judgment declaring, in connection with certain insurance policies issued in 2016, that the Warning Notices constitute a single Claim first made before the 2016 Policies' inception, and the

2016 Policies therefore do not apply to, and afford no coverage for, the 2016 Warning Notice, including any duty to advance Defense Costs, and that the Prior Notice Exclusion bars coverage for all Loss incurred in connection with the 2016 Warning Notice, including any duty to advance Defense Costs, and so declared, unanimously affirmed, with costs. Order, same court and Justice, entered September 18, 2018, which, upon reargument, adhered to the original determination, and determined that New York law applies to the remaining claim in this action, unanimously modified, on the law, to determine that Florida law, rather than New York law, applies to the remaining claim in this action, and otherwise affirmed, without costs.

This insurance dispute arises out of two separate "warning notices" issued by the United Kingdom Pensions Regulator (UK Regulator), in 2014 and 2016, respectively, to entities affiliated with defendant that are insured by various Professional Asset Management Liability policies issued by plaintiffs in 2016 (the 2016 Policy).

The unambiguous language of the Related Claims provision and the Prior Notice Exclusion establishes, as a matter of law, that there is no possible factual or legal basis on which plaintiffs may eventually be held liable under the 2016 Policy (*see First*

State Ins. Co. v J & S United Amusement Corp., 67 NY2d 1044, 1046 [1986]). It is undisputed that both warning notices allege wrongful conduct stemming from the insureds' 2011 purchase of a UK entity. The 2014 notice asserts that the purchase was undervalued; the 2016 notice asserts that the purchase, as a whole, was improper. In light of this connection, under the Related Claims provision of the 2016 Policy, the notices are deemed to be a "single Claim" made on "the earliest date on which any such Claim was first made," which preceded the inception of the 2016 Policy.

Coverage is also barred by the Prior Notice Exclusion, which provides, in pertinent part:

> "The Insurer shall not be liable to make any payment for Loss in connection with any Claim made against any Insured . . . based upon or arising out of any Wrongful Act, fact, circumstance or situation which has been the subject of any written notice given before the inception of the Policy Period under any policy, provided the insurer of such policy does not reject such notice as invalid" (boldface deleted).

Defendant does not dispute that it gave notice of the 2014 UK warning notice to its insurers when it received the warning notice (and before the inception of the 2016 Policy) and that those claims were paid out. Contrary to defendant's argument, it

does not matter which notice the UK Regulator will seek to pursue, because that will not alter the fact that the 2016 notice is based on, and arises out of, the aforementioned purchase of the UK entity, and thus coverage is barred under the Prior Notice Exclusion.

We reject defendant's argument that the motion court erred in granting summary judgment in favor of plaintiffs without reviewing the actual warning notices. The parties agreed on the content of the notices, and the record was sufficient to permit the court to decide the motion (*see Keech v 30 E. 85th St. Co., LLC*, 154 AD3d 504 [1st Dept 2017]).

The court erred, however, in concluding that New York law applies to the remaining claim in this action. The policy in question contemplated potential global risk. In such an instance, "the state of the insured's domicile should be regarded as a proxy for the principal location of the insured risk," "which under . . . Restatement [of Conflicts of Law] § 193, is the controlling factor in determining the law applicable to a liability insurance policy" (*Certain Underwriters at Lloyd's, London v Foster Wheeler Corp.*, 36 AD3d 17, 24, 27 [1st Dept 2006] *affd* 9 NY3d 928 [2007]). The law of the state of defendant's principal place of business (Florida) must apply to any remaining

claims in this action.

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: MAY 21, 2019

DEPUTY CLERK

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

9378 The People of the State of New York, Respondent, Ind. 4907/07 5375/16

-against-

Moustapha Walker, Defendant-Appellant.

_____

Seon J. Lee Law Firm, New York (Seon J. 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 (Michael J. Obus, J.), rendered January 11, 2018, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of 3½ years, unanimously affirmed.

Defendant failed to meet his burden of establishing that his prior conviction was unconstitutionally obtained (*see* CPL 400.21[7][b]). Defendant's ineffective assistance of counsel claim based on his prior counsel's failure to request youthful offender treatment is unavailing, because the court expressly found that defendant should not receive such treatment, and defendant received a relatively lenient eight-year prison

sentence on his plea of guilty to first-degree robbery, in satisfaction of an indictment charging second-degree murder among other things (*see People v Reyes*, 213 AD2d 253 [1st Dept 1995], *lv denied* 85 NY2d 979 [1995]; *People v Vega*, 158 AD2d 258, 259 [1st Dept 1990], *lv denied* 75 NY2d 925 [1990]). The record demonstrates that any advocacy by counsel for YO treatment would have had little or no chance of success.

We have considered and rejected defendant's alternative argument that his prior plea was not knowing, intelligent, and voluntary in light of his cognitive limitations. There is no indication in the record of the plea colloquy "that defendant was uninformed, confused or incompetent" (*People v Alexander*, 97 NY2d 482, 486 [2002]).

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

ENTERED: MAY 21, 2019

DEPUTY CLERK

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

9380 Federal National Mortgage Association, Index 159921/14
Plaintiff-Appellant,

-against-

Cohn David also known as David Cohn,
Defendant-Respondent,

Alberto Morales, et al.,
Defendants.

_____

Sandelands Eyet LLP, New York (Len M. Garza of counsel), for appellant.

Anderson, Bowman & Zalewski, PLLC, Kew Gardens (Mark Anderson of counsel), for respondents.

_____

Order, Supreme Court, New York County (Judith M. McMahon, J.), entered on or about December 1, 2017, which, to the extent appealed from as limited by the briefs, dismissed the complaint, unanimously affirmed, with costs.

Plaintiff never objected to or preserved for appeal that portion of defendants' order to show cause seeking consolidation of the 2009 and 2014 foreclosure actions, and even requested such relief itself. Upon consideration of this issue, the dismissal of the 2014 foreclosure action was permissible since the 2009 foreclosure action had been withdrawn by stipulation, the actions had common questions of law and fact, and plaintiff did not

demonstrate a clear abuse of discretion or prejudice to a substantial right (*see Geneva Temps, Inc. v New World Communities, Inc.*, 24 AD3d 332, 334 [1st Dept 2005]). Contrary to plaintiff's contention, it was not improper for the Justice presiding over the 2009 foreclosure action to dismiss both actions, as there was no prior ruling that was a consideration in this case (*Gee Tai Chong Realty Corp. v GA Ins. Co. of N.Y.*, 283 AD2d 295, 296 [1st Dept 2001]; *cf. Rhymer v New York City Tr. Auth.*, 2 AD3d 350 [1st Dept 2003]; *Matter of Kamara v East Riv. Landing*, 132 AD3d 510 [1st Dept 2015]).

The affidavits of plaintiff's process server describing the person who accepted service of the summons, complaint, and notice of pendency constituted prima facie evidence of proper service (*see NYCTL 2012-A Trust v Colbert*, 146 AD3d 482, 483 [1st Dept 2017]). Defendants' sworn affidavits, attesting that they did not reside at the premises purportedly served at the time of service, and that they did not receive notice of publication, were sufficient to rebut the presumption of proper service (*Johnson v Deas*, 32 AD3d 253, 254 [1st Dept 2006]). Thus, a traverse hearing was required (*see NYCTL 1998-1 Trust & Bank of N.Y. v Rabinowitz*, 7 AD3d 459, 460 [1st Dept 2004]). Plaintiff

failed to produce the process server, the process server's log book, or other opposing evidence at the hearing. Thus its burden to prove that process was effectuated was not met (*see Woods v M.B.D. Community Hous. Corp.*, 90 AD3d 430, 430 [1st Dept 2011]).

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

ENTERED: MAY 21, 2019

DEPUTY CLERK

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

9381 Gowkarran Jagatpal, Index 161749/15
Plaintiff-Appellant,

-against-

Michelle Chamble, etc.,
et al.,
Defendants-Respondents,

Jodel Leneus, et al.,
Defendant.

_____

Roth & Roth, LLP, New York (Elliot Shields of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (W. Franc Perry, J.), entered on December 19, 2017, which, to the extent appealed from as limited by the briefs, granted the motion of defendants Michelle Chamble, Angela Brown, and the City of New York (the municipal defendants) for summary judgment, unanimously affirmed, without costs.

The municipal defendants cannot be held liable for plaintiff's injuries, even if the traffic officers were negligent, because the officers were involved in the discretionary governmental function of traffic control (*see Balsam v Delma Eng'g Corp.*, 90 NY2d 966, 968 [1997]; *Devivo v*

Adeyemo, 70 AD3d 587 [1st Dept 2010]) and plaintiff failed to plead or show that there was a special relationship owed to him (*see Valdez v City of New York*, 18 NY3d 69, 77 [2011]).

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 21, 2019

DEPUTY CLERK

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

9382 The People of the State of New York, Ind. 1270N/16N
Respondent,

-against-

Kirk Fisher,
Defendant-Appellant.

_____

Janet E. Sabel, 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 a judgment of the Supreme Court, New York County (Michael Sonberg, J.), rendered October 5, 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 21, 2019

DEPUTY CLERK

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

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

9383N Freeman Lewis LLP, Index 651458/17
Plaintiff-Respondent,

-against-

Financiera De Desarrollo Industrial y Commercial S.A., et al.,
Defendants-Appellants,

Estate of Jose Enrique Heredia, et al.,
Defendants.

_____

Menz Bonner Komar & Koenigsberg LLP, White Plains (Patrick D. Bonner, Jr. of counsel), for Financiera De Desarrollo Industrial y Comercial S.A., Trecedieciocho S.A., Amherst Inc. and Edith Sara Heredia and Garcia De Daneri, appellants.

Feuerstein Kulick LLP, New York (Daniel J. Brown of counsel), for Liliana Heredia Del Solar, appellant.

Foreht Associates LLP, New York (Stephen R. Foreht of counsel), for respondent.

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered January 29, 2018, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for an attachment, unanimously reversed, on the law, with costs, and the attachment vacated.

The IAS court erred in finding that plaintiff was likely to prevail on its claim for fees under the retainer agreement. Whether some or all of plaintiff's fee should be forfeited due to

ethical violations is to be determined on a full record. At this stage of the litigation, the allegations and arguments that plaintiff violated the Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.7(a) by suing Fideicosa for fees while still representing it in the federal action preclude a finding that plaintiff is likely to succeed on the merits. Further, the clause in the retainer agreement that gave plaintiff a veto over any settlement may be found to have violated rule 1.2(a) (*see Matter of Snyder*, 190 NY 66, 75 [1907]), which also calls into question plaintiff's likelihood of success on the merits.

The IAS court also should not have found that plaintiff was likely to prevail on its veil piercing theory (*see Shisgal v Brown*, 21 AD3d 845, 848 [1st Dept 2005]). Defendants generally observed corporate formalities. Moreover, defendants did not use the corporate form to perpetrate a fraud or wrong upon plaintiff. Rather, defendants merely attempted to negotiate a settlement of the (seventeen year old) case without counsel. At most, this constituted a breach of the corporation's contract (*see Time Equities, Inc. v Naeringsbygg 1 Norge III AS*, 50 Misc 3d 1221[A], *5-6 [Sup Ct, NY County 2016]).

The IAS court was correct that the case was not subject to arbitration under Part 137 of the Rules of the Chief

Administrator of the Courts. While the parties' broad arbitration clause constituted consent to arbitrate disputes over $50,000 (*see* [22 NYCRR] § 137.1[b][2]), the case could not be arbitrated because it involves alleged attorney misconduct (*see* [22 NYCRR] § 137.1[b][3]; *Cohen v Hack*, 118 AD3d 460 [1st Dept 2014]).

Finally, plaintiff has obtained adequate security for well over half of the claimed $2 million fee by way of a stipulation with the defendant-payor in the underlying federal action. Pursuant to the stipulation, the defendant payor has agreed to honor plaintiff's charging lien upon judgment or settlement. As such, the attachment should not have issued (*see Laco X-Ray Sys. v Fingerhut*, 88 AD2d 425, 430 [2d Dept 1982]).

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

ENTERED: MAY 21, 2019

DEPUTY CLERK

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

9384N Roberto Burbano, Index 304877/13
Plaintiff-Respondent,

-against-

New York City, etc., et al.,
Defendants-Appellants.

_____

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

Peterson Delle Cave LLP, New York (Malcolm Anderson of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about April 11, 2018, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion to amend the complaint to substitute a named party in place of defendant Correction Officer Jane Doe, unanimously reversed, on the law, without costs, and the motion denied.

In this action alleging a claim of deliberate indifference under the Eighth Amendment and 42 USC § 1983, plaintiff did not serve the Jane Doe correction officer defendant before the statute of limitations ran. Although the claims against the intended defendant arise out of the same transaction as the claims alleged in the complaint, plaintiff cannot rely on the relation-back doctrine. The correction officer and defendant

City are not "united in interest" because "the City cannot be held vicariously liable for its employees' violations of 42 USC § 1983" (*Higgins v City of New York*, 144 AD3d 511, 513 [1st Dept 2016]). Nor can plaintiff's more than two-year delay in seeking to add the new defendant as a party after learning her identity be characterized as a mistake for relation-back purposes (*see Goldberg v Boatmax://, Inc.*, 41 AD3d 255, 256 [1st Dept 2007]; *see also Diaz v City of New York*, 160 AD3d 457 [1st Dept 2018]).

Plaintiff's reliance on CPLR 1024 is unavailing, as he does not demonstrate diligence in seeking to identify the unknown correction officer prior to the expiration of the statute of limitations (*see Goldberg* at 256; *Tucker v Lorieo*, 291 AD2d 261, 261-262 [1st Dept 2002]; *Holmes v City of New York*, 132 AD3d 952, 954 [2d Dept 2015]).

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

ENTERED: MAY 21, 2019

DEPUTY CLERK

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

9385 & M-1889 — In re The People of the State of New York, ex rel. Abigail Swenstein, etc.,
Petitioner-Appellant,

-against-

Cynthia Brann, etc.,
Respondent-Respondent.

Index 450260/19
Ind. 2196/18

_____

Janet E. Sabel, The Legal Aid Society, New York (Abigail Swenstein of counsel), for petitioner.

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

_____

Judgment (denominated an order), Supreme Court, New York County (Michael Obus, J.), entered on or about March 15, 2019, denying the petition for a writ of habeas corpus and dismissing the proceeding, unanimously affirmed, without costs.

We find that the writ of habeas corpus was properly denied (*see* CPLR 7010).

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

ENTERED: MAY 21, 2019

DEPUTY CLERK