SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 24, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Richter, Kapnick, Kern, Singh, JJ.

9875 The People of the State of New York, Ind. 457/11
Respondent,

-against-

John Calderon,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

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Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered March 21, 2013, as amended March 27, 2013, convicting defendant, after a jury trial, of assault in the second degree, aggravated criminal contempt, criminal contempt in the first degree (two counts), criminal possession of a weapon in the third degree and criminal mischief in the fourth degree, and sentencing him, as a second violent felony offender, to an aggregate term of seven years, unanimously reversed, on the law, and the matter remanded for a new trial and a de novo hearing

addressing the People's *Molineux/Ventimiglia* application.

The dispositive issue on appeal is whether defendant's absence from a pretrial *Ventimiglia* proceeding deprived him of his right to be present at all material stages of trial, including ancillary proceedings. "A key factor in determining whether a defendant has a right to be present during a particular proceeding is whether the proceeding involved factual matters about which defendant might have peculiar knowledge that would be useful in advancing the defendant's or countering the People's position" (*People v Spotford*, 85 NY2d 593, 596 [1995] [internal quotation marks omitted]). Moreover, the right to be present "does not rest exclusively on defendant's potential contribution to the proceedings[;] [r]ather, it is based on the effect that defendant's absence might have on the opportunity to defend" (*People v Hoey*, 145 AD3d 118, 122 [1st Dept 2016] [citation and internal quotation marks omitted] *lv denied* 28 NY3d 1185 [2017]).

Here, the trial court conducted an initial *Ventimiglia* hearing with defendant present to address the prosecution's *Molineux* application, which sought to admit evidence of defendant's alleged prior assault on his then-girlfriend. After the parties made their arguments, the trial court postponed the issuance of its ruling. On the date the trial court intended to

issue its ruling, it noted that defendant had not yet been produced, and defense counsel stated that he would prefer if the court issued its ruling with defendant present. The court stated that defendant's presence was not required since it was merely issuing a legal ruling and began ruling on the application. The People then sought to include new factual details of the prior assault not mentioned at the earlier proceeding where defendant was present (i.e. that defendant choked his then-girlfriend to the point that she almost lost consciousness). The trial court advised the prosecutor to leave out any testimony regarding these new details since these facts were not included in the original application. However, the prosecutor stressed that these new facts were "critical" for the jury to understand why the victim feared defendant, and the trial court allowed the prosecutor to elicit testimony from the witness.

Defendant should have been afforded the opportunity to be present given that the prosecutor's introduction of these new facts, in effect, expanded the original *Molineux* application and involved factual matters of which defendant may have had peculiar knowledge. Defendant was in the best position to either deny the new factual details, point out errors in the prosecutor's account of the details, or provide defense counsel with details that

would have been useful in advancing his position (*Spotford*, 85 NY2d at 597). In addition, we cannot conclude that defendant's presence at the proceeding at issue would have been superfluous since the trial court's ruling was not favorable to defendant (*People v Favor*, 82 NY2d 254, 267 [1993]). Equally important, defendant was not given an opportunity to raise any objections to the introduction of the new factual details presented in his absence, or review the court's ruling, which was made part of the record, prior to the commencement of trial (*see Hoey*, 145 AD3d 118, 123; *cf. Spotford*, 85 NY2d 593, 598).

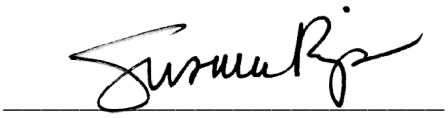
The cases relied on by the People to support the proposition that defendant's right to be present was not violated are distinguishable. In those cases, either the defendant was present when all relevant facts of the prior uncharged crimes were discussed, the proceedings at issue involved only legal discussions, or the defendant waived his right to be present at the proceedings (*see People v Rodriguez*, 93 AD3d 595, 596 [1st Dept 2012], *lv denied* 19 NY3d 966 [2012]; *People v Garbutt*, 9 AD3d 255, 256 [1st Dept 2004], *lv denied* 3 NY3d 674 [2004]; *People v Spotford*, 85 NY2d 593, 597-598 [1995]). Moreover, the fact that defense counsel did not contest the allegations prior to or during trial is irrelevant and could be interpreted as a

tactical decision on the part of counsel.

We reject defendant's challenges to the sufficiency and weight of the evidence supporting his assault conviction (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence supports the inference that the victim sustained physical injury (*see generally People v Chiddick*, 8 NY3d 445, 447 [2007]; *People v Guidice*, 83 NY2d 630, 636 [1994]). Defendant's sufficiency argument regarding the dangerous instrument element of second-degree assault is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits.

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

ENTERED: OCTOBER 24, 2019



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Friedman, J.P., Kapnick, Oing, Singh, JJ.

10178 The People of the State of New York, Ind. 2140/12
Respondent,

-against-

Keisi Guerrero-Mariano,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Robert L. Myers of counsel), for respondent.

_____

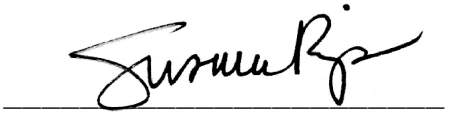
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Efrain Alvarado, J.), rendered February 17, 2016,

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 24, 2019



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

Friedman, J.P., Kapnick, Oing, Singh, JJ.

10179 US Bank National Association, etc., Index 380322/09
Plaintiff-Appellant,

-against-

Evelyn Okeke,
Defendant-Respondent,

First Community Industrial
Bank, et al.,
Defendants.

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

Kenneth R. Berman, Forest Hills, for respondent.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered on or about June 25, 2018, which denied plaintiff's motion, inter alia, to vacate an order striking the complaint upon default, unanimously reversed, on the law, without costs, and the matter remanded for proceedings in accordance herewith.

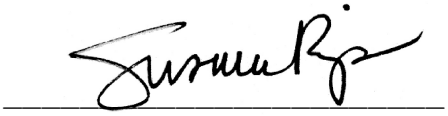
The record demonstrates that plaintiff has a meritorious claim. The issue is whether it has demonstrated a reasonable excuse to warrant vacatur of the underlying dismissal order that was obtained on default.

Here, plaintiff contends that it was not properly served with defendant Okeke's motion to strike the complaint. The

parties' conflicting affirmations based on personal knowledge of this issue are sufficient to warrant a traverse hearing to determine that issue.

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

ENTERED: OCTOBER 24, 2019



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Friedman, J.P., Kapnick, Oing, Singh, JJ.

10180 In re Shaquel A.M., also known as Shaquel M., and Others,

Children Under the Age of Eighteen Years, etc.,

Jamel C.M., etc.,
Respondent-Appellant,

Saint Dominic's Home,
Petitioner-Respondent,

Administrative for Children's Services,
Respondent.

_____

Andrew J. Baer, New York, for appellant.

Warren & Warren PC, Brooklyn (Ira L. Eras of counsel), for respondent.

Larry S. Bachner, New York, attorney for the children.

_____

Order, Family Court, Bronx County (Valerie Pels, J.), entered on or about June 5, 2018, to the extent it brings up for review a fact-finding determination of permanent neglect against respondent father, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence that the agency made diligent efforts to strengthen and encourage the relationship between respondent and the children and that nevertheless respondent failed to maintain contact with the children or plan for their future (*see* Social

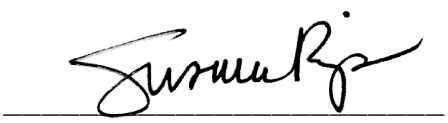
Services Law § 384-b[7][a]). The agency formulated a service plan, referred respondent to a substance abuse counseling program and a parenting skills program, repeatedly reminded him of the consequences of failure to comply, and provided drug testing. Respondent completed the parenting program, but did not make sufficient progress to enroll in or complete the other programs (*see e.g. Matter of Joseph P. [Edwin P.]*, 143 AD3d 529 [1st Dept 2016], *lv denied* 28 NY3d 1110 [2016]). Moreover, he refused to submit to drug tests. Respondent was uncooperative and failed to accept that his anger issues and erratic behavior interfered with his ability to be a parent to the children (*see e.g. Matter of Raekwon Maxx A.*, 47 AD3d 435 [1st Dept 2008], *lv denied* 11 NY3d 703 [2008]; *Matter of Samantha C.*, 305 AD2d 167 [1st Dept 2003], *lv denied* 100 NY2d 508 [2003]).

We find no reason for disturbing the court's finding that respondent is a consent father, rather than a notice father (*see*

Domestic Relations Law § 111[1][d], [3][b]; *Cheeks v City of New York*, 123 AD3d 532, 556 [1st Dept 2014]).

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

ENTERED: OCTOBER 24, 2019



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Friedman, J.P., Kapnick, Oing, Singh, JJ.

10181 Nakia Scott, Index 302641/15
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

_____

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

Lester Schwab Katz & Dwyer, LLP, New York (John Sandercock of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Llinét M. Rosado, J.), entered on or about July 23, 2018, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Summary judgment was properly granted in this action where plaintiff alleges that he was injured when he slipped and fell while descending an interior stairway in a building owned by defendant. The original notice of claim that was timely filed with defendant failed to provide it with the correct accident location as required by General Municipal Law § 50-e(2), and the photographs and plaintiff's 50-h hearing testimony failed to correct the mistake (*see Atwater v County of Suffolk*, 50 AD3d 713, 714-715 [2d Dept 2008], *lv denied* 11 NY3d 702 [2008]).

Although plaintiff testified at his 50-h hearing that the accident occurred at 535 Havemeyer and not 585 Randall Avenue as set forth in the original notice of claim, he also testified at his 50-h hearing that he fell in stairwell "B" as he descended the stairway, but could not recognize the location shown in the photographs (*see Reyes v City of New York*, 281 AD2d 235 [1st Dept 2001]). It was not until his deposition two years after the accident that he testified that stairwell "A" was where he fell. Since plaintiff never sought to amend his notice of claim pursuant to General Municipal Law § 50-e(6), defendant did not have to establish that it was prejudiced by the mistake (*see Davis v New York City Tr. Auth.*, 117 AD3d 586, 587 [1st Dept 2014]).

Plaintiff's subsequent service of a corrected notice of claim that states that the accident happened at 535 Havemeyer Avenue in stairwell "A" is unavailing since that notice is a nullity because it was untimely and served without leave of court (*see Bobko v City of New York*, 100 AD3d 439 [1st Dept 2012]).

In any event, upon a search of the record, defendant is entitled to summary judgment on the merits. Defendant met its initial burden of demonstrating that it neither created the hazardous condition nor had actual or constructive notice of its

existence. In response, plaintiff failed to create an issue of fact. His testimony was clear that he did not see the allegedly dangerous condition before his accident, nor did he aver that he or anyone else complained about the stairwell's condition prior to the accident.

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 24, 2019

CLERK

Friedman, J.P., Kapnick, Oing, Singh, JJ.

10182 In re Tycoon Construction Corp., Index 101036/17
Petitioner-Respondent,

-against-

New York City Housing Authority,
Respondent-Appellant.

_____

Kelly D. MacNeal, General Counsel, New York (Lauren L. Esposito of counsel), for appellant.

Canfield Ruggiero, LLP, Garden City (David J. Canfield of counsel), for respondent.

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Judgment, Supreme Court, New York County (Arlene P. Bluth, J.), entered July 10, 2018, granting the petition brought pursuant to CPLR article 78 to annul respondent New York City Housing Authority's (NYCHA) determination, dated March 27, 2017, which found petitioner in default of a contract between petitioner and NYCHA, unanimously affirmed, without costs.

After complaining about alleged electrical deficiencies and informing petitioner that it had until the end of the contract period to correct them, NYCHA cited safety concerns related to the alleged electrical deficiencies as a basis for requiring petitioner to fix the deficiencies within two days, and declared petitioner in default when it did not meet that two-day deadline. The article 78 court correctly granted the petition to annul

NYCHA's action as it lacked a rational basis (*see Matter of Ward v City of Long Beach*, 88 AD3d 734 [2011], *affd* 20 NY3d 1042 [2013]).

Although NYCHA identified alleged deficiencies in petitioner's work, there was no basis for NYCHA to conclude that petitioner had unnecessarily delayed work, refused to supply enough properly skilled workers or materials to complete the work, or was either unwilling or unable to complete the work within the time specified in the contract, as extended by the parties (*cf. Matter of Clover Constr. Consultants, Inc. v New York City Hous. Auth.*, 44 AD3d 654, 655 [2d Dept 2007], *lv denied* 9 NY3d 818 [2008]; *Matter of R.C. 27th Ave. Realty Corp. v City of New York*, 278 AD2d 142, 142-43 [1st Dept 2000]).

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

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

ENTERED: OCTOBER 24, 2019

CLERK

Friedman, J.P., Kapnick, Oing, Singh, JJ.

10183 Cynthia Moctezuma, Index 20483/16E
Plaintiff-Appellant,

-against-

Luis Garcia, et al.,
Defendants-Respondents.

_____

Gropper Law Group PLLC, New York (David De Andrade of counsel), for appellant.

Abrams, Gorelick, Friedman & Jacobson, LLP, New York (Jay S. Gunsher of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered December 17, 2018, which granted defendants' motion for summary judgment dismissing the complaint on the threshold issue of serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants made a prima facie showing that the condition of plaintiff's left knee involved preexisting osteoarthritis not causally related to the accident and that she did not seek contemporaneous post-accident treatment for left knee complaints after the accident (*see Farmer v Ventkate Inc.*, 117 AD3d 562 [1st Dept 2014]). In opposition, plaintiff submitted her own MRI reports finding osteoarthritis, and an affirmed report of her orthopedic surgeon, whose operative report diagnosed severe

osteoarthritis before and after surgery. The surgeon's opinion that the accident exacerbated the preexisting conditions was insufficient to raise an issue of fact as to causation since it provided no objective support, other than plaintiff's history, and failed to offer any evidence of injuries different from the "undisputed preexisting arthritic condition" (*id.*; *see also Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043, 1044 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]; *Acosta v Traore*, 136 AD3d 533 [1st Dept 2016]). The absence of records showing contemporaneous post-accident treatment of the left knee – other than the MRI reports showing osteoarthritis – further undermines plaintiff's claim that the condition was causally related to the accident (*see Rosa v Mejia*, 95 AD3d 402, 403-404 [1st Dept 2012]).

Assuming, without deciding, that plaintiff properly alleged injuries to her lumbar and thoracic spine, left shoulder, and right wrist, her unsworn medical records were insufficient to raise an issue of fact as to whether she sustained a serious

injury as to each of those body parts (*see Pastora L. v Diallo*, 167 AD3d 424, 425 [1st Dept 2018]; *Luetto v Abreu*, 105 AD3d 558 [1st Dept 2013]).

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

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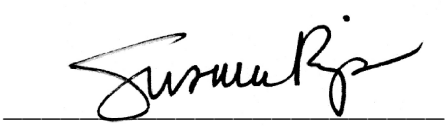

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Friedman, J.P., Kapnick, Oing, Singh, JJ.

10184 The People of the State of New York, Ind. 2487/16
Respondent,

-against-

Andres Rodriguez,
Defendant-Appellant.

_____

Marianne Karas, Thornwood, for appellant.

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

_____

Judgment, Supreme Court, New York County (James M. Burke, J.), rendered March 15, 2017, convicting defendant, upon his plea of guilty, of criminal sexual act in the first degree and forcible touching, and sentencing him to an aggregate term of 12 years, unanimously affirmed.

Even if some of the court's remarks to defendant about the consequences of proceeding to trial should have been avoided, "the record as a whole, including the fact that defendant had already received an extensive opportunity to consider the plea offer and confer with counsel, establishes the voluntariness of the plea" (*People v Wilson*, 172 AD3d 413, 414 [1st Dept 2019]; *see also People v Garcia*, 92 NY2d 869, 870 [1998]; *People v Elliot*, 137 AD3d 715 [1st Dept 2016], *lv denied* 27 NY3d 1131

[2016]).

Based on the all circumstances, the court providently exercised its discretion in summarily denying defendant's motion to withdraw his guilty plea (*see generally People v Manor*, 27 NY3d 1012, 1013 [2016]). To the extent defendant was claiming innocence, the court viewed the videotape of the incident establishing defendant's guilt, negating any possible defense of intoxication or consent. Defendant did not advance any other valid basis for withdrawing his plea.

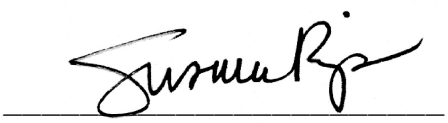
Defendant claims that he received ineffective assistance at the sentencing proceeding because counsel did not argue in support of defendant's pro se plea withdrawal motion. This claim is unreviewable on direct appeal because it involves matters not reflected in, or fully explained by, the record, including an off-the-record discussion between counsel and defendant during sentencing in connection with the motion (*see People v Rivera*, 71 NY2d 705, 709 [1988]). Accordingly, because defendant has not

made a CPL 440.10 motion, the merits of the claim may not be addressed on appeal.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 24, 2019



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Friedman, J.P., Kapnick, Oing, Singh, JJ.

10185-
10185A ABB, Inc.,
Plaintiff-Respondent,

-against-

Havtech, LLC,
Defendant-Appellant.

Index 650277/18

_____

Spiro Harrison, New York (David B. Harrison of counsel), for appellant.

Goodell Devries LLP, Baltimore, MD (Derek M. Stikeleather of the bar of the State of Maryland, admitted proc hac vice, of counsel), for respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered January 10, 2019, which denied defendant's motion for summary judgment dismissing the complaint and granted plaintiff's motion to dismiss certain counterclaims, unanimously affirmed, with costs. Order (same court and Justice), entered May 10, 2019, which granted plaintiff summary judgment declaring that the parties' agreement is governed by New York law and denied defendant's cross motion for a stay, unanimously affirmed, with costs.

The parties' agreement contains a clause entitled "governing law" that provides the agreement is to be interpreted and construed in accordance with New York law, without reference to

its choice of law principles. The contract involves millions of dollars of heating, ventilation and air conditioning (HVAC) equipment sales.

As a preliminary matter, the parties' agreement falls within the ambit of General Obligations Law § 5-1401, and thus, regardless of whether there is a connection between the transaction and New York, New York will enforce the choice of law clause (*see IRB-Brasil Resseguros, S.A. v Inepar Invs., S.A.*, 20 NY3d 310 [2012], *cert denied* 569 US 994 [2013]).

Defendant's sole defense and counterclaims were based on its argument that the Maryland Dealer Act applied to invalidate the termination without cause and other provisions of the agreement. The motion court properly rejected the application of Maryland law. *IRB* makes clear that no such choice of law analysis is proper in light of the clear choice of New York law and the legislative purpose of General Obligations Law § 5-1401 (*see Ministers & Missionaries Benefit Bd. v Snow*, 26 NY3d 466 [2015]).

We reject defendant's argument that we are required to consider the public policy concerns of the Maryland Dealer Act in determining this dispute. Non-New York statutes do not invalidate contracts that chose New York law and are valid and enforceable under New York law (*see Gottwald v Sebert*, 161 AD3d

679 [1st Dept 2018]).

Finally, defendant's reference to similar dealer protection statutes in New York that protect dealers in other industries does not indicate a public policy in New York that would mandate extending such protections to HVAC equipment dealers. The legislature has made the determination to provide such protections on an industry by industry basis, thus far not including HVAC distributors.

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

ENTERED: OCTOBER 24, 2019

CLERK

Friedman, J.P., Kapnick, Oing, Singh, JJ.

10186 Andres F. Montoya, et al., Index 21204/16E
Plaintiffs-Appellants,

-against-

K.P. Rosenberger,
Defendant-Respondent.

_____

Mitchell Dranow, Sea Cliff, for appellants.

Picciano & Scahill, P.C., Bethpage (Keri A. Wehrheim of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (John R. Higgitt, J.), entered on or about August 29, 2018, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing plaintiff Montoya's claim that he sustained a "significant limitation of use" injury to his lumbar spine within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion denied.

Defendant established prima facie absence of a serious injury in Montoya's lumbar spine by submitting the affirmed report of an orthopedic surgeon, who examined Montoya and found full range of motion and resolved sprain and strain. Defendant also submitted the affirmed report of a radiologist, who opined

that the "facet arthropathy" and "synovial cyst" reflected in the MRI film were preexisting degenerative conditions (*see Holloman v American United Transp. Inc.*, 162 AD3d 423 [1st Dept 2018]).

In opposition, plaintiffs raised triable issues of fact. The affirmed report of Montoya's treating physician demonstrated persisting meaningful limitations a year and nine months after the accident, raising an issue of fact as to existence of a "significant limitation" (*see Kone v Rodriguez*, 107 AD3d 537, 538 [1st Dept 2013]). The MRI finding of a synovial cyst by Montoya's radiologist, and the treating physician's finding of muscle spasms and nerve root irritation and/or radiculopathy, provided objective proof of a serious injury (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]). Although the MRI report is unaffirmed, the finding of a cyst is nonetheless admissible, as defendant's and plaintiffs' radiologists both confirm its existence (*see Clemmer v Drah Cab Corp.*, 74 AD3d 660, 661-662 [1st Dept 2010]).

The treating physician's opinion that Montoya's lumbar spine condition was causally related to the accident was sufficient to raise a triable issue of fact as to causation. In view of plaintiff's relatively young age, absence of a reported history of lumbosacral injury, and the onset of symptoms shortly after

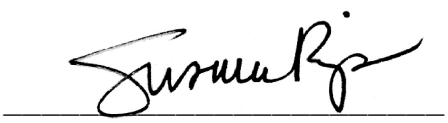
the accident, the opinion of Montoya's doctor that his lumbar conditions were causally related to the accident, based on his treatment and review of Montoya's medical records, sufficiently raised "a different, yet altogether equally plausible, cause" of the injuries (*Fathi v Sodhi*, 146 AD3d 445, 446 [1st Dept 2017] [internal quotation marks omitted]). The doctor's affirmed report also provided a reasonable explanation for Montoya's gap in treatment by stating that he had reached "maximal improvement" (*see Pommells v Perez*, 4 NY3d 566, 577 [2005]).

Furthermore, plaintiffs demonstrated the contemporaneous treatment required to establish a causal link between Montoya's injuries and the accident (*see Perl v Meher*, 18 NY3d 208, 217-218 [2011]) by submitting a report on initial examination two weeks post accident and by submitting Montoya's testimony that he sought treatment for his lower back shortly after the accident

(*see Gomez v Davis*, 146 AD3d 456 [1st Dept 2017]; *Pietropinto v Benjamin*, 104 AD3d 617 [1st Dept 2013]).

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

ENTERED: OCTOBER 24, 2019



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Friedman, J.P., Kapnick, Oing, Singh, JJ.

10187 A-A-, an Infant by His Mother and Natural Guardian, et al., Plaintiffs-Respondents, Index 350314/09

-against-

St. Barnabas Hospital, Defendant-Appellant,

Network OB/GYN, P.C., et al., Defendants.

_____

Gabarini & Scher, P.C., New York (Thomas M. Cooper of counsel), for appellant.

Meagher & Meagher, P.C., White Plains (Merryl F. Weiner of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about October 16, 2018, which, insofar as appealed from as limited by the briefs, denied defendant St. Barnabas Hospital's motion for summary judgment dismissing all claims against it except those premised upon vicarious liability pursuant to *Mduba v Benedictine Hosp.* (52 AD2d 450 [3d Dept 1976]), unanimously modified, on the law, to grant the motion as to the lack of informed consent claim and as to any claims based on vicarious liability for the conduct of defendants David Green, M.D. or Mumtaz M. Master, M.D., and otherwise affirmed, without costs.

Plaintiffs assert claims for medical malpractice, loss of services, and lack of informed consent in connection with the premature birth of the infant plaintiff at defendant St. Barnabas Hospital. Plaintiffs allege that St. Barnabas departed from the standard of care by negligently performing a transvaginal ultrasound (TVU) on October 22, 2007, notwithstanding the prior diagnosis of placenta previa, and by failing to obtain informed consent to this procedure. Plaintiffs further allege that, as a result of these departures, plaintiff mother suffered a placental hemorrhage, which in turn caused the infant to suffer brain damage and developmental delays.

On appeal, St. Barnabas does not dispute that it may be subject to liability for negligent acts by employees of defendant Network OB/GYN, P.C. (Network) - the entity that ran the obstetrical and gynecological practice at the hospital pursuant to a contract with St. Barnabas - pursuant to *Mduba v Benedictine Hosp.* (52 AD2d 450, 452-454 [3d Dept 1976]).

St. Barnabas established prima facie that there was no departure from good and accepted medical practice by submitting its expert opinion that the vaginal probe could not have caused plaintiff mother to hemorrhage because the TVU films demonstrated that the probe did not disturb the cervix. In opposition,

plaintiffs raised an issue of fact by submitting their expert opinion that there was a "very real likelihood that the placenta [could] be disrupted by putting the vaginal probe inside the vagina" and that that was in fact what happened here. This opinion was sufficient to preclude summary judgment. Contrary to St. Barnabas's contention, the TVU films do not constitute dispositive proof. The films consist of still photos taken at discrete points in time during the procedure, and the possibility cannot be ruled out that the probe was inserted into the cervix at a time not pictured or that the injury was created by the probe after the last photo was taken. For this reason, *DiGeronimo v Fuchs* (101 AD3d 933, 936 [2d Dept 2012]), on which St. Barnabas relies, is distinguishable.

Plaintiffs' lack of informed consent claim must be dismissed, because it was not St. Barnabas's responsibility to obtain the consent. Contrary to St. Barnabas's contention, the record does not conclusively demonstrate that defendant Ndubueze Okereke, M.D. ordered the TVU. Dr. Okereke denied doing so, and none of the other deposed witnesses knew with certainty who had ordered it. Although the requisition form indicates that Dr. Okereke made the order, this document is not properly considered, because it was not discovered and submitted until reply (*see*

Small v City of New York, 160 AD3d 471, 473 [1st Dept 2018]). In any event, the record demonstrates that the TVU was ordered by a Network employee, even if an employee of St. Barnabas performed the procedure. St. Barnabas's expert opined that the responsibility for obtaining consent "rests entirely with the attending physician who ordered [the test], not with the technician who carries out the . . . order," and this opinion is unrebutted (*see also Salandy v Bryk*, 55 AD3d 147, 152 [2d Dept 2008] ["where a private physician attends his or her patient at the facilities of a hospital, it is the duty of the physician, not the hospital, to obtain the patient's informed consent"]).

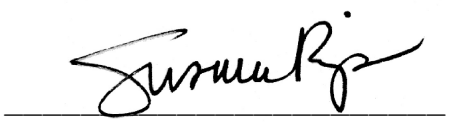
St. Barnabas is entitled to the dismissal of the claims based on vicarious liability for alleged negligence by doctors against whom this action has already been dismissed - i.e., David Green, M.D. and Mumtaz M. Master, M.D. (*see Kukic v Grand*, 84 AD3d 609, 610 [1st Dept 2011]).

St. Barnabas is not entitled to summary judgment dismissing claims based on vicarious liability for the conduct of its employees, because plaintiffs raised an issue of fact whether any St. Barnabas employees committed independent acts of negligence (*see Suits v Wyckoff Hgts. Med. Ctr.*, 84 AD3d 487, 488 [1st Dept 2011], *appeal withdrawn* 17 NY3d 804 [2011]). Although its

employees were not responsible for the determination to order a TVU, St. Barnabas may be liable if its employee performed the TVU negligently or it failed to properly supervise the procedure.

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

ENTERED: OCTOBER 24, 2019



CLERK

Friedman, J.P., Kapnick, Oing, Singh, JJ.

10188 In re Jessica M.,
Petitioner-Respondent,

-against-

Julio G.R.,
Respondent-Appellant.

_____

The Law Offices of Salihah R. Denman, PLLC, Harrison (Salihah R. Denman of counsel), for appellant.

Leslie S. Lowenstein, Woodmere, for respondent.

The Children's Law Center, Brooklyn (Janet Neustaetter of counsel), attorney for the child.

_____

Appeal from order, Family Court, Bronx County (Referee Karen M. C. Cortes), entered on or about March 26, 2018, upon consent, which awarded petitioner sole legal and physical custody of the subject child, and directed that respondent have visitation with the child upon the child's request, unanimously dismissed, without costs, as taken by a nonaggrieved party.

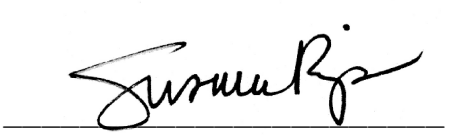
The record reflects that respondent consented to the order, and therefore, it is not appealable since he is not an "aggrieved party" within the meaning of CPLR 5511 (*see Matter of Gabrielle N.N. [Jacqueline N.T.]*, 171 AD3d 671, 672 [1st Dept 2019]; *Matter of Kaylin P. [Derval S.]*, 170 AD3d 592 [1st Dept 2019]). Although respondent maintains that his consent was not knowingly or

voluntarily given, his remedy is to move to vacate or resettle the order in Family Court (*see Matter of Rinaldi v Faiella*, 172 AD3d 871 [2d Dept 2019]; *Matter of Rumpel v Powell*, 129 AD3d 1344, 1345 [3d Dept 2015]).

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

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

ENTERED: OCTOBER 24, 2019



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Friedman, J.P., Kapnick, Oing, Singh, JJ.

10189 The People of the State of New York, Ind. 2888/12
Respondent,

-against-

Alex Jean,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered August 20, 2014, convicting defendant, after a jury trial, of burglary in the second degree and criminal possession of stolen property in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of eight years, unanimously affirmed.

The trial court providently exercised its discretion in precluding cross-examination of the victim and building security personnel regarding the victim's reports of unrelated prior thefts from his apartment, and in denying defendant's request to subpoena any such prior reports. There was no violation of defendant's right to cross-examine witnesses and present a defense (*see Delaware v Van Arsdall*, 475 US 673, 678-679 [1986]).

While "a complainant's prior false allegations . . . may be permitted if the prior allegations suggest a pattern casting substantial doubt on the validity of the charges (*People v Diaz*, 20 NY3d 569, 576 [2013] [internal quotation marks omitted]), here the prior reports did not bear a significant probative relation to the instant charges and there was nothing but speculation upon which to even suspect that the reports were false (*see People v Mandel*, 48 NY2d 952, 953 [1979], *cert denied* 446 US 949 [1980]; *People v Petty*, 17 AD3d 220 [1st Dept 2005], *lv denied* 5 NY3d 793 [2005]). Furthermore, defendant received an ample opportunity to cross-examine the victim about whether defendant acquired the victim's money and property as payment for sex rather than by theft. In any event, any error was harmless. The evidence overwhelmingly established defendant's guilt and refuted his implausible defense (*see People v Hall*, 18 NY3d 122, 132 [2011]).

The court properly denied defendant's mistrial motion, made where the prosecutor referred in his opening statement to a witness who was expected to testify but ultimately became unavailable. The prosecutor did not act in bad faith, and the curative instructions given by the court, at defense counsel's request, were sufficient to prevent any prejudice (*see People v De Tore*, 34 NY2d 199, 207 [1974], *cert denied* 419 US 1025 [1974];

People v Miles, 157 AD3d 641 [1st Dept 2018], *lv denied* 31 NY3d 1015 [2018]). Defendant's related claim that hearsay involving the uncalled witness was improperly admitted is unavailing. In any event, any error regarding the uncalled witness and related matters was harmless, for the reasons discussed above.

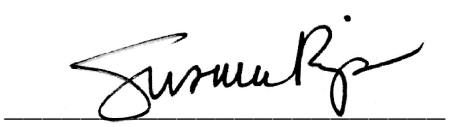
The court properly denied defendant's suppression motion. The record supports the hearing court's finding that there was probable cause to arrest defendant. A detective was able to recognize defendant both from the victim's description and from having observed him in a surveillance videotape. At the time of his arrest he was carrying the same distinctive duffel bag that he had stolen from the victim's apartment, as shown on the videotape. The detective was also aware that someone had brought the victim's stolen computer to a store for servicing and would be returning to the store to pick it up, providing further

probable cause for the arrest when defendant appeared outside the store.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 24, 2019



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Friedman, J.P., Kapnick, Oing, Singh, JJ.

10190 Melissa Lawyer, etc., Index 309963/09
Plaintiff-Appellant,

-against-

The City of New York,
Defendant,

922 Southern LLC, et al.,
Defendants-Respondents.

_____

Law Office of Michael Biniakewitz, New York (Michael Biniakewitz of counsel), for appellant.

Kaufman Dolowich Voluck, LLP, New York (Kevin J. O'Donnell of counsel), for 922 Southern LLC, East River Family Center LLC, David Levitan, Mark Goldberg and City Homes Associates, LLC, respondents.

White Werbel & Fino, LLP, New York (Nathan Losman of counsel), for Basic Housing Inc., respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered on or about November 15, 2017, which, insofar as appealed from as limited by the briefs, granted the motions of defendants 922 Southern LLC, City Homes Associates, LLC and David Levitan, and defendant Basic Housing, Inc. (defendants) for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

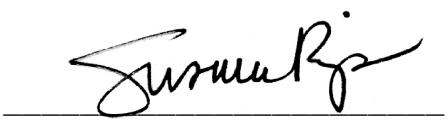
"A landlord has a common-law duty to take minimal security precautions to protect tenants and members of the public from the

foreseeable criminal acts of third parties" (*Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301, 303 [1st Dept 2001]). Here, that duty was discharged by providing, inter alia, locking doors to the building in question with a buzzer and intercom system and video surveillance cameras (*Batista v City of New York*, 108 AD3d 484, 486 [1st Dept 2013]; *Anzalone v Pan-Am Equities*, 271 AD2d 307, 309 [1st Dept 2000]). In addition, defendants prima facie established through testimony regarding a lack of prior robberies or violent crimes in the building that the shooting here was not foreseeable (*see Todorovich v Columbia Univ.*, 245 AD2d 45, 45-46 [1st Dept 1997], *lv denied* 92 NY2d 805 [1988]). Plaintiff's reliance on vague testimony regarding unknown police activity at the building and speculation about drug sales, robberies, and other violent crimes is insufficient to raise a triable issue of fact. In any event, because plaintiff does not contend that the assailant was not an invited guest, any insufficiency with security precautions was not a proximate cause of the shooting (*see Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 551 [1998]).

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

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

ENTERED: OCTOBER 24, 2019



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Friedman, J.P., Kapnick, Oing, Singh, JJ.

10191-
10192 Index 300823/12

Humberto Rivera,
Plaintiff-Respondent,

-against-

11 West 42 Realty Investors,
L.L.C., et al.,
Defendants-Appellants,

American Construction, Inc., et al.,
Defendants.

- - - - -

[And Third-Party Actions]

- - - - -

Humberto Rivera,
Plaintiff-Respondent,

-against-

11 West 42 Realty Investors, L.L.C., et al.,
Defendants,

NTT Services, LLC, et al.,
Defendants-Respondents.

- - - - -

[And Third-Party Actions]

_____

Tromello & Fishman, Tarrytown (Silvia C. Souto of counsel), and O'Toole Serivo, New York (Sean Callahan of counsel), for 11 West 42 Realty Investors, L.L.C. and Tishman Speyer Properties, L.P., appellants.

Russo & Toner LLP, New York (Marie A. Castronuovo of counsel), for NTT Services, LLC and Pritchard Industries, Inc., appellants.

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph III of counsel), for respondent.

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Order, Supreme Court, Bronx County (Donna M. Mills, J.), entered on or about January 19, 2018, which denied defendants 11 West 42 Realty Investors, L.L.C. and Tishman Speyer Properties, L.P.'s motion for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly. Order, Supreme Court, Bronx County (Donna M. Mills, J.), entered on or about December 27, 2017, which denied defendants NTT Services, LLC and Pritchard Industries, Inc.'s motion for summary judgment dismissing the complaint and cross claims against them, unanimously affirmed, without costs.

Defendants 11 West 42 and Tishman established prima facie that they did not cause, create or have actual or constructive notice of the one-time unsafe condition in the elevator when plaintiff was injured (*see Kalish v HEI Hospitality, LLC*, 114 AD3d 444, 445 [1st Dept 2014]). Although it cannot be determined from the record who placed the counter tops in the elevator, there is no evidence that it was either 11 West 42 or Tishman. None of the witnesses testified that either of these defendants played any role in loading, unloading or placing construction materials in the elevator. In addition, numerous witnesses testified that they had no knowledge of complaints or accidents

related to construction materials in the elevator.

Plaintiff's testimony that the person who instructed the elevator operator to remove the materials from the elevator worked for the building is speculative and appears to be based solely on the fact that the person was wearing a uniform. Moreover, plaintiff acknowledged that he did not know if the person was employed as a maintenance or cleaning worker.

Plaintiff also failed to raise an issue of fact whether 11 West 42 or Tishman exercised more than general supervisory control over the conduct of the elevator operator, who was employed by Pritchard Industries (*see Duhe v Midence*, 48 AD3d 244 [1st Dept 2008], *lv denied* 11 NY3d 706 [2008]). Under the contract, Pritchard and NTT Services had control over the conduct of their employees in the performance of the contractual obligations, not 11 West 42 or Tishman, and there is no evidence that 11 West 42 or Tishman supervised those workers.

NTT and Pritchard failed to establish prima facie that they did not launch a force or instrument of harm in failing to exercise reasonable care in performing their duties or that pursuant to contract they did not entirely displace 11 West 42 and Tishman's duty to maintain the premises safely (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). The record

shows that plaintiff was permitted by Pritchard's employees to ride in the elevator when it was filled with unsecured construction materials. The elevator operator, a Pritchard employee, testified that the elevator was not supposed to carry heavy loads between 8 a.m. and 6 p.m. without the permission of his supervisor, which he did not obtain, and the relief operator, also a Pritchard employee, testified that persons were not permitted in an elevator when it was carrying construction materials.

As to the scope of their contractual duties, the contract gave NTT full responsibility for the operation of the elevators. While some witnesses testified that 11 West 42 and Tishman imposed certain rules for the transport of heavy loads, NTT and Pritchard failed to show that 11 West 42 and Tishman had more than general supervisory control over the elevator.

NTT and Pritchard failed to establish that they are entitled to the summary dismissal of the cross claim for contractual indemnification. While Tishman is expressly covered by the indemnification clause in the contract, issues of fact exist whether 11 West 42 is covered by the indemnification clause, since the contract listed another entity as the owner, and the relationship between the two entities cannot be determined from

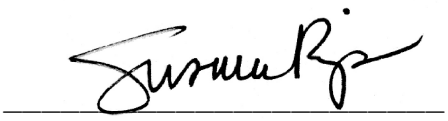
the record.

In any event, NTT and Pritchard failed to demonstrate that they were free from negligence, since the elevator operator was employed by Pritchard and plaintiff testified that the counter tops were not properly secured in the elevator, which was under the operator's control.

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

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

ENTERED: OCTOBER 24, 2019



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CORRECTED ORDER - OCTOBER 29, 2019

Friedman, J.P., Kapnick, Oing, Singh, JJ.

10193 The People of the State of New York, Ind. 2963/09
Appellant,

-against-

Engels Gonzalez,
Defendant-**Respondent.**

_____

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

Robert S. Dean, Center for Appellate Litigation, New York (Matthew Bova of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Efrain Alvarado, J.), entered May 21, 2018, which summarily granted defendant's CPL 440.10 motion to vacate a January 30, 2013 judgment of conviction, unanimously reversed, on the law, and the matter remanded for a hearing in accordance with this decision.

Defendant did not fully substantiate his claim that his counsel provided constitutionally deficient advice regarding the immigration consequences of defendant's guilty plea (*see Padilla v Kentucky*, 559 US 356, 367-369 [2010]; *People v McDonald*, 1 NY3d 109, 113-114 [2003]; *People v Doumbia*, 153 AD3d 1139, 1140 [1st Dept 2017]), and, as such, a hearing on that issue is required (*see* CPL 440.30[3][c]). As to the prejudice prong of his claim, which requires proof that he would not have pleaded guilty but for the incorrect advice, a hearing on that issue is also

necessary (*see People v Gaston*, 163 AD3d 442, 444-445 [1st Dept 2018]). We have considered and rejected both parties' remaining arguments.

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

ENTERED: OCTOBER 24, 2019

CLERK

Friedman, J.P., Kapnick, Oing, Singh, JJ.

10194 In re Nexia Health Technologies, Inc., formerly known as Nightinggale Informatix Corp., Petitioner-Appellant, Index 654151/18

-against-

Miratech, Inc., Respondent-Respondent.

Gibson, Dunn & Crutcher LLP, New York (Randy M. Mastro of counsel), for appellant.

Greenberg Traurig, LLP, New York (Caroline J. Heller and Timothy C. Bass of the bar of the State of Maryland, the State of Virginia, and the District of Columbia, admitted pro hac vice, of counsel), for respondent.

Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered on or about May 20, 2019, which denied petitioner's petition to vacate a final arbitration award dated August 10, 2018 and granted respondent's cross motion to confirm the award, unanimously affirmed, without costs.

Petitioner commenced this special proceeding to vacate an arbitration award rendered in New York. Supreme Court denied the petition to vacate and granted respondent's cross motion to confirm the award.

Petitioner is a Canadian software company. Respondent is an IT company headquartered in Delaware. In 2012, petitioner decided

to upgrade its software as it was having trouble upgrading it on its own. After some meetings and discussions, the parties entered into a letter of intent on June 23, 2015.

The letter of intent contemplated that respondent would help petitioner in phases, labelled Phase 0 through Phase 3. Phase 0 would be billed at a flat fee of $45,000 while the further phases would each be billed on a "Time and Material" basis. Petitioner paid respondent the agreed-on fee for Phase 0. It also paid respondent for Phase 1.

On or about January 1, 2016, the parties entered into a Master Services Agreement (MSA).

Respondent performed the Phase 2 work, but petitioner failed to pay. When respondent asked where the parties stood on unpaid invoices, petitioner replied, "Will pay you in time. But don't rock the boat at this critical time."

When petitioner refused to pay, respondent brought an arbitration action for payment. The arbitrator awarded the respondent for work done for Phases 2 and 3. The arbitrator found that the MSA depicts the scope of work done for Phase 2. He found that respondent was to be compensated for Phase 3 although there was no meeting of the minds as to the pricing of the work performed during Phase 3 as petitioner had been unjustly enriched

by respondent's work during this phase.

At issue is whether the arbitrator manifestly disregarded the law in failing to apply the limitations of liability clause of the MSA to the damages awarded for Phase 2.

It is undisputed that the Federal Arbitration Act (FAA) applies to this dispute. "To modify or vacate an award on the ground of manifest disregard of the law, a court must find both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case" (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 481 [2006], *cert dismissed* 548 US 940 [2006] [internal quotation marks omitted]). "Vacatur on the basis of manifest disregard of a contract is appropriate . . . where the arbitral award contradicts an express and unambiguous term of the contract" (*id.* at 485 [internal quotation marks omitted]). Manifest disregard of the law is a "doctrine of last resort limited to the rare occurrences of apparent egregious impropriety on the part of the arbitrators" and is "severely limited" (*Matter of Daesang Corp. v NutraSweet,* 167 AD3d 1, 15-16 [1st Dept 2018], *lv denied* 32 NY3d 915 [2019] [citing to *Wein*, 6 NY3d at 480-481]; *see also Dufreco Intl Steel Trading v T. Klaveness Shipping A/S*,

333 F 3d 383, 390 [2d Cir 2003][holding that the error must be so egregious "that it would be instantly perceived as such by the average person qualified to serve as an arbitrator]).

A party seeking to vacate an award pursuant to 9 USC § 10(a)(4) "bears a heavy burden. It is not enough to show that the arbitrator committed an error – or even a serious error" (*Oxford Health Plans LLC v Sutter*, 559 US 564, 569 [2013]). Section 10(a)(4) "permits courts to vacate an arbitral decision only when the arbitrator strayed from his delegated task of interpreting a contract, not when he performed that task poorly" (*id.* at 572; *see also id.* at 573 ["Under § 10[a][4], the question for a judge is not whether the arbitrator construed the parties' contract correctly, but whether he construed it at all"]). "[C]ourts are obligated to give deference to the decision of the arbitrator . . . . This is true even if the arbitrator misapplied the substantive law in the area of the contract" (*Matter of New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 336 [2005]).

When the arbitrators give at least "a barely colorable justification for the outcome reached," their finding stands (*Matter of Daesang*, 167 AD3d at 15 [1st Dept 2018]; *see also id.* at n 18 ["internal inconsistencies within an arbitral judgment

are not ground for vacatur"]). Mere "error does not equate to a manifest disregard for the law" (*Cantor Fitzgerald Sec. v Refco Sec., LLC*, 83 AD3d 592, 593 [1st Dept 2011]; *see also Wien*, 6 NY3d at 483 ["[A]s long as the arbitrator is even arguably construing or applying the contract," the award should be upheld]).

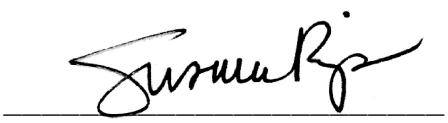
Here, the arbitrator gave a colorable justification for the outcome reached. The arbitrator found that a correct reading of the clause "assumes that invoices and amounts due must have been paid and the clause limits liability upon payment in the ordinary course." Since no invoices were paid for Phase 2, the arbitrator reasoned that the limitation of liability clause did not limit the damages awarded to respondent for work performed under Phase 2. In reaching his conclusion, the arbitrator did not contradict an express term of the contract, rather, he interpreted it. Even if the arbitrator's interpretation was erroneous, it does not equate to manifest disregard of the law.

Moreover, the arbitrator did not exceed his authority, as he had the power to interpret the contract and decide the issues based on the parties' submissions. Finally, we find no reason to

reverse Supreme Court's affirmance of the arbitral award with regards to Phase 3 of the work.

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

ENTERED: OCTOBER 24, 2019



CLERK

Friedman, J.P., Kapnick, Oing, Singh, JJ.

10195 The People of the State of New York, Dkt. 13808/01
Respondent,

-against-

Rodney Harper,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Ryan J. Foley of counsel), for respondent.

_____

Order Supreme Court, Bronx County (Harold Adler, J.), entered on or about June 4, 2018, which denied defendant's Correction Law § 168-o(2) petition to modify his sex offender classification, unanimously affirmed, without costs.

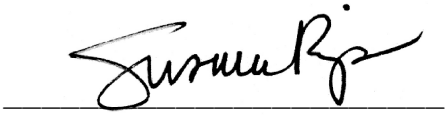
We decline to revisit our holding that this type of order is appealable (*People v Shaljamin*, 164 AD3d 1169 [1st Dept 2018]).

The court providently exercised its discretion when it declined to grant a downward modification of defendant's level three classification (*see People v Lashaway*, 25 NY3d 478 [2015]). Defendant's long period of law abiding conduct after being released from custody was outweighed by the seriousness of the underlying sex crime against a child, as well as the fact that, at an earlier stage of his life, defendant had committed another

sex crime against a child. The motion court was appropriately concerned that, in these circumstances, defendant's threat of recidivism remained.

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

ENTERED: OCTOBER 24, 2019



CLERK

Friedman, J.P., Kapnick, Oing, Singh, JJ.

10196 The People of the State of New York, Ind. 2452/16
Respondent,

-against-

Jonathan McRae,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Albert Lorenzo, J.), rendered September 11, 2017, unanimously affirmed.

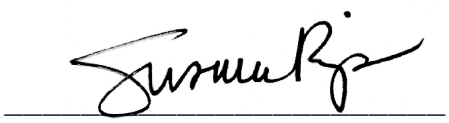
Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised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

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

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

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

ENTERED: OCTOBER 24, 2019



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Friedman, J.P., Kapnick, Oing, Singh, JJ.

10197 Funk This Entertainment LLC, doing business as Venfino, Plaintiff-Respondent, Index 653152/13

-against-

B.R. Guest, LLC, et al., Defendants-Appellants.

_____

Yankwitt LLP, White Plains (Alicia A. Tallbe of counsel), for appellants.

Iaconis Fusco LLP, Malverne (Joseph P. Fusco of counsel), for respondent.

_____

Order, Supreme Court, New York County (Melissa A. Crane, J.), entered on or about April 17, 2019, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

In light of court's September 21, 2018 preclusion order,

summary judgment should have been granted as plaintiff would be unable to establish its case.

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

ENTERED: OCTOBER 24, 2019

CLERK

Friedman, J.P., Kapnick, Oing, Singh, JJ.

10198 Andre Jackson, Index 20013/17E
Plaintiff-Respondent,

-against-

Insoo Lah,
Defendant-Respondent,

Andrew Jackson, et al.,
Defendants-Appellants.

_____

Keane & Bernheimer, PLLC, Valhalla (Thomas J. Keane of counsel), for appellants.

Oresky & Associates, PLLC, Bronx (Payne Tatich of counsel), for Andre Jackson, respondent.

Marjorie E. Bornes, Brooklyn, for Insoo Lah, respondent.

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Order, Supreme Court, Bronx County (John R. Higgitt, J.), entered February 6, 2018, which denied the motion of defendants Andrew Jackson and Gricel Rosa for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

In this personal injury action, plaintiff Andre Jackson was a passenger in a vehicle owned by defendant Gricel Rosa and driven by defendant Andrew Jackson while the vehicle was traveling south on the New England Thruway. The record shows that defendant Jackson was driving in the left lane when he felt the

car shaking and heard a rubbing sound. He pulled the car over to the left shoulder of the roadway. After defendant Jackson, plaintiff and another passenger got out of the car to change the passenger-side rear tire, defendant Lah, who was driving his vehicle in the left lane, struck plaintiff with his vehicle.

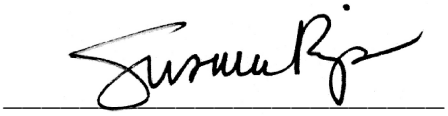
In support of their motion for summary judgment, defendants Jackson and Rosa relied on the deposition testimony of plaintiff, defendant Jackson and a nonparty witness, who all testified that the hazard lights were on at the time of the accident. In opposition, plaintiff pointed to Lah's testimony questioning whether the hazard lights were on. Also before the court was a nonparty witness's testimony indicating that the stopped vehicle was partially in the left lane.

Given the conflicting testimony regarding the details of this accident, the motion court correctly denied summary

judgment, as there are triable issues of fact as to negligence and proximate cause (*see Peritore v Anna & Diane Cab Corp.*, 127 AD3d 669 [1st Dept 2015]).

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

ENTERED: OCTOBER 24, 2019



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Friedman, J.P., Kapnick, Oing, Singh, JJ.

10199N 1591 Second Avenue LLC, et al., Index 161539/15
Plaintiffs-Appellants,

-against-

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

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Greenberg, Trager & Herbst, LLP, New York (Richard J. Lambert of counsel), for appellants.

Young & Yagerman, P.C., New York (Louise M. Cherkis of counsel), for respondents.

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Order, Supreme Court, New York County (Robert R. Reed, J.), entered on or about April 18, 2019, which, insofar as appealed from as limited by the briefs, denied plaintiffs' motion to strike defendants' answer due to discovery abuses, unanimously affirmed, without costs.

Plaintiffs failed to conclusively demonstrate that defendants' actions relating to discovery warranted the drastic remedy of striking defendants' answer (*see Henderson-Jones v City of New York*, 87 AD3d 498, 504 [1st Dept 2011]). Defendants largely provided timely responses to the court's orders directing disclosure, and those responses generally evidenced a good-faith effort to meaningfully address plaintiffs' requests (*cf. Kihl v*

Pfeffer, 94 NY2d 118, 123 [1999]).

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

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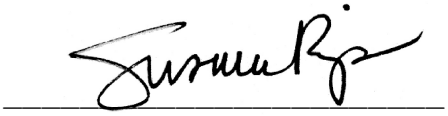

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