SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 23, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Renwick, J.P., Richter, Tom, Gesmer, Oing, JJ.

5589 The People of the State of New York, Respondent, Ind. 3846/14

-against-

Thomas Holmes,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered March 16, 2016, as amended October 24, 2018, convicting defendant, upon his plea of guilty, of two counts of burglary in the second degree, and sentencing him to concurrent terms of 3½ years, with five years' postrelease supervision, unanimously affirmed.

We held this appeal in abeyance and remanded for reconsideration of the length of defendant's term of postrelease supervision (164 AD3d 1118 [2018]). On remand, the court reimposed the original term of PRS. The record does not establish that the court employed any improper criteria in making

this discretionary determination, and we perceive no basis for reducing the sentence.

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

ENTERED: MAY 23, 2019

CLERK

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

9018 Freddie Evans, Index 301983/13
Plaintiff-Respondent, 83873/14

-against-

Robert Norecaj,
Defendant,

Mark Gjurashaj,
Defendant-Respondent,

Dolphin Restaurant Bar Lounge, et al.,
Defendants-Appellants.

- - - - -

Dolphin Restaurant Bar Lounge, et al.,
Third-Party Plaintiffs-Appellants,

-against-

APV Valet Parking Corp.,
Third-Party Defendant-Respondent,

Robert Norecaj,
Defendant.

_____

Burke, Conway & Dillon, White Plains (Jayne F. Monahan of counsel), for appellants.

The Altman Law Firm, PLLC, Woodmere (Michael T. Altman of counsel), for Freddie Evans, respondent.

Mead, Hecht, Conklin & Gallagher, LLP, White Plains (Sara Luca Salvi of counsel), for Mark Gjurashaj, respondent.

Lester Schwab Katz & Dwyer, LLP, New York (Paul M. Tarr of counsel), for APV Valet Parking Corp., respondent.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about March 29, 2018, which, to the extent

appealed from, denied the motion of defendants Dolphin Restaurant Bar Lounge and WSH Group 1 LLC (collectively Dolphin) for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Dolphin failed to demonstrate a prima facie entitlement to judgment as a matter of law. The parties' deposition testimony raised material issues of fact as to whether, and to what extent, Dolphin can be held liable for the negligence, if any, of its valet parking service, third-party defendant APV Valet Parking Corporation (APV).

A restaurant providing valet parking services can be held liable for the negligence of the service whose attendants are alleged to have caused an accident to a third party. This is the case even where the service is an independent contractor with which the restaurant has contracted (*see Spadaro v Parking Sys. Plus, Inc.*, 113 AD3d 833 [2d Dept 2014]; *see also Berger v Rokeach*, 58 Misc 3d 827 [Sup Ct, Kings County 2017] [supermarket had duty to exercise reasonable care to have taken reasonable measures to control the foreseeable conduct of parties on the property with whom they contracted, i.e., the parking attendants, to prevent them from either intentionally harming or creating an unreasonable risk of harm to others]).

This duty arises when there is an ability and opportunity to

control the conduct of the restaurant's contractors and an awareness of the need to do so. Thus, Dolphin cannot assert that it signed a contract with the valet parking service and then "covered its eyes with a blindfold"; rather, Dolphin was required to select a company "with, at the minimum, both appropriate insurance and competent drivers" (*Berger v Rokeach*, 58 Misc 3d at 842). Defendant restaurant was able to decline to enter into any contract for valet services it felt insufficient, and therefore in the best position to protect against the risk of harm.

Dolphin similarly failed to demonstrate that it did not create an unreasonable risk of harm to others or that APV entirely displaced its duty to maintain the valet parking area safely (*see Espinal v Melville Snow Contrs., Inc.*, 98 NY2d 136, 140 [2002]). Indeed, the evidence showed, inter alia, that the restaurant and the valet service communicated on a daily basis to determine proper staffing. The restaurant, further, obtained parking spots for the valet service to utilize on its behalf. The restaurant informed the valet service in advance of functions so that staffing could be arranged. The parties' agreement similarly provided that service was provided "as requested" by the restaurant, and that it was the restaurant's obligation to provide the schedule for each week.

Dolphin may also be liable under the doctrine of ostensible

agency or apparent authority and thus estopped from denying liability for an entity it held out as its agent (*see Berger v Rokeach*, 58 Misc 3d at 847-848; *see e.g. Stern v Starwood Hotels & Resorts Worldwide, Inc.*, 149 AD3d 496, 497 [1st Dept 2017] [hotel was not entitled to summary judgment where the plaintiff was injured when she tripped on a defective walkway owned by a franchisee independent contractor responsible for the hotel's day-to-day operations; the evidence showed that the defendant hotel's reservations website holds out the hotel to the public as a Starwood property, and that the plaintiff relied on the representations on the website in choosing to book a room at the hotel]; *Taylor v Point at Saranac Lake, Inc.*, 135 AD3d 1147 [3d Dept 2016] [resort was not entitled to summary judgment when guest was killed on a snowmobile tour arranged by the resort with an independent contractor; resort's website could be read to suggest that snowmobiling was a service provided by the defendant's agents and employees, as it was listed as an activity available on the premises, and the plaintiff dealt with the resort staff in organizing the tour and never heard of the independent contract prior to the tour]). Notably, plaintiff described the valet who hit him as wearing a "Dolphin uniform."

We decline to consider APV's argument concerning the denial of its motion for summary judgment, as it failed to file a notice of appeal challenging that portion of the underlying order (*see Hecht v City of New York*, 60 NY2d 57 [1983]).

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

ENTERED: MAY 23, 2019

CLERK

Sweeny, J.P., Gische, Webber, Kahn, Moulton, JJ.

9192
[M-705] In re A.P., Jr., a minor, OP. 176/19
by his mother Felicia Freeman,
Petitioner,

-against-

Hon. Gayle P. Roberts, etc., et al.,
Respondents.

_____

Neighborhood Defender Service of Harlem, New York (Elsie Chandler of counsel), for petitioner.

Cyrus R. Vance, Jr., District Attorney, New York (Celina Inez Guerra of counsel), for Cyrus R. Vance, Jr., respondent.

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

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

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

Where a petitioner "can obtain full judicial review of his claim . . . on direct appeal from any judgment of conviction

against him" an article 78 proceeding does not lie (*Matter of Legal Aid Socy. of Sullivan County v Scheinman*, 53 NY2d 12, 17 [1981]).

Justice Gayle P. Roberts has elected, pursuant to CPLR 7804(i), not to appear in this proceeding.

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

ENTERED: MAY 23, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Kahn, Kern, Moulton, JJ.

9386-
9386A The People of the State of New York, Respondent,

Ind. 5974/06
2125/07

-against-

Rashiem Swails,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered November 30, 2010, convicting defendant, upon his plea of guilty, of attempted robbery in the second degree, and sentencing him, as a second violent felony offender, to a term of five years, and judgment, same court and Justice, rendered November 30, 2010, as amended December 23, 2010, convicting defendant, upon his plea of guilty, of robbery in the third degree, and sentencing him, as a second felony offender, to a concurrent term of two to four years, unanimously affirmed.

Defendant's constitutional speedy trial claim is unpreserved, or otherwise procedurally defective, for all of the following reasons, and we decline to review it in the interest of justice. In a CPL 30.30 motion, defendant made

only a perfunctory constitutional claim and citation to *People v Taranovich* (37 NY2d 442 [1975]), without making any of the arguments raised on appeal; most of the delay cited on appeal occurred after defendant's motion, and was not the subject of any further motion; defendant abandoned his constitutional claim by pleading guilty without obtaining any ruling on that part of his motion; and defendant's claim is unreviewable because he has not supplied minutes necessary to determine the reasons for certain delays.

As an alternative holding, to the extent that the record permits review, we conclude, upon review of the relevant factors (*see Taranovich*, 37 NY2d at 445), that defendant's constitutional right to a speedy trial was not violated. Little of the delay can be attributed to the People, and much of it is attributable to defendant's motion practice, two competency proceedings, counsel's engagement in other trials, and counsel's request to have these prosecutions track other pending cases against defendant in Queens County, upon which defendant was also incarcerated. Defendant has not shown that his defense was

impaired by the delay; on the contrary, counsel sought to track the more serious Queens cases in hopes of duplicating the defense asserted therein of mental disease or defect.

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

ENTERED: MAY 23, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Kahn, Kern, Moulton, JJ.

9387 Joanne R. Black, Index 151238/16
Plaintiff-Appellant,

-against-

Ronald F. Gordon, et al.,
Defendants-Respondents.

_____

Gruenberg Kelly Della, Ronkonkoma (Zachary M. Beriloff of counsel), for appellant.

Picciano & Scahill, P.C., Bethpage (Andrea E. Ferrucci of counsel), for respondents.

_____

Order, Supreme Court, New York County (Adam Silvera, J.), entered on or about July 11, 2018, which granted defendants' motion for summary judgment dismissing the complaint due to plaintiff's inability to establish a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Contrary to plaintiff's contention, defendants demonstrated prima facie that she did not sustain a serious injury involving hearing loss and tinnitus as a result of the motor vehicle accident. Their expert otorhinolaryngologist found mild hearing impairment of less than one percent, and subjective complaints of tinnitus, which could not be causally related to the accident. Such minor limitations and subjective complaints do not constitute a significant or serious injury within the meaning of

Insurance Law § 5102(d) (*see Peel v Jordan*, 202 AD2d 485, 485 [2d Dept 1994]; *see generally Gaddy v Eyler*, 79 NY2d 955, 957—958 [1992] [a "minor, mild or slight limitation of use" is "insignificant" under the no-fault statute]). In opposition, plaintiff did not submit any medical evidence to substantiate this claim.

Defendants also demonstrated prima facie that plaintiff's claimed cervical spine injuries were not serious injuries causally related to the accident, but were preexisting degenerative conditions.

In opposition, plaintiff submitted, inter alia, an unaffirmed MRI report of her radiologist, who found bulging and herniated discs, with a bony ridge and hypertrophic changes, and the affidavit of a chiropractor, who examined her several years after the accident. The chiropractor acknowledged that the MRI film showed preexisting degenerative conditions, and therefore he was required to address the issue of causation and explain the basis for his conclusions that the conditions were caused by the accident (*Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043, 1044 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]). Instead, the chiropractor provided only a conclusory opinion, which provided no basis for his opinion that the preexisting disc bulges were aggravated by the accident, or for assessing the extent of any exacerbation

(*Shu Chi Lam v Wang Dong*, 84 AD3d 515, 516 [1st Dept 2011]). Nor did he provide a reason for his opinion that the herniation was new, or address the significance of the bony growth at the same level of the herniation, as noted in plaintiff's own MRI report (*see Sosa-Sanchez v Reyes*, 162 AD3d 414 [1st Dept 2018]; *De La Rosa v Okwan*, 146 AD3d 644 [1st Dept 2017], *lv denied* 29 NY3d 908 [2017]).

Further, plaintiff provided no admissible evidence documenting contemporaneous complaints of pain or limitation in her cervical spine following the accident, which also undercuts her claim that the conditions were causally related to the accident (*see Hernandez v Marcano*, 161 AD3d 676, 678 [1st Dept 2018]; *Rosa v Mejia*, 95 AD3d 402, 403 [1st Dept 2012]; *see also Perl v Meher*, 18 NY3d 208, 217-218 [2011]).

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

ENTERED: MAY 23, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Kahn, Kern, Moulton, JJ.

9388-
9389-
9390-
9391 In re Shali D.,
Petitioner,

-against-

Victoria V.,
Respondent-Respondent.

- - - - -

Sofia D.,
Nonparty Appellant.

- - - - -

Shali D.,
Petitioner-Appellant,

-against-

Victoria V.,
Respondent-Respondent.

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Andrew J. Baer, New York, attorney for the child Sofia D., appellant.

The Bresky Law Firm PLLC, Elmhurst (Kyle Mallary Halperin of counsel), for Shali D., appellant.

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

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Order, Family Court, New York County (Carol J. Goldstein, J.), entered on or about February 10, 2017, which awarded the mother certain attorneys' fees as sanctions, unanimously affirmed, without costs. Order, same court and Justice, entered on or about August 4, 2017, which, after a trial, awarded the

parents joint legal custody with specified spheres of influence and awarded the mother primary physical custody, unanimously affirmed, without costs.

While the father's notice of appeal is from an order awarding the mother sanctions, his arguments relate to an earlier order entered on or about December 20, 2016, denying his motion to redact hearsay portions of the forensic report of Dr. Marvin Aronson. Were we to treat the father's appeal as one from the December 20th order, we would still affirm. The arguments challenging introduction of the Aronson report are academic, as the core conclusions reached by Dr. Aronson were based upon nonhearsay sources, namely, his interviews with and observations of the parties and the subject child (*see Matter of Chad Nasir S. [Charity Simone S.]*, 157 AD3d 425, 425-426 [1st Dept 2018]; *see also Lieberman v Lieberman*, 142 AD3d 1144, 1146 [2d Dept 2016]).

The trial consisted of multiple days of testimony. The court conducted an in camera interview with the child, and it indicated it was willing to hear testimony from the collateral witnesses, had the father chosen to call them. The comprehensive Aronson report was given appropriate, not disproportionate weight, and the record reflects that the court properly considered the totality of circumstances in determining the custody arrangement that was in the child's best interests

(*Eschbach v Eschbach*, 56 NY2d 167 [1982]). The court's determinations had a sound and substantial basis in the record. The court acknowledged and detailed both parents' deficits but reasonably determined that, on balance, the mother's presented far less threat to the child's best interests (*Eschbach*, 56 NY2d at 171).

The weight to be accorded the child's wishes was improperly first raised in the attorney for the child's reply brief, and is therefore unpreserved for our review (*see e.g. Shackman v 400 E. 85th St. Realty Corp.*, 161 AD3d 438 [1st Dept 2018]). Were we to reach the issue, we would nonetheless affirm. The child was not equipped to opine as to which of her parents could better address her learning challenges or mental health issues, and the child's attorney does not address record evidence that the father may have manipulated his daughter into stating that she would prefer to live with him.

We have considered the remaining arguments by the father and the attorney for the child and find them unavailing.

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

ENTERED: MAY 23, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Kahn, Kern, Moulton, JJ.

9392 In re Richard Vaccari, et al., Index 656347/17
Petitioners-Appellants,

-against-

Paul Vaccari, et al.,
Respondents-Respondents.

_____

The Weinstein Group, P.C., Syosset (Lloyd J. Weinstein of counsel), for appellants.

Stein Riso Mantel McDonough, LLP, New York (Gerard A. Riso of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered on March 30, 2018, which, insofar appealed from as limited by petitioners' brief, granted respondents' cross motion for summary judgment dismissing petitioners' claims for unjust enrichment, conversion and misappropriation, and attorney's fees, unanimously affirmed, without costs.

The court was not required to notify petitioners pursuant to CPLR 3211(c) that it was converting respondents' cross motion to one for summary judgment, because respondents moved pursuant to both CPLR 3211 and 3212. Petitioners could hardly have been unaware that respondents were moving for summary judgment, as they submitted a statement of uncontroverted facts (*see* Rules of Commercial Div of the Sup Ct [22 NYCRR 202.70(g)] rule 19-a[a]).

The motion court providently exercised its discretion by

deeming admitted the unopposed and uncontroverted statements in respondents' statement of material facts (*see e.g. Harmacol Realty Co. LLC v Nike, Inc.,* 143 AD3d 503, 504-505 [1st Dept 2016]; Rules of Commercial Div of the Sup Ct [22 NYCRR 202.70(g)] rule 19-a[b] and [c]).

Petitioners' appellate argument that they needed discovery to oppose respondents' motion is unpreserved (*see generally Levy v Carol Mgt. Corp.,* 199 AD2d 140 [1st Dept 1993]). Moreover, their affidavit in support of discovery failed to show that "facts essential to justify opposition may exist but cannot then be stated" warranting further discovery (CPLR 3212[f]).

The court properly granted summary judgment dismissing petitioners' claims for unjust enrichment and conversion/misappropriation. According to respondents' statement of uncontroverted facts, nonparty Piccinini Brothers Inc. (of which respondent Paul Vaccari is the sole shareholder) has *overpaid* the rent due to respondent Ametal Realty Corp.

The court correctly dismissed petitioners' claim for

attorneys' fees because they did not "achieve a substantial benefit" on the merits of their substantive claims (*see Seinfeld v Robinson*, 246 AD2d 291, 294 [1st Dept 1998]).

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

ENTERED: MAY 23, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Kahn, Kern, Moulton, JJ.

9393-
9393A Index 155255/14

Erin Langston, et al.,
Plaintiffs-Respondents,

-against-

MFM Contracting Corp., et al.,
Defendants,

The Trustees of Columbia University
in the City of New York,
Defendant-Appellant.

_____

Rivkin Radler LLP, Uniondale (Stuart M. Bodoff of counsel), for appellant.

Erlanger Law Firm PLLC, New York (Robert K. Erlanger of counsel), for respondents.

_____

Order, Supreme Court, New York County (Alexander M. Tisch, J.), entered June 21, 2018, which denied defendant Trustees of Columbia University's motion for summary judgment dismissing the complaint as against it on statute of limitations grounds, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered September 17, 2018, which, upon reargument, adhered to the original determination, unanimously dismissed, without costs, as academic.

Plaintiffs raised an issue of fact as to whether the doctrine of equitable estoppel should preclude defendant from

asserting its statute of limitations defense (*see Simcuski v Saeli*, 44 NY2d 442, 448-449 [1978]). Their counsel's affirmation detailing his communications with defendant, supported by the emails and documents exchanged, establishes that defendant misled plaintiffs about its ownership of the pipe beneath the gouge in the roadway on which plaintiff Erin Langston tripped and fell, inducing plaintiffs to refrain from filing a timely action against it. Even if it were true that defendant did not own the pipe, its evasiveness in response to plaintiffs' requests for information about its relationship to the pipe or the function of the pipe is an affirmative act of concealment that could give rise to equitable estoppel (*see General Stencils v Chiappa*, 18 NY2d 125, 128 [1966]). Plaintiffs also established that they discovered information sufficient to prompt further inquiry only after the statute of limitations had expired (*see Simcuski*, 44 NY2d at 449-450; *Rite Aid Corp. v Grass*, 48 AD3d 363, 364-364 [1st Dept 2008]; *Dowdell v Greene County*, 14 AD3d 750 [3d Dept 2005]).

Defendant's remaining arguments are improperly raised for the first time on appeal, and we decline to consider them.

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

ENTERED: MAY 23, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Kahn, Kern, Moulton, JJ.

9397 The People of the State of New York, Ind. 4704/15
Respondent,

-against-

Derwood Grant,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered September 8, 2016, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: MAY 23, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Kahn, Kern, Moulton, JJ.

9398 Welsbach Electric Corp., Index 652595/17
Plaintiff-Appellant,

-against-

Judlau Contracting, Inc., et al.,
Defendants-Respondents.

_____

Gibbons, P.C., New York (Jennifer A. Hradil of counsel), for appellant.

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for respondents.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered July 2, 2018, which granted defendants' motion to dismiss the third, fourth, fifth and seventh causes of action of the amended complaint, unanimously modified, on the law, to reinstate the seventh cause of action, and otherwise affirmed, without costs.

The causes of action relating to additional work, delay and acceleration of scheduled work were all properly dismissed, as the alleged cause of the delays was within the scope of the "no damages for delay" provision of the agreement between plaintiff and defendant Judlau Contracting, Inc. (JCI) (*see Corinno Civetta Constr. Corp. v City of New York*, 67 NY2d 297, 309, 313-314 [1986]; *Universal/MMEC, Ltd. v Dormitory Auth. of State of N.Y.*, 50 AD3d 352, 353 [1st Dept 2008]). Plaintiff failed to adequately allege either bad faith or a breach of a "fundamental,

affirmative obligation" expressly imposed on defendants by the agreement (*see Corinno Civetta* at 313; *Dart Mech. Corp. v City of New York*, 68 AD3d 664, 664 [1st Dept 2009]; *Polo Elec. Corp. v New York Law Sch.*, 114 AD3d 419, 419 [1st Dept 2014]).

Since damages caused by delays are precluded by the agreement between plaintiff and JCI, plaintiff also cannot recover damages under the bond due to such delays (*see Varlotta Constr. Corp. v Sette-Juliano Constr. Corp.*, 234 AD2d 183, 183 [1st Dept 1996]). However, the bond, by its terms, covers payment for wages and compensation for labor performed and services rendered in furtherance of the construction project. Plaintiff's first cause of action, which defendants have not moved to dismiss, concerns nonpayment for services rendered. Accordingly, plaintiff's seventh cause of action, against the payment bond, should not have been dismissed.

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

ENTERED: MAY 23, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Kahn, Kern, Moulton, JJ.

9399 In re Sunny's Limousine Service Inc., Petitioner-Appellant, Index 157687/17

-against-

New York State Department of Labor, et al., Respondents-Respondents.

The Shanker Law Firm, P.C., New York (Steven J. Shanker of counsel), for appellant.

Letitia James, Attorney General, New York (Seth M. Rokosky of counsel), for respondents.

Judgment, Supreme Court, New York County (Gerald Lebovits, J.), entered October 23, 2017, granting respondents' cross motion to dismiss the petition to compel respondents to provide petitioner with notice and a hearing regarding petitioner's unemployment insurance law contributions, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

New York Labor Law § 620(2) provides that "[a]ny employer who claims to be aggrieved by the commissioner's determination of the amount of the employer's contributions . . . may apply to the commissioner for a hearing within thirty days after mailing or personal delivery of notice of such determination." Here, the Department of Labor sent a Notice of Determination of Contributions Due on April 5, 2013, and petitioner requested a

hearing within 30 days thereof. The parties dispute whether notice of the hearing set for July 13, 2015 before an administrative law judge was sent to petitioner. Petitioner failed to appear at the hearing and the Department of Labor's determination was sustained.

Pursuant to 12 NYCRR 461.8, petitioner's remedy was to request that the administrative law judge reopen the claim (*see also Matter of Green [Village of Hempstead-Commissioner of Labor]*, 80 AD3d 954 [3d Dept 2011]). If the application to reopen the case is denied, petitioner may then appeal that decision to the Unemployment Insurance Appeal Board and then to the Appellate Division, Third Department, which will review the denial under an abuse of discretion standard (*see Matter of Browne [Nassau BOCES-Commissioner of Labor]*, 153 AD3d 1073 [3d Dept 2017]; Labor Law § 624).

The record shows that petitioner has not exhausted its administrative remedies before seeking to litigate in court, which it was required to do (*see Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]). Under the circumstances

presented herein, none of the exceptions to the exhaustion rule apply (*id.*).

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

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

ENTERED: MAY 23, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Kahn, Kern, Moulton, JJ.

9400 The People of the State of New York, Ind. 55/16
Respondent,

-against-

Zachary Williams,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Siobhan C. Atkins of counsel), and Arnold & Porter Kaye Scholer LLP, New York (Mark Osmond of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Neil E. Ross, J.), rendered May 15, 2017, convicting defendant, after a jury trial, of criminal mischief in the third degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 343 [2007]). Moreover, we find that the evidence was overwhelming. The victim followed defendant and apprehended him almost immediately after the crime, and as in *People v Zohri* (82 AD3d 493, 494 [1st Dept 2011], *lv denied* 16 NY3d 901 [2011]), "the victim continuously kept defendant in sight, except for very brief periods under circumstances that would render mistaken identity highly unlikely."

The court providently exercised its discretion in receiving

evidence that, while defendant was being apprehended, he shouted racial epithets at the victim and the men who were assisting the victim. This evidence was relevant to motive and identity (*see generally People v Scarola*, 71 NY2d 769, 777 [1988]), because there was evidence supporting inferences that the person who damaged the victim's car was aware that it was being driven by an African American, and that the otherwise unexplained attack may have been racially motivated. The probative value of the evidence exceeded its prejudicial effect, which the court minimized by way of careful limiting instructions that the jury is presumed to have followed. In any event, any error was harmless in light the overwhelming evidence of guilt.

The court granted defendant's request for a jury charge on cross-racial identification. Because defendant did not object to specific deficiency in that charge, either before or after it was given, defendant failed to preserve (*see People v Whalen*, 59 NY2d 273, 280 [1983]) his present argument that the court's instruction did not satisfy the requirements of *People v Boone* (30 NY3d 521 [2017]). We decline to review it in the interest of justice. As an alternative holding, we find that any error under *Boone* (which was decided after defendant's trial) was harmless in

light of the overwhelming evidence. There was no reasonable possibility that the victim's identification of defendant after pursuing and apprehending him was the product of any difficulty in making a cross-racial identification.

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

ENTERED: MAY 23, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Kahn, Kern, Moulton, JJ.

9401 In re Bethelite Community Church, et al., Petitioners-Appellants, Index 103377/04

-against-

The Department of Environmental Protection of the City of New York, Respondent-Respondent,

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

_____

Shaw & Binder, P.C., New York (Stuart F. Shaw and Daniel S. LoPresti of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Ingrid R. Gustafson of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Manuel J. Mendez, J.), entered September 15, 2017, denying the petition to annul the determination of respondent Department of Environmental Protection, dated October 7, 2003, which denied petitioner's application for an exemption from water and sewer charges, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

In *Matter of Brooklyn Assembly Halls of Jehovah's Witnesses, Inc. v Department of Envtl. Protection of City of N.Y.* (11 NY3d 327 [2008]), the Court of Appeals upheld respondent's determination that the petitioner church could qualify for an exemption from water and sewer charges only for the portion of its building used for public worship, plus one caretaker's

dwelling. Contrary to petitioner's arguments, the case is controlling here. Respondent's determination limiting the water and sewer exemption to the portion of petitioner's premises devoted exclusively to public worship, plus the residence of a caretaker for these premises, is not arbitrary and capricious.

Petitioner's contention that *Brooklyn Assembly Halls* is distinguishable because, unlike the property in that case, its property includes a homeless shelter and a nonpublic school was improperly raised for the first time in its reply papers in the article 78 proceeding and will not be considered (*see Bluebird Realty Corp. v Department of Envtl. Protection of City of N.Y.*, 300 AD2d 6, 7 [1st Dept 2002]).

Petitioner urges this Court to consider its poor finances, its good works, and a looming foreclosure, which would force it to close. While petitioner's situation is compelling, a court cannot invalidate mandatory liens on property based on a foreclosure action specifically authorized by statute

(*see* Public Authorities Law § 1045-j[5]; *Matter of Delafield 246 Corp. v City of New York*, 11 AD3d 268, 272-273 [1st Dept 2004], *lv denied* 4 NY3d 703 [2005]).

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

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

ENTERED: MAY 23, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Kahn, Kern, Moulton, JJ.

9402-
9402A-
9402B

Index 156179/14
595350/14
157977/14

Greater New York Mutual Insurance Company, as subrogee of Myra Realty LLC, etc.,
Plaintiff-Respondent,

-against-

Utica First Insurance Company,
Defendant-Appellant.

- - - - -

Utica First Insurance Company,
Third-Party Plaintiff-Appellant,

-against-

Allstate Insurance Company as subrogee of Renee Fleysher, et al.,
Third-Party Defendants-Respondents,

Erie Insurance Company as subrogee of Jennifer J. McCarron, et al.,
Third-Party Defendants.

- - - - -

Allstate Insurance Company as subrogee of Renee Fleysher, et al.,
Plaintiffs-Respondents,

-against-

Utica First Insurance Company,
Defendant-Appellant.

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Farber Brocks & Zane L.L.P., Garden City (Sherri N. Pavloff of counsel), for appellant.

Gwertzman Lefkowitz Smith Marcus & Sullivan, New York (Barbara J. Marcus of counsel), for Greater New York Mutual Insurance Company, respondent.

Feldman & Feldman, LLP, Smithtown (John Reitano of counsel), for Allstate Insurance Company and Allstate Indemnity Company, respondents.

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Order and judgment (one paper), Supreme Court, New York County (Barry R. Ostrager, J.), entered May 9, 2018, which insofar as appealed from, granted the motions for summary judgment brought by plaintiff Greater New York Mutual Insurance Company (GNY), third-party defendants Allstate Insurance Company (Allstate Insurance) and Allstate Indemnity Company (Allstate Indemnity, and collectively, Allstate), and third-party defendant New Triple M. Construction Corp. (Triple M.); denied defendant Utica First Insurance Company's (Utica First) motion for summary judgment; and adjudged that GNY recover from Utica First judgment in the amount of $2,693,300.39, unanimously reversed, on the law, with costs, the judgment vacated, GNY, Allstate, and Triple M's motions denied, and Utica First's motion granted. The Clerk is directed to enter judgment in favor of Utica First. Order and judgment (one paper), Supreme Court, New York County (Barry R. Ostrager, J.), entered May 9, 2018, which insofar as appealed from, granted plaintiff Allstate's motion for summary judgment; denied defendant Utica First's motion for summary judgment; adjudged that Allstate Insurance recover from Utica First judgment in the amount of $250,372.21; and adjudged that Allstate Indemnity recover from Utica First judgment in the amount of $41,876.89, unanimously reversed, on the law, with costs, the judgment vacated, Allstate's motion denied, and Utica First's motion granted. The Clerk is directed to enter judgment in favor

of Utica First. Appeal from order, Supreme Court, New York County (Barry R. Ostrager, J.), entered July 12, 2017, which denied defendant Utica First's motion for issuance of a subpoena to the New York City Fire Department, unanimously dismissed (CPLR 5501[a]), without costs.

The instant appeals involve two related insurance actions arising out of a fire at an apartment building in Queens.

GNY insured the owner and manager of the building. Allstate insured various tenants in the building. Utica First insured Triple M, which was retained by GNY's insured to perform work on the building.

Both GNY and Allstate paid claims to their insureds for damages sustained as a result of the fire. They then obtained default judgments against Triple M, whose employees were alleged to have caused the fire through their negligent use of a torch to perform roof repairs. Utica First disclaimed coverage and did not defend Triple M in these actions. GNY and Allstate now seek to recover from Utica First the amount of the underlying judgments against Triple M pursuant to Insurance Law § 3420(a)(2).

We find that Utica First has no duty to indemnify Triple M for damage resulting from the fire because Triple M failed to "make fair and truthful disclosures in reporting the [accident]," which failure "constitutes a breach of the cooperation clause . .

. of the insurance policy as a matter of law" (*Nationwide Mut. Ins. Co. v Posa*, 56 AD3d 1143, 1144 [4th Dept 2008]; *see also Federated Dept. Stores, Inc. v Twin City Fire Ins. Co.*, 28 AD3d 32, 37 [1st Dept 2006]; *American Ref-Fuel Co. of Hempstead v Resource Recycling*, 281 AD2d 573, 574 [2d Dept 2001]; *J.P. Morgan Sec. Inc. v Vigilant Ins. Co.*, 53 Misc3d 694, 697 [Sup Ct, NY County 2016], *affd* 151 AD3d 632 [1st Dept 2017]).

It is clear that Triple M employees lied to Utica First's investigators about not having used a torch on the roof. These self-serving statements were inconsistent with the investigatory reports of each of the parties and the New York City Fire Department (FDNY). Allstate and GNY are also judicially estopped from claiming that Triple M employees did not use a torch because they took the opposite position in the underlying actions and secured judgments on this basis (*see Baje Realty Corp. v Cutler*, 32 AD3d 307, 310 [1st Dept 2006]).

Because we find that Triple M's failure to cooperate with Utica First's investigation relieved the latter of its duty to indemnify, we need not reach the parties' contentions regarding the applicability of the insurance policy's roofing and willful violation exclusions or the amount of the judgments.

Utica First's appeal from the order denying its motion to issue a subpoena to the FDNY must be dismissed because the denial

does not "necessarily affect[] the final judgment" (*see* CPLR 5501[a][1]; *Matter of Aho*, 39 NY2d 241, 248 [1976]). Utica First was able to independently obtain the FDNY records it sought and submitted them in support of its summary judgment motion.

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

ENTERED: MAY 23, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Kahn, Kern, Moulton, JJ.

9403 Eran Elhanani, et al., Index 655350/17
Plaintiffs-Appellants,

-against-

Boris Kuzinez, et al.,
Defendants-Respondents.

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Kishner Miller Himes P.C., New York (Elizabeth Tobio of counsel), for appellants.

Loeb & Loeb LLP, New York (Sara Crisafulli of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered on or about March 30, 2018, which granted with prejudice defendants' motion to dismiss the complaint, unanimously reversed, on the law, and the motion denied, with costs.

The complaint sufficiently states a claim for breach of contract as it asserts all material and essential terms of the contract (*see Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 482 [1989]). The complaint alleges that plaintiff Eran Elhanani, a real estate broker, and defendant Boris Kuzinez, a real estate developer, entered into an oral agreement pursuant to which Elhanani would lower his commission rate from the industry standard of 3% to 1% in exchange for exclusive rights to broker sales of residential luxury apartments to be developed in a building purchased by Kuzinez. Pursuant to the contract, Elhanani also agreed to promote the units by partnering with a

national real estate sales and marketing agency approved by defendants. The complaint alleges that defendants accepted plaintiffs' services, which included free consulting based on the alleged agreement, for almost two years, "[b]ut once they had obtained the benefits of the bargain," defendants fired plaintiffs and refused to pay them anything for their work.

Plaintiffs' failure to identify in the complaint the specific national real estate sales and marketing agency with which plaintiffs were going to partner, along with the terms of such partnership, is not fatal to plaintiffs' breach of contract claim. The alleged contract would imply a covenant of good faith and fair dealing pursuant to which plaintiffs would propose reasonable entities and defendants would reasonably accept or reject those proposals (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]). As to the entity's compensation, that would be between plaintiffs and the third-party entity. As to the start and end date of the agreement, it can be inferred from the allegations in the complaint that plaintiffs' commissions on the sales of units would commence when the units were either completed or listed for pre-construction sale, and would end when the units were sold, as plaintiffs allege an exclusive agreement for such sales. With regard to the identity of the promisor, the complaint indicates that all negotiations and interactions were with defendant Kuzinez.

Whether Kuzinez was negotiating on his own behalf, or on behalf of one or both of his companies, is a question of fact.

The complaint should not have been dismissed pursuant to the statute of frauds. As an initial matter, defendants did not move to dismiss based on the statute of frauds and plaintiffs were not afforded the opportunity to address the issue (*see Greene v Davidson*, 210 AD2d 108 [1st Dept 1994], *lv denied* 85 NY2d 806 [1995]). Moreover, the statute of frauds is inapplicable here as General Obligations Law § 5-701(a)(10) specifically exempts contracts to pay compensation to licensed real estate brokers, which is the type of contract alleged by plaintiffs.

The declaratory judgment cause of action, which seeks a declaration that plaintiffs have the right to serve as exclusive broker for all residential sales for the subject development, should be reinstated based on our finding that the complaint sufficiently alleges a claim for breach of contract.

Additionally, the quantum meruit, unjust enrichment, and promissory estoppel claims state causes of action. As to quantum meruit, the complaint alleges that plaintiffs provided services to defendants at a reduced cost or no cost, based on the promise of the oral agreement (*see Soumayah v Minelli*, 41 AD3d 390, 391 [1st Dept 2007], *appeal withdrawn* 9 NY3d 989 [2007]; *H. & L. Elec. Inc. v Midtown Equities LLC*, 151 AD3d 660, 661 [1st Dept 2017] ["The reasonableness of plaintiff's expectation of

compensation for services rendered raises an issue that is not capable of being resolved at this stage"]). As to unjust enrichment, the complaint alleges that plaintiffs provided services and value outside their role as broker and that it is against equity and good conscience to allow defendants to retain the value of those services (*see Farina v Bastianich*, 116 AD3d 546, 548 [1st Dept 2014]). As to promissory estoppel, the complaint alleges that defendants promised plaintiffs that they would serve as exclusive broker and that, in reasonable reliance on that promise, plaintiffs agreed, among other things, to substantially reduced

commissions (*see MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 841-842 [1st Dept 2011], *lv denied* 21 NY3d 853 [2013]).

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

ENTERED: MAY 23, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Kahn, Moulton, JJ.

9409N Paul J. Napoli, Index 159576/14
Plaintiff-Respondent,

-against-

Marc J. Bern,
Defendant-Appellant.

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Law Offices of Michael S. Ross, New York (Michael S. Ross of counsel), and Robert & Robert PLLC, Uniondale (Clifford S. Robert of counsel), for appellant.

Quinn Emmanuel Urquhart & Sullivan, LLP, New York (Luke Nikas of counsel), for respondent.

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Order, Supreme Court, New York County (Mark C. Zauderer, Referee), entered August 22, 2017, which denied defendant's motion to disqualify the Referee, unanimously affirmed, with costs.

The Referee did not abuse his discretion in finding that his impartiality would not be reasonably questioned such that he should recuse himself from this matter (22 NYCRR 100.3[E][1]; *People v Moreno*, 70 NY2d 403, 405-407 [1987]; *R & R Capital LLC v Merritt*, 56 AD3d 370 [1st Dept 2008]). The Referee notified the parties that he was withdrawing as counsel for a law firm in an unrelated matter "effective immediately" before plaintiff's new counsel, an attorney at said firm, even filed his notice of appearance. Defendant points to no credible evidence, such as adverse rulings or other actions evidencing the alleged judicial bias (*see R & R Capital, LLC* at 370).

Furthermore, as part of the settlement agreement naming Zauderer, an attorney with an active private practice, as Referee in this action winding up the parties' legacy firm, the parties explicitly agreed to waive any such conflict.

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 23, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Kahn, Kern, Moulton, JJ.

9410N SW Productions, Inc., Index 652990/14
Plaintiff-Appellant, 595801/15

-against-

CBGB Festival, LLC, et al.,
Defendants-Respondents,

CBGB Holdings, LLC, et al.,
Defendants.

- - - - -

[And Other Actions]

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Mark L. Lubelsky and Associates, New York (Mark L. Lubelsky and Josef K. Mensah of counsel), for appellant.

Sher Tremonte LLP, New York (Kimo S. Peluso of counsel), for respondents.

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Order, Supreme Court, New York County (Andrea Masley, J.), entered December 5, 2017, which, to the extent appealed from as limited by the briefs, granted the motion of defendants CBGB Festival, LLC and 315 Bowery Holdings, LLC to strike the amended complaint, unanimously affirmed, without costs.

The motion court exercised its discretion in a provident manner in granting the motion to strike the complaint. The record demonstrates that plaintiff willfully and contumaciously failed to meaningfully comply with its discovery obligations as set forth in several court orders (*see e.g. Eli Cabinetry, Inc. v*

P.C. Consulting Mgt. Corp., 158 AD3d 482 [1st Dept 2018]; *Anron Heating & A.C., Inc. v AMCC Corp.*, 133 AD3d 542 [1st Dept 2015]; CPLR 3126[3]).

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

ENTERED: MAY 23, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Kahn, Kern, Moulton, JJ.

9411N Laura Leon, Index 153936/15
Plaintiff-Appellant,

-against-

Wyatt Harlan,
Defendant-Respondent,

327 Central Park West Condominium
Board of Managers,
Defendant.

_____

Stuart S. Perry, New York, for appellant.

O'Donnell & Fox, P.C., New York (William G. O'Donnell, Jr. of counsel), for respondent.

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Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered August 28, 2018, which, to the extent appealed from, denied plaintiff's motion for summary judgment dismissing defendant Wyatt Harlan's counterclaim for nuisance, unanimously reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff made a prima facie showing that her piano playing and piano lessons were reasonable by averring that these activities usually occurred during business hours on weekdays, they usually totaled less than 4½ hours a day, and her sound technician concluded that the noise emanating from her piano was within acceptable boundaries (*Chelsea 18 Partners, LP v Sheck Yee Mak*, 90 AD3d 38, 41 [1st Dept 2011]; *see Carroll v Radoniqi*, 105 AD3d 493, 494 [1st Dept 2013]). Harlan failed to raise a triable

issue of fact in opposition because she did not submit any evidence showing that the level of sound that entered her apartment from plaintiff's piano was unreasonable. Harlan's reliance on the recordings by plaintiff's sound technician is unavailing; the expert did not take any volume measurements in Harlan's apartment and the recording taken in the condominium stairwell did not exceed that of a normal conversation.

To the extent the motion court denied plaintiff's motion on the ground that discovery was not complete, the record reveals that no additional discovery could be conducted regarding the level of sound that entered Harlan's apartment because plaintiff had moved out of the condominium building with her piano.

Based on the foregoing, we need not reach plaintiff's other arguments.

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

ENTERED: MAY 23, 2019

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, P.J.
Sallie Manzanet-Daniels
Peter Tom
Jeffrey K. Oing, JJ.

8977
Index 156960/16

_____x

In re Ilya Mikhlov, also known as M. Mikhailov, etc.,
Petitioner-Appellant,

-against-

Samuel Festinger,
Respondent,

Charnie Rosenbaum,
Respondent-Respondent.

_____x

Petitioner appeals from an order and judgment (one paper), of the Supreme Court, New York County (Barbara Jaffe, J.), entered December 18, 2017, which granted respondent Rosenbaum's motion to dismiss the petition brought to enforce a judgment for a writ of execution and turnover order on a restitution judgment entered against respondent Festinger, and denied petitioner's cross motion for leave to amend the petition.

Allyn & Fortuna LLP, New York (Paula Lopez of counsel), for appellant.

Charnie Rosenbaum, respondent pro se.

ACOSTA, P.J.

This case requires us to determine whether petitioner had legal standing to bring a petition to enforce a judgment for a writ of execution and turnover order on a restitution judgment entered against respondent Festinger. The issue narrows down to whether the Victim and Witness Protection Act (VWPA) or its amended version, the Mandatory Victim Restitution Act of 1996 (MVRA), was applicable when the petition was filed and whether the versions of the statute in question provide a private cause of action for victims of a crime.

As alleged in the petition, in April 1995, respondent Samuel Festinger pleaded guilty in the U.S. District Court for the Southern District of New York to a felony count of mail fraud in connection with a 10-year scheme to defraud customers of his fuel oil business. He was sentenced to five years' probation and one year of home confinement. In addition, the District Court ordered Festinger to make restitution to his victims, who were all identified in a list, in the amount of $1,835,936, with $20,000 paid per quarter (Restitution Judgment).

Approximately five years later, an amended judgment was entered requiring Festinger to serve a one-month prison term as a result of false statements made in his monthly supervision reports and personal financial statement forms. The April 2000

amended judgment did not alter the terms of the required restitution.

In 2003, respondent Charnie Rosenbaum, who married Festinger in 2001, became the record owner of a real property located at 1150 East 4th Street in Brooklyn, with the $140,000 down payment paid by Festinger. Festinger allegedly contributed $1.5 million in cash toward rebuilding on the property and all mortgage payments until October 2010, when the marriage began to deteriorate.

A foreclosure action against Rosenbaum was commenced on the property eight years later.

Petitioner, Ilya Mikhlov, on behalf of judgment creditors of Festinger, commenced this special proceeding in 2016 by filing a petition for a writ of execution and turnover order pursuant to article 52 of the CPLR (§ 5225) directing respondents to turn over $1,835,936, plus interest and penalties, less any payments made to date, from the proceeds of the contemplated sale of the property, in an amount sufficient to satisfy the balance due on the Restitution Judgment, on the ground that petitioner and the class of creditors have a valid lien on the assets of Festinger.[1]

[1] The petition also seeks a declaration that Festinger is the record owner of the property, and that the transfer of funds from Festinger to Rosenbaum for purchase and improvement of the property was fraudulent under the Debtor and Creditor Law.

Rosenbaum moved to dismiss the petition, arguing, inter alia, that petitioner lacked standing.[2]

Petitioner opposed the motion to dismiss and cross-moved for leave to file an amended petition. Petitioner argued, inter alia, that he is a proper party for bringing the proceeding as a victim named in the Restitution Judgment under either the old version of 18 USCA § 3663(h)(2) or the amended version, the MVRA.[3]

The motion court granted Rosenbaum's motion to dismiss the petition, and denied petitioner's cross motion for leave to amend.

The court found that the MVRA, which repealed and replaced the VWPA provides that only the United States may enforce a restitution order in the same manner as a civil judgment. It

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Festinger answered the petition, admitting that Rosenbaum had notice of the Restitution Judgment when they married and that he provided funds to her for the purchase of the property, its improvement, and mortgage payments.

[2] Additionally, Rosenbaum argued that she owns the property, that she financed the purchase of the property as well as its improvements, and that Festinger only contributed $22,000 and cannot claim ownership interest in it. She further argued that the petition should be dismissed as time-barred.

[3] Further, petitioner argued that the petition was governed by the 20-year-statute of limitations enforcing a money judgment and is therefore not time-barred. In addition, he argued that issues of fact exist regarding Festinger's ownership interest.

held that the applicable statute "provides no authority for the proposition that a crime victim has standing to enforce a restitution order in any manner other than by obtaining a lien on property," as provided for in the applicable 18 USC § 3664(m)(1)(B).

To the extent petitioner argued that the MVRA was inapplicable because it became effective after the Restitution Judgment in this case was entered, the court found that "the record reflects an amended judgment including the restitution order was entered in 2000, thereby superseding the original judgment," and that Rosenbaum had thus established that "petitioner has no standing to enforce the restitution order in the instant proceeding."

Given that, the court found it unnecessary to address the parties' remaining contentions, including the motion to amend the petition, which it denied as academic.

The MVRA became effective on April 24, 1996, as part of the Antiterrorism and Effective Death Penalty Act of 1996, Pub L 104-132, 110 Stat 1214, and made restitution mandatory for the identified victims of certain crimes, including mail and wire fraud, regardless of the defendant's ability to pay (18 USC § 3663A; *United States v Cheal*, 389 F3d 35, 46 [1st Cir 2004]). As of the effective date in 1996, where there is a conviction for a

crime qualifying for mandatory restitution, it is the MVRA, which was technically an amendment to the VWPA, that must be applied (*see United States v Owens*, 426 F3d 800, 808-809 [6th Cir 2005], *cert denied* 546 US 1119 [2006]).

It is the VWPA rather than the MVRA that should be applied to the claim here. The criminal conduct qualifying for mandatory restitution was the mail fraud. It occurred in 1995, before the effective date of the MVRA in 1996. The amendment to the Restitution Judgment in 2000 did not relate to the initial criminal conduct of mail fraud but was merely entered as a result of false statements made by Festinger in his monthly supervision reports and financial statement forms. The conviction because of the false statements does not constitute a conviction for a crime qualifying for mandatory restitution. Consequently, there was no conviction in relation to mandatory restitution after the effective date of the MVRA. Thus, the MVRA is not applicable. Applying the MVRA instead of the VWPA would violate the Constitution's ex post facto prohibition (*see United States v Schulte*, 264 F3d 656, 661-662 [6th Cir 2001]).

Petitioner has no standing under the VWPA to bring this proceeding for a writ of execution and turnover order on a restitution order.

The VWPA provided that a court could exercise its discretion

to order restitution and that the order of restitution could be enforced "(1) by the United States . . . (B) in the same manner as a judgment in a civil action; and (2) *by a victim named in the order to receive the restitution, in the same manner as a judgment in a civil action*" (18 USCA former § 3663[h] [emphasis added]). The plain statutory language of the VWPA did not further specify the means by which restitution could be collected by the victim. The case law shows that although a restitution order operates "in the same manner as a civil judgment" for enforcement purposes under the VWPA, it does not constitute a civil judgment and does not provide a private cause of action for victims (*see United States v Mindel*, 80 F3d 394, 398 [9th Cir 1996]; *United States v Keith*, 754 F2d 1388, 1392 [9th Cir 1985], *cert denied* 474 US 829 [1985]. Courts have uniformly found that Congress made restitution "an element of the criminal sentencing process and not an independent civil action in nature" (*see Lyndonville Sav. Bank & Trust Co. v Lussier*, 211 F3d 697, 702 [2d Cir 2000] [internal quotation marks omitted]). Thus, the VWPA makes civil remedies available to collect restitution but does not make restitution a civil judgment that can simply be enforced in a private suit (*see United States v Johnson*, 983 F2d 216, 220 [11th Cir 1993]; *United States v Brown*, 744 F2d 905, 910 [2d Cir 1984], *cert denied* 469 US 1089 [1984]; *United States v Kelley*,

997 F2d 806 [10th Cir 1993]). Rather, a victim may pursue a civil action for damages in connection with the injuries that resulted in a restitution order, and the restitution order may provide assistance in proving liability, but the petitioner may not rely entirely on the restitution order and the amount ordered in the criminal action. Thus, the petitioner can separately plead and prove liability and damages under either a statutory or a common-law cause of action if the restitution order fails to satisfy the victim (*United States v Bruchey*, 810 F2d 456, 461 [4th Cir 1987]).

Here, petitioner did not separately plead under a statutory or a common-law cause of action, but is merely relying on the restitution order and the plain statutory language of the VWPA. As discussed, the plain language does not indicate and case law and legislative history do not show that Congress intended to provide a private cause of action for victims under the VWPA. Thus, petitioner has no legal standing under the VWPA.

Even if MVRA were applicable, petitioner would not have standing under that statute either. At the same time as the MVRA, which states that "[a]n order of restitution under this section shall be issued and enforced in accordance with section 3664" (18 USC § 3663A[d]), became effective, Congress made significant alterations to the mentioned section 3664. Section

3664 states that "[a]n order of restitution may be enforced by the United States [as provided elsewhere] . . . or by all other available and reasonable means" [§ 3664[m][1][A] and that

> "[a]t the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. . . . *[T]he abstract of judgment shall be a lien* on the property of the defendant" (*id.* Subsection [m][B] [emphasis added]).

While subsection A explicitly provides "all other available and reasonable means" of enforcement to the government, subsection B limits enforcement for victims to obtaining a lien. Thus, Congress set a "negative implication" that all other enforcement mechanisms, including the enforcement of an abstract judgment in a separate court proceeding, are unavailable to private victims (*Schultz v United States*, 594 F3d 1120, 1123 [9th Cir 2010]). Although the MVRA was adopted to make restitution for victims more widespread, it does not appear that this intent was translated into enforcement mechanisms meant to ensure that victims could bring private state court actions to obtain the ordered restitution where government collection efforts fell short, other than by obtaining and enforcing a lien granted under 18 USC § 3664(m) (*see Davis v MacDonald*, 2016 WL 5791452, 2016 US Dist LEXIS 137281 [ED Mich 2016], *appeal dismissed* 2016 WL 10519121 [6th Cir 2016]).

Some cases may support the conclusion that under the MVRA, a victim who has obtained a lien on property based on a restitution order may enforce that lien in a special court proceeding (*see United States v Manuelian*, 298 F Supp 3d 255, 258 [D Mass 2018]; *United States v Perry*, 360 F3d 519 [6th Cir 2004]). However, these cases provide no support for the conclusion that a victim may enforce the abstract judgment itself without obtaining a lien, especially given that this would contradict the language of 18 USC § 3664(m), explicitly requiring a lien. Petitioner has obtained an abstract of judgment, but never recorded it as a lien on defendant's property or brought an action to enforce it. As discussed, the MVRA does not provide a cause of action for a private victim to enforce an abstract judgment on a restitution order, which is exactly what petitioner is seeking to do. Therefore, petitioner has no standing under the MVRA.

Accordingly, the order and judgment (one paper), of the Supreme Court, New York County (Barbara Jaffe, J.), entered December 18, 2017, which granted respondent Rosenbaum's motion to dismiss the petition brought to enforce a judgment for a writ of execution and turnover order on a restitution judgment entered

against respondent Festinger, and denied petitioner's cross motion for leave to amend the petition, should be affirmed, without costs.

All concur.

Order and judgment (one paper), Supreme Court, New York County (Barbara Jaffe, J.), entered December 18, 2017, affirmed, without costs.

Opinion by Acosta, P.J. All concur.

Acosta, P.J., Manzanet-Daniels, Tom, Oing, JJ.

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

ENTERED: MAY 23, 2019

CLERK