SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 17, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Renwick, Manzanet-Daniels, Singh, JJ.

9990 In re Kennedy Cobb, Index 260088/17
Petitioner-Appellant,

-against-

New York State Department of Corrections
and Community Supervision, et al.,
Respondents-Respondents.

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Robert S. Dean, Center for Appellate Litigation, New York (Molly Schindler of counsel), and Arnold & Porter Kaye Scholer LLP, New York (Cathy M. Liu of counsel), for appellant.

Letitia James, Attorney General, New York (Mark S. Grube of counsel), for respondents.

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Judgment, Supreme Court, Bronx County (Howard Sherman, J.), entered on or about February 8, 2018, which, insofar as appealed from as limited by the briefs, denied the petition seeking an order vacating the special condition of parole imposed on petitioner by respondents, on October 27, 2016, that prohibits him from traveling under any circumstances to the borough of Queens, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, the petition to vacate the special condition granted, and the matter remanded to respondents for issuance of a new travel restriction.

In a 2010 Queens County case, petitioner pled guilty to assault in the second degree. The allegations against him stated that he poured boiling water on his domestic partner, punched her, and repeatedly raped her while her skin was peeling off, leaving her with multiple second-degree burns. Petitioner was sentenced to a prison term of six years to be followed by five years of post-release supervision. Upon his conviction, the court issued a full Order of Protection on behalf of the victim.

On February 24, 2016, petitioner was released to post-release supervision subject to the standard conditions of release, as well as a number of special conditions, including, as relevant here, special condition 15, prohibiting him from "associat[ing] in any way or communicat[ing] by any means with the victim [ ] without the permission of the P.O.," and Special Condition 26, requiring him to "comply with all Orders of Protection."

On April 28, 2016, petitioner was arrested and charged with the misdemeanor offense of criminal contempt in the second degree and the violation of harassment in the second degree, based on an allegation made by the victim to petitioner's parole officer that he approached her in Far Rockaway, Queens. Subsequently, a jury acquitted petitioner, and the case was dismissed and sealed.

Thereafter, petitioner was informed that he would be

required to sign several new conditions of release, including Special Condition 3 stating, "I will not leave New York City . . . [including Queens] without written permission from my parole officer (including work purposes). *I understand that I am not to travel under any circumstances to the borough of Queens*." Queens is the borough in which the victim resides.

Petitioner commenced the instant article 78 proceeding seeking reversal of the prohibition of travel to Queens. Petitioner argues that this special condition must be vacated as arbitrary and capricious since it barred petitioner from the entire borough of Queens under all circumstances and without any clear right to seek, or ability to obtain, a waiver from respondents. Respondents state that they permit petitioner to request permission from his parole officer to travel to Queens on a case-by-case basis if he has a legitimate need to travel to that borough. In fact, petitioner requested and was granted permission to travel to Queens to get his belongings from Rikers Island. We agree with petitioner's interpretation of the restriction.

Release conditions that implicate certain fundamental rights, such as the right to travel and the right to associate, have been held permissible as long as "reasonably related" to a petitioner's criminal history and future chances of recidivism

(*Matter of Williams v New York State Div. of Parole*, 71 AD3d 524, 526 [1st Dept 2010], *lv denied* 15 NY3d 710 [2010], *appeal dismissed* 15 NY3d 770 [2010]; *see also Matter of Williams v Department of Corr. & Community Supervision*, 136 AD3d 147, 159, 164-165 [1st Dept 2016], *appeal dismissed* 29 NY3d 990 [2017]).

The special condition, as noted, provides, "I will not leave New York City . . . [including Queens] without written permission from my parole officer (including work purposes). *I understand that I am not to travel under any circumstances to the borough of Queens*." Barring petitioner from the entire county of Queens under all circumstances, without any clear right to seek, or ability to obtain, a waiver from respondents, is a categorical ban impinging upon his rights to travel and association, and, for this reason alone, the travel restriction must be vacated as arbitrary and capricious, as it is not "reasonably related" to petitioner's criminal history and future chances of recidivism (*Matter of Williams,* 71 AD3d at 526).

Accordingly, we remand this matter for respondents to issue a new travel restriction. The restriction must be clear and "reasonably related" to petitioner's criminal history and future chance of recidivism (*Matter of Williams*, 71 AD3d at 526). Unlike the vacated restriction, the new restriction should

specify that any travel restrictions are subject to case-by-case exceptions for legitimate reasons, which petitioner may request from his parole officer.

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: OCTOBER 17, 2019

CLERK

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

10093-
10093A The People of the State of New York,
Respondent,

-against-

Dionis Mejia,
Defendant-Appellant.

Ind. 4474/11

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Myers & Galiardo LLP, New York (Matthew D. Myers of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J. at initial suppression hearing; Bonnie G. Wittner, J. at independent source hearing; Daniel P. FitzGerald, J. at jury trial and sentencing), rendered May 6, 2016, convicting defendant of assault in the first degree and criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 17 years, and order, same court (Daniel P. FitzGerald, J.), entered on or about December 7, 2017, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

Defendant's legal insufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. There is no

basis for disturbing the jury's determinations concerning identification and credibility.

The record supports the court's determination that, notwithstanding an unduly suggestive lineup, the witnesses had an independent source for their in-court identifications of defendant (*see Neil v Biggers*, 409 US 188, 199–200 [1972]; *People v Williams*, 222 AD2d 149, 153 [1st Dept 1996], *lv denied* 88 NY2d 1072 [1996]). Among other things, each of the witnesses at issue had an ample opportunity to observe defendant at the time of the crime, and each witness made a detailed, accurate description.

Defendant's remaining contentions regarding the admissibility of evidence, the prosecutor's summation and the court's charge are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

The court properly denied defendant's motion to vacate the judgment, made on the ground of ineffective assistance of counsel. The court conducted a thorough evidentiary hearing, including the testimony of trial counsel and several witnesses whom defendant claims should have been called at trial. There is no basis for disturbing the court's credibility determinations. We conclude that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d

708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that counsel's choices regarding calling or interviewing potential witnesses fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome.

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

ENTERED: OCTOBER 17, 2019

CLERK

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

10094 In re Giselle H.G., also known as Giselle G., and Others,

Children Under the Age of Eighteen Years, etc.,

Vanessa G.,
Respondent-Appellant,

New York Foundling Hospital,
Petitioner-Respondent,

Administration for Children's Services,
Petitioner.

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Douglas H. Rieniger, New York, for appellant.

Daniel Gartenstein, Long Island City, for respondent.

Andrew J. Baer, New York, attorney for the child Giselle G.

Larry S. Bachner, New York, attorney for the child Dionne G.

Kenneth M. Tuccillo, Hastings on Hudson, attorney for the child Diavonni G.

Lewis S. Calderon, Jamaica, attorney for the child Charisma D.

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Order, Family Court, New York County (Karen I. Lupuloff, J.), entered on or about September 11, 2017, denying respondent mother's motion to vacate a dispositional order, same court and Judge, entered on or about March 31, 2017 upon her default, which, upon a fact-finding determination that she permanently neglected the subject children, terminated her parental rights and committed custody and guardianship of the children to the

petitioner agency and the Commissioner of Social Services for the City of New York for the purpose of adoption, unanimously affirmed, without costs.

The Family Court providently exercised its discretion in denying the mother's motion to vacate, as she failed to present a reasonable excuse for her failure to appear at the fact-finding and dispositional hearings, and failed to provide a meritorious defense to the petition to terminate her parental rights (CPLR 5015 [a][1]; *Matter of Arianna-Samantha Lady Melissa S. [Carissa S.]*, 134 AD3d 582, 583 [1st Dept 2015], *lv denied in part, dismissed in part* 27 NY3d 952 [2016]). The mother failed to provide any details or documentation to support her claim that she was incarcerated on the date of the hearing (*Matter of Amani Dominique H. [Andre H.]*, 67 AD3d 466 [1st Dept 2009]; *Matter of Dumaka Hershey Jones D.*, 7 AD3d 261 [1st Dept 2004]; *Matter of Devon Dupree F.*, 298 AD2d 103 [1st Dept 2002]).

Respondent's purported excuse of illness for failing to appear at another hearing was properly rejected since she failed to provide any documentation to substantiate her claim, and did not explain why she was unable to contact either the court or her attorney regarding her inability to attend the hearings of which she had notice, especially since the hearing with respect to the eldest child was held in the afternoon (*Matter of Evan Matthew A.*

[Jocelyn Yvette A.], 91 AD3d 538 [1st Dept 2012]. In light of the mother's chronic failure to appear in court, the Family Court properly proceeded with the permanent neglect proceeding in her absence (*Matter of Brittany Annette M. [Danielle McC.]*, 88 AD3d 466 [1st Dept 2011], *lv dismissed* 18 NY3d 873 [2012]; *Matter of Kristen Simone V.*, 30 AD3d 174, 175 [1st Dept 2006]). Clear and convincing evidence supports the court's finding that despite the agency's diligent efforts, the mother permanently neglected her children.

We have considered the mother's remaining contentions, including that the court was biased against her in favor of the agency, and find them unavailing.

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

ENTERED: OCTOBER 17, 2019

CLERK

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

10095 Richard Lyons, et al., Index 160496/15
Plaintiffs-Appellants-Respondents,

-against-

New York City Economic Development Corporation, et al.,
Defendants-Respondents-Appellants.

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Foulke Law Firm, Goshen (Evan M. Foulke of counsel), for appellants-respondents.

Goldberg Segalla LLP, White Plains (William T. O'Connell of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered on or about June 19, 2018, which, to the extent appealed from as limited by the briefs, granted those branches of defendants' motion which were for summary judgment dismissing plaintiffs' common-law negligence and Labor Law § 200 causes of action, but denied that branch of defendants' motion which was for summary judgment dismissing plaintiffs' Labor Law § 241(6) cause of action, unanimously modified, on the law, to deny defendants' motion as to the common-law negligence and Labor Law § 200 causes of action, and otherwise affirmed, without costs.

According to the record, at the time defendants filed their motion, no depositions had taken place. The record does not show that the parties have exchanged any paper discovery, such as

records concerning the installation, maintenance, or repair of the mesh walkway on which plaintiff Richard Lyons fell.

Accordingly, plaintiffs met their burden of demonstrating that facts essential to justify opposition to the motion may lie within defendants' exclusive knowledge or control (*see* CPLR 3212[f]), and defendants' motion should have been denied in its entirety as premature, with leave to renew upon the completion of discovery (*see Marabyan v 511 W. 179 Realty Corp.*, 165 AD3d 581, 582 [1st Dept 2018]; *Figueroa v City of New York*, 126 AD3d 438, 439 [1st Dept 2015]; *Brooks v Somerset Surgical Assoc.*, 106 AD3d 624, 624-626 [1st Dept 2013]).

The parties' remaining contentions are academic in light of our determination.

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

ENTERED: OCTOBER 17, 2019

CLERK

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

10096 The People of the State of New York, Respondent, Ind. 5147/14

-against-

Terrence Maynard, Defendant-Appellant.

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Office of the Appellate Defender, New York (Christina A. Swarns of counsel), and Jones Day, New York (Lily E. Hann of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered February 16, 2016, convicting defendant, after a jury trial, of burglary in the second degree and robbery in the third degree, and sentencing him, as a persistent violent felony offender, to concurrent terms of 18 years to life and 3½ to 7 years, respectively, unanimously affirmed.

The record fails to support defendant's claim that his trial counsel conceded his guilt. Accordingly, defendant has not established a right to counsel violation under *McCoy v Louisiana* (584 US__, 138 S Ct 1500 [2018]).

In *McCoy*, the Supreme Court held that "[w]hen a client expressly asserts that the objective of [the client's defense] is to maintain innocence of the charged criminal acts, [the] lawyer

must abide by that objective and may not override it by conceding guilt" (*id.* at 1509). Defendant argues that his trial counsel ran afoul of *McCoy*, and thus that his Sixth Amendment right to counsel was violated, because counsel "effectively conced[ed]," against defendant's express wishes to the contrary, that defendant robbed the victim. He further argues that his trial counsel focused the defense on the effort to persuade the jury that the (third-degree) robbery occurred entirely in an unlocked apartment building vestibule, and therefore not in a dwelling, compelling the conclusion that defendant was not guilty of second-degree burglary, the most serious count in the indictment.

However, while the defense focused its efforts on persuading the jury to accept the nonfrivolous proposition that there was reasonable doubt as to whether the robbery occurred in a dwelling, counsel does not concede defendant's identity as the perpetrator. Among other things, counsel argued in his opening statement that one of the *two* things the case was "about" was "whether the state will be able to prove the identity of the person who in fact robbed [the victim]," and counsel elicited from the victim an admission that she did not know if defendant was the man who robbed her. Even though counsel did not probe deeply into the question of the robber's identity and asked only perfunctory questions in this regard, *McCoy* did not hold that the

right to counsel is violated when a defense lawyer advocates for the defendant's claim of complete innocence with what the defendant might consider insufficient zeal. Rather, it prohibits an attorney from overriding a defendant's "protected autonomy right" (*id*. at 1511) to assert innocence of the criminal acts charged by conceding the defendant's guilt. Counsel in this case did not do that. Rather – in light of testimony by the defendant that was decisively contradicted by the evidence and therefore transparently false – counsel made the permissible alternative argument (*see People v Steele*, 26 NY2d 526, 529 [1970]) that, if the jury determined that defendant was the perpetrator, it should still acquit him of the top count of burglary in the second degree. Neither counsel's concentration on this aspect of the defense nor counsel's characterization of the defense's trial strategy in a remark made at sentencing – relied on by defendant on appeal – establishes a violation of the rule of *McCoy*.

Defendant's numerous other claims of constructive denial, or ineffective assistance, of counsel are also unavailing. In the first instance, all of these arguments are unreviewable on direct appeal because they involve questions regarding counsel's strategy, intentions, and interactions with defendant that could only have been fully assessed on a record developed in the context of a CPL 440 motion (*see People v McClean*, 15 NY3d 117,

121 [2010]; *People v Rivera*, 71 NY2d 705, 709 [1988]). In particular, the record suggests that when defendant testified, against the advice of counsel, in narrative form, without direct examination, counsel may have been following the procedure approved in *People v DePallo* (96 NY2d 437 [2001]; *see also Nix v Whiteside*, 475 US 157 [1986]). Furthermore, defendant's CPL 330.30(1) motion to set aside the verdict did not render any of these claims reviewable on direct appeal, because such a motion is limited to grounds appearing in the record (*see People v Wolf*, 98 NY2d 105 [2002]; *see also People v Giles*, 24 NY3d 1066, 1068 [2014]; *People v Ai Jiang*, 62 AD3d 515, 516 [1st Dept 2009], *lv denied* 14 NY3d 769 [2010]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of these claims may not be addressed on appeal.

In the alternative, to the extent that defendant's claims may be reviewed on the existing record, each fails on the merits. Defendant has not shown that any of counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). The presentation of alternative defenses, and the emphasis of one defense over

another, may be a plausible strategy (*see e.g. People v Gomez*, 305 AD2d 238 [1st Dept 2003], *lv denied* 100 NY2d 581 [2003]; *People v Brito*, 304 AD2d 320, 321 [2003], *lv denied* 100 NY2d 592 [2003]). It should be noted that had counsel obtained his principal objective of a conviction of only third-degree robbery, a class D felony, defendant would have avoided a mandatory life sentence as a persistent violent felony offender.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 17, 2019

CLERK

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

10100 The People of the State of New York, Ind. 1761/15
Respondent,

-against-

Leonardo Acosta,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles Solomon, J.), rendered March 28, 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: OCTOBER 17, 2019

CLERK

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

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

10101- Ind. 4736/13
10101A The People of the State of New York, 5743/13
Respondent,

-against-

Marc Lewis,
Defendant-Appellant.

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Janet E. Sabel, The Legal Aid Society, New York (Harold V. Ferguson, Jr. Of counsel), for appellant.

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

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An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Ronald Zweibel, J.), rendered February 26, 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 judgments so appealed from be and the same are hereby affirmed.

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

ENTERED: OCTOBER 17, 2019

CLERK

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

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

10102-
10102A In re S.H. and Another,

Children Under Eighteen Years of Age etc.,

Patricia W.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

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Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Janet L. Zaleon of counsel), for respondent.

Dawne A. Mitchell, The Legal Aid Society, New York (Marcia Egger of counsel), attorney for the child S.H.

Carol L. Kahn, New York, attorney for the child Jasmine H.'S.

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Order of disposition, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about January 23, 2018, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about December 13, 2017, which found that respondent mother neglected the subject children, unanimously affirmed, without costs. Appeal from fact-finding order unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The findings of neglect were supported by a preponderance of

the evidence (*see* Family Ct Act § 1012[f][i][B]; § 1046[b][i]). Such evidence shows that the mother neglected the children by repeatedly placing her then 18-month-old daughter (J.) in the control of her nine-year-old son (S.) for brief periods of time while the children were sent to retrieve mail from the lobby of their building. S. had a history of emotional and behavioral issues that made this particularly inappropriate. Prior to the incident that led to S's. removal from the mother's home, the mother had failed to continue with recommended therapy for S. after his school disciplined him for offering to give a female classmate money for sex. In addition, the mother was aware that S. had engaged in dangerous and destructive behavior, including attempting to set fires, and had expressed extreme jealousy of J., even prompting him to write a letter to the mother expressing that he felt unloved. Despite this history and the fact that J. was just 18 months old and still learning to walk on stairs, on numerous occasions, the mother encouraged S. to walk with J. down multiple flights of stairs without adult supervision. On at least one of these occasions, S. engaged in sexual behavior with J. while alone with her in the building's elevator, which was discovered only after a building manager reviewed the elevator's surveillance video. Thus, the mother's judgment was so impaired

as to expose J. to substantial risk of harm (*see Matter of Serenity P. [Shameka P.]*, 74 AD3d 1855, 1856 [4th Dept 2010]). Furthermore, the mother failed to adequately address S.'s emotional and psychiatric needs, thereby adversely affecting his mental health and posing a risk to other children (*see Matter of Sayeh R.*, 91 NY2d 306, 315 [1997]; *see also Matter of Faridah W.*, 180 AD2d 451, 452 [1st Dept 1992], *lv denied* 80 NY2d 751 [1992]).

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

ENTERED: OCTOBER 17, 2019

CLERK

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

10103 Raymond Moore, et al., Index 154133/17
Plaintiffs-Appellants,

-against-

Greystone Properties 81 LLC,
Defendant-Respondent.

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Law Offices of Hariri & Crispo, New York (Ronald D. Hariri of counsel), for appellants.

Horing Welikson Rosen & Digrugilliers, P.C., Williston Park (Niles C. Welikson of counsel), for respondent.

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Order, Supreme Court, New York County (David B. Cohen, J.), entered October 12, 2018, which granted defendant landlord's motion to dismiss the complaint, unanimously reversed, with costs, on the law, and the motion denied.

The complaint seeking, inter alia, a declaration that plaintiffs' apartment is rent stabilized and that plaintiffs are entitled to a rent stabilized lease, was improperly dismissed. The record demonstrates that defendant landlord only showed its entitlement to collect the last registered rent for the subject apartment (i.e., $972.51 in 1998), as it failed to comply with the rent registration requirements (*see* Administrative Code of City of NY § 26-517[e]; 9 NYCRR 2528.4[a]; *Bradbury v 342 W. 30th St. Corp.*, 84 AD3d 681, 683-684 [1st Dept 2011]; *Jazilek v Abart Holdings, LLC*, 72 AD3d 529, 531 [1st Dept 2010]), and did not

demonstrate what increases, if any, it may be entitled to as a legal regulated rent for the apartment. Contrary to the landlord's argument regarding plaintiffs' claims for rent overcharges and treble damages, plaintiffs' overcharge claims were timely brought within six years of the first overcharge payment (*see* CPLR 213-a, as amended by L 2019, ch 36, § 7 [Part F]).

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

ENTERED: OCTOBER 17, 2019

CLERK

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

10104 Gracie O'Rourke, Index 156502/16
Plaintiff-Respondent,

-against-

National Foreign Trade Council, Inc.,
Defendant-Appellant.

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Gordon Rees Scully Mansukhani, LLP, New York (Heather E. Griffin of counsel), for appellant.

Schwartz Perry & Heller, LLP, New York (Brian Heller of counsel), for respondent.

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Order, Supreme Court, New York County (Alan C. Marin, J.), entered on or about March 5, 2019, which denied defendant's motion to dismiss the complaint without prejudice, unanimously affirmed, without costs.

The complaint states a claim for gender discrimination under the New York City Human Rights Law (HRL) (*see* Administrative Code of the City of NY § 8-107[1][a][3]) by alleging, as relevant here, that plaintiff's supervisor treated her less well than other employees under circumstances giving rise to an inference of discrimination on the basis of gender (*see Harrington v City of New York*, 157 AD3d 582, 584 [1st Dept 2018] [elements of gender discrimination claim]; *Williams v New York City Hous. Auth.*, 61 AD3d 62, 78 [1st Dept 2009], *lv denied* 13 NY3d 702 [2009] [standard in hostile work environment context]).

Plaintiff alleges that her supervisor insulted, excluded, and concealed information from her, and denied her requests for a raise; that he made numerous statements that at least arguably reflect gender-based animus, including, "You women are such sensitive flowers"; he "only supports humble and meek women"; plaintiff was an "in your face woman"; he would "probably" treat male employees differently, including by grooming them for advancement; and his perception of plaintiff as "a smart confident accomplished woman with an opinion might be the reason for [his] harsh treatment of her." Her supervisor's alleged remarks, which rise above the level of nonactionable petty slights or inconveniences, establish differential treatment (*see Williams*, 61 AD3d at 79-80).

The complaint also states a claim for retaliation under the HRL (*see* Administrative Code § 8-107[7]; *Williams*, 61 AD3d at 70-71) by alleging that, after plaintiff engaged in protected activities, her supervisor took away her responsibility for hiring support staff and ability to use such staff as a resource; excluded her from projects and ignored and hid information from her; publicly undermined her; and took away her planning responsibilities with respect to two annual conferences. The supervisor's alleged gender-discriminatory statements (described above) are sufficient to raise an inference of retaliatory animus

- especially when viewed in conjunction with his alleged threat to "make the situation worse" for plaintiff if she continued to complain. Although defendant is correct that some of the alleged protected activities occurred after the alleged retaliatory conduct, and thus could not have been causally related thereto, most of the protected activities occurred before the alleged retaliation.

Defendant is also correct that the employer's conduct after the employee engaged in protected activity does not constitute retaliation where it is a continuation of the course of the employer's conduct before the employee engaged in the protected activity (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 129 [1st Dept 2012]). However, while some of plaintiff's supervisor's alleged retaliatory conduct mirrored conduct that occurred before the protected activities, the complaint alleges at least some "new" or escalated conduct after the protected activities took place. Whether the motivation for this conduct was retaliation or continued discrimination cannot be determined at this stage of

the litigation.

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

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

ENTERED: OCTOBER 17, 2019

CLERK

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

10105- Ind. 3333/09
10105A The People of the State of New York, 3440/11
Respondent,

-against-

Lahmau Mitchell,
Defendant-Appellant.

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Christina Swarns, Office of the Appellate Defender, New York (Gabe Newland of counsel), for appellant.

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

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Judgments, Supreme Court, New York County (Richard D. Carruthers and James M. Burke, JJ. at pleas; Burke, J. at sentencing), rendered October 12, 2016, convicting defendant of robbery in the first degree and bail jumping in the first degree, and sentencing him to an aggregate term of 10 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the prison component of the sentence on

the robbery conviction to 8 years, and otherwise affirmed.

We find the sentence excessive to the extent indicated.

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

ENTERED: OCTOBER 17, 2019

CLERK

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

10106 Federal Home Loan Bank of Boston, Index 656707/17
Plaintiff-Respondent,

-against-

Moody's Corporation, et al.,
Defendants-Appellants.

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Satterlee Stephens LLP, New York (James J. Coster of counsel), for appellants.

Keller Rohrback L.L.P., New York (David S. Preminger of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joel M. Cohen, J.), entered on March 26, 2019, which, to the extent appealed from as limited by the briefs, denied defendants' motion to dismiss plaintiff's first cause of action as time-barred, unanimously affirmed, with costs.

CPLR 205(a) applies "to prior actions commenced in a federal court within this state" (Weinstein-Korn-Miller, NY Civ Prac ¶ 205.09 [2d ed 2019]; *see also e.g. 423 S. Salina St. v City of Syracuse,* 68 NY2d 474, 486 [1986], *cert denied* 481 US 1008 [1987]). Plaintiff's prior action, which was removed to the U.S. District Court for the District of Massachusetts on May 27, 2011, was transferred from that court – which lacked general personal jurisdiction over defendants – to the Southern District of New York (SDNY). 28 USC § 1631 provides in pertinent part, "Whenever

a civil action is filed in a court . . . and that court finds that there is a want of jurisdiction, the court shall . . . transfer such action . . . to any other such court . . . in which the action . . . could have been brought at the time it was filed . . ., and *the action . . . shall proceed as if it had been filed in . . . the court to which it is transferred on the date upon which it was actually filed in . . . the court from which it is transferred"* (emphasis added). Hence, the motion court properly treated plaintiff's prior action as if it had been filed in the SDNY as of May 2011 (*see generally Arty v New York City Health & Hosps. Corp.*, 148 AD3d 407, 409 [1st Dept 2017]).

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

ENTERED: OCTOBER 17, 2019

CLERK

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

10107 In re Melissa N.,
Petitioner-Respondent,

-against-

Jeffrey B.,
Respondent-Appellant.

_____

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

_____

Order of fact-finding and disposition (one paper), Family Court, Bronx County (Valerie A. Pels, J.), entered on or about June 28, 2018, which, upon a fact-finding determination that respondent committed the family offense of harassment in the first degree, granted petitioner a two-year order of protection against respondent, unanimously modified, on the law and the facts, to vacate the finding of harassment in the first degree and substitute findings that respondent committed the family offenses of harassment in the second degree and disorderly conduct, and otherwise affirmed, without costs.

Family Court's determination that respondent's actions constituted the family offense of harassment in the first degree cannot be sustained, because that offense requires proof of a course of conduct or repeated commission of acts of harassment, while the petition alleged only a single incident (*see Matter of*

Doris M. V Yarenis P., 161 AD3d 502 [1st Dept 2018]; *Matter of Ryan Perrie M. v Caden M.*, 153 AD3d 1200 [1st Dept 2017]; *see* Family Court Act §§ 812[1]; 832 and Penal Law § 240.25).

Although Family Court did not make any findings concerning the other family offenses alleged, remand is not required because "the record is sufficiently complete to allow this Court to make an independent factual review and draw its own conclusions" (*Matter of Charlene R. v Malachi R.*, 151 AD3d 482, 482 [1st Dept 2017]; *see Matter of Allen v Black*, 275 AD2d 207, 209 [1st Dept 2000]). Upon such review, and accepting Family Court's credibility determinations (*Matter of Chigusa Hosono D. v Jason George D.*, 137 AD3d 631, 632 [1st Dept 2016]), we find that petitioner established by a fair preponderance of the evidence that respondent committed acts constituting the family offenses of harassment in the second degree and disorderly conduct during a visit with their son in a public place (Penal Law §§ 240.26; 240.20[2] and [3]; *see Matter of Vanita UU. v Mahender VV.*, 130 AD3d 1161, 1166 [3d Dept 2015], *lv dismissed and denied* 26 NY3d

998 [2015]; *Matter of Banks v Opoku*, 109 AD3d 470 [2d Dept 2013]). We also agree that the issuance of a two-year order of protection in petitioner's favor was proper (Family Ct Act §§ 842[a]; [c]).

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

ENTERED: OCTOBER 17, 2019

CLERK

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

10109 Resurgence Asset Management, LLC, Index 651737/12
Plaintiff-Respondent,

Resurgence GP III, LLC, et al.,
Plaintiffs,

-against-

Steve Gidumal,
Defendant-Appellant.

_____

O'Brien LLP, New York (Sean R. O'Brien of counsel), for appellant.

Pollack Solomon Duffy LLP, New York (Barry S. Pollack of counsel), for respondent.

_____

Order, Supreme Court, New York County (James E. d'Auguste, J.), entered November 7, 2018, which, to the extent appealed from as limited by the briefs, inter alia, granted plaintiff Resurgence Asset Management, LLC's (RAM) cross motion for partial summary judgment on liability on the claim for breach of contract, unanimously affirmed, without costs.

Defendant, Steve Gidumal, served as a Managing Director and Co-Chief Investment Officer for RAM, a private equity firm founded and owned by plaintiff M.D. Sass Investors Services, Inc. During his tenure, Gidumal managed, inter alia, an investment fund titled M.D. Sass Corporate Resurgence Holdings III, LLC (Holdings), a wholly-owned subsidiary of a fund known as "Fund

III" consisting of 13 investors. The Limited Partnership Agreement that created Holdings contained a "clawback provision" that allowed the Limited Partners to receive any overpayments in incentive fees from the General Partner, Resurgence GP III LLC, in the event that they lost money.

On September 28, 2008, Gidumal entered into a Termination Agreement, effective July 31, 2008, with RAM and its affiliates (the Companies) due to differences in the parties' investment strategies. The Termination Agreement provided that the Companies would continue to pay Gidumal 20.588% of profits from August 1, 2008 through July 31, 2009, and 10.294% for the following year.

The Termination Agreement specifically stated that defendant's compensation payment was subject to clawback obligations. By letter dated January 31, 2011, the Companies informed Gidumal that the preliminary estimate of his pro rata share of his clawback obligations for Fund III would be $428,072. The breach of contract claim is premised upon Gidumal's failure to pay his share of the clawback obligation.

Plaintiffs established prima facie entitlement to summary judgment. Plaintiffs submitted evidence sufficient to show that Gidumal's compensation payment under the terms of the Termination Agreement was subject to a clawback, that plaintiffs performed

their obligation under the contract by paying Gidumal the agreed upon compensation and that Gidumal breached the contract by failing to pay his clawback obligation. The terms of the Termination Agreement unambiguously state that Gidumal's pro rata share of any clawback obligation was determined by dividing the profits he received from the fund, through incentive fees or other allocations, by the aggregate profits received by all persons who were subject to the clawback obligation for that fund. This formula does not base the pro rata share of clawback obligations on the investor, and Gidumal's understanding to the contrary cannot alter these clear terms or create a material question of fact (*see Wells v Shearson Lehman/American Express*, 72 NY2d 11, 24 [1988]).

Moreover, RAM's breach of a representation in the Termination Agreement, that it would not pay Gidumal's Co-Chief Investment Officer, Byron Haney, an amount greater than the $838,662 compensation payment it made to Gidumal does not preclude summary judgment or discharge Gidumal's duty to perform. RAM, in effect, paid Gidumal a total of $1.07 million under the terms of the Termination Agreement, but split the total payment into two payments. This amount is commensurate with what Haney was ultimately paid.

Gidumal's counterclaim for breach of contract against RAM

does not preclude or undermine RAM's claim for breach of contract, as the counterclaim was not "inextricably interwoven with and inseparable from the issues raised in [RAM's] complaint" (*cf Marion Scott Real Estate v Riverbay Corporation, 173 AD3d 588 (1st Dept 2019); Boston Concessions Group v Criterion Ctr. Corp.*, 200 AD2d 543, 544 [1st Dept 1994]).

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

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

ENTERED: OCTOBER 17, 2019

CLERK

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

10110-
10110A The People of the State of New York,
Respondent,

Ind. 4379/14
5030/14

-against-

Michael Caviness,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Amith Gupta 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 August 10, 2016, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of six years, unanimously affirmed. Judgment, same court and Justice, rendered August 10, 2016, as amended August 25, 2016, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a concurrent term of two to four years, unanimously reversed, as a matter of discretion in the interest of justice, and the indictment dismissed.

With respect to defendant's drug conviction, we find that

the court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). The hearing evidence established probable cause for defendant's arrest.

With respect to the weapon conviction, involving a gravity knife, the People, in the exercise of their broad prosecutorial discretion, have agreed that the indictment should be dismissed under the particular circumstances of the case and in light of recent legislation amending Penal Law § 265.01 to effectively decriminalize the simple possession of gravity knives, notwithstanding that this law does not apply retroactively. We agree, and we do not reach any other issues.

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

ENTERED: OCTOBER 17, 2019

CLERK

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

10111 The People of the State of New York, Ind. 3659N/17
Respondent,

-against-

Xavier Washington,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (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 (Steven Antignani, J. at plea; Laurie Peterson, J. at sentencing), rendered January 24, 2018,

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

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

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

ENTERED: OCTOBER 17, 2019

CLERK

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

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

10112N Cafe Lughnasa Inc., Index 100457/14
Plaintiff-Appellant,

-against-

A&R Kalimian LLC,
Defendant-Respondent.

_____

Michael Stepper, New York, for appellant.

Rosenberg & Estis, P.C., New York (Brett B. Theis of counsel), for respondent.

_____

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered November 1, 2018, which denied plaintiff's motion to amend the second amended complaint, unanimously affirmed, without costs.

The court properly denied plaintiff's motion to amend the second amended complaint on the ground that the proposed amendments lack merit and would delay discovery and trial in this action. Leave to amend a pleading should be "freely given" (CPLR 3025[b]) "as a matter of discretion in the absence of prejudice or surprise" (*Stroock & Stroock & Lavan v Beltramini*, 157 AD2d 590, 591 [1st Dept 1990]). However, leave will be denied where the proposed amendment lacks merit or would serve no purpose other than to "needlessly complicate and/or delay discovery and trial" (*Verizon N.Y. Inc. v Consolidated Edison, Inc.*, 38 AD3d

391, 391 [1st Dept 2007]).

The first, third, and fourth causes of action contained in the proposed third amended complaint are without merit as they are based on the 2014 and 2016 notices of default, which cannot provide a basis for a breach of contract claim (*see Despresso of 42nd Street, LLC v Green 317 Madison, LLC*, 2014 WL 916660, at *2, 2014 NY Slip Op 30508[U] [Sup Ct, NY Cty 2014]). The fifth cause of action contained in the proposed third amended complaint, which is for breach of contract based on the covenant of quiet enjoyment, is also without merit because plaintiff tenant was not evicted and did not pay rent (*see Dave Herstein Co. v Columbia Pictures Corp.*, 4 NY2d 117, 121 [1958]). Leave to amend the second amended complaint to add the proposed second cause of action for water damage should also be denied based on the unexplained delay in bringing such claim and the prejudice to the defendant. Defendant landlord alleges that plaintiff was aware of "severe" flooding when it rained or when snow melted since March 2015. Plaintiff nonetheless waited until 2018, after defendant obtained a judgment of possession and a money judgment, to assert this new claim. Not only has plaintiff failed to explain this delay, but defendant would have its position inextricably changed if plaintiff were allowed to add the proposed claim, as the result would be additional expenses and

lengthy litigation to investigate the merit or defenses of the claim, which could have been asserted while plaintiff was still in possession (*see Barbour v Hospital for Special Surgery*, 169 AD2d 385, 386 [1st Dept 1991]; *Chichilnisky v Trustees of Columbia Univ. in City of N.Y.*, 49 AD3d 388, 389 [1st Dept 2008]).

The proposed third amended complaint also fails to "clearly [show] the changes or additions" between it and the second amended complaint, as directed by the court and required by CPLR 3025(b).

The court also properly found that the only remaining claim in the action is one for the defendant landlord's attorney's fees. Plaintiff's failure to pay rent foreclosed its claims under the breach of quiet enjoyment provision of the lease (*see Dave Herstein Co. v. Columbia Pictures Corp.*, 4 NY2d 117, 121 [1958]). Moreover, plaintiff's failure to include a copy of the

hearing transcript in the record on appeal precludes any review of the court's final determination that the only remaining issue was for attorney's fees (*see Matter of Rose G. [Vincent G.]*, 120 AD3d 683, 684 [2d Dept 2014]).

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

ENTERED: OCTOBER 17, 2019

CLERK

Manzanet-Daniels, J.P., Gische, Webber, Moulton, JJ.

10113 The People of the State of New York, Respondent, Ind. 30026/04

-against-

Joseph Burden, Defendant-Appellant.

_____

Epstein & Weil LLC, New York (Lloyd Epstein of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Paul A. Andersen of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Dominic R. Massaro, J.), entered on or about March 4, 2005, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously reversed, on the law, without costs, and the sex offender adjudication vacated.

Defendant is not required to register as a sex offender in New York on the basis of his Connecticut misdemeanor conviction. In 2003, defendant was convicted in Connecticut of two counts of fourth-degree sexual assault. To the extent relevant here, a person is guilty of that misdemeanor when he "subjects another person to sexual contact who is . . . physically helpless, or . . . subjects another person to sexual contact without such other person's consent" (Conn Gen Stat § 53a-73a[a][1][D],[2]). The physical helplessness element would make the crime the

equivalent of first-degree sexual abuse (Penal Law § 130.65[2]), a registrable offense in New York. In the absence of that element, the crime is the equivalent of third-degree sexual abuse (Penal Law § 130.55), which is not registrable.

Equivalency, based on a comparison of essential elements (*see* Corr Law § 168-a[1],[2][d]), may be established when "the conduct underlying the foreign conviction . . . is, in fact, within the scope of the New York offense" (*Matter of North v Board of Examiners of Sex Offenders of State of N.Y.*, 8 NY3d 745, 753 [2007]). Here, the hearing court relied on undisputed documentary evidence that each victim "felt paralyzed" while being sexually abused by defendant; one victim "just froze" and the other "was afraid to confront" him. There is no indication, however, that either victim was physiologically incapable of speech, drugged into a stupor, or otherwise unable to communicate her unwillingness to submit to the sexual contact (*see People v Battease*, 74 AD3d 1571, 1574 [3d Dept 2010], *lv denied* 15 NY3d 849 [2010]; *People v Conto*, 218 AD2d 665, 666 [2d Dept 1995], *lv denied* 87 NY2d 845 [1995]). Therefore, the hearing court erred in finding that the victims were "physically helpless" for purposes of determining what New York offense was the equivalent of the Connecticut convictions, and, correspondingly, erred in determining that the equivalent New York offense was first-

degree, rather than third-degree, sexual abuse. Accordingly, the sex offender adjudication must be vacated.

The issue is properly reviewable on this appeal, notwithstanding defendant's failure to raise it before the hearing court. While we agree with the People that preservation considerations applicable to civil appeals apply here, those considerations do not bar review. This appeal presents a pure question of law. This issue could not have been avoided if raised before the hearing court, and it is reviewable on the existing record (*see Chateau D'If Corp. v City of New York*, 219 AD2d 205, 209 [1st Dept 1996], *lv denied* 88 NY2d 811 [1996]). Moreover, the hearing court expressly ruled on the issue in its detailed decision.

Finally, we find that the doctrine of laches does not warrant dismissal of the appeal. No new hearing or other proceedings is required, given that the sex offender adjudication was erroneous ab initio and should never have been imposed, and, as discussed, the existing record is fully adequate for review of the legal issue presented. Although some 13 years passed without

defendant taking any action to exercise his right to appeal (*see* CPLR 5513[a]), the People have failed to show any resultant prejudice (*see Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 816-817 [2003], *cert denied* 540 US 1017 [2003]).

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

ENTERED: OCTOBER 17, 2019

CLERK

Manzanet-Daniels, J.P., Gische, Webber, Moulton, JJ.

10114- Index 651497/17
10114A-
10114B-
10114C-
10114D-
10114E In re McKenna, Long & Aldridge, LLP,
Petitioner-Appellant,

-against-

Ironshore Specialty Insurance Company, et al.,
Respondents-Respondents,

Eidos Partners, LLC, et al.,
Respondents-Appellants.

_____

Arnold & Porter Kaye Scholer LLP, New York (James M. Catterson, of counsel), for McKenna, Long & Aldridge, LLP, appellant.

Dentons US LLP, Atlanta, GA (R. Matthew Martin of the bar of the State of Georgia, admitted pro hac vice, of counsel), for Eidos Partners, LLC; Eidos III, LLC; Eidos IV, LLC; Eidos Display, LLC; Eidos Advanced Display, LLC; Kamdes Holding, LLC and Eidos, LLC, appellants.

Kaufman Dolowich & Voluck, LLP, New York (Peter A. Stroili and Kevin J. Windels of counsel), for Ironshore Specialty Insurance Company, respondent.

Cole Schotz P.C., New York (Michael D. Sirota of counsel), for Stairway Legacy Assets L.P., respondent.

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Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered June 18, 2018, in favor of respondent Stairway Legacy Assets, L.P. and against petitioner and respondents Eidos Partners, LLC; Eidos III, LLC; Eidos IV, LLC; Eidos Display, LLC;

Eidos Advanced Display, LLC; Kamdes Holding, LLC; and Eidos, LLC (collectively, Eidos), and amended judgment, same court and Justice, entered July 3, 2018, in favor of Ironshore Specialty Insurance Company and against petitioner and Eidos, unanimously affirmed, with costs. Appeals from orders, same court and Justice, entered May 24, 2018, August 2, 2018, August 27, 2018, and August 24, 2018, to the extent not abandoned, unanimously dismissed, without costs, as subsumed in the appeals from the aforesaid judgments.

Contrary to petitioner's and Eidos's arguments about the final arbitration award on which the judgments were entered, the arbitration panel neither exceeded its authority in making the award (*see* CPLR 7511[b][iii]) nor issued the award in manifest disregard of the law (*see Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 480 [2006], *cert dismissed* 548 US 940 [2006]). The language of the arbitration clause referring to "any controversy, claim or dispute arising in connection with [the insurance] policy [issued by Ironshore]," reflects "such a broad grant of power to the arbitrators as to evidence the parties' clear intent to arbitrate issues of arbitrability" (*Shaw Group Inc. v Triplefine Intl. Corp.*, 322 F3d 115 [2d Cir 2003] [internal quotation marks and bracket omitted]). Moreover, the U.S. District Court for the Southern District of New York

determined that petitioner was bound by the arbitration provision in the policy as an intended third-party beneficiary of the policy (*see McKenna Long & Aldridge, LLP v Ironshore Specialty Ins. Co.*, 2015 WL 144190, *12, 2015 US Dist LEXIS 3347, *31-32 [SD NY 2015]). "[I]t is undisputed that Eidos obtained the policy in order to obtain funds to pay [petitioner's] legal fees" (*id.*).

As to manifest disregard of the law, petitioner and Eidos failed to show that the arbitration panel "knew of a governing legal principle" that was "well defined, explicit, and clearly applicable," and "yet refused to apply it or ignored it altogether" (*Wien*, 6 NY3d at 481). The record demonstrates that the panel carefully considered the language in the loan agreement, the insurance policy, the patent agreements (the subject of the litigation), and the law before reaching its conclusions. For example, petitioner contends that the panel was aware of the applicability of Delaware law but refused to apply it, citing *Doroshow, Pasquale, Krawitz & Bhaya v Nanticoke Mem. Hosp., Inc.* (36 A3d 336 [Del 2012]). However, the panel considered the applicability of Delaware law and *Doroshow*, and distinguished the case, concluding that it was not applicable. The conclusion that *Doroshow* did not apply was, at worst, a

mistake of law, which does not constitute manifest disregard (*Wien*, 6 NY3d at 480-481) and is not a ground for vacating an arbitration award (*Hackett v Milbank, Tweed, Hadley & McCloy*, 86 NY2d 146, 155 [1995]).

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

ENTERED: OCTOBER 17, 2019

CLERK

Manzanet-Daniels, J.P., Gische, Webber, Moulton, JJ.

10115 In re Janos L.,
Petitioner-Appellant,

-against-

Lynne D.,
Respondent-Respondent.

_____

Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for appellant.

_____

Order, Family Court, New York County (Marva A. Burnett, Referee), entered on or about March 22, 2017, which, after a hearing, dismissed petitioner's family offense petition brought pursuant to article 8 of the Family Court Act, unanimously affirmed, without costs.

Petitioner failed to establish by a fair preponderance of the evidence that respondent had committed the family offense of harassment in the second degree (*see* Penal Law § 240.26; *cf. Matter of Nafissatou D. v Ibrahima B.*, 149 AD3d 517 [1st Dept 2017], *lv denied* 29 NY3d 918 [2017]). Petitioner did not present

evidence sufficient to establish that respondent had any intent to "harass, annoy, or alarm" him, nor did he present evidence establishing a course of conduct by respondent (Penal Law § 240.26).

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

ENTERED: OCTOBER 17, 2019

CLERK

Manzanet-Daniels, J.P., Gische, Webber, Moulton, JJ.

10116 Joseph Fekah, etc., et al., Index 153767/17
Plaintiffs-Appellants,

-against-

Baker Hughes Incorporated,
Defendant-Respondent.

_____

Pradal & Associates PLLC, New York (Philippe Pradal of counsel), for appellants.

Skadden, Arps, Slate, Meagher & Flom LLP, New York (Noelle M. Reed of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered September 27, 2018, bringing up for review an order, same court and Justice, entered on or about September 6, 2018, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

As the Second Department held in *Aybar v Aybar* (169 AD3d 137 [2d Dept 2019], *lv dismissed* 33 NY3d 1044 [2019]), a corporate defendant's registration to do business in New York and the designation of the Secretary of State to accept service of process in New York does not constitute consent by the corporation to submit to the general jurisdiction of New York for causes of action that are unrelated to the corporation's affiliations with New York. Accordingly, defendant's motion to dismiss on ground of CPLR 301 was properly granted (*see also Best*

v Guthrie Med. Group, P.C., 175 AD3d 1048 [4th Dept 2019]; *Gronich & Co., Inc. v Simon Prop. Group, Inc.*, 2019 NY Slip Op 31107(U) [Sup Ct, NY County 2019]; *Kline v Facebook, Inc.*, 62 Misc 3d 1207[A] [Sup Ct, NY County 2019]; *Kyowa Seni Co., Ltd. v ANA Aircraft Technics, Co., Ltd.*, 60 Misc 3d 898 [Sup Ct, NY County 2018]).

Nor do plaintiffs show grounds to disturb the court's determination that defendant is not subject to personal jurisdiction pursuant to CPLR 302(a)(1). That statute provides for specific jurisdiction over nonresidents only to the extent the causes of action arise from the nonresident transacting business within the state. Even if defendant's recruitment of employees here, designating a registered agent here, and maintaining active registration to do business here, did constitute the transaction of business in this state, plaintiffs fail to show their claims arise from them. Plaintiffs' broad-brush assertions about the administration of employment benefits and insurance coverage from the United States are never linked to the tragic events alleged to have occurred in Gabon, and bear no apparent connection to New York.

Plaintiffs also do not show that dismissal on forum non conveniens grounds was an abuse of the court's discretion (*see* CPLR 327[a]; *Swaney v Academy Bus Tours of N.Y., Inc.*, 158 AD3d

437 [2018]). The doctrine of forum non conveniens permits a court to dismiss an action otherwise jurisdictionally sound if it finds "in the interest of substantial justice the action should be heard in another forum" (CPLR 327[a]; *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-489 [1984], *cert denied* 469 US 1108 [1985]). The relevant factors include: (1) the burden on the New York courts; (2) potential hardship to the defendant; (3) the unavailability of an alternative forum in which plaintiff may bring suit; (4) whether both parties are nonresidents; and (5) whether the transaction from which the cause of action arose occurred primarily in a foreign jurisdiction (*id.* at479). The court may also consider the location of potential witnesses and documents and potential applicability of foreign law (*Shin-Etsu Chem. Co., Ltd. v ICICI Bank Ltd.*, 9 AD3d 171 [1st Dept 2004]).

Plaintiffs essentially argue that the situs of the accident is irrelevant for forum non conveniens purposes, but the readily distinguishable cases they cite only highlight the argument's weaknesses. In *Corines v Dobson* (135 AD2d 390 [1st Dept 1987]), this Court held New York was the proper forum for a case arising from a car accident in Guadeloupe because the plaintiff lived here, and essentially all medical care was rendered here, neither of which is true in the instant case where, to the contrary, most of the medical care – whose allegedly poor quality is at the

heart of plaintiffs' claims – was administered in Gabon and South Africa. In *Neville v Anglo Am. Mgt. Corp.* (191 AD2d 240 [1st Dept 1993]), which arose from a fatal motor vehicle accident in England, two of four plaintiffs were New York residents, defendants were New York corporations, and the crux of plaintiffs' claims was the alleged negligence of the chaperone alleged to be defendants' employee.

Plaintiffs claim their key witnesses are here, but their argument is unavailing, as the individuals they list as potential witnesses are at very high levels of management at defendant's company, and plaintiffs' conclusory assertions that these individuals have personal knowledge of the relevant facts are unsupported by anything in the record.

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

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

ENTERED: OCTOBER 17, 2019

CLERK

Manzanet-Daniels, J.P., Gische, Webber, Moulton, JJ.

10117 Alexander C.E., Index 350433/04
Plaintiff-Respondent,

-against-

Anne Y.E.,
Defendant-Appellant.

_____

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

Anne Y.E., appellant pro se.

Kanfer & Holtzer, LLP, New York (Mark M. Holtzer of counsel), for respondent.

Fink & Katz PLLC, New York (Philip Katz of counsel), attorney for the child.

_____

Order, Supreme Court, New York County (Lori S. Sattler, J.), entered April 19, 2019, which, following a hearing, modified the parties' judgment of divorce to grant petitioner sole legal and physical custody of the child and permit him to relocate to Cincinnati, Ohio with her, and set forth a visitation schedule for defendant, unanimously affirmed, without costs.

It was uncontroverted that there had been a sufficient change of circumstances to warrant a modification of custody. Plaintiff established that his having sole legal and physical custody would be in the child's best interests (*see Matter of Sergei P. v Sofia M.*, 44 AD3d 490 [1st Dept 2007]). The hearing

evidence shows that plaintiff is better able to provide a stable home environment for the child and is more capable of addressing and meeting the child's emotional, social and intellectual needs. Defendant's demonstrated deteriorating mental health, poor judgment, and lack of insight into her own irrational behavior render her unable to offer the child proper parental guidance. Moreover, the child, who was 14 years old when the order was issued, expressed a preference for living with plaintiff (*see Eschbach v Eschbach*, 56 NY2d 167, 173 [1982]).

Defendant contends that the forensic evaluator's testimony and report were biased, warranting reversal and a new trial. However, it is apparent from his testimony that the evaluator appropriately analyzed the evidence presented to him and issued a report consistent with the evidence. His conclusions that defendant lacked insight, was unable to accept responsibility for her actions, and was incapable of fostering the child's best interests were supported by the information he obtained during his forensic evaluation. Moreover, the trial court's decision was based on more than just the forensic evaluator's testimony.

The hearing evidence amply supports the grant of permission to plaintiff to relocate with the child (*see Matter of Tropea v Tropea*, 87 NY2d 727, 739, 740-741 [1996]).

The visitation schedule is in the child's best interests.

The stated goal of the court's parenting plan was to enable defendant to "return to stable ground." Given defendant's past erratic behavior and failure to adhere to court orders, it would have been imprudent to allow defendant overnight or unsupervised visits before determining her progress toward that goal.

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

ENTERED: OCTOBER 17, 2019

CLERK

Manzanet-Daniels, J.P., Gische, Webber, Moulton, JJ.

10118 Ronald Kopetic, Index 305797/12
Plaintiff-Appellant,

-against-

The Port Authority of New York
and New Jersey,
Defendant-Respondent.

_____

Buttafuoco & Associates, PLLC, Woodbury (Scott Szczesny of counsel), for appellant.

Lewis Brisbois Bisgaard & Smith, LLP, New York (Seth A. Guiterman and James H. Rodgers of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about April 30, 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 was injured when, while operating a top loader in order to move shipping containers, the top loader tipped over due to uneven ground. Defendant, through its submission of the lease for the subject premises, showed that it was an out-of-possession landlord with no duty to maintain the area where the accident occurred or remedy the defect alleged (*see Kittay v Moskowitz*, 95 AD3d 451 [1st Dept 2012], *lv denied* 20 NY3d 859 [2013]; *Babich v*

R.G.T. Rest. Corp., 75 AD3d 439, 440 [1st Dept 2010]).

In opposition, plaintiff failed to raise a triable issue of fact. Although defendant maintained a right to re-enter in the leaase, plaintiff failed to adduce evidence that the alleged defect, depressions in the asphalt near the loading berths, was a significant structural defect in violation of an applicable statutory provision (*see Kittay* at 452*; DeLeon v Port Auth. of N.Y. & N.J.*, 306 AD2d 146 [1st Dept 2003]). Furthermore, defendant's intermittent presence at the premises was for the purpose of ensuring that it was being occupied according to the terms of the lease, and plaintiff acknowledges that defendant never exercised any control over either the lessee's operations or maintenance of the property (*compare Dimas v 160 Water St. Assoc.*, 191 AD2d 290 [1st Dept 1993]).

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

ENTERED: OCTOBER 17, 2019

CLERK

Manzanet-Daniels, J.P., Gische, Webber, Moulton, JJ.

10120 In re Juan Gil, et al., Index 100419/18
Petitioners-Appellants,

-against-

New York City Department of Housing Preservation and Development, et al.,
Respondents.

_____

Juan Gil, petitioner pro se.

Jennifer Bonesteel, petitioner pro se.

Zachary W. Carter, Corporation Counsel, New York (D. Alan Rosinus, Jr. of counsel), for New York City Department of Housing Preservation and Development, respondent.

Gutman, Mintz, Baker & Sonnenfeldt, LLP, New Hyde Park (Moses Ginsberg of counsel), for Manhattan Plaza LP, respondent.

_____

Determination of respondent New York City Department of Housing Preservation and Development (HPD), dated January 11, 2018, which, after a hearing, denied the petition and issued a certificate of eviction, unanimously confirmed, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Carmen Victoria St. George, J.], entered August 17, 2018), dismissed, without costs.

The hearing officer's determination to issue a certificate of eviction is rational and supported by substantial evidence, inasmuch as petitioners' lease expressly prohibited them from

engaging in any unlawful activity in the subject apartment that threatened the health, safety, or right to peaceful enjoyment of such premises by other residents of the development and also prohibited petitioners from engaging in acts that would disturb the rights or comfort of their neighbors (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 (1978); *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of Goldstein v Lewis*, 90 AD2d 748, 749 [1st Dept 1982], *affd* 59 NY2d 706 [1983]). Petitioners' neighbors testified to loud, violent fights involving petitioners and their son on a regular basis, and in several instances, threats against specific neighbors. Much of this testimony was corroborated by police reports and building security reports.

The hearing officer also found petitioners' denials not credible, a finding that is largely unreviewable (*see Matter of Botkin v Cadman Plaza N.*, 82 AD3d 527, 527-528 [1st Dept 2011]). Petitioners' claims that the hearing officer was biased and the hearing transcript was altered are unsupported by the record (*see Matter of Gimenez v Artus*, 63 AD3d 1461, 1462 [1st Dept 2009]).

Despite petitioners' claim that they were without counsel, the hearing was adjourned for four months initially, and then another month; hence petitioners had adequate time to obtain representation.

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

ENTERED: OCTOBER 17, 2019

CLERK

Manzanet-Daniels, J.P., Gische, Webber, Moulton, JJ.

10121 The People of the State of New York, Ind. 2634/01
Respondent,

-against-

Luis Nunez,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered July 23, 2002, as amended July 30, 2010, convicting defendant, upon his plea of guilty, of robbery in the first degree, and sentencing him to a term of 10 years, unanimously affirmed.

As the People concede, defendant's guilty plea was invalid because there was no warning about postrelease supervision. Nevertheless, defendant is not entitled to his requested relief of dismissal of the indictment or, in the alternative, replacement of his conviction with a youthful offender adjudication.

Although defendant has served his sentence, dismissal of the indictment would be inappropriate, especially because he has committed a serious crime (*see People v Conceicao*, 26 NY3d 375,

385 n [2015]; *People v Allen*, 39 NY2d 916, 917-918 [1976]). His conviction of an armed felony renders him ineligible for youthful offender treatment (CPL 720.10[2][a][ii]), and we find no "mitigating circumstances that bear directly upon the manner in which the crime was committed" (CPL 720.10[3][i]) This was a gunpoint robbery, in which defendant fired shots (*see e.g. People v Davis*, 168 AD3d 616 [1st Dept 2019], *lv denied* 33 NY3d 975 [2019]).

Because defendant is not seeking to vacate his plea, but expressly seeks affirmance of his conviction if the requested relief is not granted, we affirm (*see People v Teron*, 139 AD3d 450 [1st Dept 2016]).

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

ENTERED: OCTOBER 17, 2019

CLERK

Manzanet-Daniels, J.P., Gische, Webber, Moulton, JJ.

10122 The People of the State of New York, Respondent, Ind. 635/12

-against-

Reginald Robinson, Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Mandy E. Jaramillo of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Nicole Neckles of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Leonard Livote, J.), rendered October 22, 2013, convicting defendant, after a jury trial, of robbery in the second degree, menacing in the second degree and criminal possession of stolen property in the fifth degree, and sentencing him to an aggregate term of five years, unanimously affirmed.

Defendant has not established that he was deprived of effective assistance based on counsel's failure to bring a second speedy trial motion, addressing time periods not encompassed by the court's denial of an earlier speedy trial motion. In this case, as in *People v Brunner* (16 NY3d 820, 821 [2011]), "although defendant's arguments concerning the timeliness of the prosecution are substantial, there is nothing clear cut about his CPL 30.30 claim." Accordingly, the record fails to establish

that counsel's performance was constitutionally deficient.

The period of delay that began on June 19, 2012 appears to be excludable under CPL 30.30(4)(a) as delay resulting from motion practice and its resolution by the court, particularly because the record shows that neither party received the court's decision on defendant's omnibus motion for an extended period of time. If this delay is excluded, a speedy trial motion would fail even if each of the two remaining disputed periods were added to the 39 days of undisputedly includable time.

In any event, even if the delay beginning on June 19 were found to be includable, a successful speedy trial motion would still require that one or both of the remaining disputed periods be found includable. However, the record fails to establish that, in either instance, the People were not ready for trial.

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

ENTERED: OCTOBER 17, 2019

CLERK

Manzanet-Daniels, J.P., Gische, Webber, Moulton, JJ.

10123 The People of the State of New York, Ind. 303/14
Respondent,

-against-

Agustus Jenkins,
Defendant-Appellant.

_____

Christina Swarns, Office of the Appellate Defender, New York (Stephen R. Strother of counsel), for appellant.

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

_____

Judgment, Supreme Court, Bronx County (Peter J. Benitez, J.), rendered June 29, 2015, convicting defendant, after a jury trial, of criminally negligent homicide, and sentencing him to a term of 1⅓ to 4 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The jury's mixed verdict does not warrant a different conclusion (*see People v Abraham*, 22 NY3d 140, 147 [2013]; *People v Rayam*, 94 NY2d 557 [2000]; *People v Johnson*, 73 AD3d 578, 580 [1st Dept 2010], *lv denied* 15 NY3d 893

[2010]). There was ample evidence of defendant's criminal negligence, including that after drinking alcohol and smoking marijuana, defendant, whose license had been suspended, drove far above the speed limit on a rainy night and killed a pedestrian (*see People v Loughlin*, 76 NY2d 804, 807 [1990]).

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

ENTERED: OCTOBER 17, 2019

CLERK

Manzanet-Daniels, J.P., Gische, Webber, Moulton, JJ.

10125-
10125A-
10125B In re Michael A.S.,
Petitioner,

-against-

Kiamesha A.,
Respondent-Respondent.

- - - - -

The Children's Law Center on behalf of
Michael Sewell, Jr.,
Nonparty Appellant.

- - - - -

In re Kiamesha A.,
Petitioner-Respondent,

-against-

Michael A.S.,
Respondent.

- - - - -

The Children's Law Center on behalf of
Michael Sewell, Jr.,
Nonparty Appellant.

_____

Karen P. Simmons, The Children's Law Center, Brooklyn (Janet Neustaetter of counsel), for appellant.

Law Office of Bruce A. Young, New York (Bruce A. Young of counsel), for respondent.

_____

Order, Family Court, Bronx County (Lisa S. Headley, J.), entered on or about August 25, 2017, which, vacated an order entered October 5, 2016, dismissing petitioner Michael A.S.'s petition to vacate the acknowledgment of paternity with prejudice and restored the paternity matter to the calendar for

disposition, and vacated an order of child support entered on consent on December 16, 2016 and restored the child support matter to the calendar for disposition, unanimously reversed, on the law and the facts, without costs, and the orders entered on or about October 5, 2016 and December 16, 2016, dismissing the petition to vacate the acknowledgment of paternity and awarding child support on consent, respectively, reinstated. Appeal from order, same court and Judge, entered on or about August 25, 2017, which, adjudged that petitioner Michael A.S. is not the father of the child, granted petitioner's request to vacate the acknowledgment of paternity, and ordered that a copy of the order be provided to the registrar of the district where the child's birth certificate was filed and the putative father registry, unanimously dismissed, without costs, as moot. Appeal from order, same court and Judge, entered on or about August 25, 2017, which, inter alia, vacated and terminated the order of child support by Michael A.S. effective December 23, 2016, unanimously dismissed, without costs, as moot.

Petitioner Michael A. S. did not file a timely objection to the Support Magistrate's order entered on or about October 5, 2016 dismissing his petition to vacate the acknowledgment of paternity. As such, he failed to exhaust the Family Court procedure for review of the objections, he waived his right to

appellate review, and the Family Court lacked jurisdiction to consider the merits of the issue (*see Matter of Cynthia B.C. v Peter J.C.*, 161 AD3d 423, 423 [1st Dept 2018]; *Matter of Dallas C. v Katrina J.*, 121 AD3d 456, 456-457 [1st Dept 2014]).

In addition, because petitioner consented to the child support order entered on December 16, 2016, he was not entitled to appeal to either the Family Court or this Court as he was not an "aggrieved party" under CPLR 5511 (*see Oropallo v Tecler*, 263 AD2d 716, 718 [3d Dept 1999]; *see generally Matter of Kaylin P. [Derval S.]*, 170 AD3d 592, 592-593 [1st Dept 2019]; *Matter of Gabrielle N.N. [Jacqueline N.T.]*, 171 AD3d 671, 672 [1st Dept 2019]). Therefore, Family Court improperly considered petitioner's objection.

In light of the lack of jurisdiction of the Family Court, vacatur of the prior orders was inappropriate.

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

ENTERED: OCTOBER 17, 2019

CLERK

Manzanet-Daniels, J.P., Gische, Webber, Moulton, JJ.

10126-
10126A Brembo, S.P.A.,
Plaintiff-Respondent-Appellant,

-against-

T.A.W. Performance LLC,
Defendant-Appellant-Respondent.

- - - - -

T.A.W. Performance LLC,
Third-Party Plaintiff,

-against-

Omnia Racing S.R.L., et al.,
Third-Party Defendants.

Index 654931/17

_____

Law Offices of Anthony A. Capetola, Williston Park (Michael C. Barrows of counsel), for appellant-respondent.

Herzfeld & Rubin, P.C., New York (Mark A. Weissman of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Paul A. Goetz, J.), entered on or about July 3, 2018, which, to the extent appealed from as limited by the briefs, granted the part of plaintiff's motion seeking to dismiss the counterclaims for breach of an oral agreement (first), fraudulent inducement (third), and breach of the implied covenant of good faith and fair dealing (fourth), and denied the part of the motion seeking to dismiss the counterclaim for breach of contract (second), unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or

about December 3, 2018, upon reargument, to the extent it adhered to the original determination granting plaintiff's motion to dismiss the first, third, and fourth counterclaims, unanimously dismissed, without costs, as academic.

Defendant failed to allege that there was consideration for the alleged oral agreement (*See Vista Food Exch., Inc. v BenefitMall*, 138 AD3d 535 [1st Dept 2016], *lv denied* 28 NY3d 902 [2016]). Paragraphs 33 through 36 of the answer, on which defendant relies, allege that plaintiff reaffirmed its promise to appoint defendant as its exclusive distributor in meetings and through correspondence. They do not allege that, in exchange for this promise, plaintiff received a benefit or defendant suffered a detriment. Nor was the oral agreement definitive in its material terms so as to be enforceable (*see Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 482 [1989], *cert denied* 498 US 816 [1990]). No terms were agreed upon when plaintiff allegedly made the promise: not the duration of the agreement, not the pricing of plaintiff's parts, and not any other term governing the alleged exclusive distributorship. In any event, the 2014 written distribution agreement, by its terms, superseded any alleged prior oral agreement concerning the same subject matter.

The fraudulent inducement and breach of the covenant of good

faith and fair dealing counterclaims are duplicative of the counterclaim for breach of the written distributor agreement (*see Krantz v Chateau Stores of Canada*, 256 AD2d 186, 187 [1st Dept 1998]; *Rong Rong Jiang v Tan*, 11 AD3d 373, 374 [1st Dept 2004]; *Netologic, Inc. v Goldman Sachs Group, Inc.*, 110 AD3d 433, 433-434 [1st Dept 2013]).

With respect to the counterclaim for breach of the written distributor agreement, whether plaintiff complied with the agreement is a factual issue that cannot be resolved on this motion to dismiss, where the allegations of the counterclaim are presumed to be true (*see Leon v Martinez*, 84 NY2d 83, 87 [1994]).

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

ENTERED: OCTOBER 17, 2019

CLERK

Manzanet-Daniels, J.P., Gische, Webber, Moulton, JJ.

10127 Ira Schacter, Index 311503/07
Plaintiff-Appellant,

-against-

Janice Schacter,
Defendant-Respondent.

Ira J. Schacter, appellant pro se.

Janice Schacter Lintz, respondent pro se.

Order, Supreme Court, New York County (Laura E. Drager, J.), entered May 9, 2018, which, to the extent appealed from as limited by the briefs, awarded defendant 40% of the value of plaintiff's law firm partnership interest as of the date of trial, unanimously affirmed, without costs.

On a prior appeal, this Court vacated the October 2007 date of commencement valuation of plaintiff's law firm interest and remanded the matter for a determination of defendant's distributive share and maintenance award based upon the September 2012 date of trial valuation (151 AD3d 422 [1st Dept 2017] Although the trial court had found that market forces and defendant's negative conduct contributed to the decline in the value of plaintiff's partnership interest between October 2007, when the action commenced, and September 2012, when the trial commenced, the trial court nevertheless chose October 2007 to

determine the value of this asset. We vacated and remanded this part of the distributive award for a determination of defendant's distributive share of plaintiff's partnership interest "based on the September 2012 valuation." The 2012 date of trial valuation was $1,660,000, less than the 2007 valuation previously relied on ($5,032,000). On remand, Supreme Court, using the September 2012 date of trial value ($1,660,000), increased defendant's distributive award from 17% to 40% and otherwise adhered to its original maintenance award, finding that plaintiff still had sufficient income available to pay that award.

By using the far lower date of trial value in determining defendant's distributive share of that interest, as directed by this Court, the trial court necessarily took into account how defendant's negative conduct during the pendency of the action and the economic downturn of 2007-2008 contributed to the decline in value of this marital asset (*see id.*). There was no need to make a further adjustment.

Supreme Court did not err in awarding defendant a 40% share of plaintiff's law firm partnership ($1.66 million x .4, or $664,000), nor does this award, as plaintiff argues, confer a windfall on defendant simply because it is a greater percentage than Supreme Court previously awarded. It is a lower monetary amount than the $855,440 awarded by the trial court before the

prior appeal. When distributing marital property, the trial court has "broad discretion" and is accorded "substantial flexibility in fashioning an appropriate decree based on what it views to be fair and equitable under the circumstances" (*Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 420 [2009]). The trial court considered all the relevant factors and did not abuse its discretion. By making the adjustment that plaintiff urges, defendant would be penalized twice for the same misconduct because her actions were already taken into account when the Court used the date of trial valuation. Furthermore, the award takes into account defendant's contribution as primary caretaker of the parties' two children, one of whom has special needs, and defendant's significant indirect contributions, as well as limited direct contributions, to plaintiff's career.

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

ENTERED: OCTOBER 17, 2019

CLERK

Manzanet-Daniels, J.P., Gische, Webber, Moulton, JJ.

10128 Jordan Seaman, Index 152828/18
Plaintiff-Appellant,

-against-

Schulte Roth & Zabel LLP, et al.,
Defendants-Respondents.

_____

Emery Celli Brinckerhoff & Abady LLP, New York (Illan M. Maazel of counsel), for appellant.

Schulte Roth & Zabel LLP, New York (Robert M. Abrahams of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Robert D. Kalish, J.), entered October 29, 2018, bringing up for review an order, same court and Justice, entered October 22, 2018, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

In this legal malpractice action, plaintiff alleges that defendant Frunzi, a partner of defendant Schulte Roth & Zabel LLP, agreed to represent him and his then-wife in drafting a postnuptial agreement between them. According to plaintiff, despite his clearly expressed intent to preserve the terms of the parties' prenuptial agreement, Frunzi drafted the agreement in a way that imposed open-ended financial obligations on him and failed to disclose a substantial conflict of interest arising from her role as a trustee of trusts that benefitted his then-

wife.

Defendants moved to dismiss the complaint under CPLR 3211(a)(1) and (7), arguing that documentary evidence utterly refuted plaintiff's claim of attorney-client relationship (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

We find that the motion court properly granted defendants' motion based upon the specific facts and documentary evidence establishing there was no attorney-client relationship. On a motion to dismiss, a court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Under CPLR 3211(a)(1), dismissal "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *see Leon v Martinez*, 84 NY2d at 88).

Emails may be considered as documentary evidence if those papers are "essentially undeniable" (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 432-33 [1st Dept 2014]). An unambiguous written agreement can also constitute documentary evidence (*150 Broadway N.Y. Assoc., L.P. v Bodner*, 14

AD3d 1, 5 [1st Dept 2004] [citation omitted]).

The law is well-established that "the absence of any attorney-client relationship bars an action for attorney malpractice" (*Cabrera v Collazo*, 115 AD3d 147, 153 [1st Dept 2014]).

The course of conduct among the parties demonstrated by the documentary evidence, particularly the repeated communications from defendants to plaintiff clearly disclaiming an attorney-client relationship and advising plaintiff and his wife to consult independent counsel, refute plaintiff's general allegations that Frunzi was his attorney in connection with the negotiation and execution of the postnuptial agreement in question (*cf. Barrett v Goldstein*, 161 AD3d 472 [1st Dept 2018]). Although defendants were required to use the ordinary degree of skill required of the legal community in drafting a postnuptial agreement, there is no claim that the agreement was ineffective due to a technical error or that Frunzi failed to accurately memorialize the terms of the parties' agreement (*compare Shanley v Welch*, 31 AD3d 1127 [4th Dept 2006] and *Shanley v Welch*, 6 AD3d 1065 [4th Dept 2004] [defendant attorney failed to have

settlement agreement properly acknowledged, so that it was ineffective]).

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: OCTOBER 17, 2019

CLERK

Manzanet-Daniels, J.P., Gische, Webber, Moulton, JJ.

10129 The People of the State of New York, Ind. 2201/09
Respondent,

-against-

Elmer Castillo,
Defendant-Appellant.

_____

Christina Swarns, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), and Sullivan & Cromwell LLP, New York (Akash M. Toprani of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Clara H. Salzberg of counsel), for respondent.

_____

Judgment of resentence, Supreme Court, Bronx County (Martin Marcus, J.), rendered June 8, 2018, resentencing defendant to a term of 15 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to 14 years, and otherwise affirmed.

We find the sentence excessive to the extent indicated.

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

ENTERED: OCTOBER 17, 2019

CLERK

Manzanet-Daniels, J.P., Gische, Webber, Moulton, JJ.

10130 The People of the State of New York, Respondent, Ind. 3555/13

-against-

Bernadita Fermin, Defendant-Appellant.

_____

Jorge Guttlein & Associates, New York (Juan Carlos Guttlein of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Samuel Z. Goldfine of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Arlene D. Goldberg, J. at hearing; Laura Ward, J. at nonjury trial and sentencing), rendered December 3, 2014, convicting defendant of criminal possession of a controlled substance in the third degree (two counts) and criminal possession of a controlled substance in the fourth and fifth degrees, and sentencing her to an aggregate term of six months, with five years' probation, unanimously affirmed.

The hearing court properly determined that defendant's post-*Miranda* statements were sufficiently attenuated from earlier statements that had not been preceded by *Miranda* warnings. Although the statements were obtained by the same detective, there was a 4½-hour break, different officers transported defendant to the precinct, and the initial interaction with

defendant was brief (*see People v White*, 10 NY3d 286, 291-292 [2008], *cert denied* 555 US 897 [2008]; *People v Paulman*, 5 NY3d 122, 130-131 [2005]). There is no basis for disturbing the hearing court's credibility determinations.

The trial court's verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the trial court's credibility determinations. The evidence supported the conclusion that defendant was in possession of the drugs found in her apartment and that she had the intent to sell them.

Defendant's argument that her counsel provided conflicted, ineffective representation because, at a single court appearance at an early stage of the proceedings, he jointly represented her and another defendant involved in the case is not reviewable on direct appeal because this claim involves factual matters outside the record concerning the conduct of the defense that should have been raised in a CPL 440.10 motion (*see People v Peyton*, 27 AD3d 402 [1st Dept 2006], *lv denied* 7 NY3d 793 [2006]). As an alternative holding, based on the existing record, we find that

defendant has failed to "demonstrate[] that a significant possibility of a conflict of interest existed bearing a substantial relationship to the conduct of the defense" (*People v Recupero*, 73 NY2d 877, 879 [1988]).

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

ENTERED: OCTOBER 17, 2019

CLERK

Manzanet-Daniels, J.P., Gische, Webber, Moulton, JJ.

10131 The People of the State of New York, Ind. 2450/15
Respondent,

-against-

Jeremy Perez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Rebecca Hausner 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 December 21, 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: OCTOBER 17, 2019

CLERK

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

Manzanet-Daniels, J.P., Gische, Webber, Moulton, JJ.

10132 The People of the State of New York, Respondent, Ind. 4498/15

-against-

Armando Hernandez, Defendant-Appellant.

_____

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

_____

Appeal from judgment, Supreme Court, New York County (Jill Konviser, J.), rendered March 21, 2016, convicting defendant, upon his plea of guilty, of attempted assault in the second degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, held in abeyance, the application by assigned counsel to withdraw on the ground that the appeal is wholly frivolous (*People v Saunders*, 52 AD2d 833 [1st Dept 1976]) granted to the extent of relieving counsel, assigning the Office of the Appellate Defender as new counsel, and enlarging the time to reperfect the appeal to the March 2020 Term of this Court.

Assigned counsel's brief does not analyze all the legal issues presented on the face of the record. While we express no opinion with respect to the merit, or lack thereof, of any possible issue, we find that there may be issues regarding the specific crime to which defendant pleaded guilty (*see e.g. People*

v Campbell, 72 NY2d 602, 605-607 [1988]; *People v Lopez*, 45 AD3d 493, 494 [1st Dept 2007]) that would not be "wholly frivolous" under the *Saunders* standard. "Since our own review cannot substitute for the single-minded advocacy of appellate counsel, a new assignment of counsel and reconsideration of the appeal is required" (*People v Bueno*, 104 AD3d 519, 520 [1st Dept 2013]).

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

ENTERED: OCTOBER 17, 2019

CLERK

Manzanet-Daniels, J.P., Gische, Webber, Moulton, JJ.

10133 The People of the State of New York, Ind. 3227/14
Respondent,

-against-

Davone Merritt,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Robert Stolz, J.), rendered January 13, 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: OCTOBER 17, 2019

CLERK

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

Manzanet-Daniels, J.P., Gische, Webber, Moulton, JJ.

10134N American Country Insurance Company, Index 26031/14
Plaintiff-Respondent,

-against-

Mark Umude, et al.,
Defendants,

Anthony Rodriguez, et al.,
Defendants-Appellants.

_____

Law Offices Of Alexander Bespechny, Bronx (Luis A. Badolato of counsel), for appellants.

Shearer PC, Locust Valley (Mark G. Vaughan of counsel), for respondent.

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Order, Supreme Court, Bronx County (Ben Barbato, J.), entered July 6, 2017, which to the extent appealed from as limited by the briefs, granted plaintiff American Country Insurance Company's motion for summary judgment for a declaration that it is not obligated to provide coverage to defendants, unanimously affirmed, without costs.

Plaintiff submitted substantial evidence to rebut the presumption that defendant Mark Umude, the brother of plaintiff's insured, Amoghene Umude, was operating Amoghene's vehicle with Amoghene's permission at the time of the accident (*see* Vehicle and Traffic Law § 388[1]; *Tsadok v Veneziano*, 65 AD3d 1130, 1132 [2d Dept 2009]; *Panteleon v Amaya*, 85 AD3d 993, 994-995 [2d Dept

2011]). In addition to Amoghene's uncontradicted testimony that he did not give his brother permission to use the vehicle and was asleep when his brother took the keys and crashed it, Amoghene promptly reported to the police that Mark did not have his permission to use the vehicle, and subsequently filed an official complaint concerning Mark's unauthorized use. Mark was indicted and criminally prosecuted in connection with his unauthorized operation of the vehicle (*see Tsadok* at 1132; *cf. Leon v Citywide Towing, Inc.*, 111 AD3d 464, 465 [1st Dept 2013]).

Defendants failed to submit competent evidence suggesting implausibility, collusion, or implied permission so as to require the issue of consent to be submitted to a jury (*see Country-Wide Ins. Co. v National R.R. Passenger Corp.*, 6 NY3d 172, 178 [2006]). Contrary to defendants' argument, Amoghene did not delay in informing the police after he learned of the unauthorized use (*cf. Motor Veh. Acc. Indem. Corp. v Levinson*, 218 AD2d 606, 607 [1st Dept 1995]).

Written statements from nonparties alleging Mark's prior use of the vehicle were not submitted in admissible form, because, even though they were notarized, they contained no jurat or any other indication that the signatories had been sworn, or even a statement from the signatories as to the truth of the matters to which they subscribed their names (*see Lillo-Arouca v Masoud*, 163

AD3d 646, 647 [2d Dept 2018]; *Matter of MacKenzie v Ghartey*, 131 AD3d 638, 638-639 [2d Dept 2015], *lv denied* 25 NY3d 914 [2015]; *cf. Collins v AA Truck Renting Corp.*, 209 AD2d 363 [1st Dept 1994]). The motion court also properly determined that the remaining hearsay evidence about Mark's prior use of the vehicle for business purposes was insufficient to defeat summary judgmen (*see Gonzalez v 1225 Ogden Deli Grocery Corp.*, 158 AD3d 582, 584 [1st Dept 2018]).

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

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