SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 29, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Richter, J.P., Gische, Kapnick, Kern, Moulton, JJ.

9939 The People of the State of New York, Respondent, Ind. 4261/14

-against-

Oliver Davis,
Defendant-Appellant.

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Christina A. Swarns, Office of the Appellate Defender, New York (Stephen Chu of counsel), and Cleary Gottlieb Steen & Hamilton LLP, New York (Georgia V. Kostopoulos of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered May 4, 2016, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him to a term of time served and three years' probation, unanimously affirmed.

Defendant was charged with attempted assault in the first degree and assault in the second degree, based on an incident during which he stabbed a man in a building where they both resided. Defendant asked the court to give a justification charge on the use of deadly force both in defense of a person and

to prevent a burglary or attempted burglary. Defendant also asked the court, pursuant to *People v Velez* (131 AD3d 129 [1st Dept 2015]) and its progeny, to charge that, if the jury acquitted him of the higher count of attempted first degree assault based on justification, then it should not continue with deliberations on the lower count of second-degree assault.

The court charged the jury on the defense of justification to prevent a burglary, but declined to give a justification charge based on defense of a person. The court also told the jury that if they find defendant not guilty of either count in the indictment by reason of justification, they must also find defendant not guilty of the other count as well "because justification is a complete defense to both counts of the indictment." Finally, the court instructed the jury on the elements of each crime, with the third element of both being "that the defendant was not justified." During deliberations, the jury asked the court for reinstruction on the elements of the charged crimes. In a supplemental charge, the trial court reread the elements of each offense, with both including the element "that the defendant was not justified." The jury returned a verdict finding defendant not guilty of attempted assault in the first degree, but guilty of assault in the second degree.

On appeal, defendant contends that the court's initial and

supplemental charges did not comply with *Velez*, and that the verdict sheet erroneously omitted the issue of justification. These claims are unpreserved. During a colloquy on the *Velez* issue, the court showed defense counsel a copy of its proposed charge, and defense counsel expressly agreed that it "satisfies *Velez*." Further, defense counsel made no objection to the charge as given. As to the supplemental charge, defense counsel never asked the court to repeat its *Velez* instruction, and did not object to its absence after the charge was given. Likewise, defendant made no objections to the verdict sheet. Under the circumstances, we decline to exercise our interest of justice jurisdiction to review these unpreserved claims.

The court properly declined to instruct the jury on the use of deadly force in defense of a person. No reasonable view of the evidence supports the conclusion that defendant reasonably believed that the victim was using or about to use deadly physical force against him (*see People v Weir*, 14 AD3d 447, 448 [1st Dept 2005], *lv denied* 4 NY3d 836 [2005]). The evidence, when viewed in a light most favorable to defendant, showed that the victim used, at most, ordinary physical force, and not deadly physical force.

Finally, there is no merit to defendant's claim that certain comments made during the prosecutor's summation warrant

reversal. "The remarks at issue generally constituted permissible comment on the evidence, including reasonable inferences to be drawn therefrom, and where the summation arguably went beyond the evidence, this was not so egregious as to deprive defendant of a fair trial" (*People v Kurita*, 172 AD3d 503, 503 [1st Dept 2019]).

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

ENTERED: OCTOBER 29, 2019

CLERK

Richter, J.P., Gische, Kapnick, Kern, Moulton, JJ.

9946 Sean Rad, et al., Index 654038/18
Plaintiffs-Respondents,

-against-

IAC/InterActiveCorp, et al.,
Defendants-Appellants.

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Wachtell, Lipton, Rosen & Katz, New York (Marc Wolinsky of counsel), for appellants.

Gibson, Dunn & Crutcher LLP, Dallas, TX (Allyson Ho of the bar of the State of Texas and the District of Columbia, admitted pro hac vice, of counsel), for respondents.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered June 13, 2019, which, to the extent appealed from as limited by the briefs, denied defendants' motion to dismiss the cause of action for breach of contract except for the merger-related claims asserted by plaintiffs Alexa Mateen and Justin Mateen, and the causes of action for tortious interference with contractual relations and tortious interference with prospective economic advantage, unanimously affirmed, without costs.

The court properly found that CPLR 7601 does not apply to bar plaintiffs' claims. The parties' stock option agreements did not, in clear, explicit and unequivocal language and without resorting to implication or subtlety, bind plaintiffs to an appraisal valuation or limit their remedies in the event of a

dispute as to valuation (*see Matter of Waldron [Goddess]*, 61 NY2d 181 [1984]). Initially, the valuation process contained in the 2014 Equity Incentive Plan was not framed as a dispute-settling mechanism and it was not an adversarial process. The Plan merely stated that Tinder and IAC "shall undertake the process described below." Although the parties agreed that the value of their stock options would be determined by the valuation process, nothing in the agreements provided that the valuation would be binding or final or that the parties would be precluded from fully disputing the valuation in court. Moreover, there is no evidence that any of the plaintiffs participated in creating a list of qualified banks or that they were permitted to select the banks that actually conducted the appraisal. Option holders were not direct signatories to the Plan and were not even mentioned in the valuation procedure. The fact that plaintiff Rad, a holder of stock options, participated in the valuation process is not dispositive, as the Plan did not entitle Rad or any other holder of stock options to do so. In light of the foregoing, the parties' other arguments about the application of CPLR 7601 are moot.

The motion court properly found that issues of fact exist as to whether plaintiffs acquiesced to the transaction at issue. Although plaintiff Rad's unvested options vested immediately upon

the merger, and he exercised them all, the equitable defense of acquiescence is "fact intensive, often depending ... on an evaluation of the knowledge, intention and motivation of the acquiescing party" (*see Julin v Julin*, 787 A2d 82, 84 [Del 2001]).

Contrary to defendants' contention, those plaintiffs whose employment terminated prior to the merger have standing to assert merger-related claims. While they were obligated to sell their outstanding options upon leaving the company, those options were not valued until the merger.

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

ENTERED: OCTOBER 29, 2019

CLERK

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

10119 Randy Polanco Rodriguez, Index 301012/14
Plaintiff-Appellant,

-against-

Antillana & Metro Supermarket Corp., doing business as Antilla Superfood Supermarket, et al.,
Defendants-Respondents.

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[And a Third-Party Action]

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

Kaufman Borgeest & Ryan LLP, Valhalla (Rebecca A. Barrett of counsel), for Antillana & Metro Supermarket Corp., respondent.

Black Marjieh & Sanford, LLP, Elmsford (Sheryl A. Sanford of counsel), for Boss Realty Company, LLC, respondent.

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered on or about May 10, 2018, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment on his Labor Law § 241(6) claim, granted defendant Boss Realty Company, LLC's (Boss) motion for summary judgment dismissing the complaint and any cross claims as against it, and granted defendant Antillana & Metro Supermarket Corp. d/b/a Antillana Superfood Supermarket's (Antillana) motion for summary judgment dismissing plaintiff's Labor Law § 241(6) claim as against it, unanimously modified, on the law, to deny

defendant Antillana's motion for summary judgment dismissing plaintiff's Labor Law § 241(6) claim as against it, and otherwise affirmed, without costs.

Plaintiff alleges that he was injured while installing a refrigeration condenser unit at premises owned by Boss and leased by Antillana. We find that the motion court improperly granted Antillana's motion for summary judgment dismissing the Labor Law § 241(6) claim. Plaintiff was engaged in an activity within the purview of Labor Law § 241(6). Plaintiff worked at the subject premises during the build-out installing three refrigeration system condensers, which weighed about 3000 pounds and had to be moved with a forklift. Three weeks after the store was opened, plaintiff was asked to install an additional condenser which weighed about 200 pounds. The president of Antillana acknowledged that there had been a renovation project underway at the premises before plaintiff's accident.

We find that there is an issue of fact whether the subsequent installation of the condenser constituted an "alteration" of the premises, which falls within the ambit of "construction" work under Labor Law § 241(6) (*see Fuchs v Austin Mall Assoc., LLC*, 62 AD3d 746, 747 [2d Dept 2009]; *Becker v ADN Design Corp.*, 51 AD3d 834 [2d Dept 2008]).

We also find triable issues of material fact as to whether

Antillana violated 12 NYCRR 23-1.25(d), (e)(1), (e)(3), and (f), relied upon by plaintiff to support his Labor Law § 241(6) claim.

However, the motion court properly dismissed the complaint as against Boss. The record demonstrates that Boss, an out-of-possession landlord, had no supervisory control over plaintiff's actions (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]) and it did not violate an applicable Industrial Code regulation.

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 29, 2019

CLERK

Richter, J.P., Gische, Tom, Gesmer, Moulton, JJ.

10200 The People of the State of New York, Respondent, Ind. 3007/08

-against-

Devin Alexander,
Defendant-Appellant.

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Christina A. Swarns, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Shera Knight of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Miriam R. Best, J.), rendered October 20, 2014, convicting defendant, after a jury trial, of assault in the first degree, and sentencing him to a term of 20 years, unanimously reversed, on the law, and the matter remanded for a new trial.

On the second day of jury deliberations, a Friday, the jury sent the court its sixth note, stating that "Jurors 4, 7 and 10 cannot continue further with this case." The court spoke with each of these three jurors individually and ascertained from all three, in essence, that they were concerned because they were not being paid by their employers for the days that they spent serving on the jury.

Notwithstanding numerous specific requests by defense counsel, the court declined to specifically ask the jurors

whether their financial concerns would have any impact on their ability to deliberate fairly. The court determined that further inquiry would be improper because it had spoken to the three jurors and "none of these jurors has yet told us that they would be unable to continue deliberating fairly." The court dismissed the jury for the weekend. On the following Monday, the jury found defendant guilty.

A court is required to discharge a juror when, after a "probing and tactful inquiry" (*People v Buford*, 69 NY2d 290, 299 [1987]), "it becomes obvious" that the juror "possesses a state of mind which would prevent the rendering of an impartial verdict" (*id.* at 298). Here, the court's inquiry was insufficient. Although the court ascertained that the concern of all three jurors was that they would not be paid by their employers during further days of jury service, the court still needed to inquire regarding the connection between that concern and the jury note's statement that the jurors could not "continue with this case."

The court should have granted the defense request for inquiries into whether the financial pressure the jurors were experiencing had any bearing on their ability to deliberate fairly. In *People v Hines* (191 AD2d 274 [1st Dept 1993], *lv denied* 81 NY2d 1074 [1993]), this Court held that although

"financial hardship is generally not a sufficient reason to warrant discharge when the trial is near completion," the trial court "should have ascertained whether the juror's financial difficulties would have affected his ability to deliberate impartially" (*id.* at 276). Similarly, in *People v Cook* (52 AD3d 255, 256 [1st Dept 2008], *lv denied* 11 NY3d 735 [2008]), we observed that "a juror's personal or financial inconvenience alone would be insufficient to establish the requisite manifest necessity" for a mistrial, but we went on to state that the fact that "the juror was unable to declare her continued ability to deliberate fairly" weighed in favor of a mistrial.

Here, the jury's note raised the possibility that one or more of the jurors referred to was unqualified, and the fact that they did not specifically volunteer, in their colloquies with the court, that financial pressures might compromise their impartiality did not obviate the necessity of an inquiry. Because the court did not make any such inquiry, or give a contemporary curative instruction relating to the jurors' financial concerns, it is impossible, in the circumstances presented, to determine whether any of the jurors had become

grossly unqualified for further service (*see People v Ordenana*, 20 AD3d 39, 42 [1st Dept 2005], *lv denied* 5 NY3d 831 [2005]).

Because we are ordering a new trial, we find it unnecessary to reach any other issues.

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

ENTERED: OCTOBER 29, 2019

CLERK

Richter, J.P., Gische, Tom, Gesmer, Moulton, JJ.

10201 Global Liberty Insurance Co., Index 22398/16E
Plaintiff-Appellant,

-against-

Akeem Evans, et al.,
Defendants,

SML Acupuncture, P.C.,
Defendant-Respondent.

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

Gary Tsirelman, P.C., Brooklyn (Stefan Belinfanti of counsel), for respondent.

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Order, Supreme Court, Bronx County (Rubén Franco, J.), entered on or about April 9, 2019, which, as limited by the briefs, denied Global's motion for summary judgment to declare it does not owe no fault coverage to health care provider defendant SML Acupuncture, P.C. (SML) because defendant-assignor Akeem Evans failed to attend two properly scheduled examinations under oath (EUOs), unanimously affirmed, without costs.

Based on the claims adjuster's conflicting affidavits and an application for no-fault benefits that was dated September 15, 2015, and stamped as received by facsimile on October 11, 2011, Global failed to provide evidence sufficient to prove that the EUO letters were timely mailed (*see Unitrin Advantage Ins. Co. v*

All of NY, Inc., 158 AD3d 449, 449 [1st Dept 2018]; *National Liab. & Fire Ins. Co. v Tam Med. Supply Corp.*, 131 AD3d 851 [1st Dept 2015]; *American Tr. Ins. Co. v Longevity Med. Supply, Inc.*, 131 AD3d 841, 841 [1st Dept 2015]).

Summary judgment was also correctly denied because issues of facts arise as to why Evans, who appeared at the EUO with counsel, left after counsel abruptly announced that he would no longer represent claimant (*see American States Ins. Co. v Huff*, 119 AD3d 478, 478-479 [1st Dept 2014]).

SML's contention that Global failed to provide notice as to the reasons why the claim was delayed "by identifying in writing the missing verification and the party from whom it was requested" (11 NYCRR 65-3.6(b)), is unpreserved, and its argument that it should be awarded attorneys' fees is unavailing, as this is an appeal from a declaratory action, not an arbitration (Insurance Law § 5106[c]; 11 NYCRR 65-4.10[j][4]).

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

ENTERED: OCTOBER 29, 2019

CLERK

Richter, J.P., Gische, Tom, Gesmer, Moulton, JJ.

10203 Eli Massillon, Index 26953/16E
Plaintiff-Appellant,

-against-

Ana Rosa Regalado, et al.,
Defendants-Respondents.

_____

Michael J. Redenburg, P.C., New York (Michael J. Redenburg of counsel), for appellant.

Marjorie E. Bornes, Brooklyn, for respondents.

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Order, Supreme Court, Bronx County (John R. Higgitt, J.), entered on or about October 4, 2018, which granted defendants' motion for summary judgment dismissing the complaint for lack of a serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to deny the motion as to plaintiff's claims of serious injury to his cervical and lumbar spine and his 90/180-day claim, and otherwise affirmed, without costs.

Plaintiff alleges that he sustained serious injuries to his cervical and lumbar spine, shoulders, left thumb, and legs as the result of a motor vehicle collision that occurred in October 2015. He also alleges that he was unable to return to work for over five months after the accident.

As to plaintiff's claimed cervical and lumbar spine

injuries, defendants demonstrated prima facie that the injuries were not causally related to the subject accident through the reports of their radiologist, who opined that the MRIs of those body parts showed conditions that were chronic and degenerative in nature and could not have been caused by the subject accident (*see Auquilla v Singh*, 162 AD3d 463, 463 [1st Dept 2018]). Defendants also relied on plaintiff's testimony that he had previously sustained injuries to his spine in a motor vehicle accident in 2010.

In opposition, plaintiff raised a triable issue of fact. His treating physiatrist directly addressed and explained the evidence of a prior spinal injury by comparing the MRIs taken following the 2010 accident and with those taken after the subject accident, and opined that the 2015 MRIs showed new and worsened disc bulges and herniations, which were causally related to the subject accident (*see Michels v Marton*, 130 AD3d 476, 477 [1st Dept 2015]; *Matos v Urena*, 128 AD3d 435, 436 [1st Dept 2015]; *see generally Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043, 1044 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]). Although defendant's radiologist opined that the conditions were degenerative, the plaintiff produced contemporaneous MRI reports expressly ruling out degeneration of the cervical spine and lumbar spine at the L3/4 and L4/5 disc levels. These reports

were provided along with the opinions of plaintiff's treating doctors that the conditions were causally related to the accident. This evidence was sufficient to raise an issue of fact, given plaintiff's "relatively young age" and the absence of any evidence in his own medical records of degeneration (*Fathi v Sodhi*, 146 AD3d 445 [1st Dept 2017]; *see Sanchez v Oxcin*, 157 AD3d 561, 563 [1st Dept 2018]; *Yuen v Arka Memory Cab Corp.*, 80 AD3d 481 [1st Dept 2011]). Further, in response to the findings by defendants' examining physicians that plaintiff had fully recovered and showed only subjective limitations, plaintiff submitted affirmed medical reports by his treating physicians documenting significant limitations in range of motion of his lumbar and cervical spine shortly after the accident and recently (*see Pauling v City Car & Limousine Servs., Inc.*, 155 AD3d 481, 481 [1st Dept 2017]).

Plaintiff was not required to address any gap in treatment perceived from his own medical records, since defendants did not raise the issue in their moving papers (*see Lewis v Revello*, 172 AD3d 505, 506 [1st Dept 2019]; *Pauling* at 481). In any event, plaintiff testified that he continued treating at least monthly, and his treating physiatrist averred that he had reached maximum medical improvement when he left that facility, which provides a reasonable explanation for any gap (*see Pommells v Perez*, 4 NY3d

566, 572, 576 [2005]; *Lewis* at 506).

As to plaintiff's 90/180-day claim, defendants' initial showing of lack of causation met their prima facie burden as to that claim as well. However, as discussed, plaintiff raised an issue of fact as to causation. He also submitted his deposition testimony that he missed work for five to six months following the accident, as well as affirmed evaluation reports documenting that he remained partially disabled and unable to work safely or effectively due to his injuries during that period (*see Lazzari v Qualcon Constr., LLC*, 162 AD3d 440, 441-442 [1st Dept 2018]). Thus, triable issues of fact exist as to the 90/180-day claim.

However, assuming arguendo that plaintiff adequately alleged in his bill of particulars that he sustained injuries to his shoulders, left thumb, and legs, defendants demonstrated prima facie that such injuries were not serious by relying on plaintiff's own deposition testimony that he had no complaints concerning those parts, either contemporaneously with the accident or currently. In opposition, plaintiff submitted no

medical evidence concerning those body parts, and therefore failed to raise an issue of fact (*see Santana v Centeno*, 140 AD3d 437, 438 [1st Dept 2016]; *Singer v Gae Limo Corp.*, 91 AD3d 526, 527 [1st Dept 2012]).

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

ENTERED: OCTOBER 29, 2019

CLERK

Richter, J.P., Gische, Tom, Gesmer, Moulton, JJ.

10204 Barbara Ruchames, Index 805026/15
Plaintiff-Appellant,

-against-

The New York and Presbyterian Hospital, et al.,
Defendants-Respondents,

Empire State Orthopaedics, PLLC, et al.,
Defendants.

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Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellant.

McAloon & Friedman, P.C., New York (Roya Namvar of counsel), for respondents.

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Judgment, Supreme Court, New York County (George J. Silver, J.), entered August 2, 2018, dismissing the complaint as against defendants The New York and Presbyterian Hospital (NYPH), Sharyn N. Lewin, M.D., and Nicholas J. Morrissey, M.D., pursuant to an order, same court and Justice, entered on or about July 5, 2018, which granted said defendants' motion for summary judgment, unanimously affirmed, without costs. Appeal from aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Defendants made a prima facie case of entitlement to summary judgment by submitting, inter alia, plaintiff's medical records,

the deposition testimony of the parties, and expert affirmations of a board certified orthopedic surgeon and licensed physician board certified in internal medicine and infectious diseases. Such evidence demonstrated that defendants did not depart from accepted medical practice or that any alleged departure was not a proximate cause of plaintiff's injuries (*see Anyie B. v Bronx Lebanon Hosp.*, 128 AD3d 1, 3 [1st Dept 2015]

Contrary to defendants' contention, the sworn affidavit of plaintiff's expert submitted in opposition to the summary judgment motion was admissible even though it lacked a certificate of conformity as required by CPLR 2309 (*see Matapos Tech. Ltd. v Compania Andina de Comercio Ltda*, 68 AD3d 672, 673 [1st Dept 2009]; *Bey v Neuman*, 100 AD3d 581, 582 [2d Dept 2012]). Nevertheless, plaintiff's evidence was insufficient to raise a triable issue of fact as to whether NYPH and Dr. Lewin departed from accepted practice by failing to refer her to an orthopedic surgeon once active infection in port was confirmed, and but for this departure, she might not have required multiple surgeries.

The affidavit of plaintiff's expert - an out-of-state orthopedic surgeon - not only improperly raised, for the first time, a new theory of liability that had not been set forth in the complaint or bills of particulars (*see Abalola v Flower Hosp.*, 44 AD3d 522 [1st Dept 2007]), but was speculative, and

contradicted by the record (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; *Bartolacci-Meir v Sassoon*, 149 AD3d 567, 572 [1st Dept 2017]; *Mignoli v Oyugi*, 82 AD3d 443, 444 [1st Dept 2011]). The expert ignored the fact that plaintiff was examined by two orthopedic surgeons in the months following her port infection, yet no hip infection was detected until approximately eight months after the port infection was diagnosed.

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

ENTERED: OCTOBER 29, 2019

CLERK

Richter, J.P., Gische, Tom, Gesmer, Moulton, JJ.

10205 The People of the State of New York, Ind. 1981/14
Respondent,

-against-

Carlos Navedo,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Noreen M. Stackhouse 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 (Marcy L. Kahn, J.), rendered October 9, 2015,

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 29, 2019

CLERK

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

Richter, J.P., Gische, Tom, Gesmer, Moulton, JJ.

10206 Abram Sabo, Index 652899/13
Plaintiff-Appellant,

-against-

Alberto Candero, et al.,
Defendants,

Capital One Equipment Finance Corp., etc., et al.,
Defendants-Respondents.

_____

Abram Sabo, appellant pro se.

Stein Adler Dabah Zelkowitz LLP, New York (Jonathan L. Adler of counsel), for respondents.

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Order, Supreme Court, New York County (Kelly O'Neill Levy, J.), entered November 15, 2018, which granted defendant Capital One Equipment Finance Corp.'s motion to dismiss the amended complaint, and denied plaintiff's motion to hold Capital One in contempt of court, unanimously affirmed, without costs.

The complaint fails to state a cause of action for fraudulent transfer, because no assets were conveyed to Capital One as part of the loan transactions in which Capital One participated; Capital One merely acquired a security interest in the medallions (*see Stickler v Ryan*, 270 App Div 962, 962 [3d Dept 1946], *lv dismissed* 296 NY 735 [1946]; *Suk v Lee*, 2009 NY Slip Op 31368[U], * 19 [Sup Ct, Nassau County 2009]).

The tortious interference claim was correctly dismissed because, according to the allegations in the complaint, which we accept as true, plaintiff was a judgment creditor seeking to seize a debtor's or transferee's assets for purposes of satisfying the judgment and had no business relations with any of the defendants (*see Mehrhof v Monroe-Woodbury Cent. Sch. Dist.*, 168 AD3d 713, 714 [2d Dept 2019]). The complaint also fails to allege that Capital One used any "unlawful means" to secure the liens on the medallions (*see Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 108 [1st Dept 2009], *lv denied* 15 NY3d 703 [2010]). It does not allege that Capital One engaged in fraud or negligence or any other tortious or criminal conduct. Nor does the complaint allege that Capital One secured the liens for the "sole purpose" of harming plaintiff (*see id.*). To the contrary, the complaint alleges that Capital One's purpose was to profit off of the medallions.

The complaint fails to state a cause of action for common-law negligence, because it alleges no facts that could give rise to a duty of care on the part of Capital One towards plaintiff (*see Lauer v City of New York*, 95 NY2d 95, 100 [2000]; *Verizon N.Y., Inc. v Optical Communications Group, Inc.*, 91 AD3d 176, 182 [1st Dept 2011]). In the absence of a viable tort claim, there can be no conspiracy claim (*Thome*, 70 AD3d at 110).

Capital One's participation in the loan transactions did not violate either of the two temporary restraining orders of which plaintiff seeks to hold Capital One in contempt.

In the absence of a substantive cause of action, there can be no claim for punitive damages (*see Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 616-617 [1994]).

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

ENTERED: OCTOBER 29, 2019

CLERK

Richter, J.P., Gische, Tom, Gesmer, Moulton, JJ.

10207 Vija Hodosy, Index 161964/15
Plaintiff-Respondent,

-against-

Apotheke, LLC, et al.,
Defendants-Appellants.

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Norton & Associates, LLC, New York (Michael E. Norton of counsel), for appellants.

The Dweck Law Firm, LLP, New York (Christopher S. Fraser of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Nancy M. Bannon, J.), entered December 24, 2018, in favor of plaintiff in the total sum of $259,570.51, and bringing up for review an order, same court and Justice, entered December 19, 2018, which granted plaintiff's motion to confirm the Special Referee's report and recommendation dated February 14, 2018, and denied defendants' cross motion to vacate a conditional order of preclusion dated November 13, 2017 striking defendants' answer pursuant to CPLR 3126, unanimously affirmed, without costs.

Defendants failed to establish a reasonable excuse for their

failure to comply with the conditional order's discovery directives or a meritorious defense. Therefore, the court's denial of their motion to vacate was an appropriate exercise of its discretion (*see Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 80 [2010]).

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

ENTERED: OCTOBER 29, 2019

CLERK

Richter, J.P., Gische, Tom, Gesmer, Moulton, JJ.

10208 Orgina Carter, Index 28305/16E
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

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

The Law Office of Christopher P. Di Giulio, P.C., New York (William Thymius of counsel), for respondent.

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Order, Supreme Court, Bronx County (Llinet Rosado, J.), entered December 20, 2018, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Summary judgment was properly denied in this action where plaintiff was injured when the elevator door in defendant's building closed unexpectedly on her hand as she attempted to exit. Defendant has failed to establish, as a matter of law, that res ipsa loquitur is inapplicable to this case (*Mogilanski v 250 Broadway Assoc. Corp*, 29 AD3d 374, 376-377 [1st Dept 2006]). In order for the doctrine to apply, three elements must be established: 1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; 2) it must be cause by an agency or instrumentality within the exclusive

control of defendant; and 3) it must not have been due to any voluntary action or contribution on the part of the plaintiff (*James v Wormuth*, 21 NY3d 540, 546 [2013]). The rule has the effect of creating a prima facie case of negligence sufficient for submission to the jury, and the jury may -- but is not required to -- draw the permissible inference (*see Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226-227 [1986]). Here, plaintiff claims that she was injured while attempting to exit an elevator in defendant's building, and that the elevator which malfunctioned was within the exclusive control of defendant. Elevator malfunctions are circumstances giving rise to the possible application of res ipsa loquitur to prove negligence (*Ezzard v One E. Riv. Place Realty Co., LLC*, 129 AD3d 159, 163 [1st Dept 2015]. Disputed issues regarding defendant's control and whether, as defendant contends, plaintiff's own actions may have affected the instrumentality involved in the accident, are for the jury to decide (*Ezzard* at 163). Although defendant also contends that it did not have notice of the dangerous condition alleged, proof of notice of a dangerous condition may be presumed under the doctrine of res ipsa (*id.*).

Plaintiff may also proceed on her general claim of negligence. She raised a triable issue of fact as to whether defendant had notice of a problem with the subject elevator by

its submission of the affidavit of her sister, who averred that she made complaints about the elevator door within a week prior to the accident.

Contrary to the court's finding, defendant provided an adequate basis for considering the maintenance records as business records prepared by the mechanic in the ordinary course of business (*see* CPLR 4518; *Barkley v Plaza Realty Invs. Inc.*, 149 AD3d 74, 79 [1st Dept 2017]).

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 29, 2019

CLERK

Richter, J.P., Gische, Tom, Gesmer, Moulton, JJ.

10209- Ind. 636/14
10209A The People of the State of New York, 1430/14

Respondent,

-against-

Christopher Baker,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Christopher M. Pederson of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, Bronx County (Steven Barrett, 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 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 29, 2019

CLERK

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

Richter, J.P., Gische, Tom, Gesmer, Moulton, JJ.

10210 In re Adama D.,
Petitioner-Appellant,

-against-

Mariam D.,
Respondent-Respondent.

_____

Anne Reiniger, New York, for appellant.

Jo Ann Douglas Family Law, PLLC, New York (Jo Ann Douglas of counsel), for respondent.

Andrew J. Baer, New York, attorney for the children.

_____

Order, Family Court, New York County (J. Machelle Sweeting, J.), entered on or about May 15, 2018, which dismissed petitioner father's petition to modify a prior order of custody with prejudice, and directed that petitioner must obtain leave of the court before filing any future petitions, unanimously affirmed, without costs.

The father failed to make the required evidentiary showing of changed circumstances warranting a modification of custody or a hearing (*see Matter of Patricia C. v Bruce L.*, 46 AD3d 399 [1st Dept 2007]). Furthermore, the record shows that the court

providently exercised its discretion in directing the father to obtain leave of court before filing any future petitions (*see Matter of Molinari v Tuthill*, 59 AD3d 722, 723 [2d Dept 2009]).

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

ENTERED: OCTOBER 29, 2019

CLERK

Richter, J.P., Gische, Tom, Gesmer, Moulton, JJ.

10211 The People of the State of New York, Respondent, Ind. 5678/14

-against-

Anthony Joyner, Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Daniel R. Lambright of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Thomas Farber, J. at hearing; Robert M. Stolz, J. at jury trial and sentencing), rendered January 25, 2017, convicting defendant of robbery in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 16 years to life, unanimously affirmed.

The hearing court properly determined that the police had probable cause for defendant's arrest. Within minutes of the robbery of a store, the police received a radioed description of the robber. The description was sufficiently specific and accurate, in context, because of the close spatial and temporal proximity between the crime and the police encounter with defendant at a subway station two blocks from the store, where he was reported to be heading (*see People v Perez*, 156 AD3d 507 [1st Dept 2017], *lv denied* 30 NY3d 1118 [2018]; *People v Johnson*, 63

AD3d 518 [1st Dept 2009], *lv denied* 13 NY3d 797 [2009]). In addition, a woman pointed out defendant to the officer. While the woman said nothing at the time, and the police did not yet know that she had followed defendant after the robbery, "pointing is readily interpreted as a nonverbal accusation that has often been recognized as a significant factor justifying police action" (*People v Rosa*, 67 AD3d 440 [1st Dept 2009], *lv denied* 14 NY3d 773 [2010]). The record also supports the hearing court's finding that the police action could also be justified as a stop and frisk based on, at least, reasonable suspicion.

The hearing court also properly declined to suppress the showup identification that took place immediately after the arrest, because "the overall effect of the allegedly suggestive circumstances was not significantly greater than what is inherent in any showup" (*People v Brujan*, 104 AD3d 481, 482 [1st Dept 2013], *lv denied* 21 NY3d 1014 [2013]). The security measures employed by the police during the showup were not excessive under the circumstances (*see id.*).

The court providently exercised its discretion when it denied defendant's mistrial motion, which was the only remedy requested, after the jury sent a note indicating a possible deadlock on the second-degree robbery charge. The jurors had been deliberating for a relatively short time and the note was

the first indication that they were having difficulty resolving their differing opinions. Declaration of a mistrial in such a situation may be permissible in the court's discretion, but it is not required (*see Matter of Plummer v Rothwax*, 63 NY2d 243, 250-251 [1984]). Defendant did not preserve his claim that the court should have questioned the jurors on the extent of the deadlock, and we decline to review it in the interest of justice. As an alternative holding, we find that the court's simple request to the jury that it continue deliberations was sufficient at that stage of the proceedings (*see People v Pagan*, 45 NY2d 725, 727 [1978]).

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

ENTERED: OCTOBER 29, 2019

CLERK

Richter, J.P., Gische, Tom, Gesmer, Moulton, JJ.

10213 Guo Ping Li, Index 156029/16
Plaintiff-Respondent,

-against-

Overseas Partnership Co., Inc.,
Defendant-Appellant,
- - - - -
[And A Third-Party Action]

_____

Gannon, Rosenfarb & Drossman, New York (Lisa L. Gokhulsingh of counsel), for appellant.

Law Office of Gary S. Park, P.C., Flushing (Gary S. Park of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered November 21, 2018, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant failed to establish its prima facie entitlement to judgment as a matter of law in this action where plaintiff was injured when he tripped and fell on an uneven surface of the sidewalk abutting defendant's premises (*see Dabbagh v Newmark Knight Frank Global Mgt. Servs., LLC* , 99 AD3d 448, 450 [1st Dept 2012]). Plaintiff testified that two sections of the sidewalk had a difference in height, and identified the location as approximately 12 to 18 inches behind a traffic signal pole (*see Figueroa v City of New York*, 126 AD3d 438, 440 [1st Dept 2015]).

Plaintiff's inability to pinpoint the exact location of his fall in photographs does not render his testimony speculative (*see id.* at 440). Any inconsistencies in plaintiff's testimony as to the cause of his fall are for the jury's credibility determination (*see DiGiantomasso v City of New York*, 55 AD3d 502, 503 [1st Dept 2008]). Nor did defendant establish its entitlement to summary judgment by submitting the affidavit of its expert, whose inspection of the sidewalk occurred three years after the accident occurred and after the sidewalk had been fixed (*see Figueroa v Haven Plaza Hous. Dev. Fund Co.*, 247 AD2d 210 [1st Dept 1998]).

Defendant's argument that it did not create or cause the dangerous condition and did not have notice of it is unpreserved, since it is raised for the first time on appeal (*see Diarrassouba v Consolidated Edison Co. of N.Y. Inc.*, 123 AD3d 525 [1st Dept 2014]). In any event, the argument is unavailing, as it is based

upon a property manager's vague testimony which was insufficient to show the absence of constructive notice (*see Joachim v AMC Multi-Cinema, Inc.*, 129 AD3d 433 [1st Dept 2015]).

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

ENTERED: OCTOBER 29, 2019

CLERK

Richter, J.P., Gische, Tom, Gesmer, Moulton, JJ.

10214 Margery Rubin, etc., et al., Index 154131/15
Plaintiffs,

-against-

Duncan, Fish & Vogel, L.L.P., et al.,
Defendants.
- - - - -
Duncan, Fish & Vogel, L.L.P., et al.,
Third-Party Plaintiffs-Respondents,

-against-

Peter A. Morales, CPA, P.C., et al.,
Third-Party Defendants-Appellants.

_____

Rivkin Radler LLP, Uniondale (Evan H. Krinick of counsel), for appellants.

Lewis Brisbois Bisgaard & Smith LLP, New York (Christopher J. Rados of counsel), for respondents.

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Order, Supreme Court, New York County (Paul A. Goetz, J.), entered November 27, 2018, which, as limited by the briefs, denied third-party defendants' motion to dismiss the contribution claim asserted against them in the third-party complaint, unanimously affirmed, without costs.

Defendants asserted in their answer an affirmative defense to reduce any damages awarded in favor of plaintiff by the comparative negligence of plaintiff's agents, servants or employees. Defendants later commenced a third-party action for contribution against third party-defendants, who had prepared the

tax returns for plaintiff. Because the affirmative defense may or may not include these accountants as plaintiff's agents, servants or employees, the third-party claim is not duplicative (*Millennium Import, LLC v Reed Smith LLP*, 104 AD3d 190, 196 [1st Dept 2013]). The affirmative defense seeks to impute to plaintiff any negligence of its agents, servants, or employees, thereby reducing any damages owed to plaintiff. The third-party claim seeks contribution from the accountants if they are found to be independent and not falling within the categories of agents, servants, or employees. Thus, in the absence of the third-party action, should the accountants not be found to fall within the categories of agent, servant, or employee, defendants would not have an avenue of recovery from the accountants. Therefore, unlike in *Hercules Chem. Co. v North Star Reins. Corp.* (72 AD2d 538, 538 [1st Dept 1979]), defendants here were not fully protected by their affirmative defense.

Contrary to appellants' contention, the issue of whether or not they acted as plaintiff's agents has not been resolved (*see Fogel v Hertz Intl.*, 141 AD2d 375, 376 [1st Dept 1988]).

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

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

ENTERED: OCTOBER 29, 2019

CLERK

Richter, J.P., Gische, Tom, Gesmer, Moulton, JJ.

10215-
10215A Raymond Gonzalez,
Plaintiff-Respondent,

-against-

G. Fazio Construction Co., Inc.,
et al.,
Defendants-Appellants.

- - - - -

G. Fazio Construction Co., Inc., et al.,
Third-Party Plaintiffs-Appellants,

-against-

RGB Group, Inc.,
Third-Party Defendant-Respondent-Appellant.

Index 20996/14E

_____

Mauro Lilling Naparty LLP, Woodbury (Anthony F. DeStefano of counsel), for appellants.

Law Offices of Sean H. Rooney, Brooklyn (Robert S. Mazzuchin of counsel), for Raymond Gonzalez, respondent.

Milber Makris Plousadis & Seiden, LLP, Woodbury (Sarah M. Ziolkowski of counsel), for RGB Group, Inc., respondent-appellant.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered on or about November 28, 2018, which denied third-party defendant RGB Group, Inc.'s (RGB) motion for summary judgment dismissing the complaint, unanimously modified, on the law, to grant the motion to the extent of dismissing the Labor Law § 240(1) claim and the Labor Law § 241(6) claim except insofar as predicated on Industrial Code § 23-1.7(e)(2), and otherwise

affirmed, without costs. Order, same court and Justice, entered on or about November 28, 2018, which denied defendants/third-party plaintiffs G. Fazio Construction Co., Inc. and El Rio Housing Development Fund Corporation's (defendants) motion for summary judgment dismissing their common law negligence and Labor Law §§ 200 and 241(6) claims, and their third-party claim for contractual indemnification against RGB, unanimously modified, on the law, to grant the motion to the extent of dismissing the Labor Law § 241(6) claim except insofar as predicated upon Industrial Code § 23-1.7(e)(2), and awarding conditional contractual indemnification, and otherwise affirmed, without costs.

Plaintiff, a laborer on a construction site employed by foundation contractor RGB, was allegedly injured when he tripped on debris while pushing a wheelbarrow of materials across the site. RGB's motion to dismiss plaintiff's Labor Law § 240(1) claim should have been granted, as this section is inapplicable here. Additionally RGB's and defendants' motions should have been granted to the extent they sought dismissal of the Labor Law § 241(6) claim predicated on a violation of 12 NYCRR 23-1.7(e)(1), because the accident did not occur in a passageway (*Quigley v Port Auth. of N.Y. & N.J.*, 168 AD3d 65, 67 [1st Dept 2018]). However, plaintiff's testimony that he tripped on

construction debris was sufficient to raise an issue of fact as to whether 12 NYCRR 23-1.7(e)(2) was violated (*Lelek v Verizon N.Y., Inc.*, 54 AD3d 583, 585 [1st Dept 2008]). Since plaintiff was required to navigate the allegedly debris strewn area in order to perform his assigned task, it was part of the "[w]orking area" within the meaning of the provision (*Quigley*, 168 AD3d at 68; *Smith v Hines GS Props., Inc.*, 29 AD3d 433 [1st Dept 2006]).

We affirm the denial of that portion of defendants' and RGB's motions seeking dismissal of the common law negligence and Labor Law § 200 claims. Plaintiff's testimony that the area where he fell was strewn with rocks, metal, wood, broken pieces of concrete, and "full of debris everywhere" was sufficient to raise an issue of fact as to whether defendants had notice of the accumulation of debris that plaintiff was required to navigate which caused him to trip (*see Kutza v Bovis Lend Lease LMB, Inc.*, 95 AD3d 590, 591 [1st Dept 2012]). Further, defendants' liability is not negated by the allegedly open nature of the debris, which, at most, would go to plaintiff's comparative negligence (*Maza v University Ave. Dev. Corp.*, 13 AD3d 65, 66 [1st Dept 2004]).

Under the broad language of the indemnification agreement,

defendants are conditionally entitled to contractual indemnification to the extent the accident was not caused by their own negligence (*DeSimone v City of New York*, 121 AD3d 420, 422-423 [1st Dept 2014]).

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

ENTERED: OCTOBER 29, 2019

CLERK

Richter, J.P., Gische, Tom, Gesmer, Moulton, JJ.

10216 The People of the State of New York, Ind. 99063/15
Respondent,

-against-

Roul Santos,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Jennifer L. Watson of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Efrain Alvarado, J.), entered on or about May 31, 2016, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Clear and convincing evidence, including reliable hearsay, supported the court's assessment of points under the risk factor relating to the victim's physical helplessness (*see People v Mingo*, 12 NY3d 563, 571-573 [2009]; *People v Epstein*, 89 AD3d 570, 571 [1st Dept 2011]). The court properly relied on the case summary, the sworn arrest affidavit from the underlying out-of-state case, and information from the detective who investigated that case. The record supports the court's finding that defendant sexually assaulted the victim while she was "physically

helpless," in that she was asleep when the assault began (*see People v Davis*, 51 AD3d 442 [1st Dept 2008], *lv denied* 11 NY3d 703 [2008]). The documents before the court also supported its assessments under the risk factors relating to drug and alcohol abuse and lack of supervision.

The court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant were adequately taken into account by the risk assessment instrument, and did not demonstrate a reduced likelihood of reoffense.

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

ENTERED: OCTOBER 29, 2019

CLERK

Richter, J.P., Gische, Tom, Gesmer, Moulton, JJ.

10219 EVEMeta, LLC, Index 651484/16
Plaintiff-Respondent-Appellant,

-against-

Siemens Convergence Creators Corp., et al.,
Defendants,

Synacor, Inc.,
Defendant-Appellant-Respondent.

_____

Duke Holzman Photiadis & Greses, LLP, Buffalo (Steven W. Klutkowski of counsel), for appellant-respondent.

Hughes Hubbard & Reed LLP, New York (Hagit M. Elul of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered on or about October 5, 2018, which, to the extent appealed from as limited by the briefs, denied defendant Synacor, Inc.'s motion pursuant to CPLR 3211 to dismiss as against it the claims for tortious interference with contract, tortious interference with prospective economic relations, unfair competition, punitive damages, and attorneys' fees, and granted the motion to dismiss the claims for fraudulent misrepresentation, fraudulent concealment, and civil conspiracy, unanimously modified, on the law, to grant the motion as to the claims for tortious interference with prospective economic relations and attorneys' fees, and otherwise affirmed, without

costs.

As Synacor and plaintiff acknowledge, most of the issues in this appeal are governed by our prior decision (173 AD3d 551 [1st Dept 2019]).

Synacor contends that, even if the claim for tortious interference with contract was correctly upheld against defendant Siemens, it should be dismissed as against Synacor. This argument is unavailing, because it cannot be said that Siemens would have breached its contract with plaintiff without Synacor's participation (*see Antonios A. Alevizopoulos & Assoc., Inc. v Comcast Intl. Holdings, Inc.*, 100 F Supp 2d 178, 187 [SD NY 2000]). Without Synacor, Siemens would have had no one else with whom to contract (*see id.*). Synacor does not argue that, absent its participation, Siemens would have contracted with someone else (*see id.* at 187 n 7).

Synacor correctly notes that, in the prior appeal, Siemens did not argue that the unfair competition claim was duplicative of the contract claims. While Synacor may so argue, the argument is unavailing. In the cases cited by Synacor where unfair competition claims were dismissed as duplicative of contract claims, the contract claims alleged breaches of covenants not to compete. By contrast, plaintiff's contract and unfair competition claims do not completely overlap.

Both sides agree that the availability of punitive damages rests on whether plaintiff's claim for tortious interference with contract survives. Since we have upheld the motion court's refusal to dismiss that claim, we also affirm its refusal to dismiss plaintiff's request for punitive damages.

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

ENTERED: OCTOBER 29, 2019

CLERK

Richter, J.P., Gische, Tom, Gesmer, Moulton, JJ.

10220N Dale Polakoff, et al., Index 805029/16
Plaintiffs-Appellants,

-against-

NYU Hospitals Center, et al.,
Defendants-Respondents.

_____

Herzfeld & Rubin, P.C., New York (Miriam Skolnik of counsel), for appellants.

Aaronson Rappaport Feinstein, & Deutsch, LLP, New York (Deirdre E. Tracey of counsel), for respondents.

_____

Order, Supreme Court, New York County (Judith N. McMahon, J.), entered March 16, 2018, which, to the extent appealed from as limited by the briefs, granted defendants' motion pursuant to CPLR 3126 to preclude plaintiffs' use of audio and video recordings of defendants, unanimously affirmed, without costs.

CPLR 3101(i) provides in relevant part that "there shall be full disclosure of any films, photographs, video tapes or audio tapes" involving a party and its agents or employees. This provision applies "regardless of who created the recording or for what purpose," and "requires 'full disclosure,' without regard to whether the party in possession of the recording intends to use it at trial" (*Bermejo v New York City Health & Hosps. Corp.*, 135 AD3d 116, 146 [2d Dept 2015]). Disclosures under CPLR 3101(i) are not subject to a timing limitation and thus should have been

made pursuant to the court's discovery orders (*see Tai Tran v New Rochelle Hosp. Med. Ctr.*, 99 NY2d 383, 389-390 [2003]).

Here, the motion court did not abuse its discretion in granting defendants' motion to preclude plaintiffs' use of the video and audio recordings pursuant to CPLR 3126. Plaintiffs' failure to produce the audio and video recordings until after their depositions and on the eve of the continuation of defendant Dr. Galloway's deposition demonstrates plaintiffs' willful and contumacious violation of the court's various discovery orders as well as plaintiffs' duty of full disclosure under CPLR 3101(i) (*Bermejo* at 146-147; *compare Fox v Grand Slam Banquet Hall*, 142 AD3d 473, 474-475 [1st Dept 2016]; *Colome v Grand Concourse 2075*, 302 AD2d 251 [1st Dept 2003]). Defendants were clearly prejudiced by plaintiffs' surprise tactic, occurring a year and a half after the date of the preliminary conference order, and after the parties were deposed (*compare Liberty Petroleum Realty,*

LLC v Gulf Oil, L.P., 164 AD3d 401, 408 [1st Dept 2018]; *Law Offs. Of Russell I. Marnell v Sanabria*, 151 AD3d 605 [1st Dept 2017]).

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

ENTERED: OCTOBER 29, 2019

CLERK

Richter, J.P., Gische, Tom, Gesmer, Moulton, JJ.

10221N- Index 101935/16
10221NA In re Justin Montero,
Petitioner-Appellant,

-against-

The City of New York,
Respondent-Respondent.

_____

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

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

_____

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered June 2, 2017, which, to the extent appealable, denied petitioner's motion to renew his application for leave to file a late notice of claim against respondent, unanimously reversed, on the law and the facts, without costs, and the application granted. Appeal from order, same court and Justice, entered on or about January 18, 2017, which denied petitioner's motion for leave to file a late notice of claim against respondent, unanimously dismissed, without costs, as academic.

In this action for personal injuries, petitioner alleges that on May 31, 2016, he tripped and fell in a hole in a soccer field at the East River Park, suffering injury. Respondent the City of New York (City) owns and maintains the accident location.

Petitioner's assertion that he was unaware of the requirement that he file a notice of claim within 90 days of his accident is not a reasonable excuse for failing to file a timely notice (*see Gaudio v City of New York*, 235 AD2d 228 [1st Dept 1997]). His contention that his injuries prevented him from timely filing a notice of claim is not an acceptable excuse, because he failed to provide any medical documentation to support his claimed incapacity (*see Moran v New York City Hous. Auth.*, 224 AD2d 257, 257-258 [1st Dept 1996]; *Matter of Green v New York City Hous. Auth.*, 180 AD2d 586, 587 [1st Dept 1992]). Notwithstanding, his failure to establish a reasonable excuse for not timely filing a notice of claim is not fatal (*see Matter of Thomas v City of New York*, 118 AD3d 537, 538 [1st Dept 2014]).

The City obtained actual notice of the accident within a reasonable time after the 90-day period expired (*see Pendley v City of New York*, 119 AD3d 410 [1st Dept 2014]). It does not contest petitioner's assertion that the condition of the hole remained unchanged at the time he sought leave (*see Matter of Richardson v New York City Hous. Auth.*, 136 AD3d 484, 485 [1st Dept 2016], *lv denied* 28 NY3d 905 [2016]). Although petitioner does not address whether anyone saw the accident, the bare claim that the delay would make it difficult for the City to locate witnesses is insufficient to establish prejudice (*see Matter of*

Newcomb v Middle Country Cent. Sch. Dist., 28 NY3d 455, 467-468 [2016]; *Lisandro v New York City Health & Hosps. Corp. [Metropolitan Hosp. Ctr.]*, 50 AD3d 304 [1st Dept 2008], *lv denied* 10 NY3d 715 [2008]).

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

ENTERED: OCTOBER 29, 2019

CLERK

Richter, J.P., Gische, Tom, Gesmer, Moulton, JJ.

10222 & M-7475 — In re Jonathan Landow, et al., Petitioners, — Index 653605/19, OP 186/19

-against-

Hon. Andrew Borrok, etc., et al., Respondents.

_____

Gordon Law Group, Katonah (Michael R. Gordon of counsel), for petitioners.

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

Goodwin Procter LLP, New York (Meghan K. Spillane of counsel), for Qwil PBC, respondent.

Paul Hastings LLP, New York (Michael L. Spafford of counsel), for Enter, Inc., respondent.

_____

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

And a cross motion having been made on behalf of respondents Qwil PBC and Enter, Inc. to dismiss the petition,

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

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

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

ENTERED: OCTOBER 29, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Webber, Oing, JJ.

10223 The People of the State of New York, Respondent, Ind. 4189/14

-against-

Christopher Glover, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Marcy L. Kahn, J. at hearings; Ann M. Donnelly, J. at jury trial and sentencing), rendered July 30, 2015, convicting defendant of robbery in the first degree, and sentencing him to a term of five years, unanimously affirmed.

The evidence of defendant's guilt was so overwhelming, independent of the stolen property recovered from defendant's bag, that we find it unnecessary to determine whether the hearing court correctly found that defendant lacked standing to challenge

the search of the bag. Any error in the court's ruling was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]) because the stolen property added little or nothing to the People's overwhelming case, and had no bearing on any issue contested at trial.

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

ENTERED: OCTOBER 29, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Webber, Oing, JJ.

10224 Dr. Nonyelu Anyichie, Index 153343/17
Plaintiff-Appellant,

-against-

Lincoln Medical and Mental Health Center,
Defendant-Respondent.

_____

Law Offices of Albert Van-Lare, New York (Albert Van-Lare of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Mackenzie Fillow of counsel), for respondent.

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered on or about February 8, 2018, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

The complaint, which asserts a claim pursuant to Public Health Law § 2801-c for an alleged violation of Public Health Law § 2801-b(1), was properly dismissed. Plaintiff's challenge of defendant's decision not to renew her hospital privileges is not based on one of the enumerated reasons set forth in § 2801-b(1), but instead, is based exclusively on her contention that she was denied due process due to defendant's failure to abide by its bylaws. Given the plain language of § 2801-b, plaintiff's demand for reinstatement, premised on a violation of the bylaws, is not a permissible basis to maintain a § 2801-c claim (*see* Public

Health Law §§ 2801-b[1]; 2801-c).

Section 2801-b(2) requires any person claiming to be aggrieved by an improper practice under Public Health Law § 2801-b(1) to first make a complaint to the Public Health and Health Planning Council (PHHPC), which requires the PHHPC to conduct an investigation and determine if "cause exists for crediting the allegations of the complaint" (Public Health Law § 2801-b[3]). The PHHPC's review is limited to whether there has been a violation of one of the two instances of improper conduct set forth in § 2801-b(1). The complaint asserts that the court should adhere to the PHHPC's determination in this case (that defendant denied plaintiff due process because it violated the procedure in its bylaws); however, it is inherently flawed because the PHHPC did not have authority to make such a determination.

Additionally, pursuant to Public Health Law § 2801-c, any finding of the PHHPC after review of a decision to deny privileges is prima facie evidence in any action of the fact

found. Here, however, the PHHPC made no factual findings in its decision (*see Karim v Raju*, 165 AD3d 504 [1st Dept 2018]) and did not set forth any reasoning for its conclusion (*see* 10 NYCRR 93.5[a]).

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

ENTERED: OCTOBER 29, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Webber, Oing, JJ.

10225 In re James G.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

_____

Dawne A. Mitchell, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

Georgia M. Pestana, Acting Corporation Counsel, New York (John Moore of counsel), for presentment agency.

_____

Order of disposition, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about May 2, 2018, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of attempted criminal mischief in the fourth degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court providently exercised its discretion in adjudicating appellant a juvenile delinquent, rather than a

person in need of supervision, and placing him on probation. This was the least restrictive alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]).

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

ENTERED: OCTOBER 29, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Webber, Oing, JJ.

10226 Reiter Resources, Inc. doing business as Professional Accounting Sales,
Plaintiff-Respondent,

-against-

Richard Gilmartin
Defendant-Appellant.

Index 652797/17

_____

La Reddola, Lester & Associates, LLP, Garden City (Steven M. Lester of counsel), for appellant.

Moulinos & Associates LLC, New York (Peter Moulinos of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Gerald Lebovits, J.), entered November 9, 2018, awarding plaintiff the principal sum of $52,500, plus interest, and bringing up for review an order, same court and Justice, entered September 27, 2018, which granted plaintiff's motion for summary judgment on its breach of contract cause of action, unanimously affirmed, with costs.

Plaintiff established prima facie entitlement to summary judgment on its breach of contract claim against defendant by showing the existence of a contract entitling it to 10% of the purchase price of the sale of defendant's business, plaintiff's performance thereunder, defendant's breach, and the resulting damages (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Plaintiff showed that it procured a buyer, who

ultimately purchased defendant's accounting business at a cost of $625,000, and that defendant paid only $10,000 of the $62,500 owed to plaintiff, resulting in damages of $52,500.

In opposition, defendant failed to raise a triable issue of fact (*see Licata v Cuzzi*, 161 AD3d 844 [2d Dept 2018]). Defendant did not establish that the contract contemplated a setoff in the event that defendant's subsequent, unrelated purchase of a residential property in California failed to proceed as a result of delays in the sale of his business. Furthermore, the Purchase Agreement between defendant and the buyer of his business stated only that the closing would take place "on or about October 31, 2016," suggesting that timeliness was not a critical term in the contract.

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 29, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Webber, Oing, JJ.

10227 The People of the State of New York, Respondent, Ind. 2187/16

-against-

Paul Christie, Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Dana B. Wolfe of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Neil E. Ross, J.), rendered December 21, 2016, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the seventh degree, and sentencing him, as a second felony drug offender, to an aggregate term of five years, unanimously affirmed.

Defendant did not preserve his claim that, at certain places in its preliminary and final jury instructions, the court failed to state the correct standard for proof beyond a reasonable doubt, and we decline to review this claim in the interest of justice. As an alternative holding, we find no basis for reversal. The reasonable doubt instructions, viewed as a whole, conveyed the proper standards, and nothing in these instructions

was constitutionally deficient (*see e.g. People v Umali*, 10 NY3d 417 [2008], *cert denied* 556 US 1110 [2009}; *People v Cubino*, 88 NY2d 998, 1000 [1996]; *People v Fields*, 87 NY2d 821 [1995]).

Defendant claims that his counsel rendered ineffective assistance by asking the court to defer a final ruling on the scope of impeachment and the admissibility of uncharged crimes evidence until after the court heard defendant's direct testimony. This claim is unreviewable on direct appeal because it involves matters not reflected in, or fully explained by, the record, regarding counsel's strategic decision-making and consultations with his client, including what appears to be an in-court, off-the-record discussion between defendant and his counsel on the subject at issue (*see People v Rivera*, 71 NY2d 705, 709 [1988]). Accordingly, because defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claim may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find 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]). Regardless of whether counsel should have obtained a more definitive ruling before defendant testified, defendant has not shown that he was prejudiced by the absence of such a ruling, where the court

indicated in advance of defendant's testimony that an anticipated line of defense might open the door to evidence of prior drug dealing by defendant.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 29, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Webber, Oing, JJ.

10228 Walid M., etc., et al., Index 154808/13
Plaintiffs-Respondents,

-against-

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

_____

Zachary W. Carter, Corporation Counsel, New York (Jamison Davies of counsel), for appellants.

The Aboushi Law Firm, New York (Aymen A. Aboushi of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Nancy M. Bannon, J.), entered June 11, 2018, upon a verdict in favor of plaintiffs and against defendants, unanimously affirmed, without costs.

After a trial, a jury found that the defendant police officers assaulted, battered, and used excessive force against plaintiff Walid Mohamed, a teenager who had been diagnosed with autism, in the course of responding to plaintiffs' request for assistance in transporting him to his assisted living facility (Ferncliff Manor) during Hurricane Sandy.

We find that, under the circumstances, the trial court did not improvidently exercise its discretion in precluding defendants from introducing testimony from Walid's treating doctors at Ferncliff Manor. Defendants failed to disclose any of these witnesses until four days before trial, after having

previously affirmatively represented to the court that they did not intend to call any witnesses. The court and plaintiffs relied on this representation in estimating the length of trial and selecting a jury. In view of the trial court's broad authority to control its courtroom, it was not unreasonable for the court to decline to add these witnesses and prolong the trial when a jury had already been chosen (twice) based on certain representations about its length (*see Feldsberg v Nitschke*, 49 NY2d 636, 643-644 [1980]; *Mike v 91 Payson Owners Corp.*, 137 AD3d 555, 555 [1st Dept 2016]).

The trial court also did not improvidently exercise its discretion in allowing only a limited subset of Walid's records from Ferncliff Manor to be admitted into evidence. It is clear that these records required at least some redaction, including to eliminate double hearsay (*see Matter of Jaden C. [Phillip J.]*, 90 AD3d 485, 487 [1st Dept 2011]; *Lodato v Greyhawk N. Am., LLC*, 39 AD3d 494, 495 [2d Dept 2007]) and propensity evidence (*see Mazella v Beals*, 27 NY3d 694, 709 [2016]). Because defendants refused to propose any redactions, after having been given ample opportunities to do so, the trial court was justified in adopting plaintiffs' proposed redactions instead. Even if defendants are correct that the complete records contain additional relevant evidence that should not have been excluded, having failed to

propose any redactions of their own, defendants cannot now complain that the records should have been redacted less heavily.

Plaintiffs' expert's testimony was not insufficient to support the award for emotional distress and psychological injury, or to demonstrate causation more generally. It does not matter that the expert reviewed only a small portion of the Ferncliff Manor records prior to writing his report, as this was not the only information he relied on, and he testified that he had since reviewed the complete records, which did not alter his diagnosis or opinion. The expert's reliance on statements made by his subject (Walid) in two interviews was proper, as such evidence is clearly generally accepted as reliable in the profession (*see Hambsch v New York City Tr. Auth.*, 63 NY2d 723, 725-726 [1984]). Although the expert's reliance on statements by Walid's sister was improper, as there was no showing that such statements are generally accepted as reliable and she was not called as a witness at trial, this is not a basis to disregard his entire opinion, but only any portions based solely on such statements (*see Hambsch*, 63 NY2d at 726; *Straus v Strauss*, 136 AD3d 419, 420 [1st Dept 2016]). Because the expert's key conclusions were based primarily on appropriate evidence, and are supported by other evidence in the record, they were appropriately considered.

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

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

ENTERED: OCTOBER 29, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Webber, Oing, JJ.

10229 Massimo Demetrio, Index 653686/16
Plaintiff-Respondent-Appellant,

-against-

Clune Construction Company, L.P., et al.,
Defendants-Appellants-Respondents,

Nordic Contracting Company, Inc.,
Defendant,

E&N Construction Incorporated,
Defendant-Respondent.

_____

Lewis Brisbois, Bisgaard & Smith, LLP, New York (Nicholas Hurzeler of counsel), for appellants-respondents.

Fortunato & Fortunato, PLLC, Brooklyn (Ronald W. Gill of counsel), for respondent-appellant.

Gallo Vitucci Klar LLP, Woodbury (Anne Marie Garcia of counsel), for respondent.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered on or about March 7, 2019, which, insofar as appealed from as limited by the briefs, denied the motion by defendants Clune Construction Company, L.P. and Time Warner Cable New York City LLC (Time Warner NYC) for summary judgment dismissing the complaint as against them and for summary judgment on their contractual indemnification cross claim against defendant E&N Construction Incorporated (E&N), granted plaintiff's motion for partial summary judgment on the Labor Law §§ 240(1) and 241(6)

claims as against Clune and Time Warner NYC, denied plaintiff's motion for summary judgment on the Labor Law § 240(1) claim and the Labor Law § 241(6) claim based on alleged violations of Industrial Code (12 NYCRR) §§ 23-1.7(d), 23-1.7(b)(1), and 23-4.2(h) as against E&N, and granted E&N's motion for summary judgment dismissing those claims as against it and dismissing Clune and Time Warner NYC's contractual and common-law indemnification cross claims against it, unanimously modified, on the law, to grant plaintiff's motion for summary judgment on the Labor Law § 240(1) claim as against defendant Time Warner Cable Enterprises, LLC (Time Warner Enterprises),[1] and deny E&N's motion for summary judgment dismissing the Labor Law § 240(1) claim as against it and dismissing the common-law indemnification cross claim against it, and otherwise affirmed, without costs.

Plaintiff established prima facie that his injuries were proximately caused by a failure to provide adequate safety devices to protect him from the elevation-related risk of falling into a trench while he was working on the construction site (*see* Labor Law § 240[1]; *Gjeka v Iron Horse Transp., Inc.*, 151 AD3d

[1]The order refers to Time Warner NYC, and not Time Warner Enterprises. However, we will treat the two Time Warner entities as one (Time Warner), following the approach of all parties to this appeal, and because it appears that that was the intent of Time Warner's somewhat confusing motion papers. Moreover, plaintiff's motion names both Time Warner entities.

463 [1st Dept 2017]). He testified that the only safety device protecting workers from falling into the trench at the time of his accident was orange netting secured by wooden fencing. When plaintiff slipped on a nearby patch of mud in the rain while exiting the building under construction to give instructions to another worker, he grabbed onto the wooden fencing in an attempt to prevent himself from falling into the trench, but the fencing collapsed and fell into the trench along with plaintiff.

Clune and Time Warner failed to raise an issue of fact as to whether there was excavation work being done at the time of the accident, rendering it impracticable to maintain safety devices around the trench at the time (*compare Dias v City of New York*, 110 AD3d 577 [1st Dept 2013], *with Salazar v Novalex Contr. Corp.*, 18 NY3d 134, 140 [2011]). Their argument that plaintiff was acting outside the scope of his work at the time of his accident is also unavailing. While two witnesses testified broadly that no one should have used the door through which plaintiff exited the building and stepped into the outdoor area where he fell, it is undisputed that plaintiff was never instructed not to go to the area in question, and there were no warning signs to that effect (*see Dedndreaj v ABC Carpet & Home*, 93 AD3d 487 [1st Dept 2012]). Nor are witnesses' differing estimates as to the depth of the trench, ranging from about 3

feet to 15 feet, dispositive as to whether plaintiff's accident resulted from a significant elevation differential (*see e.g. Lelek v Verizon N.Y., Inc.*, 54 AD3d 583, 584 [1st Dept 2008]; *Megna v Tishman Constr. Corp. of Manhattan*, 306 AD2d 163 [1st Dept 2003]). We also reject Clune and Time Warner's argument that plaintiff's injuries resulted not from a failure to protect against elevation-related risks but from the usual and ordinary dangers on a construction site, i.e., mud on the ground in the rain (*see Pipia v Turner Constr. Co.*, 114 AD3d 424, 426-427 [1st Dept 2014], *lv dismissed* 24 NY3d 1216 [2015]).

The Labor Law §§ 240(1) and 241(6) claims should not be dismissed as against E&N. The testimony that E&N dug the trench and was responsible for installing protective devices around it raises an issue of fact as to whether E&N was a statutory agent of Time Warner (*see Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 434 [2015]; *Bove v New York City Hous. Auth.*, 181 AD2d 427 [1st Dept 1992]).

We note that plaintiff has abandoned his Labor Law § 200 and common-law negligence claims against E&N.

Summary judgment dismissing Clune and Time Warner's common-law and contractual indemnification cross claims against E&N is

precluded by issues of fact as to whether E&N exercised actual supervision or control over the work involving the trench (*see Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012]; *see e.g. Bellucia v CF 620*, 172 AD3d 520, 522 [1st Dept 2019]).

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

ENTERED: OCTOBER 29, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Webber, Oing, JJ.

10230 Mountain Valley Indemnity Company, Index 153146/17
Plaintiff-Respondent,

-against-

Raul Gonzalez,
Defendant,

Lucas Santana,
Defendant-Appellant.

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Barbara Jaffe, J.), entered on or about October 4, 2018,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated October 8, 2019,

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

ENTERED: OCTOBER 29, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Webber, Oing, JJ.

10231-
10231A In re J.R.M.-C., and Others,

Children under Eighteen Years
of Age, etc.,

Antonio M.
Respondent-Appellant,

The of Administration for Children's
Services,
Petitioner-Respondent.

_____

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

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

Dawne A. Mitchell, The Legal Aid Society, New York (Riti P. Singh of counsel), attorney for the children.

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Order of disposition, Family Court, Bronx County (Michael R. Milsap, J.), entered on or about July 11, 2018, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about May 7, 2018, which found that respondent father neglected the subject children by committing acts of domestic violence against their mother, unanimously affirmed, without costs. Appeal from fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The finding of neglect was supported by a preponderance of

the evidence (*see* Family Ct Act § 1046[b][i]; *Matter of Tammie Z.*, 66 NY2d 1, 3 [1985]). The testimony of the non-respondent mother and ACS caseworker at fact-finding demonstrated that on February 4, 2017, at about 3:00 a.m., the father neglected the three subject children by grabbing the mother by the throat, pushing her against the wall and choking her while they were in the family's apartment and while at least one child, the eldest child, was aware of what was transpiring because she "yelled, stop, poppy, stop" (*see Matter of AnnMarie S.W. [Raheem Sandford W.]*, 160 AD3d 548, 549 [1st Dept 2018]).

The eldest child's out-of-court statement that she saw the father choking the mother and yelled for him to stop as testified to by the caseworker was supported by the mother's testimony about the February 4, 2017 incident (*see Matter of Jamya C. [Jermaine F.]*, 165 AD3d 410, 410 [1st Dept 2018]; *Matter of Aliyah B. [Denise J.]*, 87 AD3d 943, 943 [1st Dept 2011]). The mother's testimony and the eldest child's out-of-court statement that all three children were in the apartment during the February 4, 2017 incident were also supported by the father's testimony (*see Matter of Isaiah D. [Mark D.]*, 159 AD3d 534, 535 [1st Dept 2018]). Although the father denied that the eldest child yelled for him to stop during the February 4, 2017 incident, he testified that the child had said something similar before.

Contrary to the father's contention, exposure to even a single instance of domestic violence may be a proper basis for a finding of neglect. Here, the children were in imminent danger of physical impairment due to their proximity to the violence directed at the mother and because the father's actions exposed them to a risk of substantial harm (*see Matter of Bobbi B. [Bobby B.]*, 165 AD3d 587, 587 [1st Dept 2018]; *Matter of Cristalyn G. [Elvis S.]*, 158 AD3d 563, 564 [1st Dept 2018]). Although the father maintains that the Family Court erred in concluding that the mother's and the caseworker's testimony were more credible than his, there is no reason to disturb the court's evaluation of the evidence, including its credibility determinations (*see Matter of Ilene M.*, 19 AD3d 106, 106-107 [1st Dept 2005]; *Matter of Jared S. [Monet S.]*, 78 AD3d 536 [1st Dept 2010], *lv denied* 16 NY3d 705 [2011]).

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

ENTERED: OCTOBER 29, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Webber, Oing, JJ.

10232 Joao Ortega, Index 303059/15
Plaintiff-Respondent-Appellant, 83866/16

-against-

Trinity Hudson Holding LLC, et al.,
Defendants-Appellants-Respondents,

Tishman Speyer Hudson Limited Partnership,
Defendant.

- - - - -

[And A Third-Party Action]

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Newman Myers Kreines Gross Harris, P.C., New York (Charles Dewey Cole, Jr. of counsel), for appellants-respondents.

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

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about November 15, 2018, which, inter alia, denied defendants' motion for summary judgment dismissing plaintiff's Labor Law §§ 240(1) and 241(6) claims, and denied plaintiff's motion for partial summary judgment on the Labor Law § 240(1) claim, unanimously modified, on the law, to the extent of granting plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim, and granting defendant's motion for summary judgment dismissing the Labor Law § 241(6) claim, and otherwise affirmed, without costs.

Plaintiff sustained comminuted fractures in his right hand

when, while securing a piece of equipment he referred to as a "delta scaffold" to a bracket on a wall with a "tieback," the scaffold tipped over and pinned his hand against the bracket. At the time, two stacks of counterweights were placed on the scaffold for the purpose of balancing out a suspension scaffold that would later be suspended from the other end.

Plaintiff is entitled to partial summary judgment on his Labor Law § 240(1) claim. Regardless of whether plaintiff's hand was struck by the beam of the scaffold or the counterweights placed on the scaffold, this matter falls within the purview of Labor Law § 240(1). Plaintiff's injuries were the direct result of the application of the force of gravity to the scaffold and the counterweights, and, although the scaffold and counterweights fell a short distance after the scaffold tipped, the elevation differential was not de minimis, as their combined weight of over 2,400 pounds was capable of generating a great amount of force during the short descent (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 9-10 [2011]; *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604-605 [2009]; *Marrero v 2075 Holding Co. LLC*, 106 AD3d 408, 409 [1st Dept 2013]).

The scaffold was a load that required securing for the purpose of plaintiff's undertaking (*see Quattrocchi v F. J. Schiame Constr. Corp.*, 11 NY3d 757 [2008]; *Narducci v Manhasset*

Bay Assoc., 96 NY2d 259, 268 [2001]). Contrary to defendants' contention, the counterweights were not a safety device provided to secure the equipment being tied to the bracket, but were to balance a scaffold that would later be suspended from it.

Furthermore, the record establishes, as a matter of law, that plaintiff was not the sole proximate cause of his injuries. Plaintiff and his coworker both testified that there was slack in the tieback at the time of the accident. Their foreman's testimony that the scaffold tipped over due to overtightening of the tieback by plaintiff is speculative, as he did not witness the accident. The reports and expert affidavit submitted by defendants concluding that the accident was caused by overtightening are also speculative. In any event, even accepting the defense's proof, it is still insufficient to raise an issue of fact as to sole proximate causation, since the record established that the scaffold tipped over in part due to being inadequately secured, raising only comparative negligence by plaintiff (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]; *White v 31-01 Steinway, LLC*, 165 AD3d 449, 451-452 [1st Dept 2018]).

Defendants are entitled to dismissal of the Labor Law § 241(6) claim. 12 NYCRR 23-1.5(c)(1) and (2) are "too general to serve as Labor Law § 241(6) predicates" (*Jackson v Hunter*

Roberts Constr. Group, LLC, 161 AD3d 666, 667 [1st Dept 2018]; *see also Gasques v State of New York*, 15 NY3d 869 [2010]). In view of plaintiff's testimony that his foreman had instructed him how to perform tiebacks, and that he had been performing it daily the week before the accident, any violation of 12 NYCRR 23-5.1(h) by the foreman's absence from the job site at the time of the accident was not the proximate cause of the accident (*see Vitolo v City of New York*, 128 AD3d 614 [1st Dept 2015], *lv denied* 26 NY3d 907 [2015]). 12 NYCRR 23-5.1(d) is inapplicable, as the subject equipment was not a "scaffold" contemplated by that provision and, even if so, the counterweights were not the type of load contemplated by it.

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

ENTERED: OCTOBER 29, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Webber, Oing, JJ.

10233 Lisette Lopez,
Plaintiff,

Index 305744/10
84018/12
83985/14

-against-

G.P. Castle Realty, LLC,
Defendant.

- - - - -

G.P. Castle Realty, LLC,
Third-Party Plaintiff,

-against-

M&M Castle Deli Grocery Corp.,
Third-Party Defendant.

- - - - -

G.P. Castle Realty, LLC,
Second Third-Party Plaintiff-Appellant,

-against-

Ahmed Alsaedi,
Second Third-Party Defendant-Respondent.

_____

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Louise M. Cherkis of counsel), for appellant.

Devitt Spellman Barrett, LLP, Smithtown (Christi Kunzig of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about April 16, 2019, which denied second third-party plaintiff's (Castle) motion for summary judgment on the second third-party complaint, and granted second third-party defendant's (Alsaedi) motion for summary judgment dismissing the second third-party complaint, unanimously affirmed, with costs.

Alsaedi, a commercial tenant in a property owned by Castle, established prima facie that he owes neither contractual nor common-law indemnification to Castle in connection with plaintiff's trip and fall on the sidewalk outside Alsaedi's store (*see Puchalsky v Historic Travel Agency*, 236 AD2d 279 [1st Dept 1997]). Alsaedi's evidence shows that he did not occupy or control any part of the sidewalk, as required by the indemnification provision in the lease. With respect to common-law indemnification, the lease placed the obligation to make structural repairs, which include repairs to broken concrete sidewalks, on Castle, not on him, and he had never made any changes to the sidewalk, curb, or parking lot during his tenancy.

In opposition, Castle failed to raise an issue of fact.

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

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

ENTERED: OCTOBER 29, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Webber, Oing, JJ.

10234 The People of the State of New York, Ind. 3037/17
Respondent,

-against-

Timothy Canty,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Jody Ratner 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 (Maxwell T. Wiley, J.), rendered February 28, 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 29, 2019

CLERK

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

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Webber, Oing, JJ.

10235 Julio Encarnacion, Index 304134/14
Plaintiff-Respondent,

-against-

3361 Third Avenue Housing Development Fund Corporation, et al.,
Defendants-Appellants,

Peri Formwork Systems, Inc.,
Defendant.

— — — — —

[And Third-Party Actions]

_____

Gerber Ciano Kelly Brady LLP, White Plains (Laura Ashley Martin of counsel), for appellants.

Gorayeb & Associates, P.C., New York (Howard B. Altman of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about July 6, 2018, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment against defendants 3361 Third Avenue Housing Development Fund Corporation, 3361 Third Avenue Acquisition LLC, Strategic Construction Corp., and 3361 Third Avenue Partnership, L.P. (collectively, defendants) on the Labor Law § 240(1) claim, unanimously affirmed, without costs.

Plaintiff alleges that he was injured during the disassembly of a formwork structure used to construct a concrete wall. The

record shows that plaintiff's supervisor, operating an excavator, lifted a section of formwork out of an excavation pit and moved it to ground level. The formwork remained connected to the excavator bucket via a chain, and was kept in an upright position by brace frames. The connector pins attaching the brace frames to the panel were to be removed so that the brace frames could fall away and the panel could be laid flat on the ground. The brace frames themselves, which stood at least 12 feet tall and weighed approximately 1,500 pounds, were not connected to the excavator bucket or any other device either to hold them upright once the connector pins were removed or to lower them slowly to the ground. When plaintiff removed the last connector pin, the brace frame fell and struck him.

Contrary to defendants' contention, this evidence establishes prima facie that the activity in which plaintiff was engaged is covered under Labor Law § 240(1). Although plaintiff and the brace frame were at the same level at the time of the accident, the work plaintiff was doing posed a substantial gravity-related risk, because the falling of the brace frame away from the formwork panel would have generated a significant amount of force (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 10 [2011]).

An engineer employed by defendant Peri Formwork Systems,

Inc., the manufacturer of the formwork structure, testified that if a formwork structure was disassembled on the ground, then the brace frames had to be secured by a crane before removing them, and if the formwork structure was standing upright, then each individual component had to be secured by a crane. He said that an unsecured brace frame freestanding in the air would pose a hazard to any worker standing nearby. This testimony established prima facie that defendants violated Labor Law § 240(1) by failing to furnish or erect adequate safety devices, such as a crane, so as to properly protect those involved in disassembling the formwork structure, and that this failure was a proximate cause of plaintiff's injuries (*see Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 605 [2009]; *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 523 [1985]).

In opposition, defendants failed to raise an issue of fact as to whether plaintiff was the sole proximate cause of the accident. Defendants' contentions would amount to, at most, comparative negligence, which is not a defense to a Labor Law § 240(1) violation (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 286 [2003]; *Salinas v 64 Jefferson Apts., LLC*, 170 AD3d 1216, 1223 [2d Dept 2019]).

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

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

ENTERED: OCTOBER 29, 2019

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Webber, Oing, JJ.

10236 The People of the State of New York, Ind. 3361/15
Respondent,

-against-

Dale Weston,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Joseph Capraro 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 (Shari R. Michels, J.), rendered October 30, 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 29, 2019

CLERK

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

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Webber, Oing, JJ.

10237 The People of the State of New York, Respondent, Ind. 3361/15

-against-

Rodney Goode, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Thomas Farber, J. at suppression hearing; Daniel P. Conviser, J. at jury trial and sentencing), rendered May 17, 2016, convicting defendant of criminal possession of a forged instrument in the second degree (six counts), forcible touching and sexual abuse in the third degree, and sentencing him to an aggregate term of two to six years, unanimously affirmed.

The hearing court properly denied defendant's motion to suppress the credit cards retrieved from his wallet. The record establishes that the cards were recovered as part of a lawful stationhouse inspection of objects on defendant's person. To the extent this police action can be considered an inventory search, an officer's detailed testimony about the relevant police procedures was sufficient to establish its validity (*see People v*

Padilla, 21 NY3d 268 [2013], *cert denied* 571 US 889 [2013]), especially when viewed in the particular context of the long-recognized reasonableness of stationhouse inspections of arrestees' personal effects (*see People v Perel*, 34 NY2d 462, 465-468 [1974]; *see also Illinois v Lafayette*, 462 US 640, 648 [1983]).

The trial court providently exercised its discretion in admitting evidence of defendant's prior incident of sexual misconduct on the subway. The evidence was relevant to establish defendant's intent and lack of mistake, where the charged sexual conduct occurred on a crowded subway during rush hour. Furthermore, even if defendant's principal defense was that he did not touch the victim at all, the record demonstrates, as in *People v McKenzie* (169 AD3d 557, 558 [1st Dept 2019], *lv denied* 33 NY3d 1033 [2019]), that "portions of the defense cross-examination and summation could be viewed as challenging the proof of the element of intent."

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

ENTERED: OCTOBER 29, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Webber, Oing, JJ.

10238 Armando Santos, Index 304062/15
Plaintiff-Appellant,

-against-

UM Cab Corp., et al.,
Defendants-Respondents.

_____

Mitchell Dranow, Sea Cliff, for appellant.

Robert D. Grace, Brooklyn, for respondents.

_____

Order, Supreme Court, Bronx County (John R. Higgitt, J.), entered on or about September 14, 2018, which granted defendants' motion for summary judgment dismissing the complaint due to plaintiff's inability to satisfy the serious injury threshold of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants established prima facie entitlement to judgment as a matter of law in this action where plaintiff alleges that he suffered serious injuries to his cervical spine and left shoulder as a result of an accident that occurred when defendants' vehicle hit the side of his vehicle. Defendants demonstrated that plaintiff did not sustain any serious injury by submitting the affirmed reports of their experts who, among other things, reviewed plaintiff's medical records and MRIs and opined that plaintiff's cervical spine and shoulder conditions were preexisting degenerative conditions not causally related to the

accident (*see Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043, 1044 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]). Defendants also submitted the report of an emergency medicine expert, who found that plaintiff's hospital records were inconsistent with his claimed serious injuries (*see Hayes v Gaceur*, 162 AD3d 437 [1st Dept 2018]), as well as plaintiff's own MRI reports showing disc desiccation in the cervical spine and his testimony concerning prior left shoulder surgery following a work-related accident (*see Thompson v Bronx Merchant Funding Servs. LLC*, 166 AD3d 542, 543 [1st Dept 2018]).

In opposition, plaintiff failed to raise a triable issue of fact. His treating physicians provided only conclusory opinions that the accident caused or exacerbated his conditions, but failed to explain why the degenerative and preexisting conditions reflected in plaintiff's medical records could not be ruled out as the cause of his injuries (*see Thompson* at 543-544; *Campbell v Drammeh*, 161 AD3d 584, 585 [1st Dept 2018]; *Rickert v Diaz*, 112 AD3d 451, 452 [1st Dept 2013]).

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

ENTERED: OCTOBER 29, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Webber, Oing, JJ.

10239 Michael Hernandez, Index 300491/13
Plaintiff-Appellant,

-against-

Bronx-Lebanon Hospital Center,
Defendant-Respondent.

_____

Mills & Edwards, LLP, New York (Dontè Mills of counsel), for appellant.

Turken, Heath & McCauley, Armonk (Jason D. Turken of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered on or about October 4, 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 sustained injuries during a fight with another individual outside the hospital. The evidence shows that plaintiff voluntarily participated in the physical altercation on defendant's premises, including by taking the first swing. "[O]ne who voluntarily participates in a physical fight cannot recover from a party generally charged with ensuring a safe environment" (*Carreras v Morrisania Towers Hous. Co. Ltd. Partnership*, 107 AD3d 618, 621 [1st Dept 2013], *lv denied* 22 NY3d 852 [2013]).

In opposition, plaintiff failed to raise an issue of fact. Plaintiff's voluntary participation in the fight severed any causal connection between defendant's alleged negligence in providing reasonable security and his injuries (*see Vega v Ramirez*, 57 AD3d 299, 300 [1st Dept 2008]).

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

ENTERED: OCTOBER 29, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Webber, Oing, JJ.

10240N Birama Dabo, Index 150334/17
Plaintiff-Respondent,

-against-

One Hudson Yards Owner, LLC,
et al.,
Defendants-Appellants.

_____

Cornell Grace, P.C., New York (Porsha Johnson of counsel), for appellants.

Sullivan Papain Block McGrath & Cannavo, P.C., New York (Brian J. Shoot of counsel), for respondent.

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Order, Supreme Court, New York County (Paul A. Goetz, J.), entered on or about October 12, 2018, which denied defendants' motion for a protective order to prevent disclosure of their insurer's accident investigation report, unanimously reversed, on the law, without costs, and the motion granted.

Documents in an insurer's claim file, including an accident investigation report, that were prepared for litigation against its insured are immune from disclosure (*see* CPLR 3101[d][2]; *Recant v Harwood*, 222 AD2d 372, 373-374 [1st Dept 1995]). Although documents in a first-party insurance action prepared in an insurer's ordinary course of business in investigating whether to accept or reject coverage are discoverable (*see* CPLR 3101[g]; *Brooklyn Union Gas Co. v American Home Assur. Co.*, 23 AD3d 190,

191 [2005]), there is no indication that such documents are being protected here. In the absence of any demonstration of hardship by plaintiff, the insurer's accident investigation report remains privileged (*see Veltre v Rainbow Convenience Store, Inc.*, 146 AD3d 416 [1st Dept 2017]).

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

ENTERED: OCTOBER 29, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Webber, Oing, JJ.

10241N Shareholder Representative Services LLC, etc., Plaintiff-Respondent, Index 651145/14

-against-

The NASDAQ OMX Group, Inc., et al., Defendants-Appellants.

_____

Susman Godfrey L.L.P., New York (Lucas Issacharoff of counsel), for appellants.

Oved & Oved LLP, New York (Edward C. Wipper of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered November 30, 2018, which denied defendants' motion to amend their answer to add counterclaims for breach of contract and fraud, unanimously modified, on the law, to grant the motion as to the fraud counterclaim, and otherwise affirmed, without costs.

The motion court employed the correct standard in denying defendants' motion to amend the answer to add counterclaims, i.e., whether the proposed counterclaims could withstand a motion to dismiss, and did not rely on factual determinations to determine that the counterclaims were insufficient (*see Williams v 268 W. 47th Rest. Inc.*, 160 AD3d 436, 437 [1st Dept 2018]). The court correctly found that the claim notice that defendants

sent to plaintiff did not assert or preserve claims for indemnification under the indemnification for breach of warranties provision of the merger agreement. The claim notice asserted a claim for indemnification only under the "Tax Controversy" provision. Further, it failed to identify the specific representations breached, as required by the agreement.

However, defendants should be permitted to add the proposed fraud counterclaim, because the language of the agreement is ambiguous, and defendants' interpretation of it is reasonable (*see Enzon Pharms., Inc. v Nektar Therapeutics*, 143 AD3d 617 [1st Dept 2016]). Section 9.03 provides that all liability under the representations and warranties expires 18 months after closing. However, the last sentence of that section states that no new claims for "indemnification" can be brought after that time. In contrast, sections 9.05 and 9.10 expressly exempt fraud claims from the indemnification provisions. Thus, it is reasonable to read the agreement to exempt fraud claims from the expiration provisions in the indemnification section.

Plaintiff's argument, raised in opposition to the motion but not addressed by the court, is that it will be prejudiced if the amendment is granted. However, plaintiff failed to identify any prejudice beyond the purported need for additional discovery, which is insufficient (*see Flowers v 73rd Townhouse LLC*, 149 AD3d

420, 421 [1st Dept 2017]). Moreover, in the absence of prejudice, any purported delay in bringing the motion is irrelevant (*see Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]).

We have considered plaintiff's remaining argument that was raised before the motion court but not addressed and find it unavailing.

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

ENTERED: OCTOBER 29, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Webber, Oing JJ.

10242N Erin Construction & Development Co., Inc., Plaintiff-Appellant, Index 300680/14

-against-

Hartford Services, Ltd., et al., Defendants-Respondents,

Joseph Ameyaw, et al., Defendants.

_____

Forchelli Deegan Terrana LLP, Uniondale (Parshhueram T. Misir of counsel), for appellant.

Rodman and Campbell, P.C., Bronx (Hugh W. Campbell of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered on or about May 23, 2018, which vacated plaintiff's mechanic's lien, and discharged plaintiff's notice of pendency, unanimously reversed, on the law, without costs, and the mechanic's lien and notice of pendency reinstated.

The trial court was divested of jurisdiction over this matter upon the death of defendant Herman W. Smith, which occurred six months prior to the issuance of the court's order (CPLR 1015). Accordingly, its vacatur of plaintiff's mechanic's lien and its discharge of plaintiff's notice of pendency, both rendered prior to any substitution on the deceased party's behalf, were nullities (*Faraone v National Academy of Tel. Arts &*

Sciences., 296 AD2d 349 [1st Dept 2002]). Our holding is without prejudice as to any proceedings that may be taken once a legal representative has been substituted (*see Gaines v City of New York*, 104 AD3d 610 [1st Dept 2013]).

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

ENTERED: OCTOBER 29, 2019

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Dianne T. Renwick, J.P.
Peter Tom
Anil C. Singh
Peter H. Moulton, JJ.

8453
Index 17741/07

_____x

I.M., by Parent and
Natural Guardian L.M.,
Plaintiff-Appellant,

-against-

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

John Doe, etc., et al.,
Defendants.
_____x

Plaintiff appeals from an order of the Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about March 7, 2017, which, insofar as appealed from, granted defendants' motions for summary judgment dismissing plaintiff's statutory claims against them.

Clement H. **Berne**, New York, and the Law Offices of Mitchell I. Weingarden, White Plains (Mitchell I. Weingarden of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Elina Druker and Fay Ng of counsel), for City respondents.

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska and Nicholas M. Cardascia of counsel), for The Pioneer Transportation Corporation, respondent.

MOULTON, J.

This action arises from defendants' alleged failure to provide plaintiff I.M. with an appropriate mode of transportation to his special education school. According to plaintiff, this deprivation caused him to act out, exposed him to harm and impaired his access to the free appropriate public education (FAPE) to which he had a statutory right.[1]

In 2005, I.M. was a six-year-old nonverbal diapered child with autism spectrum disorder, moderate to severe intellectual disability, and attention deficit disorder. His 2005-06 Individualized Educational Program (IEP) stated, in bold faced type, that he required a "mini-bus" to transport him to and from school.[2] However, due to a computer coding error he was placed on a full-sized school bus operated by defendant the Pioneer

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[1]A FAPE is guaranteed by the Individuals with Disabilities Education Act (IDEA) "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living" (20 USC § 1400[d][1][A]). A public education is appropriate when, inter alia, it is "designed to meet individual education needs of handicapped persons as adequately as the needs of nonhandicapped persons are met" (34 CFR 104.33[b][1]).

[2]An IEP is a school's written plan that is "reasonably calculated to enable the child to receive educational benefits[]" (*Board of Educ. of Hendrick Hudson Cent. School Dist., Westchester County v Rowley*, 458 US 176, 207 [1982]).

Transportation Corporation (Pioneer) from September 8, 2005 through October 19, 2005. During this period, Pioneer filed nine incident reports with I.M.'s school in connection with these trips. I.M.'s family also repeatedly complained to I.M.'s school and to the New York City Department of Education's Office of Pupil Transportation (OPT). The problem was not rectified until October 20, 2005, when I.M. was placed on a minibus in accordance with his IEP.

Plaintiff I.M., by his father, appeals from Supreme Court's dismissal of his claims under section 504(a) of the Rehabilitation Act of 1973 as amended (the RA), Title II of the Americans with Disabilities Act of 1990 (the ADA), section 296(2)(a) of the New York State Executive Law, and section 8-107 of the Administrative Code of the City of New York (the State and City HRLs). Supreme Court dismissed these statutory claims on the basis that "[t]here is no evidence that the infant was purposefully discriminated against as a result of his disability when he was placed on the full-sized bus."[3] It let stand

[3]Defendants moved for summary judgment dismissing plaintiff's claims for (1) discrimination; (2) negligence and gross negligence; (3) failure to report child abuse; and (4) violation of 42 USC § 1983. As is noted above, Supreme Court declined to dismiss plaintiff's negligence and gross negligence claims but dismissed plaintiff's claims for discrimination and for failure to report child abuse. Supreme Court also dismissed all claims against defendant Susan Erber. Supreme Court did not

plaintiff's common-law negligence and gross negligence claims. The only issue on appeal is whether Supreme Court properly dismissed plaintiff's statutory discrimination claims.

We now reverse in part and reinstate these statutory discrimination claims against the Board of Education of the City of New York, its employees Lorraine Sesti and Joanne Richburg, and OPT (collectively DOE).[4] We affirm Supreme Court's dismissal of the statutory claims against Pioneer but on different grounds. Viewing the evidence, much of which is uncontested, in the light most favorable to I.M. as nonmovant, issues of fact exist as to whether DOE violated the discrimination statutes by acting with bad faith, gross misjudgment, or deliberate indifference to I.M.'s rights to be transported by minibus, thereby depriving him of a FAPE. A reasonable jury could conclude that a simple bureaucratic mistake was compounded by inaction into a violation of the RA, the ADA and the State and City HRLs.

Relevant Facts

A. The IEP

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address or dismiss plaintiff's claim for violation of 42 USC § 1983.

[4]Lorraine Sesti was the principal of plaintiff's school. As discussed, *infra*, Richburg was the District Representative of the Committee on Special Education and the school employee who met the school buses. Plaintiff sued Joanne Richburg as J. Richberg.

I.M.'s 2005-06 IEP was created by a team of DOE professionals, with input from I.M.'s family. The IEP was signed by I.M.'s grandmother, defendant Richburg (as District Representative for the Committee on Special Education), a counselor, a speech pathologist, an occupational therapist, and a school nurse. The IEP indicates that I.M. had "significant academic, behavioral and language/communication needs"; that I.M. required "intensive supports"; and that I.M. needed "highly intensive supervision" in a "highly structured learning environment." The IEP also indicates that I.M. "has difficulty remaining in his seat." In addition, I.M.'s 2006-07 IEP indicates that "[w]hen he is frustrated or upset he begins to jump up and down, but is able to calm self." Thus, DOE's team of professionals determined that, to provide I.M. with a FAPE, his challenges necessitated that he be placed in a class with five other students, one teacher, and one paraprofessional. They also determined that given I.M.'s challenges, he required minibus transportation as a "related service" in order to benefit from his special education.[5] Defendant Richburg acknowledged at her

[5]34 CFR 300.34(a) defines "Related Services" in relevant part as "transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability *to benefit from special education*" (emphasis added).

deposition that the purpose of an IEP is to assure that each student receives the best possible education considering the student's disability and that each IEP contains a section that specifies the requisite type of transportation.

B. I.M.'s Commute To And From School

At her deposition, I.M.'s teacher Yvonne Elaine Dixon agreed that I.M. required a minibus because, among other things, it carried fewer children, had a shorter ride, and was "calmer, not as much activity." She testified that a shorter ride would help prevent I.M. from becoming agitated and "start up and down jumping or crying or whatever have you . . . when you have a bigger bus it's just a little harder." The record indicates that a minibus typically carried 8 to 12 children. By contrast, a full-sized bus held 34 to 45 children.

Despite the direction in I.M.'s IEP that he travel in a minibus for his school commute he was placed on a full-sized school bus owned and operated by defendant Pioneer, a private carrier that contracted with DOE. Within days I.M. began acting out on his commute. Pioneer personnel wrote up nine "Student Misbehavior Reports" for I.M. on bus trips from September 20, 2005 through October 19, 2005. Bus matron Patricia Del Ponte, who filled out six of the nine reports in September, testified that she handed her reports to Richburg because she was the bus

coordinator who met the buses at school in the morning and afternoons. At her deposition, Richburg confirmed that as the coordinator for the school's transportation it was her practice to initial the reports that the matrons handed to her. All of the reports bear the initials "J.R." except the September 23, 2005 report which bears the initials "C.S."[6] The September reports provide:

> September 20, 2005 - "In P.M. he was disruptive on bus. He was throwing his stuff around. Also he took off his shirts. He also banged his fist on bus window."
>
> September 21, 2005 - "In P.M. he took off his socks and sneakers & threw them on the bus floor. I was not aware of this because the bus is full with many students, some of which [sic] are very disruptive. He needs a para because it is impossible for me to just watch him. He also eats food on bus."
>
> September 22, 2005 - "In PM he took off his shoes and socks & threw them on floor of bus. He also threw his book bag. He refuses to put his socks and shoes on again."
>
> September 23, 2005 - "In P.M. he took off his socks & shoes and threw them on bus floor along with his book bag. He was also yelling and banging on bus window. This happens every day."
>
> September 29, 2005 - "*In PM he was standing in his seat*. He was also banging on the window. He took off his socks & sneakers" (emphasis added). Notably, the matron checked off a box that states "CHILD REFUSES TO WEAR SEATBELT."

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[6]At her deposition, Richburg testified that she did not recognize her initials on several of the reports. However she also testified that it was possible that she initialed all but one of the reports because one report "definitely doesn't look like mine." In any event, even if Richburg did not initial all the reports, she testified that they were all forwarded to the school's administration.

September 30, 2005 - "Took his sock & sneakers off on bus & threw them. He also threw his school bag & was banging on window."

According to I.M.'s father, I.M.'s bus route - - but not the size of the bus - - changed in October. He explained that more students were on the bus and many of them were older middle school children (about 14 years old). Pioneer bus matron Joanne Indiviglia testified at her deposition that the older children were about 10 to 12 years old. Indiviglia testified that she witnessed Richburg initial the three October reports that the bus matron prepared. The October reports provide:

October 18, 2005 - "[I.M.] pulled down his pants to his knees and began playing with his genitals in view of the other children."[7]

October 18, 2005 - "[I.M.] took his pants off and began jumping on the seat, he then removed his diaper & began playing with his genitals."

October 19, 2005 - "[I.M.] pulled down his pants to his ankles – 10/19/05@ 8:20 A.M."

At her deposition, Indiviglia testified that on the October 17, 2005 afternoon bus trip I.M. had "opened his pants up and ripped into the side of his diaper." She explained that once the children saw that I.M. "was playing with his genitals" they took off their seatbelts. Indiviglia testified that I.M. did not

[7]Indiviglia testified that while this report is dated October 18, 2005, it concerned I.M.'s October 17, 2005 bus ride home.

comply with her attempts to put his clothes on, and that the ride devolved into chaos as she attempted to deal with I.M.'s needs and the needs of the other special education students. Indiviglia explained that she told the school bus coordinator what happened when she handed her the report on the morning of October 18, 2005.

The afternoon bus ride on October 18, 2005 was, according to Indiviglia, "a little worse." She testified that I.M. was "doing the same thing again." He took his pants off, masturbated and jumped on his seat. She testified that he walked down the aisle with his pants down and his genitals exposed. Indiviglia also testified that he "really tore into the diaper and started throwing the stuffing from the diaper around." She described that within 15 minutes, "there was stuffing everywhere." On the morning of October 19, 2005, Indiviglia testified that I.M. arrived at school with his pants down to his ankles and the school bus coordinator witnessed this. That day I.M.'s father informed Richburg that in the future he would drive I.M. to and from school, and he drove I.M. home that afternoon.

I.M. was placed on a minibus the following day. After that, I.M. apparently had no further incidents during his school commute.

I.M.'s family repeatedly complained about defendants'

failure to adequately monitor and care for him while he was on the bus. In his affidavit in opposition to summary judgment, I.M.'s father explained that he complained to Pioneer after I.M. came home missing a shoe in September 2005 and bus matron Del Ponte informed him that I.M. threw his shoe out of the window. He asserted that he informed Pioneer that he was concerned that I.M. was not being supervised or cared for properly. He also explained that he called Jeff Berger at OPT at this time with the same complaint and he requested that his child be placed on a different bus. According to I.M.'s father, Berger responded that he would look into the matter.

In addition, I.M.'s father stated that he called Pioneer on October 17, 2005 after bus matron Indiviglia described to him what happened on the bus that day. The record also includes a October 19, 2005 OPT Report that indicates that I.M.'s grandmother called to complain that I.M. arrived at school naked and, because he could not remove his own clothes, she expressed concern that another child may have abused him. In all, the record contains four OPT complaint numbers. It also contains an October 19, 2005 note from the father's fiancée (later his wife) to I.M.'s teacher stating:

> "Yesterday when [I.M.'s] bus pulled up, he was nude on the back of the bus. I was advised he was moved to the back of the bus because he was playing with himself.

> Can you please make sure his belt is tight. We don't think this will help. But I am going to visit his doctor today, to try to see what can be done to prevent him from doing that. If you could also send me the number of the bus company, my mother-in-law is going to get him put on to a little bus."[8]

Richburg admitted at her deposition that she knew that "there was an incident where [I.M.] was taking off his shirt and throwing his shoes out the window" and, that on at least two occasions "he was taking off his socks and shoes on the bus."[9]

Discussion

The ADA provides in relevant part that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity" (42 USC § 12132). The RA provides in relevant part that no qualified person with a disability "shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity

[8]I.M.'s teacher testified that she turned the note over to Richburg. Richburg conceded at her deposition that she spoke with the fiancée.

[9]I.M.'s teacher testified that Richburg told her on approximately five occasions that I.M. was jumping up and down in his bus seat, although she did not recall when Richburg informed her of this behavior.

receiving Federal financial assistance" (29 USC § 794[a]).

A brief discussion of the IDEA and its relationship to the ADA and RA is warranted here. The IDEA requires that disabled students receive a FAPE that is tailored to each student's individual needs (*see Scaggs v New York State Dept. of Educ.*, 2007 WL 1456221, *3, 2007 US Dist LEXIS 35860, *10 [ED NY, May 16, 2007, No. 06-CV-0799 (JFB)]). That goal is accomplished primarily through the design and implementation of an IEP (*id.*). The RA similarly requires that a disabled student receive a FAPE that is properly tailored to the student's needs (*see C.L. v Scarsdale Union Free Sch. Dist.*, 744 F3d 826, 840-841 [2d Cir 2014]). The "IDEA is phrased in terms of a state's affirmative duty to provide a free, appropriate public education [and the RA] is worded as a negative prohibition against disability discrimination in federally funded programs" (*W.B. v Matula*, 67 F3d 484, 492 [3d Cir 1995], *abrogated on other grounds by A.W. v Jersey City Public Schools*, 486 F3d 791 [3d Cir 2009]). Thus, the RA offers relief from discrimination "whereas IDEA offers relief from inappropriate educational placement, regardless of discrimination" (*Gabel ex rel L.G. v Board of Educ. of Hyde Park Cent. Sch. Dist.*, 368 F Supp 2d 313, 333 [SD NY 2005]). The "denial of *access* to an appropriate educational program on the basis of a disability is [an RA] issue, whereas dissatisfaction

with the *content* of an IEP would fall within the purview of IDEA" (*id.* at 333-334).

While there are no specific ADA regulations concerning the education of disabled children, the ADA has been interpreted co-extensively with the RA's special education requirements (*see R.B. ex rel. L.B. v Board of Educ. of the City of New York*, 99 F Supp 2d 411, 419 [SD NY 2000]).

Given that the three statutes are related, a plaintiff may assert an RA and ADA claim, in conjunction with an IDEA claim, on the theory that the disabled student has been denied access to a FAPE (*see R.B.*, 99 F Supp 2d at 419; *see also C.L.*, 744 F3d at 841).[10]

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[10]The IDEA contains an exhaustion requirement that is applicable to claims under the ADA and RA (*see Scaggs*, 2007 WL 1456221, *4, 2007 U.S. Dist LEXIS, *12-13). We reject DOE's contention that plaintiff's failure to pursue administrative remedies under the IDEA precludes recovery under the ADA or the RA. The primary reason for the exhaustion requirement is to promote the utilization of administrators who are familiar with resolving IEP content issues but the requirement is excused when, as is alleged here, the claim is based on the "failure to implement services already spelled out in an IEP" (2007 WL 1456221, *5, *6, 2007 US Dist LEXIS, *16, *18 [internal quotation marks omitted]). Here, plaintiff seeks compensatory damages, which would not be available under the IDEA given that the situation at issue was remedied long before the instant action. As such, pursuit of administrative remedies under the IDEA would be excused as futile (*see MC v Arlington Cent. Sch. Dist.*, 2012 WL 3020087, *9, 2012 US Dist LEXIS 103064, *36-37 [SD NY, July 24, 2012, No. 11-CV-1835 (CS)]).

Standards for recovery under the ADA and the RA "are generally the same" (*Henrietta D. v Bloomberg*, 331 F3d 261, 272 [2d Cir 2003], *cert denied* 541 US 936 [2004]). To establish a prima facie violation under the ADA and the RA, a plaintiff must show that "(1) she is a qualified individual with a disability; (2) that the defendants are subject to one of the [statutes]; and (3) that she was denied the opportunity to participate in or benefit from defendants' services, programs, or activities, or was otherwise discriminated against by defendants, by reason of her disability" (*Harris v Mills*, 572 F3d 66, 73-74 [2d Cir 2009]).[11] The RA and ADA require that reasonable accommodations may have to be provided to assure that a disabled student can participate in, or benefit from, defendants' services (*id.* at 73).

State HRL "disability discrimination claims are governed by the same legal standards as federal ADA claims" (*Pimentel v Citibank*, N.A., 29 AD3d 141, 147 n 2 [1st Dept 2006], *lv denied* 7 NY3d 707 [2006]; *accord Rodal v Anesthesia Group of Onandaga, P.C.*, 369 F3d 113, 117 n 1 [2d Cir 2004]).[12] The City HRL is as

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[11]DOE concedes that I.M. is a qualified individual with a disability and that it is subject to the ADA and RA. Thus, only the third prong is at issue here.

[12]The State HRL provides in relevant part that it is an unlawful discriminatory practice for any agent or employee of any

or more protective than State and Federal discrimination laws (*see Williams v New York City Hous. Auth.*, 61 AD3d 62, 65 [1st Dept 2009], *lv denied* 13 NY3d 702 [2009]).[13]

Given the close overlap, if a plaintiff can satisfy his or her burden under the ADA, a plaintiff will also satisfy his or her burden under the RA and the State and City HRLs (*see Williams v City of New York*, 121 F Supp 3d 354, 364 n 10 [SD NY 2015]).

DOE, and our colleague, who dissents in part, argue that plaintiff has not shown the requisite level of intent, nor sufficient causation, to establish a prima facie claim under the statutes. We disagree.

Over 30 years ago in *Alexander v Choate,* the United States Supreme Court recognized that disability discrimination is "most often the product, not of invidious animus, but rather of thoughtlessness and indifference -- of benign neglect" (469 US 287, 295 [1985]). Thus, a disabled plaintiff "need not show

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place of public accommodation to "because of . . . disability . . . refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof" (Executive Law § 296[2][a]).

[13]The City HRL provides in relevant part that it is an unlawful discriminatory practice for any agent or employee of any place of public accommodation to "[b]ecause of any person's actual or perceived . . . disability . . . refuse, withhold from or deny to such person . . . any of the accommodations, advantages, facilities or privileges [thereof]" (Administrative Code of the City of NY § 8-107[4][a][1][a]).

defendants acted with animosity or ill will" to prove a violation of either the RA or ADA (*R.B.*, 99 F Supp 2d at 419; *see also Loeffler v Staten Is. Univ. Hosp.*, 582 F3d 268, 275 [2d Cir 2009]). It is well settled that a disabled student can plead a claim under the RA or ADA by showing that the defendant "acted in bad faith or with gross misjudgment when administering disability services" (*J.L. v New York City Dept of Educ.*, 324 F Supp 3d 455, 467 [SD NY 2018] [the plaintiffs sufficiently pleaded that New York City Department of Education violated the RA and ADA by acting with gross misjudgment in failing to provide nursing and special transportation services in accordance with three disabled student's IEP's]; *Rutherford v Florida Union Free Sch. Dist.*, 2019 WL 1437823, *36, 2019 US Dist LEXIS 55971, *105 [SD NY, March 29, 2019, No. 16-CV-9778 (KMK)] [the plaintiffs sufficiently pleaded that the Board of Cooperative Educational Services acted with bad faith or gross misjudgment by failing to implement the IEP it helped to create]; *Gabel ex rel L.G.*, 368 F Supp 2d at 334-335 [issues of fact existed whether the Board of Education of the Hyde Park Central School District's errors in handling a disabled student's placement rose to the level of gross negligence or reckless indifference]; *R.B.*, 99 F Supp 2d at 419 [the plaintiff sufficiently pleaded that the New York City Department of Education and other defendants acted with bad faith

or gross misjudgment in denying the plaintiff a FAPE by failing to comply with the student's IEP's private school placement]). Courts have also equated gross misjudgment with deliberate or reckless indifference (*see J.L.*, 324 F Supp 3d at 468).[14]

Contrary to Supreme Court's and our dissenting colleague's conclusion, plaintiff has demonstrated a prima facie violation of the ADA, the RA, and the State and City HRLs. While DOE half-heartedly argues that it "was sensitive" to I.M.'s educational needs, a reasonable jury could find that DOE acted with bad faith, gross misjudgment, or deliberate indifference to I.M.'s rights to be transported by minibus thereby depriving him of a FAPE. While the original coding error was arguably the product of simple bureaucratic negligence, a reasonable jury could conclude that DOE's inaction, in the face of the reports and family complaints, escalated into a violation of the RA, the ADA, and the State and City HRLs (*see J.L.*, 324 F Supp 3d at 468 ["[w]hile bureaucratic incompetence may have triggered DOE's failure to implement IEP services, it eventually morphed into a

[14]Deliberate indifference is the "deliberate indifference to the strong likelihood [of] a violation" (*Loeffler v Staten Island Univ. Hosp.*, 582 F3d at 275 [internal quotation marks omitted] [a reasonable jury could find that a hospital discriminated against a deaf patient and his family by acting with deliberate indifference in failing to provide the patient with a sign language interpreter]).

reckless disregard for [the plaintiffs'] educational needs"]).[15]

Our dissenting colleague further concludes that even if plaintiff could establish DOE's intentionality, plaintiff did not establish that the requisite intention was "causally linked with" or "directed at" I.M.'s disability. Thus, our colleague concludes that plaintiff did not suffer "a deprivation of an educational service on account of plaintiff's autism."[16]

The "by reason of" language in the ADA, the "solely by reason of" language in the RA, and the "because of" language in the State and City HRLs set forth a causation requirement (*see Henrietta D.*, 331 F3d at 277-278). In the context of a failure-to-accommodate claim related to public services, a plaintiff can

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[15]Notably, the RA was intended to "rectify the harms resulting from action that discriminated by effect as well as by design" (*Alexander*, 469 US at 297). While DOE did not discriminate against I.M. by design, in that his IEP provided for the related service of a minibus, the effect of DOE's inactions, over a period of 29 days, was the same (*see e.g. Loeffler v Staten Island Univ. Hosp.*, 582 F3d at 271, 275 [a reasonable jury could find that the hospital discriminated against a deaf patient and his family by failing to provide them with a sign language interpreter even though the hospital had a policy in place that provided for such interpreters]).

[16]Our dissenting colleague adopts DOE's argument that the record contains no evidence casually linking DOE's failure to implement I.M.'s IEP to his disability. Although DOE makes this argument in its appellate brief, it fails to provide a rationale other than maintaining that the evidence does not support a finding that it acted with deliberate indifference, bad faith, or gross misjudgment.

demonstrate that his or her disability is "a cause of the denial of access to benefits" by demonstrating that the disability-related challenges make it more difficult for the plaintiff to access public services than for those without disabilities and that a reasonable accommodation should have been, but was not, provided (*see Henrietta D.*, 331 F3d at 278-281).

The dissent expresses no theory of causation that is *unrelated* to I.M.'s disability. While our colleague points to evidence that I.M. engaged in similar behaviors at home, those behaviors are directly *related* to I.M.'s disability. Nor is there a speculative link between I.M.'s behavior and the bus size, as our colleague suggests. Far from being speculative, DOE determined that "because of" I.M.'s disability, he required the "related service" of a minibus to meaningfully access his FAPE and benefit from his special education.[17]

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[17]Our colleague relies on two student bullying cases cited by DOE in its appellate brief. In *Eskenazi-McGibney v Connetquot Cent. Sch. Dist.*, the Court held that the plaintiffs failed to state a claim under the RA and ADA because they did not provide facts to support a conclusion that the disabled student was bullied "because of" his disability, as opposed to "based on some other reason, such as personal animus" (84 F Supp 3d 221, 233 [ED NY 2015]). *Doe v Torrington Bd. of Educ.* (179 F Supp 3d 179 [D Conn 2016]) followed *Eskenazi-Mcgibney*. Because neither case involved a failure-to-accommodate claim they have no relevance to this appeal.

The dissent also incorrectly posits that I.M. cannot assert claims under the discrimination statutes because he was physically transported to and from school on the full sized-bus, and thus, he was not "excluded" from an educational service. This position overlooks that the RA and ADA not only prohibit the exclusion from an educational service, but also prohibit the denial of the opportunity to "benefit from" those services. A student does not need to demonstrate that he or she is physically prevented from school access to demonstrate that he or she is denied the opportunity to benefit from a defendant's services (*see e.g. Davis v Monroe County Bd. of Educ.* 526 US 629 [1999] [analyzing student sexual harassment under Title IX of the Education Amendments of 1972 which provides that no person shall be "excluded from participation in, be denied the benefits of, or be subjected to discrimination" because of sex]). Where a student's educational experience is undermined, equal access to the school's opportunities is effectively denied (*see id.* at 651). As we previously noted, DOE has already determined that given I.M.'s challenges, he required minibus transportation as a "related service" in order to meaningfully access his FAPE and benefit from his special education. Accordingly, Supreme Court erred in dismissing plaintiff's statutory discrimination claims against DOE.

Supreme Court correctly granted Pioneer's motion to dismiss I.M.'s claims under the under the RA, the ADA and the State and City HRLs, although not for the reasons stated. As a threshold matter, as a private bus company, and not a direct recipient of any federal funding, Pioneer is not amenable to direct suit by I.M. under the RA (*see United States Dept. of Transp. v Paralyzed Veterans of Am.*, 477 US 597, 605 [1986]; *Doe v Jamaica Hosp.*, 202 AD2d 386, 387 [2d Dept 1994]). In any event, plaintiff's statutory claims against Pioneer were correctly dismissed because they all arise from a failure to accommodate I.M. with minibus transportation, as provided for in his IEP. However, it is only DOE that has the obligation to provide plaintiff with a FAPE under 20 USC § 1412(a)(1)(A) and to provide him with minibus transportation to and from school as a accommodation in connection with that federal law. Pioneer cannot be held liable for the failure to accommodate I.M. emanating solely from DOE's statutory obligation to provide him with a FAPE. Apart from any contractual obligations with DOE, Pioneer has no independent obligation to provide I.M. with transportation.

Nor can Pioneer be held liable as a "service provider" under Education Law § 4402(7)(a) that "did nothing about" DOE's failure to provide Pioneer with a copy of plaintiff's IEP. According to the OPT representative's deposition testimony, DOE does not

submit copies of IEPs to its transportation providers. Instead, DOE provides a code for each student indicating the type of transportation that it requires. Here, it is undisputed that with respect to plaintiff, DOE provided Pioneer with a code for a full-sized school bus (*see also* State Education Department Mem from Lawrence C. Gloeckler, dated May 2003 at 8 [DOE does not require school districts to provide bus drivers with copies of IEPs because they are "support staff" under Education Law § 4402(7)(c), not "service provider[s]" under Education Law § 4402(7)(a)]).

Accordingly, the order of the Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about March 7, 2017, which, insofar as appealed from, granted the motions of defendants DOE and Pioneer Transportation Company for summary judgment dismissing plaintiff's statutory claims against them, should be modified, on the law, to deny DOE's summary judgment motion dismissing plaintiff's claims under the Rehabilitation Act, the Americans with Disabilities Act and the New York State and City Human Rights Laws, and otherwise affirmed, without costs.

All concur except Tom, J. who dissents in part in an Opinion.

TOM, J. (dissenting in part)

Plaintiff's claims arise from his contention that he was improperly assigned to a large bus rather than to a minibus for a period of six weeks, during which time he exhibited misconduct on the bus, that the misbehavior was causally related to the incorrect bus assignment, and that he suffered various emotional and other harms as a consequence. I agree with the majority that the claims against the bus company should be dismissed and that the negligence claims against other defendants remain viable. I do not agree that the record provides a basis to support plaintiff's claim that the Department of Education and the individual defendants acted with the requisite intentionality or deliberate indifference to violate plaintiff's federal statutory rights under the Americans with Disabilities Act of 1990 (42 USC § 12132) or section 504 of the Rehabilitation Act of 1973 (29 USC § 794[a]). Thus, to this extent I respectfully dissent.

At the time of the 2005 events, plaintiff was a young child of kindergarten age, diagnosed with moderate to severe autism, with a history of some aberrant behaviors, including his removal of his clothing and sexual self-stimulation at home as well as in school settings and other public places. Plaintiff attended kindergarten in a special education school, P.S. 17X, in 2004-2005. He was transported to the school and then home in a full-

size school bus along with other special education children. However, the Individualized Education Program (IEP) devised for plaintiff by the New York City Board of Education for school year 2005-2006 provided that plaintiff should be transported to and from school in a minibus, although no further explanation or instructions were provided in that regard. Defendant Joanne Richberg[1] was a member of the IEP committee, although she was clear in her deposition that she was not a member of the school administration and thus had no authority with respect to plaintiff's IEP, nor did she act as a teacher who would have had direct supervisory responsibilities for students during the time period relevant to this case.

During the relevant time period, the Department of Education's Office of Pupil Transportation (OPT) contracted with a private carrier, Pioneer Transportation Corporation, to provide transportation for special education children to school in the morning and home in the afternoon, as well as to assign matrons who would accompany the children on the bus. Pioneer operated full sized buses, which each carried approximately 30 special education students, but not minibuses, which usually carry between 10 and 14 special education students. OPT assigned the

[1]The name is spelled Richberg in the case caption, but Richburg in plaintiff's brief and in the deposition transcript.

special education children, including plaintiff, to school buses, but the bus company was not responsible for compliance with a child's IEP. These buses transported only special education students, although they varied in age and in the nature of their disabilities. Plaintiff was placed on the available full-size buses for a six week period from September 13, 2005 to the end of October but not on a minibus, since none was provided,. OPT's acting director, Richard Scarpa, conceded that this could have resulted from human error.

The actual relevant time period for purposes of this action, however, are six days between September 20th and October 19th rather than six weeks. During this time period, the bus matron, Patricia Del Ponte, compiled student misbehavior reports relating to plaintiff. The report dated September 20, 2005 documented that plaintiff was disruptive on the afternoon bus in that he "was throwing his stuff around," took off his shirt and banged his fist on the window. The report dated September 21st related that on the afternoon bus plaintiff took off his shirt and sneakers and threw them; he also ate food on the bus, conduct that was not permitted. The report also described a bus "full" of students, many of whom were disruptive. The report further indicated that the matron could not exclusively watch plaintiff. The September 22nd report documented that plaintiff took off his

shoes and socks, threw them on the floor of the bus and refused to put them back on, then he threw his book bag, and that he regularly banged on the bus window. The report dated September 30, 2005 made similar claims.

The report dated October 18, 2005 brought matters to a new level in that plaintiff took off his pants, jumped on the seat, took off his diaper and played with his genitals. On October 19, 2005, it was reported that he pulled his pants down to his ankles on the morning bus. Plaintiff was assigned a minibus the following day on October 20, 2005. If plaintiff continued to exhibit this behavior and defendant failed to act, an issue of deliberate indifference then might have been feasible. However, because defendants quickly took action after this most recent spate of behavior, we have no valid basis to reach that issue.

Generally, the boxes that were checked on these reports indicated that plaintiff annoyed or disrupted other students, which seems to have been the case. Nevertheless, this amounts to a total of six reports, four clustered during a week in September and two a month later, of some disruptions by a special needs student being bused with other special needs students, which do not themselves seem to flag the need for alternative transportation accommodations. Stated differently, there is no evidence that these behaviors were bus-related, or even that they

were aberrational, since the record reflects that similar conduct occurred in the home. A letter affirmation dated August 15, 2014 submitted by Richard Perry, M.D., a Clinical Professor of child and Adolescent Psychiatry at New York University Medical School, who reviewed the relevant documents and deposition transcripts in this case, concluded that plaintiff's conduct was not triggered by the bus or else he would have been reluctant to even get on the bus. Dr. Perry noted that tantrums, masturbation in public and disrobing were typical of his behavior, and that sleep difficulties and/or anxieties over the start of the school year or other factors were more likely the causative elements. Dr. Perry also observed that during this time period plaintiff often rode the bus without this acting out. In any event, after October 20th, OTP granted the request that plaintiff be transferred to a minibus.

Plaintiff's father testified at his deposition that plaintiff often took off his clothes in the house when he came home from school, that he had done so on two or three occasions in school in 2004 prior to any incidents on the bus, and that his grandmother with whom plaintiff was then living told him about earlier occasions when plaintiff masturbated in school and in public places. Again, the record suggests that these recurrent behaviors occurred in contexts extraneous to whatever mode of

transportation was employed for plaintiff. When plaintiff's psychiatrist was informed of these events he changed plaintiff's medication. Apparently, plaintiff also experienced sleep problems, awakening in the middle of the night during 2005 prior to the disturbances on the bus, also leading to a change of medication. The father had not made any complaints about plaintiff being on a full sized bus during the prior 2004-2005 school year, nor prior to October 2005 had he made any requests regarding plaintiff's transportation. To the contrary, there is no indication in the record that prior to these incidents, anyone had brought any incidents on any bus to the father's attention.

The very first incident on the bus of which the father was aware was in September 2005, when plaintiff took off his sneakers and socks and threw a sneaker out of the window. On that occasion, the father only requested that the window where his son was sitting thereafter be raised so that sneakers and socks, or anything else, could not be ejected from the bus. Even after the incident when plaintiff took off his clothes in the back of the bus, the father did not connect the incident to the size of the bus; instead, he continued to take plaintiff to the bus in the morning. However, he called OPT and related the incident and was told that it would be investigated.

On three of the occasions when plaintiff's misbeahvior on

the bus was the subject of reports, the father spoke to Richberg. When the father requested to have plaintiff's bus changed, Richberg provided him with OPT's phone number, since only OPT had responsibility for transportation matters, but the father apparently never followed up with any such request. While one might fairly consider, in support of a negligence theory, whether Richberg should have taken further personal responsibility, there is no record evidence of any intentionally discriminatory conduct on her part nor even deliberate indifference that would have deprived plaintiff of any benefits on account of his disability.

Richberg's testimony provided insight into the protocols applicable under these circumstances. During 2005, as a unit coordinator for student transportation, she was also a "mandated reporter" requiring her to report to the Administration for Children's Services (at that time, the nomenclature was the Bureau of Child Welfare) any incidences of child abuse, physical abuse or educational neglect. Richberg testified that her responsibilities pertaining to transportation included checking that each child exited the bus at school in the morning and entered it for the trip home. If there were transportation issues that needed correction, such as late arrivals by a bus or if a driver or matron reported in writing student misbehavior, she would relate that to an assistant principal or the principal,

and would notify the "pupil secretary," who would then contact the OPT. If a written report was provided by a driver or matron, Richberg would initial it, signifying her receipt, and then forward the report to an assistant principal. Richberg testified that she had taken such steps numerous times while previously assigned to that position. When shown the misbehavior reports relating plaintiff's misbehavior noted above, however, she disputed whether the initials that appeared were hers.

Richberg testified that a child's assignment to a smaller bus would be made on the basis of medical documentation from his or her personal physician as well as other forms required by the OPT, which would then make the decision. Teachers or other service providers were responsible for observing whether a child's IEP was adequate or, conversely, if a reevaluation was necessary, which would then be discussed with an assistant principal, who would also be responsible for determining whether a transportation aspect of the IEP needed modification. As unit coordinator, Richberg would also act as a conduit to an assistant principal in this respect. If a child was not assigned to a bus appropriate for his or her IEP, that information would be related to the pupil secretary who would inform OPT.

Richberg testified that on October 20, 2005, the principal, Lorraine Sesti, informed her about a note written by the father's

girlfriend, a Ms. Watkin, on October 19th, relating that on October 18th plaintiff had been nude on the bus when it arrived at his home. Richberg had not previously been informed of such an incident and since the principal now had the information, it was no longer in the realm of Richberg's responsibilities, but she recalled that the principal had filed a report for purposes of investigating the matter. She had been unaware of prior reports. She also testified that she had never spoken to plaintiff's father or the father's girlfriend in connection with the incidents.

Yvonne Elaine Dixon was one of plaintiff's teacher's. She testified that one of her responsibilities was to maintain a log documenting conduct or needs for a student, which would regularly accompany the child home for the parents' review. She testified that plaintiff had been assigned a minibus for the 2005-2006 school year, either at the behest of a parent or an assistant principal or Richberg as the coordinator, but Dixon had little further information about the bus assignment. She noted that an assignment to a minibus would have been appropriate since it likely would have been calmer, and, with fewer students, possibly a shorter ride. Dixon testified that if an incident occurred on the bus, the driver or matron would relate that to Richberg as coordinator, who would then relay the information to an assistant

principal, and Dixon, too, would be informed, who would record the incident in the child's log. On October 19, 2005, Richberg informed her that plaintiff had exited the bus with no clothes on; this was the only time of which she was aware. A note dated October 19, 2005, from plaintiff's stepmother, which also advised Dixon that the prior day plaintiff had been naked in the back of the bus, requested that plaintiff's belt in the future be tightened to prevent his removal of his pants, and indicated that her mother-in-law would request that the "bus company" put plaintiff on a smaller bus. Dixon testified that she would have turned the note over to the coordinator. On about five other occasions, Richberg informed her that plaintiff had been jumping up and down on the bus when he was happy, which was one of his behavioral mannerisms. This information was related to plaintiffs' parents.

Joanne Indiviglia was assigned as a matron to the bus on which plaintiff rode in mid-October, 2005. She wrote the misbehavior reports for October 17, 18 and 19th, which she described in more detail in her deposition testimony. After the incident on October 19th, Indiviglia reported the incident orally to Richberg. On October 20, 2005, plaintiff was picked up by a minibus in compliance with the IEP.

As noted above, there is sufficient factual uncertainty in

the record to support remanding for trial on a negligence theory. However, I conclude that on the facts as well as on the law, the federal statutory claims must be dismissed.

The Americans With Disabilities Act directs that a disabled person as defined in the Act may not "by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity" (42 USC § 12132). In similar language, section 504(a) of the Rehabilitation Act directs that no disabled person "solely by reason of her or his disability [may] be excluded from the participation in, denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ... " (29 USC § 794[a]). As noted by the Second Circuit, notwithstanding some textual distinctions, "the reach and requirements of both statutes are precisely the same" (*Weixel v Board of Educ. of the City of New York*, 287 F3d 138, 146 n6 [2d Cir 2002]), and the analysis often overlaps. Under each, the plaintiff must demonstrate that: (1) he or she is a qualified individual with a disability; (2) that the defendants are subject to these statutes; and (3) that he or she was denied the opportunity to participate in or benefit from the defendants' services, programs or activities or was otherwise discriminated

against by the defendants, by reason of his or her disability; and, for the Rehabilitation Act claim, (4) that the defendant receives federal funding (*Mrs. C v Wheaton*, 916 F2d 69, 74 [2d Cir 1990]). In a special education context, the plaintiff must show that the defendants acted with bad faith or gross misjudgment (*Congemi v Sachem Sch. Dist.*, 2017 WL 5508810, *8, 2017 US Dist LEXIS 217346, *22 [ED NY 2017, Jan. 19, 2017, No. 2:11-CV-01561(SIL)]; *MC v Arlington Cent. Sch. Dist.*, 2012 WL 3020087, *10, 2012 US Dist LEXIS 103064, *41 [SD NY, July 24, 2012, No.11-CV-1835(CS)]).

Common to both of these statutes is the requirement of intentionality - that a plaintiff was intentionally discriminated against, and that the discrimination was a consequence of and directed against his or her disability. Since it is undisputed that plaintiff is disabled and defendants qualify within the meaning of the ADA and section 504(a) of the Rehabilitation Act, the issue presented for appeal concerns defendants' intentions in response to plaintiff's behavior. The ADA and Rehabilitation Act, by addressing intentional discrimination against disabled students rather than incorrect or erroneous special education treatments, in this sense differs from the Individuals and Disabilities Education Act (IDEA) (20 USC sections 1400 *et seq.*). IDEA addresses the provision of inadequate services for a

disabled student which, without more, cannot support a claim of disability-based discrimination (*French v New York State Dept. of Educ.*, 476 Fed Appx 468, 472-473 [2d Cir. 2011]]; *Congemi v Sachem Sch. Dist.*, 2017 WL 5508810, *8 2017 US Dist LEXIS 217346, *21-22). Notably, plaintiff was not deprived of bus service; he was put on an incorrect bus for a period of time, which was inconsistent with his IEP, but the bus delivered him to school in the morning and returned him home in the afternoon, and the situation ultimately was corrected. Hence, plaintiff has not "specified any programs, activities or benefits from which [he] was excluded" (*MC v Arlington Cent. Sch. Dist.*, 2012 WL 3020089, *10, 2012 US Dist LEXIS 103064, *41).

Plaintiff's theory is that Richberg's knowledge of plaintiff's misbehavior, and what seems to be a speculative link with the bus size, coupled with the failure to correct plaintiff's bus assignment earlier - that "for six weeks ... [s]he did nothing" - manifested "bad faith, gross misjudgment, gross negligence, deliberate indifference, or reckless indifference." This, in plaintiff's statutory construction, was tantamount to the necessary showing of intentionality. However, the premise is factually flawed in that these characterizations are not supported by the record, and, in any event, the legal standard is being misapplied. This record does not evince such a

quantum of deliberate indifference as to equate with defendants purposefully depriving plaintiff of a service because of his autism.

Plaintiff, though, argues that "purposeful" discrimination need not even be established, and that intentionality can be inferred when a child is deprived of access to an educational service, such as busing, because of gross negligence or reckless indifference in the absence of discriminatory animus, and that the necessary standard is established by the present record. However, again, plaintiff was bussed; plaintiff speculates that the size of the bus led to his misbehavior, a characterization that seems conclusory on the basis of this record, but, again, there was no deprivation of an educational service. To the extent that plaintiff contends that he suffered emotional pain, that speaks to a negligence theory rather than disability, and not from a deprivation of an educational service on account of plaintiff's autism. Even where a disabled student was being regularly bullied on the bus and elsewhere by another student, coupled with allegations that school officials had been amply made aware of the conduct, the disabled student failed to establish the requisite intentionality in terms that the hostile conduct was causally linked with the plaintiff's disability for purposes of the ADA and section 504 of the Rehabilitation Act;

the absence of nonconclusory facts establishing the necessary linkage required dismissal (*Doe v Torrington Bd of Educ.*, 179 F Supp 3d 179 [ED Conn 2016]; *Eskenazi-McGibney v Connetquot Cent. Sch. Dist.*, 84 F Supp 3d 221 [ED NY 2015]).

Plaintiff, citing to *MC v Arlington Cent. Sch. Dist.*, also insists that intentional discrimination need not be motivated by animosity or ill will, but the distinction is irrelevant; animus and ill will are not demonstrably present in this case. Moreover, the court in *MC* rejected the defendant's unintentional human error as a basis for liability under these statutes and dismissed the action. Similarly, even where a child suffering a disability was deprived of appropriate educational services on the basis of error, the absence of "concrete evidence to support the assertion" that the deprivation manifested bad faith or gross misjudgment required summary judgment for the defendant dismissing claims under the Rehabilitation Act (*C.L. v Scarsdale Union Free Sch. Dist.*, 744 F3d 826, 841 [2d Cir 2014]). Even if plaintiff could have established defendants' deliberate indifference in placing him on the larger bus and then being dilatory in reassigning him to a minibus, which I conclude is unsupported by the record, he still must link defendants' deliberate absence of diligent response to discrimination directed at his disability. Moreover, defendants did respond to

the complaints and assigned plaintiff with a minibus, even if not as swiftly as plaintiff would have wanted, which undermines a claim of deliberate indifference (*Doe v Torrington Bd of Educ.*, 176 F Supp 3d at 196, supra).

Although couched in terms of the need for further factual development, the majority necessarily endorses plaintiff's theory that liability under these statutes could be predicated on something well short of intentional discrimination that is solely directed at a person's disability. If this record is to be the basis for such an outcome, I think that such a holding risks the evisceration of the statutory standard. The statutory text specifically prohibits the wrongful "exclusion" of a child from covered services *because of the disability*, but plaintiff's theory in which the majority acquiesces may inappropriately open the door to lawsuits under these statutes that are in the realm of negligence rather than discrimination directed at a disability.

The majority cites to various decisions for the proposition that the requisite mental state can arise from bad faith or gross misjudgment in the administration of disability services. While I do not dispute the general proposition, the various cases relied on by the majority for that proposition present facts that are widely divergent from the facts before us and are manifestly

inapposite. In *J.L. v New York City Dept. of Educ.* (324 F Supp 3d 455 [SD NY 2018]), the statutory violations arose from "a systemic breakdown in DOE's practices, policies and procedures governing the services it must provide to medically fragile children" (id. at 460). At the outset, that clearly is not the case here where transportation services to and from school, indeed, were provided without interruption. In *J.L.*, one child who suffered seizures and other medical conditions was denied a bus nurse that the IEP required with the result that he missed two years of kindergarten. A second child, who was nonambulatory and suffered other conditions, required a bus nurse as well as wheelchair access to a school bus, but the family was frustratingly put through an ongoing bureaucratic maze over the course of three years during which their documentation was rejected and then accepted but lost, and they were then referred to other agencies, with the result that this child, too, was deprived of access to school. The IEP for a third child, a quadriplegic who also a wheelchair to access school and required a school bus that was wheelchair accessible, which he also was denied, and needed a bus nurse and school nurse at all times since he suffered seizures, whom he was also denied for a substantial time period, thereby depriving him of access to school. *J.L.* clearly has no bearing on the present case.

The majority also relies on *R.B. ex rel. L.B. v Bd of Educ. of the City of New York* (99 F Supp 2d 411 [SD NY 2000]) for the proposition that bad faith and gross misjudgment sustained the federal statutory claims when the Board of Education failed to implement the speech impaired and emotionally disturbed child's IEP requiring placement in a more structured private school setting after he was suspended from public school for an entire year; he received at-home instruction only towards the end of the school year. The majority also relies on *Rutherford v Florida Union Free Sch. Dist.* (2019 WL 1437823, 2019 US Dist LEXIS 55971 [SD NY 2019, March 29, 2019, No. 16-CV-9778 (KMK)]), where the autistic ADHD child also suffered from several other physical and emotional difficulties and was denied required counseling services for two years, leading to an exacerbation of his behavioral problems. He was often intentionally isolated from other students by school personnel, the school district declined to hire an appropriate counselor, the child started to return home bruised, but incident reports to the parents were irregularly provided, and a behavioral plan recommended by a behavioral analyst was not implemented. Other recommended counseling services also were not provided, with the result that the child was kept out of school for a time period and eventually was transferred to an out-of-district school, all the while being

deprived of adequate mental and emotional intervention because of the declined services. In almost all respects, the child's IEP was not implemented. In each cases, these children were deprived of services required by their IEPs for extended time periods with the result that they were effectively denied access to educational services. Manifestly, these cases have no relevance to the uncontested facts of the present case for reasons already noted above.

Finally, the claims asserted under the New York State Human Rights Law (Executive Law § 296[2][a]) and the New York City Human Rights Law (Administrative Code of City of NY § 8-107[4][a]), even according those protections a more liberal construction than that applicable to the federal statutory claims, cannot overcome the fundamental defects discussed above and they, too, thus fail to present viable causes of action.

In conclusion, while there is sufficient evidence to raise the issue of negligence, the evidence relative to that remedy should not be conflated with the disability discrimination regime subject to the more exacting standards imposed under the ADA and section 504(a) of the Rehabilitation Act or even the City and State Human Rights Laws. Accordingly, I would affirm Supreme Court's order dismissing these claims.

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about March 7, 2017, modified, on the law, to deny DOE's summary judgment motion dismissing plaintiff's claims under the Rehabilitation Act, the Americans with Disabilities Act and the New York State and City Human Rights Laws, and otherwise affirmed, without costs.

Opinion by Moulton, J. All concur except Tom, J. who dissents in part in an Opinion.

Renwick, J.P., Tom, Singh, Moulton, JJ.

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

ENTERED: OCTOBER 29, 2019

CLERK