SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 31, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Renwick, J.P., Gische, Kapnick, Singh, JJ.

9821 Citimortgage, Inc., Index 13637/06
Plaintiff-Respondent,

-against-

Rafael Pantoja, et al.,
Defendants,

Ana Iris Salazar, et al.,
Defendants-Appellants.

_____

Balfe & Holland, P.C., Melville (Lee E. Riger of counsel), for appellants.

Houser & Allison, APC, New York (Victoria R. Serigano of counsel), for respondent.

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Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered on or about March 13, 2018, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment on its foreclosure complaint as against defendants Ana Iris Salazar, Bernice Collado, and Intervenida Salvador (the Salazar defendants), unanimously reversed, on the law, without costs, the motion denied, and plaintiff's relief against the Salazar defendants limited to an equitable lien in the amount of the payoff of the prior valid lien held by Chase

Mortgage Company.

It is undisputed that nonparty Rapsil Corporation conveyed the same property to two different recipients, first, defendant Rafael Pantoja (who obtained a mortgage now owned by plaintiff, and, second, a bona fide entity that transferred it to the Salazar defendants. Pantoja is the principal of Rapsil.

In a 2012 action by plaintiff's predecessor in interest, ABN AMBRO, where the sole issue was lien priority (*see ABN Amro Mtge. Group, Inc. v Pantoja*, 91 AD3d 440 [1st Dept 2012]), this Court held that ABN AMRO's mortgage had priority over the MERS mortgage obtained by the Salazars, because it was recorded earlier in time. To the extent that a portion of the ABN AMRO mortgage proceeds had been used to satisfy a previous 1998 mortgage held by nonparty Chase, we held that ABN AMRO was entitled to recover under the doctrine of equitable subrogation. This Court issued no ruling addressing any party's claim to title or the viability of any deeds.

A 2016 action, brought by the Salazars against Pantoja, sought, inter alia, to quiet title and a judgment voiding the Rapsil-to-Pantoja deed. In our order on that appeal we held that the Salazars were not barred by doctrines of collateral estoppel or res judicata from challenging the Rapsil-to-Pantoja deed. We held that the Rapsil-to-Pantoja deed is "void as against all

subsequent purchasers," and affirmed Supreme Court's declaration that the Salazars, not Pantoja, have an ownership interest in the property (*Salazar v Pantoja*, 137 AD3d 511 [1st Dept 2016]). It remains undisputed that the Rapsil-to-Pantoja deed was not acknowledged and that it was not signed by an officer of Rapsil; rather it was only signed by "Rapsil Corporation." These defects rendered the deed void and invalid on its face, making it ineffective to pass title from Rapsil to Pantoja. Since the Rapsil-to-Pantoja deed did not pass title, it was, and continued to be, void at its inception. Language in our 2016 order that the deed is void "as against all subsequent purchasers" is not inconsistent with our finding here that the deed was void at its inception.

Where a deed is void and invalid on its face it conveys no title. Furthermore, "a lender who takes a mortgage to a property subject to a void deed does not have anything to mortgage, [making the] mortgage invalid as well" (*Weiss v Phillips*, 157 AD3d 1, 10 [1st Dept 2017]). Consequently, plaintiff has, and is

limited to, an equitable lien in the amount of the proceeds of the loan that were used to satisfy the prior mortgage lien recorded in 1998 (*ABN AMRO Mtge. Group, Inc.*, 91 AD3d at 440-441).

The Decision and Order of this Court entered herein on July 9, 2019 (174 AD3d 433 [1st Dept 2019]) is hereby recalled and vacated (*see* M-7117 decided simultaneously herewith).

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

ENTERED: OCTOBER 31, 2019

CLERK

Friedman, J.P., Tom, Webber, Gesmer, Oing, JJ.

9981 The People of the State of New York, Respondent, Ind. 2042/13

-against-

Benjamin Vializ, Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Lori Ann Farrington of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Alvin M. Yearwood, J.), rendered May 9, 2016, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 23 years to life, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations, including its evaluation of inconsistencies, and the witnesses' explanations for these inconsistencies.

We agree with defendant that the court should have permitted defense counsel to impeach a detective with his allegedly inconsistent hearing testimony about what one of the eyewitnesses had told the detective regarding the weapon used in the homicide. However, we find the error to be harmless (*see People v Crimmins*,

36 NY2d 230, 237 [1975]). There is no significant probability or possibility that it affected the verdict, and in the context of defendant's line of attack on the credibility of the eyewitness at issue, the particular impeachment of the detective that the court precluded would have not been unhelpful. Moreover, upon our in camera review of the disciplinary record of a testifying police officer, we find that the trial court correctly found the record to be nondiscoverable as not relevant to the defendant's guilt or innocence or to the officer's credibility and that, in any event, the record would not likely have affected the outcome of the verdict.

Defendant's argument that his right to a public trial was violated when, without the court's knowledge or approval, police detectives asked some prospective trial spectators to show identification is unpreserved (*see People v Alvarez*, 20 NY3d 75, 81 [2012], *cert denied* 569 US 910, 947 [2013]), as well as being unreviewable for lack of a sufficiently developed record (*see People v Kinchen*, 60 NY2d 772, 773-774 [1983]), and we decline to review it in the interest of justice. As an alternate holding, we find no basis for reversal. Immediately after learning of this conduct, the court ordered it stopped, and this remedy was satisfactory to defense counsel, who noted that "everybody that we wanted to be here did come in." No inquiry of any kind was

requested, and as a result there is no evidence in the record that any potential spectators had either been excluded or deterred from seeking entry.

The court providently exercised its discretion in admitting seven autopsy photographs (*see People v* Stevens, 76 NY2d 833, 835 [1990]). These photographs were either relevant to material facts in issue, or at least were admissible to "illustrate, elucidate or corroborate" the Medical Examiner's testimony (*id.* at 835), and they were not so gruesome or inflammatory that their prejudicial impact outweighed their probative value (*see id.*).

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 31, 2019

CLERK

Renwick, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

10063 Elmrock Opportunity Master Fund I, L.P., Plaintiff-Appellant, Index 653300/16

-against-

Citicorp North America, Inc., et al., Defendants-Respondents.

Kaplan Fox & Kilsheimer LLP, New York (Gregory K. Arenson of counsel), for appellant.

Goodwin Procter LLP, New York (Marshall H. Fishman of counsel), for respondents.

Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered January 15, 2019, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment on its claim for breach of contract and plaintiff's request for attorneys' fees and costs, and granted partial summary judgment to defendants, unanimously affirmed, without costs.

Plaintiff failed to establish its prima facie entitlement to judgment as a matter of law on is breach of contract claim or, that an issue of fact exists for trial. The record unequivocally demonstrates that the disputed $123,271,899 settlement payment was for "Basic Rent" due under certain facility leases through July 1, 2017. As such, this sum was properly excluded from the

valuation of the "Option Property," as defined in plaintiff's option agreements.

Plaintiff may not recover attorneys' fees and costs (*UBS Sec. LLC v RAE Sys. Inc.*, 101 AD3d 510 [1st Dept 2012], *lv denied* 20 NY3d 861 [2013]).

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

ENTERED: OCTOBER 31, 2019

CLERK

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

10243 The People of the State of New York, Ind. 4653/14
Respondent,

-against-

Tahir El Dey,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Valerie Figueredo 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 (Melissa Jackson, J.), rendered May 25, 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 31, 2019

CLERK

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

Friedman, J.P., Gische, Kapnick, Kern, JJ.

10244 & M-6830 U.S. Bank National Association, etc., Plaintiff-Appellant, Index 850240/14

-against-

Elizabeth Hazan, et al., Defendants-Respondents,

Mortgage Electronic Registration Systems, Inc., etc., et al., Defendants.

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1 East 62nd Street Apt 1A LLC Intervenor-Respondent.

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Eckert Seamans Cherin & Mellott, LLC, White Plains (Riyaz G. Bhimani of counsel), for appellant.

Marzec Law Firm, P.C., Brooklyn (Jerome Noll of counsel), for Elizabeth Hazan and Real Estate Holdings Group, L.D.C., respondents.

Richland & Falkowski, PLLC, Washingtonville (Daniel H. Richland of counsel), for 1 East 62nd Street Apt 1A LLC, respondent.

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Order, Supreme Court, New York County (Judith N. McMahon, J.), entered on May 17, 2018, which granted defendants-respondents' motion to dismiss the complaint with prejudice, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff commenced a prior foreclosure action on April 7 2008, in which it purported to accelerate the underlying mortgage debt. Defendant Hazan moved to dismiss based on plaintiff's

failure to comply with the 30-day notice requirement contained in Section 22 of the mortgage, and her motion was granted due to plaintiff's failure "to comply with the condition precedent regarding service of the thirty-day notice accelerating the loan." When plaintiff commenced this action over six years later, defendants Hazan and Real Estate Holdings Group, LDC moved to dismiss the action as time-barred.

Once a mortgage debt is validly accelerated, the entire amount becomes due and the statute of limitations begins to run on the entire debt (*see MTGLQ Invs., LP v Wozencraft*, 172 AD3d 644 (1st Dept 2019]). Because a mortgage cannot be validly accelerated without proper notice required by the mortgage (*see Norwest Bank Minn. v Sabloff,* 297 AD2d 722, 723 [2d Dept 2002]; *GE Capital Mtge. Servs. v Mittelman*, 238 AD2d 471 [2d Dept 1997]), the order dismissing plaintiff's initial action on precisely that point invalidated the purported acceleration of the mortgage, so that the statute of limitations did not accrue (*see Deutsche Bank Natl. Trust Co. v Board of Mgrs. of the E. 86th St. Condominium*, 162 AD3d 547 [1st Dept 2018] [purported acceleration of mortgage by plaintiff lacking standing was a nullity and did not trigger statute of limitations]; *Wells Fargo Bank N.A. v Burke*, 94 AD3d 980, 982-983 [2d Dept 2012] [since plaintiff's predecessor lacked standing to commence the prior

foreclosure action, commencement of that action did not operate to validly accelerate the debt]).

Accordingly, this action is not barred by the statute of limitations.

M—6830 - *US. Bank National Association v Elizabeth Hazan*,

Motion for counsel fees denied.

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

ENTERED: OCTOBER 31, 2019

CLERK

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

10245-
10245A In re Kimora D.,

A Child Under the Age of Eighteen Years, etc.,

Joseph C.,
Respondent-Appellant,

Ojetta T.D.,
Respondent,

Administration for Children's Services,
Petitioner-Respondent.

_____

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

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

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

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Order of disposition, Family Court, New York County (Ta-Tanisha D. James, J.), entered on or about January 3, 2018, insofar as it brings up for review an amended fact-finding order, same court and Judge, entered on or about May 29, 2018, which found, after a hearing, that respondent neglected the subject child, unanimously affirmed, without costs. Appeal from amended fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

Petitioner proved by a preponderance of the evidence that

respondent, the child's mother's boyfriend, neglected the child (*Matter of Tammie Z.*, 66 NY2d 1 [1985]; Family Court Act § 1012[f][1]) by exposing her to domestic violence (*see Matter of Bobbi B. [Bobby B.]*, 165 AD3d 587 [1st Dept 2018]; *Matter of Moises G. [Luis G.]*, 135 AD3d 527 [1st Dept 2016]; *Matter of Allyera E. [Alando E.]*, 132 AD3d 472, 473 [1st Dept 2015], *lv denied* 26 NY3d 913 [2015]).

The record belies respondent's contention that he was not the aggressor during the July 14, 2016 altercation with the child's mother and that he acted reasonably to protect the then-five-year-old child. The credible testimony shows that both he and the mother were aggressors. The police officer called to the scene of the incident concluded as much and arrested them both, and, according to the child, whose description of the incident was sufficiently corroborated to be considered by the court (*see Matter of Nicole V.*, 71 NY2d 112 [1987]), both adults were fully engaged in the fighting. Respondent himself testified that when the mother pushed him he pushed her back, and he continued to engage with her even after the child repeatedly asked him and the mother to stop fighting.

Respondent's claim that he tried to protect the child is not supported by the record. Respondent fought with the mother after the child repeatedly asked them to stop. He may have been

involved in telling the child to stay in the bathroom while he and the mother fought, but this was in any event a dubious protective measure, given the extremely small size of the apartment, as described by the police officer, and the child's almost certain ability to hear the screaming and struggling over a knife even from behind the bathroom door. Moreover, by entering the bathroom with his fingers lacerated and bloodied by the mother's use of a kitchen knife on him during the altercation, respondent exposed the child to the full extent of the violence between the adults, which she told petitioner's child protective specialist (CPS) scared her.

The record belies respondent's argument that the child was not impaired or in imminent danger of becoming impaired after witnessing the altercation (Family Court Act § 1012[f]). He cites her use of the word "sad," but ignores the fact that the child said she was "scared," and, given her close physical proximity to the altercation, which involved screaming, pushing, biting, and lacerations by knife, the circumstances leave no doubt that the child's emotional and mental health were impaired, or at serious risk of impairment, as a result of what she saw and heard (*see e.g. Matter of O'Ryan Elizah H. [Kairo E.]*, 171 AD3d 429 [1st Dept 2019]; *Matter of Heily A. [Flor F.-Gustavo A.]*, 165 AD3d 457 [1st Dept 2018]; *Matter of Isabella S. [Robert T.]*, 154

AD3d 606 [1st Dept 2017]).

Respondent argues that the court's aid is not required and therefore the petition should be dismissed pursuant to Family Court Act § 1051(c), because he has no further plans to be in contact with the child. Assuming that respondent raised this argument before Family Court, we reject it. Respondent offers no evidence to support his claim that he has no plans to be in contact with the child ever again, and the record strongly suggests otherwise. Respondent referred to the child as his "baby." He told the CPS and the police officer that he loved the child as though she were his flesh and blood and that he had been with her since day one. The CPS reported that the child perceived respondent as her father, and the mother similarly referred to him as such.

Petitioner proved by a preponderance of the evidence that respondent also neglected the child by misusing alcohol and marijuana (Family Court Act §§ 1012[f][i][B]; 1046[a][iii]). Contrary to respondent's contention that there is no evidence of the frequency or effects of his alcohol use, the child's unrebutted statements to the CPS encompass both points. She told the CPS that respondent drank every day, that his doing so made him sway from side to side and made him "crazy" and "different." Respondent failed to offer evidence to the contrary or a reason

to doubt the reliability of the child's statements. Nor did he say that he was in a rehabilitation program so as to render the statutory presumption of neglect based on misuse of alcohol inapplicable (*see* Family Court Act § 1046[a][iii]). Respondent argues that there is no evidence of the specific effects of his alcohol use on his parenting or treatment of the child. However, given respondent's regular alcohol use, the statute does not require such evidence (*see Matter of Nasiim W. [Keala M.]*, 88 AD3d 452 [1st Dept 2011]). The evidence of respondent's marijuana use includes his own testimony that a normal day for him includes marijuana, and he freely admitted to the CPS that he used marijuana, an unrebutted admission corroborated by the mother's testimony. Respondent failed to rebut petitioner's prima facie case of neglect on this basis by showing that he is in drug rehabilitation (*Matter of Shaun H. [Monique B.]*, 161 AD3d 559 [1st Dept 2018]; *Matter of Nyheem E. [Jamila G.]*, 134 AD3d

517, 519 [1st Dept 2015]).

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

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

ENTERED: OCTOBER 31, 2019

CLERK

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

10246 Caroline Wade, Index 307118/13
Plaintiff-Appellant,

-against-

Anthony Giacobbe,
Defendant-Respondent.

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The Ofshtein Law Firm, Brooklyn (Aida Kuperman of counsel), for appellant.

Picciano & Scahill, P.C., Bethpage (Gerard Ferrara of counsel), for respondent.

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Order, Supreme Court, Bronx County (Elizabeth A. Taylor, J.), entered on or about August 14, 2018, which denied plaintiff's motion to renew and/or vacate a prior order granting defendant's motion for summary judgment on default, unanimously affirmed, without costs.

In July 2015, plaintiff defaulted in opposing defendant's motion for summary judgment dismissing her complaint on the threshold issue of lack of a serious injury causally related to the motor vehicle accident involving defendant's vehicle (Insurance Law § 5102[d]). Defendant's motion was granted on default in October 2015, and plaintiff did not move to vacate the default until September 2016. In November 2016, the court denied that motion due to plaintiff's failure to file proof of personal service in compliance with the order to show cause. In March

2017, plaintiff brought this motion to renew and/or vacate the October 2015 order and also argued that the November 2016 order should be granted upon renewal.

The motion court providently exercised its discretion in declining to grant leave to renew the summary judgment motion and/or the prior motion to vacate because plaintiff raised no new facts that would have changed the outcome of the prior motions, and failed to provide a reasonable excuse for failing to present those facts at the proper time (*see* CPLR 2221[e]). Plaintiff's proffered new fact, an affidavit of service of the order to show cause, did not demonstrate personal service in compliance with the court's directive. Nor did her recently acquired affirmed medical report warrant renewal of the motion. Renewal is granted sparingly and is not a second chance freely given to parties who have failed to exercise due diligence in making their first factual presentation (*see Henry v Peguero*, 72 AD3d 600, 602 [1st Dept 2010], *appeal dismissed* 15 NY3d 820 [2010]; *Chelsea Piers Mgt. v Forest Elec. Corp.*, 281 AD2d 252, 252 [1st Dept 2001]).

Alternatively, considering the belated motion to vacate the default on the merits, we find that plaintiff failed to provide a reasonable excuse for defaulting on defendant's motion for summary judgment (*see* CPLR 5015[a][1]). Plaintiff's counsel did not adequately explain the inability to timely obtain medical

documents in admissible form to oppose the motion, or her failure either to seek an adjournment or to submit opposition explaining the inability to obtain medical evidence in admissible form (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Nor did counsel explain why it took nearly two months to receive the treating doctor's report after it was prepared and another eleven months to obtain an attestation from the doctor.

Counsel's vague and unsubstantiated claim that repeated requests were made for the doctor to provide the report did not amount to a reasonable excuse for the default, which had already occurred (*see Fernandez v Santos*, 161 AD3d 473, 474 [1st Dept 2018]; *Galaxy Gen. Contr. Corp. v 2201 7th Ave. Realty LLC*, 95 AD3d 789, 790 [1st Dept 2012]). While the issue need not be reached due to the absence of an acceptable excuse for the default (*see Fernandez v Santos*, 161 AD3d at 474), plaintiff also failed to demonstrate a meritorious defense to defendant's motion for summary judgment on the threshold serious injury issue. Among other things, the affirmed medical report did not provide proof of contemporaneous treatment of the claimed shoulder injury or of significant or permanent consequential limitations in range of motion as compared to normal (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353 [2002]; *Stephanie N. v Davis*, 126 AD3d 502, 502 [1st Dept 2015]).

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

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

ENTERED: OCTOBER 31, 2019

CLERK

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

10247 Universal Construction Resources, Inc.,
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

Index 652432/17

_____

Kelly D. MacNeal, New York (Gil Nahmias of counsel), for appellant.

Sullivan PC, New York (Peter R. Sullivan of counsel), for respondent.

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Order, Supreme Court, New York County (John J. Kelley, J.), entered November 7, 2018, which, to the extent appealed from denied defendant's motion to dismiss the first, second, and third causes of action, unanimously reversed, on the law, without costs, and motion granted. The Clerk is directed to enter judgment accordingly.

Three of the purported notices of claim were not facially compliant with Section 23 of the contract. Neither the July 19, 2015 letter nor the April 11, 2016 letter was designated a notice of claim, a defect this Court has found to warrant the dismissal of a contractor's action against the Housing Authority (*see Matter of Intercontinental Constr. Contr., Inc. v New York City Hous. Auth.*, 173 AD3d 453, 454 [1st Dept 2019]). The failure to

state the "nature and amount of the extra costs or damages" sought in the July 19, 2015, February 12, 2016, and April 11, 2016 letters also required dismissal (*see Hi-Tech Constr. & Mgt. Servs. Inc. v Housing Auth. of the City of N.Y.*, 125 AD3d 542, 542 [1st Dept 2015], *lv denied* 26 NY3d 908 [2015]), since Section 23 makes notice an express condition precedent to suit or recovery (*see Schindler El. Corp. v Tully Constr. Co., Inc.*, 139 AD3d 930, 931 [1st Dept 2016]).

The March 1, 2017 notice of claim was untimely, as the project was substantially completed on March 23, 2016, and the certificate of final acceptance was dated May 9, 2016. Therefore, plaintiff's claims or damages could have been ascertained well before the March 1, 2017 notice of claim was sent (*see C.S.A. Contr. Corp. v New York City School Constr. Auth.*, 5 NY3d 189, 192 [2005]; *D & L Assoc., Inc. v New York City School Constr. Auth.*, 69 AD3d 435, 435 [1st Dept 2010]).

Additional discovery is not necessary, as plaintiff was required to maintain weekly payroll records, rented or acquired materials and equipment before it began work, and based its subcontractor costs on pre-negotiated rates. Based on this data, plaintiff could have, by March 23, 2016 when the work was substantially complete, or upon final acceptance of the work on May 9, 2016, calculated costs and damages (*see D & L Assoc.*,

Inc., 69 AD3d at 435). Plaintiff has made no showing how defendant's alleged misconduct impaired its ability to fulfill Section 23 of the contract (*A.H.A. Gen. Constr. v New York City Hous. Auth.*, 92 NY2d 20, 33-34 [1998]).

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

ENTERED: OCTOBER 31, 2019

CLERK

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

10248 The People of the State of New York, Ind. 3788/16
Respondent,

-against-

Typree Smallwood,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Christopher Marin 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, Bronx County (John W. Carter, J.), rendered March 9, 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 31, 2019

CLERK

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

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

10249 The People of the State of New York, Respondent, Ind. 4097/14

-against-

Robert Moco,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Deborah L. Morse of counsel), for respondent.

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Judgment, Supreme Court, New York County (Ann M. Donnelly, J.), rendered October 16, 2015, convicting defendant, after a jury trial, of stalking in the first degree, criminal contempt in the first degree and two counts of criminal contempt in the second degree, and sentencing him to an aggregate term of seven years, unanimously affirmed.

The People should not have been permitted to cross-examine defendant about the underlying facts of two prior arrests that resulted in dismissals, where the prosecutor had not ascertained whether the charges had been dismissed on the merits, which would have negated any good faith basis for inquiry (*see People v Padilla*, 28 AD3d 365 [1st Dept 2006], *lv denied* 7 NY3d 792 [2006]; *see also People v Stabell*, 270 AD2d 894, 894 [4th Dept 2000], *lv denied* 95 NY2d 804 [2000]). Nevertheless, any

prejudice from the brief questioning was minimized by the court's statement to the jury that the charges were dismissed, and by defendant's testimony to that effect. In any case, any error was harmless because the proof of defendant's guilt was overwhelming, and there was no significant probability that the jury would have acquitted defendant had the error not occurred (*see People v Crimmins*, 36 NY2d 230, 241-242 [1975]). The victim testified in detail to defendant's threats, stalking, and violence, and her testimony was corroborated by, among other things, one of her landlords and recordings of defendant's threatening phone calls to owners of the restaurant where the victim worked.

The court providently exercised its discretion in denying defendant's request for a continuance, in the midst of trial testimony, for the purpose of hiring new counsel. Even though the court initially expressed a disinclination to grant the application, it gave defendant a full opportunity to express his grievances against his counsel, who was already the third lawyer on the case. Defendant's complaints about, and lack of communication with, his trial counsel fell short of the kind of exigent or compelling circumstances that would warrant disruption

of an ongoing trial to permit defendant to seek another attorney (*see People v Arroyave*, 49 NY2d 264, 271-272 [1980]; *People v Hansen*, 37 AD3d 318, 319 [1st Dept 2007]).

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 31, 2019

CLERK

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

10250 Todd Courtney, et al., Index 157696/17
Plaintiffs-Respondents,

-against-

John P. McDonald, et al.,
Defendants-Appellants.

_____

Winget, Spadafora & Schwartzberg, LLP, New York (Anthony D. Green of counsel), for appellants.

The Law Office of Aaron M. Schlossberg, P.L.L.C., New York (Aaron M. Schlossberg of counsel), for respondents.

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Order, Supreme Court, New York County (David B. Cohen, J.), entered May 8, 2018, which, to extent appealed from as limited by the briefs, denied defendants' motion to dismiss the complaint, unanimously modified, on the law, to grant the motion as to the first cause of action insofar as it is based on defendants' representation of plaintiffs in the matter concerning 304 W 18th and to grant the motion as to the second and third causes of action in their entirety, and otherwise affirmed, without costs.

The first cause of action in plaintiffs' complaint alleges legal malpractice with respect to defendants representation of plaintiffs in two underlying actions - the 304 W 18th Street matter and the 175 W 12th Street matter. Contrary to defendants' argument, the malpractice cause of action with respect to the 175

W 12th Street matter is not time-barred by the three-year statute of limitations applicable to legal malpractice claims (CPLR 214[6]). Defendants failed to demonstrate that the attorney-client relationship ceased to exist within three years of August 28, 2017, the date plaintiffs filed this action. Although defendants sent a letter, dated August 7, 2014, unilaterally terminating their representation of plaintiffs, they failed to move to withdraw from representation in the foreclosure action (*see* CPLR 321[b]) until more than a year after sending the subject letter. Accordingly, to the extent plaintiffs' first cause of action concerns alleged legal malpractice by defendants in their representation of plaintiffs in the matter concerning 175 W 12th Street, the motion to dismiss that cause of action was properly denied.

However, the complaint fails to state a cause of action for legal malpractice with respect to defendants' representation of plaintiff in the action concerning 304 West 18th Street, because the allegations of the complaint, even if timely, would not establish "that but for the attorney's negligence, [plaintiffs] would have prevailed in the underlying matter or would not have sustained any ascertainable damages" (*Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 115 AD3d 228, 236-237 [1st Dept 2014] [internal quotation marks omitted], *mod on other*

grounds 26 NY3d 40 [2015]). Accordingly, the portion of the first cause of action concerning the 304 W 18th Street matter should have been dismissed.

The breach of fiduciary duty and breach of contract claims should be dismissed as duplicative, as they arise out of the same facts and seek the same damages as the legal malpractice claim (*InKine Pharm. Co. v Coleman*, 305 AD2d 151 [1st Dept 2003]).

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

ENTERED: OCTOBER 31, 2019

CLERK

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

10252 Amparo Checo, Index 21812/17E
Plaintiff-Respondent,

-against-

Express, LLC,
Defendant-Appellant.

_____

Perez & Morris LLC, New City (Michael J. Glidden of counsel), for appellant.

Melcer Newman PLLC, New York (Jeffrey B. Melcer of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Donna M. Mills, J.), entered January 23, 2019, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff has sufficiently raised a factual issue based on her deposition testimony that the stool collapsed when she attempted to sit on it, and any inconsistencies in her testimony in this regard raise credibility issues for a jury to determine (*see Narvaez v 2914 Third Ave. Bronx, LLC*, 88 AD3d 500, 501 [1st

Dept 2011]).

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

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

ENTERED: OCTOBER 31, 2019

CLERK

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

10253 & M-7291 In re The State of New York, Petitioner-Respondent, Index 30202/16

-against-

Jesus H., Respondent-Appellant.

_____

Marvin Bernstein, Mental Hygiene Legal Service, New York (Diane Goldstein Temkin of counsel), for appellant.

Letitia James, Attorney General, New York (Philip J. Levitz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Daniel Conviser, J.), entered August 28, 2018, which, insofar as appealed from as limited by the briefs, after a bench trial, determined that respondent is a detained sex offender who suffers from a mental abnormality requiring him to be subject to civil management under Mental Hygiene Law (MHL) article 10, unanimously affirmed, without costs.

In 1993, respondent threatened his stepmother with a knife, telling her he planned to rape and kill her. His stepmother pleaded with him not to hurt her. In response, he orally sodomized her, repeatedly punched her in the face, stabbed her in the neck, and lacerated her throat. When his original knife broke, he sought another one in the house, came back, and continued to stab her. When she become unresponsive, respondent

hid the knife in the house, washed himself off, and fled. When he was apprehended, respondent admitted the crime, but stated he did not "give a shit about the whole thing." For this offense, he was convicted and sentenced to up to 23 years of incarceration.

In 2002, while serving his sentence, respondent lured a female corrections officer into a secluded space and began punching her head and face repeatedly until she briefly lost consciousness. When she revived, respondent began kicking her in her spine, and then smashed her head into a block wall. Again, she briefly passed out. Upon awakening, she found that respondent had opened her shirt, put his face in her chest, and was undoing her pants, and he grabbed her "private female parts." He was then apprehended by other correction officers who had entered the space and subdued him. For this offense, he was sentenced to seven years incarceration, to be served in solitary confinement, where he remained from 2002 until 2012.

During the entirety of his incarceration period, respondent committed 24 disciplinary violations, 17 of which were of the most serious class, and some of which were sex-related, including sending crude letters to various female corrections officers and masturbating while maintaining eye contact with the prison librarian. Many female corrections officers refused to guard

respondent due to this harassing behavior.

When respondent was up for release in 2016, the State initiated this article 10 proceeding. In an article 10 trial, evidence that a respondent suffers from anti-social personality disorder (ASPD) can be "used to support a finding [of] mental abnormality as defined by Mental Hygiene Law § 10.03(i) when it is . . . accompanied by *any* other diagnosis of mental abnormality" (*Matter of State of New York v Donald DD.*, 24 NY3d 174, 177 [2014] [emphasis added]).

In its decision, Supreme Court, after a bench trial, credited the expert testimony diagnosing respondent with ASPD and psychopathic traits and features, but declined to credit their diagnoses of a variety of other disorders including sexual sadism disorder. It proffered no explanation as to its decision, but nevertheless granted the State's petition. Respondent appeals.

With regard to the appropriate scope of this Court's review on this appeal, it is well settled that as to the review of a judgment following a nonjury trial, this Court's "authority is as broad as that of the trial court" and that "as to a bench trial [the Appellate Division] may render the judgment it finds warranted by the facts, taking into account in a close case the fact that the trial judge had the advantage of seeing the witnesses" (*Northern Westchester Professional Park Assoc. v Town*

of Bedford, 60 NY2d 492, 499 [1983] [internal quotation marks omitted]; *Green v William Penn Life Ins. Co. of N.Y.*, 74 AD3d 570, 571 [1st Dept 2010, Saxe, J., concurring]).

Although we agree with Supreme Court's conclusion, we find that it erred by not crediting the expert diagnoses of sexual sadism disorder, as this diagnosis was clearly supported by the record. This disorder, when paired with the diagnosis of ASPD, is sufficient to meet the criteria to show that respondent has a predisposition of conduct constituting a sex offense, as required under *Donald DD.* to establish a mental abnormality under article 10 (*see Donald DD.*, 24 NY3d at 177; *Matter of Suggs v State of New York*, 142 AD3d 1283 [4th Dept 2016]). Moreover, the State submitted clear and convincing evidence that respondent's conduct while imprisoned supports not only his predisposition to commit conduct constituting a sex offense *but also* his "serious difficulty in controlling such conduct" (*Matter of State of New York v Dennis K.*, 27 NY3d 718, 726 [2016], *cert denied* __US__, 137 S Ct 574 [2016] [internal quotation marks omitted]).

Supreme Court is owed no deference in light of its lack of explanation or indication as to why it declined to credit the expert testimony underlying the diagnoses, while crediting the same experts' diagnosis of ASPD (*see e.g. Bernard v State of New York*, 34 AD3d 1065, 1067 [3d Dept 2006] [where a trial court "did

not resolve issues of credibility, no deference is owed"]). Additionally, we also note that, as Supreme Court mentioned, respondent refused to be interviewed by a psychiatric examiner, and, under article 10, we are permitted to consider that fact in reaching this decision (MHL 10.07[c]).

M-7291 - *State of New York v Jesus H.*

Motion to strike portions of brief granted.

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

ENTERED: OCTOBER 31, 2019

CLERK

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

10254 In re Jermaine K.R., and Others,

Dependent Children Under the Age
of Eighteen Years, etc.,

Jermaine R.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent,

Taerae S.,
Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

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

The Law Office of Steven P. Forbes, Jamaica (Steven P. Forbes of counsel), attorney for the children.

_____

Order of disposition, Family Court, Bronx County (Alma M. Gomez, J.), entered on or about December 7, 2018, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about October 30, 2018, which found that respondent Jermaine R. neglected subject children Jermaine, Justin, Justina, and Jessica, unanimously affirmed, without costs.

Respondent Jermaine R. is the biological father of subject children Jermaine, Justin, Justina, and Jessica. He is not the father of the subject child Delilah, and ACS did not establish

that he was legally responsible for her care. The Family Court found that the ACS CPS caseworker testified credibly that respondent father Jermaine R., respondent mother Taerae S., and the subject child Delilah all admitted to her that the father punched the mother in the face, causing her to have a black eye, in the presence of all five subject children. During the same fight, the father pushed the mother, and the mother hit the father in the back of the head with a drinking glass. The five-year-old child Delilah told ACS that she witnessed the violent physical fight between the parents, she was with her four younger siblings at the time, and one of her siblings began crying immediately as a result of the fight.

"Exposure to domestic violence is a proper basis for a neglect finding where the violence occurred in the child's presence and resulted in physical, mental or emotional impairment or imminent danger thereof" (*Matter of Emily S. [Jorge S.]*, 146 AD3d 599, 600 [1st Dept 2017]; *Matter of Christy C. [Jeffrey C.]*, 74 AD3d 561, 562 [1st Dept 2010]). "A single incident where the parent's judgment was strongly impaired and the child was exposed to a risk of substantial harm can sustain a finding of neglect" (*Matter of Allyerra E. [Alando E.]*, 132 AD3d 472, 473 [1st Dept 2015], *lv denied* 26 NY3d 913 [2015]; *see also Matter of Cristalyn G. [Elvis S.]*, 158 AD3d 563 [1st Dept 2018]). Here, the five

extremely young children were in imminent danger of physical impairment due to their close proximity to the violence (*Matter of Andru G. [Jasmine C.]*, 156 AD3d 456, 457 [1st Dept 2017]; *see Matter of Isabella S. [Robert T.]*, 154 AD3d 606, 606-607 [1st Dept 2017]). Moreover, that the children were emotionally impaired or in imminent danger thereof as demonstrated by the fact that one child began crying as a result of the fight they witnessed (*see Matter of Isaiah D. [Mark D.]*, 159 AD3d 534, 535 [1st Dept 2018]; *Matter of Macin D. [Miguel D.]*, 148 AD3d 572, 573 [1st Dept 2017]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: OCTOBER 31, 2019

CLERK

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

10255-
10255A-
10255B-
10255C

Index 153314/12

Fausto DeJesus,
Plaintiff-Respondent,

-against-

Tatiana Moshiashvili, et al.,
Defendants-Appellants.

- - - - -

[And Other Actions]

_____

Nicolini, Paradise, Ferretti & Sabella, PLLC, Mineola (John J. Nicolini of counsel), for appellants.

Sivin & Miller, LLP, New York (Andrew C. Weiss of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Gerald Lebovits, J.), entered July 31, 2018, upon a jury verdict, awarding damages to plaintiff, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered July 17, 2018, which denied defendants' motions pursuant to CPLR 4401 and 4404(a) to dismiss the complaint or set aside the verdict, and order, same court (Arlene P. Bluth, J.), entered April 14, 2017, to the extent it denied defendants' motion for summary judgment dismissing the complaint in its entirety as against defendant Michael Moshiashvili (Michael), unanimously dismissed, without costs, as subsumed in the appeal from the judgment. Purported

appeal from the jury verdict unanimously dismissed, without costs, as taken from a nonappealable paper.

Supreme Court correctly declined to dismiss the malicious prosecution and abuse of process claims against Michael, either at the summary judgment stage or at trial. A genuine issue of material fact existed for resolution by a jury as to whether Michael, despite believing that defendant Tatiana Moshiashvili's (Tatiana) allegations were false, not only maliciously withheld critical evidence but actively encouraged the prosecution of plaintiff (*see Brown v Sears Roebuck & Co.*, 297 AD2d 205, 210 [1st Dept 2002]; *Lupski v County of Nassau*, 32 AD3d 997, 998 [2d Dept 2006]; *Mesiti v Wegman*, 307 AD2d 339, 341 [2d Dept 2003]). A genuine issue of material fact also existed as to Michael's role in the prosecution of plaintiff and whether he perverted the process with intent to do harm without excuse or justification to achieve a collateral objective (*see generally Curiano v Suozzi*, 63 NY2d 113, 116 [1984]).

The court properly admitted into evidence, over defendants' objection, incident reports and testimony of defendants' former neighbor under the motive and intent exceptions of *People v Molineux* (168 NY 264, 294-300 [1901]). Each of the incident reports was either directly relevant to this action or was also

properly admitted pursuant to the common plan or scheme exception under *Molineux* (168 NY at 305-313).

We find that the damages awards are not excessive.

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

ENTERED: OCTOBER 31, 2019

CLERK

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

10256 The People of the State of New York, Ind. 30033/17
Respondent,

-against-

Timothy Buckley,
Defendant-Appellant.

_____

Justine M. Luongo, The Legal Aid Society, New York (Rachel L. Pecker of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Juan M. Merchan, J.), rendered April 27, 2017, which adjudicated defendant a level two offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

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, including the psychiatric report he submitted, were adequately taken into account by the risk assessment instrument or outweighed by aggravating factors, including the egregiousness of the underlying child pornography offense (*see People v Labarbera*, 140 AD3d 463 [1st Dept 2016], *lv denied* 28 NY3d 902 [2016]). We do not find that the assignment of points under the risk factors for number of victims and victimization of strangers overassessed

defendant's risk of reoffense. In any event, the record also supports the court's alternative holding that, even if defendant were to be deemed a level one offender based on his point score, the court would grant an upward departure to level two, in light of the aggravating circumstances (*see People v Ryan*, 157 AD3d 463 [1st Dept 2018], 31 NY3d 904 [2018]).

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

ENTERED: OCTOBER 31, 2019

CLERK

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

10257 Alexa Varela, etc., et al., Index 22513/12E
Plaintiffs-Appellants,

-against-

Brynn Rohlf,
Defendant-Respondent,

Vincent Zanfardino,
Defendant-Appellant.

_____

Mauro Lilling Naparty, LLP, Woodbury (Kathryn M. Beer of counsel), for Alexa Varela, Alfred Mario Reitano and Sofia Patricia Reitano, appellants.

Vouté, Lohrfink, Magro & McAndrew, LLP, White Plains (David Schreiber of counsel), for Vincent Zanfardino, appellant.

Picciano & Scahill, P.C., Bethpage (Gerard Ferrara of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered November 20, 2018, dismissing the complaint as against defendant Rohlf, unanimously reversed, on the law, without costs, the judgment vacated, and the complaint reinstated as against Rohlf.

Defendant Rohlf established prima facie that the motor vehicle accident from which this action arises was caused by defendant Vincent Zanfardino by submitting her own deposition testimony, the testimony of the passenger in Zanfardino's vehicle, the police accident report, and Zanfardino's deposition

testimony in which he exercised his Fifth Amendment right to remain silent in response to questions about the cause of the accident (*see Matter of Commissioner of Social Servs. v Philip De G.*, 59 NY2d 137, 141 [1983] [witness's exercise of Fifth Amendment right in civil case "allow(s) the trier of fact to draw the strongest inference against him that the opposing evidence in the record permits"]).

However, in opposition, plaintiffs and Zanfardino raised an issue of fact as to whether Rohlf's conduct was a substantial causative factor in the accident by presenting Rohlf's testimony admitting that as she merged onto I-95, she did not see Zanfardino's car before the collision and the testimony of two friends of hers that she admitted to using drugs immediately before the accident and that she was distracted by the conduct of her fiancé in the passenger seat beside her. Moreover, both Rohlf and her fiancé exercised their Fifth Amendment rights when asked if they were using drugs in the car and in response to other questions concerning drug activity (*see id.*). In addition, based on the damage to both vehicles and their position on the roadway after the accident, the investigating police officer stated that Rohlf may have improperly failed to yield the right of way when merging onto the highway, and this conclusion was echoed by plaintiffs' and Zanfardino's experts.

The court's reliance on the testimony of a single witness was misplaced in light of this additional evidence, as it entailed a credibility determination (*see Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997]).

The court properly granted Rohlf an extension of time to file her motion for summary judgment upon her showing of good cause for the delay (*see Brill v City of New York*, 2 NY3d 648, 652 [2004]).

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

ENTERED: OCTOBER 31, 2019

CLERK

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

10259 The People of the State of New York, Ind. 2707/15
Respondent,

-against-

Jonathan K.,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Samuel Z. Goldfine 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 (Ronald Zweibel, J. at plea; Mark Dwyer, J. at sentencing), rendered June 2, 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 31, 2019

CLERK

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

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

10260 In re Technology Insurance Company Inc., Petitioner-Appellant, Index 652376/17

-against-

Progressive Max Insurance Company, Respondent-Respondent.

_____

Marschhausen & Fitzpatrick, P.C., Hicksville (Kevin P. Fitzpatrick of counsel), for appellant.

Carman, Callahan & Ingham, LLP, Farmingdale (Paul A. Barrett of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Arlene P. Bluth, J.), entered on or about December 8, 2017, which denied the petition to vacate an arbitration award dated February 4, 2017 and dismissed the proceeding, unanimously affirmed, without costs.

The award in this compulsory arbitration was neither irrational nor arbitrary and capricious (*see e.g. Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223 [1996]; *Caso v Coffey*, 41 NY2d 153, 158 [1976]). It was rational

for the arbitrator to rely on guidance from the Loss Transfer Advisory Committee and the Office of General Counsel, New York State Insurance Department (*see Matter of City of Syracuse v Utica Mut. Ins. Co.*, 61 NY2d 691, 693 [1984]).

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

ENTERED: OCTOBER 31, 2019

CLERK

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

10261 Joanne Scheinin, etc., et al., Index 302216/16
Plaintiffs-Respondents,

-against-

Habib Monas, M.D., et al.,
Defendants,

Bronx Harbor Health Care Complex Inc.,
doing business as Kings Harbor Multicare Center,
Defendant-Appellant.

_____

Kaufman Borgeest & Ryan LLP, Valhalla (David Bloom of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Robert T. Johnson, J.), entered on or about May 25, 2018, which, to the extent appealed from, denied defendant Bronx Harbor Health Care Complex Inc. d/b/a Kings Harbor Multicare Center's (Kings Harbor) motion for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Kings Harbor, the rehabilitation center to which plaintiff was transferred after surgery and hospitalization, was entitled to summary judgment dismissing plaintiff's complaint against it. In opposition to this defendant's motion, plaintiff's expert failed to identify any symptom or condition, which, if reported

to plaintiff's physicians, would have expedited their diagnosis and treatment. Accordingly, plaintiff's expert failed to demonstrate that Kings Harbor deviated from accepted medical practice and that such failure was a proximate cause of plaintiff's death (*see Bartolacci-Meir v Sassoon*, 149 AD3d 567, 571-573 [1st Dept 2017]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]).

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

ENTERED: OCTOBER 31, 2019

CLERK

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

10264N Jesus Lema, et al., Index 31184/17E
Plaintiffs-Appellants-Respondents, 12228/17
150221/18E
-against- 150316/18

The 1148 Corporation,
Defendant-Respondent.
- - - - -
[And Other Actions]
- - - - -
Fireman's Fund Insurance Company as
subrogee of The 1148 Corporation,
Plaintiff-Respondent,

-against-

Montano Wood Care, Corp.,
Defendant-Respondent-Appellant.

_____

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

Lewis Johs Avallone Aviles, LLP, New York (David Metzger of counsel), for respondent-appellant.

Lawrence, Worden, Rainis & Bard, P.C., Melville (Karin McCarthy of counsel), and Sheps Law Group P.C., Huntington (Robert C. Sheps of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered April 6, 2018, which denied the motion of plaintiffs Jesus Lema and Maria Lema for consolidation of three personal injury actions and to set venue in the Bronx, and granted the motion of defendant The 1148 Corporation for joint discovery and trial of the three personal injury actions and one subrogation action, with venue set in New York County, unanimously affirmed,

without costs.

There is a preference to join cases for discovery and trial in the interests of judicial economy and ease of decision-making where there are common questions of law and fact, unless the party opposing the motion demonstrates that joint trial will prejudice a substantial right; deference is accorded to the motion court's discretion (*see* CPLR 602[a]; *Raboy v McCrory Corp.*, 210 AD2d 145, 147 [1st Dept 1994]; *Matter of Hill v Smalls*, 49 AD2d 724 [1st Dept 1975], *appeal dismissed* 38 NY2d 893 [1976]). The motion court here providently exercised its discretion in finding that common questions of fact and law warrant invocation of CPLR 602(a) for joint discovery and trial of all four actions (*see Bass v France*, 70 AD2d 849 [1st Dept 1979]; *Bank of N.Y. v Rodgers*, 40 AD2d 777 [1st Dept 1972]). That the fourth action is one for subrogation does not substantially prejudice plaintiffs (*see Fisher 40th & 3rd Co. v Welsbach Elec. Corp.*, 266 AD2d 169, 170 [1st Dept 1999]; *compare McGinty v Structure-Tone*, 140 AD3d 465 [1st Dept 2016] [litigating an insurance coverage claim together with the underlying liability issues is inherently prejudicial to the insurer]).

It was also a provident exercise of discretion for the court to set venue in New York County when it joined the actions. While the first action was filed in the Bronx, that county bears no connection to this matter other than being the residence of the plaintiffs in that action. That the incident occurred in New

York County, hospital treatment of plaintiffs was provided in New York County, and two of the four actions are already pending in New York County are not special circumstances sufficient to justify disturbing the motion court's exercise of discretion such that the motion court's exercise of discretion (*see Fields v Zweibel*, 36 AD2d 808 [1st Dept 1971]; *see also Ferolito v Vultaggio*, 115 AD3d 541 [1st Dept 2014]).

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

ENTERED: OCTOBER 31, 2019

CLERK

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

10265 In re Anna Pezhman, OP 184/19
[M-3438] Petitioner,

-against-

Hon. Shlomo Hagler, etc.,
Respondent.

_____

Anna Pezhman, petitioner pro se.

Letitia James, Attorney General, New York (Monica Hanna of counsel), for 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,

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

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

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

ENTERED: OCTOBER 31, 2019

CLERK