SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 10, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Gische, Webber, Gesmer, Moulton, JJ.

9480 Triadou SPV S.A., Index 653462/14
Plaintiff-Respondent,

-against-

CF 135 Flat LLC, et al.,
Defendants-Appellants.

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Sukenik, Segal & Graff, P.C., New York (David Salhanick of counsel), for appellants.

Kravit Smith LLP, New York (Philip M. Smith of counsel), for respondent.

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Order, Supreme Court, New York County (David B. Cohen, J.), entered on or about March 30, 2018, which declared that defendants owed post-judgment interest on the four separate judgments entered against them, unanimously affirmed, without costs.

Defendants' deposit of full payment on the judgments entered against it to a court monitored escrow account (the Monitorship Account) was not unconditional, such that it did not stop the accrual of post-judgment interest (*see Cohen v Transcontinental Ins. Co.*, 262 AD2d 189, 191 [1st Dept 1999] [absent an unconditional tender, defendant would owe plaintiff interest from

the date of entry of the original judgment]; *see also Garigen v Morrow*, 303 AD2d 956 [4th Dept 2003]). Although the Monitorship Order expressly directed the Monitor to collect the judgment amounts and expressly provides for the collection of "pre- and post-judgment interest," such funds could not be further transferred until further order of the court. Moreover, the Monitorship Order reflects that the parties were not waiving "any rights, defenses or claims not set forth in the agreed order" by stipulating to the appointment of such Monitor. Accordingly, defendants' payment to the Monitorship Account was conditioned on defendants preserving both their defenses to plaintiff's claims, and defendants' direct claims to those funds.

Contrary to defendants' arguments, the payment to the Monitorship Account was not a "deposit to the court," as it was not "pursuant to an order of the court, made upon motion" (CPLR 5021[a][3]). Rather under the circumstances, the Monitorship Account functioned simply as an escrow account while the defendants continued to oppose plaintiff's claims and pursue their own.

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

The Decision and Order of this Court entered herein on May 30, 2019 is hereby recalled and vacated (*see* M-3505 decided simultaneously herewith).

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

ENTERED: SEPTEMBER 10, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Gesmer, Kern, Singh, JJ.

9581-
9581A-
9581B-
9581C-
9581D In re Michael R.,
Petitioner-Respondent,

-against-

Amanda R.,
Respondent-Appellant.

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Bruce A. Young, New York, for appellant.

Burger Green & Min LLP, New York (Richard Min of counsel), for respondent.

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Order, Family Court, New York County (Lewis A. Borofsky, Support Magistrate), entered on or about June 7, 2017, which granted a motion for preclusion against respondent mother, unanimously reversed, on the law, without costs, and the order vacated. Orders, same court and Support Magistrate, entered on or about December 7, 2017, which, upon the finding that the mother willfully violated a child support order, directed entry of a money judgment and directed the mother to pay petitioner father's counsel fees, unanimously reversed, on the law and the facts, without costs, and the orders vacated. Order, same court (Clark V. Richardson, J.), entered on or about March 20, 2018, which denied the mother's objections, unanimously reversed, on

the law, without costs, and the matter remanded for further proceedings consistent with this order. Appeal from warrant of arrest against the mother, same court (Patria Frias-Colon, J.), entered on or about February 8, 2018, unanimously dismissed, without costs, as taken from a nonappealable paper.

It is undisputed that the parties are divorced and have three children, a son who is now 24, and twin daughters who are now 21. It is also undisputed that, during this proceeding, the mother has resided in Israel, and the father has resided in New York. On or about November 24, 2014, the father filed a petition for child support enforcement.

The first and only day of trial on the father's enforcement petition took place on February 2, 2016 before the Support Magistrate. On that date, the father offered into evidence, without objection, his typewritten summary of the amount that he claimed the mother then owed for basic child support and for her share of the children's add-on expenses. The father's summary alleges that the mother owed total arrears of $63,003.53, from October 15, 2012 through November 1, 2015. However, he did not testify or present any documentation or other evidence to support the numbers in his chart.

The mother testified as to her income, employment, and payment of child support and add-on expenses, and put into

evidence, without objection, the parties' child support stipulation dated on or about August 20, 2012, her tax returns for 2012 through 2014, a letter of employment, documentation of unemployment benefits she had received, and her financial disclosure affidavit.[1] At the end of the day, the court adjourned the proceeding during the mother's testimony. Although there were further court dates, the court never took further testimony.

On or about May 8, 2017, the father made a motion for relief pursuant to CPLR 3126 for the mother's alleged failure to comply with pretrial discovery. The Support Magistrate granted it by order dated June 7, 2017, stating only that the motion was granted "in the following respect(s): order of preclusion against" the mother.

On or about December 7, 2017, the Support Magistrate issued findings of fact, an order of disposition, and an "Order Entry Money Judgment." The findings of fact state that the mother's testimony and evidence at trial are stricken, based on the preclusion order. The findings further state that neither party

[1]The appellate record contains the trial transcript. However, because, as discussed below, the Support Magistrate later struck the mother's testimony and exhibits, the exhibits offered by her at trial and received in evidence are not in the record before us.

"submitted proof of income, expenses, or support of others." The findings further state that the mother owes the father arrears totaling $123,720.98. This number was apparently based solely on the father's "alleged statement of arrears" submitted to the Support Magistrate on September 13, 2017, a date when no testimony was taken, and no exhibits received in evidence. Both the order of disposition and the "Order Entry Money Judgment" direct entry of a money judgment against the mother in the amount of $123,720.98. In addition, the "Order Entry Money Judgment" directs the mother to pay the father's attorney $4,680 as counsel fees. The findings and the two orders entered that day each contained a determination that the mother had willfully violated an order of support dated April 25, 2014, although that order was not in evidence.[2]

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[2]We note that the Support Magistrate's finding of willfulness failed to comply with the Family Court Rules, which require, inter alia, a recitation of "the specific facts upon which the finding of willfulness is based" (22 NYCRR 205.43[g][1]). In addition, the findings are internally inconsistent as to the mother's ability to pay. On the one hand, the findings determine, without explanation, that the mother's failure to pay child support was willful, which implies a finding that the mother was able to pay (*Matter of Powers v Powers*, 86 NY2d 63, 68 [1995] ["Willfulness requires proof of both the ability to pay support and the failure to do so"]). On the other hand, the findings determine that the basic child support obligation for the parties' twin daughters is $50 per month, the mother's pro rata share of which is $25 per month, and that the mother is "not responsible" for any of the children's medical or day care expenses, "as her income falls within the self support

On February 8, 2018, the father and counsel for each party appeared before Judge Frias-Colon, who issued a warrant directing that the mother be brought before the court, and stated, "And at that time when [the mother] is returned before this Court on that warrant, this Court will then determine. . . how this Court should proceed."

By order dated March 20, 2018, Family Court denied the mother's objections to the Support Magistrate's findings of fact and orders entered on December 7, 2017.

The mother now appeals from the March 20, 2018 order of the Family Court denying her objections, the Support Magistrate's orders entered on December 7, 2017, and the February 8, 2018 warrant of arrest.

As an initial matter, pursuant to CPLR 5501(a)(1), we review the Support Magistrate's June 7, 2017 "order of preclusion." Upon doing so, we find that it was improper, and vacate it for two reasons. First, the mother had complied with the compulsory financial disclosure required of parties to a child support proceeding (Family Ct Act § 424-a[a]) by producing her most recent tax return and her financial affidavit, which the Support Magistrate had previously received in evidence, along with other

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reserve or poverty level after paying the above amount toward child support."

documentation of her income, employment status and receipt of unemployment benefits in Israel.[3] Therefore, the Support Magistrate did not have authority to issue the order of preclusion under Family Court Act § 424-a(b).

Second, the father proceeded to trial on February 2, 2016 without first seeking to compel any additional financial discovery. Five months after trial commenced, by notice of motion dated July 7, 2016, the father sought to compel the mother's production of documents sought in his discovery notice dated March 25, 2015.[4] The father never sought or received permission to conduct further discovery after trial commenced, as required by CPLR 3102(d). By order dated August 12, 2016, the Support Magistrate denied the father's motion "at this time as to preclusion," even though the father's motion had not sought

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[3]It is undisputed that the parties' children were covered by the father's health insurance. Accordingly, information about the mother's health insurance benefits in Israel was not relevant to this proceeding.

[4]Although the mother does not appear to have contested service, we note that the father's March 25, 2015 discovery notice may not have been properly served. The affidavit of service alleges that the mother was personally served at a post office in New York City on March 25, 2015, and that a copy of the notice was mailed to her in Israel from the same post office on the same date. It is doubtful that the mother, who then lived in Israel, was personally served at a New York post office. Moreover, at that time, the mother was represented by counsel. Accordingly, service should have been made on her attorney.

preclusion.

Over a year later, by notice of motion dated May 8, 2017, the father moved for relief pursuant to CPLR 3126 for the mother's alleged failure to comply with discovery. Specifically, the father sought, more than a year after trial commenced, to strike the mother's answer to the father's petition and grant him a default judgment, or, in the alternative, to preclude her from testifying or presenting evidence at trial. The Support Magistrate granted this motion by issuing its June 7, 2017 order of preclusion.

A party may seek additional disclosure after trial commences only by permission of the trial court on notice (CPLR 3102[d]). Here, the father never sought permission for posttrial discovery. Nor do the father's motion papers demonstrate any reason why he should have been permitted to pursue additional discovery more than a year after trial commenced. In view of this, and the fact that the mother faced contempt penalties if she were unable to present evidence about her ability to pay, the Support Magistrate improvidently exercised his discretion in "precluding" the mother from presenting evidence and testimony that he had already admitted into evidence at trial more than a year previously.

Family Court's March 20, 2018 order denying the mother's objections was in error in four respects. First, it improperly

found that the Support Magistrate had made a recommendation as to incarceration and a purge amount, when he had not done so. Indeed, the findings of fact state, "Should petitioner seek relief other than the entry of a judgment for the outstanding arrears, the case will be adjourned for dispostion [sic] at which time other dispositional options will be considered by the court." Moreover, even if he had recommended incarceration, that would have had no effect until confirmed by a Family Court Judge, which had not occurred (Family Ct Act § 439[a]).

The Family Court Act provides that a determination by a support magistrate that a person is in willful violation of a support order "*and that recommends commitment shall be transmitted to the parties*, accompanied by findings of fact, but the determination shall have no force and effect until confirmed by a judge of the court" (Family Ct Act § 439[a] [emphasis added]). Furthermore, the Family Court Rules require that a support magistrate's fact findings that include a finding of willfulness "shall include. . . a recommendation regarding the sanctions that should be imposed, including a recommendation whether the sanction of incarceration is recommended" (22 NYCRR 205.43[g]). A support magistrate's written findings of facts must be issued within five days of the conclusion of a willfulness hearing (22 NYCRR 205.43[f]). Accordingly, we have

previously held that a "Support Magistrate's failure to make a recommendation as to incarceration upon [a] finding of willfulness essentially constituted a recommendation against incarceration" (*Matter of Carmen R. v Luis I.*, 160 AD3d 460, 462 [1st Dept 2018]).

Here, neither the Support Magistrate's findings of facts issued on or about December 7, 2017 nor any other document in the record contains a recommendation as to incarceration or a cure amount. It is not clear why the Family Court Judge before whom the parties appeared on February 8, 2018 stated on the record that she "believe[d]" that he had made such a recommendation. In addition, the attorneys for both parties each confirmed on the record that they were unaware that the Support Magistrate had made such a recommendation. Therefore, it is clear that no recommendation had been "transmitted to the parties" with the findings of facts. Moreover, there is no order in the record in which a Family Court Judge confirmed any recommendation by the Support Magistrate as to incarceration. Accordingly, Family Court erred in making a finding in its March 20, 2018 order that the Support Magistrate had made such a recommendation.

Second, Family Court erred in denying the objections on the basis that the mother's counsel failed to file a proper affidavit of service. Any error in the affidavit of service was

inadvertent and did not prejudice the father. Family Court Act § 439(e) provides that a party filing objections must serve those objections upon the opposing party, and that proof of service must be filed with the court at the time that the party's objections are filed. Here, the father does not argue either that the mother failed to serve the objections on him or that he suffered any prejudice. Accordingly, despite the mother's attorney's sloppy drafting, the Family Court should have addressed the merits of the mother's objections (*Matter of Worner v Gavin*, 112 AD3d 956, 957 [2d Dept 2013]; *Matter of Nash v Yablon-Nash*, 106 AD3d 740, 741 [2d Dept 2013]; *Matter of Perez v Villamil*, 19 AD3d 501 [2d Dept 2005]).

Third, contrary to the Family Court's conclusion that the mother was also barred from objecting to the amount of arrears by the doctrine of law of the case, that doctrine is only applicable to "legal determinations that were necessarily resolved *on the merits* in a prior decision" (*J.P. Morgan Sec., Inc. v Vigilant Ins. Co.*, 166 AD3d 1, 8 [1st Dept 2018] [emphasis added] [internal quotation marks omitted]). Since the mother's earlier-filed objections were denied on procedural grounds, the application of the doctrine of the law of the case did not apply under the circumstances here.

Fourth, Family Court erred in not deciding on the merits the

mother's objections to the sums set forth in the Support Magistrate's orders entered on December 7, 2017. Had Family Court considered the mother's objections on the merits at the time, it would have had to either make new findings or remand for further proceedings and issuance of new findings by a support magistrate (Family Ct Act § 439[e]), since the Support Magistrate lacked sufficient evidence to find that the mother had failed to pay any sums due, much less that she had willfully failed to do so.

A "finding of willful violation on which a person may be incarcerated requires clear and convincing evidence. . . . Willfulness requires proof of both the ability to pay support and the failure to do so. . . . [P]roof that respondent has failed to pay support as ordered alone establishes petitioner's direct case of willful violation, shifting to respondent the burden of going forward" (*Matter of Powers v Powers*, 86 NY2d at 68-69).

Here, because the Support Magistrate had struck all of the mother's testimony and evidence, including a copy of the parties' child support agreement,[5] the only evidence supporting the father's claims was his summary of alleged arrears, admitted into

[5]Because the mother's trial exhibits are not included in the record before us, it is not clear whether the child support agreement was attached to a copy of the parties' amended divorce judgment, into which their agreement was apparently incorporated.

evidence without testimony or supporting documentation on the single day of trial. The summary itself was hearsay, and was not competent evidence of the mother's obligation to pay child support or that she failed to pay any sums she was obligated to pay. Nor was it clear and convincing evidence of respondent's willful failure to pay such sums. Moreover, the summary apparently relied on by the Support Magistrate, which the father provided to the court on a later date when no testimony was taken or evidence entered, was not evidence at all.

Accordingly, we now reverse the Support Magistrate's orders entered on or about December 7, 2017 and reverse the March 20, 2018 order denying the mother's objections, and remand for further proceedings. Family Court may either "remand one or more issues of fact to the support magistrate. . . [or] make, with or without holding a new hearing, his or her own findings of fact and order" (Family Ct Act § 439[e]). Since we have vacated the Support Magistrate's June 7, 2017 order of preclusion against the mother, her testimony and documents placed in evidence on February 2, 2016 should not have been stricken, and can now be considered. If the Family Court finds that it now has sufficient evidence to render findings as to the sums the mother was obligated to pay, and the sums she failed to pay, if any, it may render new findings and issue an appropriate order. If it finds

that the trial record is insufficient to issue new findings, it may hold a new hearing or remand one or more issues of fact to the Support Magistrate.

Finally, no appeal lies from a warrant of arrest and, contrary to the father's arguments, its issuance date is irrelevant to the question of timeliness of the mother's appeal (*see Holubar v Holubar*, 2011 NY Slip Op 66140[U] [2d Dept 2011]; CPLR 5701).

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

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

ENTERED: SEPTEMBER 10, 2019

CLERK

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

9611 Derek Coombes, et al., Index 155497/14
Plaintiffs-Appellants,

-against-

Shawmut Design & Construction, et al.,
Defendants-Respondents.
- - - - -
Shawmut Design & Construction, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Rockmor Electric Enterprises,
Third-Party Defendant-Respondent.
- - - - -
Rockmor Electric Enterprises,
Second Third-Party Plaintiff-Respondent,

-against-

Cord Contracting Co., Inc.,
Second Third-Party Defendant.

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The Braunstein Law Firm, PLLC, New City (Michael L. Braunstein of counsel), for appellants.

Lawrence, Worden, Rainis & Bard, P.C., Melville (Michael E. Shay of counsel), for Shawmut Design & Construction and Apple, Inc., respondents.

Camacho Mauro Mulholland, LLP, New York (Anthony J. Buono of counsel), for Rockmor Electronic Enterprises, respondent.

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Order, Supreme Court, New York County (James E. d'Auguste, J.), entered on or about April 25, 2018, which, to the extent appealed from, denied plaintiffs' motion for summary judgment on liability on their Labor Law §§ 240(1) and 241(6) claims and

granted defendants/third-party plaintiffs Shawmut Design & Construction (Shawmut) and Apple, Inc.'s (Apple) and third-party defendant/second third-party plaintiff Rockmor Electric Enterprises' (Rockmor) motions for summary judgment dismissing the complaint, unanimously modified, on the law, to grant plaintiffs' motion as to the Labor Law § 240(1) claim, and deny Shawmut and Apple's, and Rockmor's motions as to the common law negligence and Labor Law § 200 claims as against Shawmut and as to the Labor Law § 240(1) claim, and otherwise affirmed, without costs.

Plaintiff electrician was injured when he fell from an elevated concrete platform on his work site that did not have safety rails or stairs, and over which he was repeatedly required to traverse to access an electrical panel to do his work. This accident falls within the ambit of Labor Law § 240(1), because plaintiff's injuries were the direct consequence of a failure to provide adequate protection, such as a guardrail or stairs, to prevent the risk posed by the physically significant elevation differential (*see Burton v CW Equities, LLC*, 97 AD3d 462 [1st Dept 2012]).

Since plaintiffs' Labor Law § 200 claim is premised upon Shawmut's alleged notice and failure to remedy the dangerous condition of materials stored haphazardly on the platform where

plaintiff fell, it should have been sustained (*see Burton*, 97 AD3d 462).

However, Supreme Court properly dismissed the Labor Law § 241(6) claim, as each of the Industrial Code provisions relied on by plaintiffs is either inapplicable or too general to give rise to liability under the statute.

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

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

ENTERED: SEPTEMBER 10, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Kapnick, Oing, Singh, JJ.

9628 Cushman & Wakefield, Inc., Index 652055/18
Plaintiff-Appellant,

-against-

Kadmon Corporation, LLC doing business as Kadmon, LLC,
Defendant-Respondent.

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Steven Landy & Associates, PLLC, New York (David A. Wolf of counsel), for appellant.

Axelrod, Fingerhut & Dennis, New York (Osman Dennis of counsel), for respondent.

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Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered February 4, 2019, which to the extent appealed from, as limited by the briefs, denied plaintiff's motion for summary judgment on its cause of action for an account stated, unanimously affirmed, without costs.

Plaintiff Cushman & Wakefield, Inc's (Cushman) August 17, 2017 invoice, in addition to the September 14, 2017 demand letter, were sufficient to create an account stated (*see Rosenberg Selsman Rosenzweig & Co. v Slutsker*, 278 AD2d 145, 145 [1st Dept 2000]). Nevertheless, a discrete invoice does not evidence a mutually agreed upon balanced account, as "where an account is rendered showing a balance, the party receiving it must, within a reasonable time, examine it and object, if he

disputes its correctness. If he omits to do so, he will be deemed by his silence to have acquiesced, and will be bound by it as an account stated, unless fraud, mistake or other equitable considerations are shown" (*Shaw v Silver*, 95 AD3d 416, 416 [1st Dept 2012]). The affidavit of Kadmon's representative, in which he averred that "after Cushman made a demand for commission, I gratuitously made a counter offer of $100,000 on behalf of Kadmon because of Kadmon's relationship with the Landlord and Mr. Hartman, and in recognition of the time and effort expended," was sufficient to defeat summary judgment at this juncture (*Levisohn, Lerner, Berger & Langsam v Gottlieb*, 309 AD2d 668, 668 [1st Dept 2003], *lv denied* 1 NY3d 509 [2004]; *Prudential Bldg. Maintenance Corp. v Siedman Assoc.*, 86 AD2d 519, 519 [1st Dept 1982]).

Moreover, an account stated "cannot be used to create liability where none otherwise exists" (*DL Marble & Granite Inc. v Madison Park Owner, LLC*, 105 AD3d 479, 479 [1st Dept 2013]). The circumstances here - where Kadmon denied that it should have to pay a commission because Cushman had nothing to do with the rental to a new tenant - indicate that the parties might not have reached a "meeting of the minds" on the final amount owed (*Prudential Bldg.*, 86 AD2d at 519).

We find that Supreme Court did not abuse its discretion in considering Kadmon's untimely rule 19-A statement when it denied Cushman's motion for summary judgment (*Abreu v Barking & Assoc. Realty, Inc.*, 69 AD3d 420, 421 [1st Dept 2010]).

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

ENTERED: SEPTEMBER 10, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Kapnick, Oing, Singh, JJ.

9649 Donna Rotante, etc., Index 308437/10
Plaintiff-Appellant,

-against-

New York Presbyterian Hospital-
New York Weill Cornell Medical Center,
Defendant-Respondent,

Chaim Charytan, M.D., et al.,
Defendants.

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Hasapidis Law Offices, Scarsdale (Annette G. Hasapidis of counsel), for appellant.

Heidel, Pittoni, Murphy & Bach, LLP, New York (Daniel S. Ratner of counsel), for respondent.

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Order, Supreme Court, Bronx County (Lewis J. Lubell, J.), entered on or about July 16, 2018, which granted defendant New York Presbyterian Hospital-New York Weill Cornell Medical Center's motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

In this wrongful death action, plaintiff alleges that defendant's medical personnel failed to properly treat and diagnose the decedent during an emergency department (ED) visit at defendant hospital, leading to his death three days later. At the time of decedent's visit, a laboratory facility (not affiliated with defendant) had failed to inform him that as of five days prior, he had tested positive for Methicillin Sensitive

Staphylococcus Aureus (MSSA), a bacterial staph infection. Although decedent had low blood pressure when presenting, he was coherent, did not need assistance in walking, and was able to play with his child in the waiting room. After 90 minutes, the decedent was re-assessed by a triage nurse. Fifteen minutes thereafter, he lost consciousness and went into cardiac arrest, but the attending physician and resident were able to resuscitate him and return his pulse to normal. Thereafter, decedent was transferred to the medical intensive care unit, and, after phoning the decedent's dialysis treatment center, discovered that he was positive for MSSA.

Defendant made a prima facie showing of entitlement to summary judgment by submitting an expert affirmation, the testimony of the attending medical personnel, the testimony of plaintiff, and the decedent's medical records. Defendant's expert opined that, because the decedent displayed he was coherent, could walk without assistance, and denied chest paints, there was no reason for the ED to suspect that he had MSSA and required immediate attention (*seeAlvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]). The expert also opined based on the medical records and his experience that even if defendant was to have quickly discovered the bacteremia, decedent's cardiac arrest was unavoidable.

Plaintiff failed to defeat defendant's prima facie entitlement to summary judgment by introducing a new theory of liability (*see Biondi v Behrman*, 149 AD3d 562, 563 [1st Dept 2017], *lv dismissed and denied in part* 30 NY3d 1012 [2017]). Further, plaintiff's expert failed to address the opinions and conclusions of defendant's expert regarding decedent's condition upon arrival at the ED, which included lack of fever, shortness of breath while sitting, chest pains, and no indication that he was bacteremic (*see David v Hutchinson*, 114 AD3d 412, 413 [1st Dept 2014]). Further, plaintiff's expert merely speculated that if defendant had timely discovered the life-threatening condition, decedent would have had a 30 percent chance of recovery (*see Park v Kovachevich*, 116 AD3d 182, 191 [1st Dept 2014], *lv denied* 23 NY3d 906 [2014]). Moreover, "the failure to investigate a condition that would have led to an *incidental discovery of an unindicated condition*, does not constitute malpractice" (*David*, 114 AD3d at 413 [emphasis added]).

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

ENTERED: SEPTEMBER 10, 2019

CLERK

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

9728 Michelle Haskins, Index 303536/15E
Plaintiff-Respondent,

-against-

Serge Somrov, M.D., et al.,
Defendants-Appellants.

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Kaufman Borgeest & Ryan LLP, Valhalla (Jacqueline Mandell of counsel), for Serge Somrov, M.D., appellant.

McAloon & Friedman, P.C., New York (Gina Bernardi Di Folco of counsel), for Bronx Lebanon Hospital Center, appellant.

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

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Order, Supreme Court, Bronx County (Lewis J. Lubell, J.), entered on or about September 4, 2018, which, to the extent appealed from, denied both defendants' motions for summary judgment, unanimously affirmed, without costs.

Contrary to defendants' contentions, the opinions set forth by plaintiff's expert, Dr. Ira Mehlman, raised a triable issue of fact as to whether their acts or omissions caused plaintiff's injuries because those opinions were neither conclusory nor speculative (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324-325 [1986]). Although defendants argue that Dr. Mehlman failed to address certain opinions set forth by their experts, those opinions were conclusory or did not affect Dr. Mehlman's

conclusion.

Bronx Lebanon has not established, under the circumstances of this case, that it had no duty as a matter of law to review plaintiff's chest X-ray (*see Burtman v Brown*, 97 AD3d 156, 161 [1st Dept 2012]). We decline to consider Bronx Lebanon's request that we dismiss plaintiff's claims against it that are based on vicarious liability for Dr. Somrov's acts because that relief was not requested from the motion court.

We have considered the parties' remaining contentions and find them unavailing.

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

ENTERED: SEPTEMBER 10, 2019

CLERK

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

9733 Irma Vega, etc., Index 23559/16E
Plaintiff-Respondent,

-against-

CM and Associates Construction Management, LLC,
Defendant-Appellant.

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Forchelli Deegan Terrana LLP, Uniondale (John M. Comiskey of counsel), for appellant.

Abdul Hassan Law Group, PPLC, Queens Village (Abdul K. Hassan of counsel), for respondent.

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Order, Supreme Court, Bronx County (Ruben Franco, J.), entered May 15, 2018, which denied defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff alleges that she was employed by defendant from approximately May of 2014 to September of 2015 as a manual laborer, and that, during that time, she was paid her wages on a biweekly basis, in violation of Labor Law § 191(1)(a), which requires weekly payment of manual workers. Plaintiff seeks to recover liquidated damages, as well as interest and reasonable attorney's fees, pursuant to Labor Law § 198(1-a), which applies to "wage claims based upon violations of one or more of the substantive provisions of Labor Law article 6" (*Gottlieb v Kenneth D. Laub & Co.*, 82 NY2d 457, 459 [1993]).

The purpose of section 198(1-a) is "enhancing enforcement of the Labor Law's substantive wage enforcement provisions" (*id.* at 463; *see generally Pachter v Bernard Hodes Group, Inc.*, 10 NY3d 609, 615 [2008]), and contrary to defendant's argument that § 198 provides remedies only in the event of nonpayment or partial payment of wages (but not in the event of late payment of wages), the plain language of the statute indicates that individuals may bring suit for any "wage claim" against an employer. The remedies provided by section 198(1-a) apply to "violations of article 6" (*Gottlieb*, 82 NY2d at 463), and section 191(1)(a) is a part of article 6.

Contrary to defendant's argument, the term underpayment encompasses the instances where an employer violates the frequency requirements of section 191(1)(a) but pays all wages due before the commencement of an action. "In the absence of any controlling statutory definition, we construe words of ordinary import with their usual and commonly understood meaning, and in that connection have regarded dictionary definitions as 'useful guideposts' in determining the meaning of a word or phrase" (*Rosner v Metropolitan Prop. & Liab. Ins. Co.*, 96 NY2d 475, 479-480 [2001]). The word underpayment is the noun for the verb underpay; underpay is defined as "to pay less than what is normal or required" (Merriam-Webster's Collegiate Dictionary 1364 [11th

ed 2012]). The moment that an employer fails to pay wages in compliance with section 191(1)(a), the employer pays less than what is required.

We reject defendant's implicit attempt to read into section 198(1-a) an ability to cure a violation and evade the statute by paying the wages that are due before the commencement of an action.[1] The employer may assert an affirmative defense of payment if there are no wages for the "employee to recover" (Labor Law § 198[1-a]). However, payment does not eviscerate the employee's statutory remedies.

In interpreting the liquidated damages provisions of the Fair Labor Standards Act of 1938 (FLSA), the Supreme Court has held that, regardless of whether an employee has been paid wages owed before the commencement of the action, the statute provides a liquidated damages remedy for the "failure to pay the statutory minimum on time," in order to provide "compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages" (*Brooklyn Sav. Bank v O'Neil*, 324 US 697, 707 [1945]). Labor Law § 198(1-a), although not identical to the

[1]Defendant's argument would apply with equal force to the instances where the employer pays no wages or partially pays wages but ultimately makes payment prior to the commencement of an action.

FLSA liquidated damages provision (29 USC § 216[b]), has "no meaningful differences, and both are designed to deter wage-and-hour violations in a manner calculated to compensate the party harmed" (*Rana v Islam*, 887 F3d 118, 123 [2d Cir 2018] [internal quotation marks omitted]). Accordingly, liquidated damages may be available under Labor Law § 198(1-a) to provide a remedy to workers complaining of untimely payment of wages, as well as nonpayment or partial payment of wages.[2]

Labor Law § 198(1-a) expressly provides a private right of action for a violation of Labor Law § 191. Defendant's position that no private right of action exists is dependent on its erroneous assertion that the late payment of wages is not an underpayment of wages.

Furthermore, even if Labor Law § 198 does not expressly authorize a private action for violation of the requirements of Labor Law § 191, a remedy may be implied since plaintiff is one of the class for whose particular benefit the statute was enacted, the recognition of a private right of action would

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[2]The legislative history of the 1967 amendment to section 198 reflects that in addition to imposing "stronger sanctions" to compel employer compliance, "[t]he imposition of liquidated damages will also compensate the employee for the loss of the use of the money to which he was entitled" (Governor's Approval Mem, Bill Jacket, L 1967, ch 310; 1967 NY Legis Ann at 271). The employee loses the use of money whether he or she is never paid, partially paid, or paid late.

promote the legislative purpose of the statute and the creation of such a right would be consistent with the legislative scheme (*see Sheehy v Big Flats Community Day*, 73 NY2d 629, 633 [1989]; *see also Rhodes v Herz*, 84 AD3d 1 [1st Dept 2011], *lv dismissed* 18 NY3d 838 [2011]). Here, plaintiff is a "manual worker" as defined by the statute, and allowing her to bring suit would promote the legislative purpose of § 191, which is to protect workers who are generally "dependent upon their wages for sustenance" (*see People v Vetri*, 309 NY 401, 405 [1955], citing former Labor Law § 196), and § 198, which was enacted to deter abuses and violations of the labor laws (*see P & L Group v Garfinkel*, 150 AD2d 663, 664 [2d Dept 1989] [section 198 "reflect(s) a strong legislative policy aimed at protecting an employee's right to wages earned"]). It would also be consistent with the legislative scheme, as section 198 explicitly provides that individuals may bring suit against an employer for

violations of the labor laws, even if the Commissioner chooses not to do so (*see AHA Sales, Inc. v Creative Bath Prods., Inc.*, 58 AD3d 6, 15 [2d Dept 2008]).

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

ENTERED: SEPTEMBER 10, 2019

CLERK

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

9734- Index 107019/10
9734A Estate of Robert Liss,
Plaintiff-Appellant,

-against-

Sage Systems, Inc.,
Defendant-Respondent.

_____

Raimondi Law, P.C., Massapequa (Christopher A. Raimondi of counsel), for appellant.

Law Offices of Fred L. Seeman, New York (Fred L. Seeman of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Barbara Jaffe, J.), entered April 19, 2019, which granted defendant's motion for summary judgment on its counterclaim for specific performance, terminated plaintiff's right to possess the portion of the tenth floor (the shared premises occupied by the decedent's and defendant's partnership) that it occupied in the building at 246 West 38th Street, ordered plaintiff to vacate those premises and deliver them to defendant free and clear of subtenants, ordered defendant to tender the "Fixed Price" of $469,169.92 to plaintiff, and ordered that, upon such tender, plaintiff's interest in the partnership shall be terminated, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered September 4, 2018, unanimously

dismissed, without costs, as subsumed in the appeal from the order and judgment.

Plaintiff argues that the affidavit by Shahen Chekijian, defendant's president, should have been stricken by the motion court, and should be disregarded on appeal, because of Chekijian's alleged gamesmanship in avoiding his deposition. However, there is no indication in the record that plaintiff moved to compel Chekijian's deposition or brought to the court's attention the delays or other scheduling issues it details in its appellate brief. Accordingly, these arguments will not be heard now.

We reject plaintiff's arguments about the invalidity of the March 31, 2011 notice of election to purchase. As an initial matter, the notice provision on which plaintiff relies, ¶ 13.03 of the partnership agreement, is not relevant, as it concerns notice to "Liss" (the decedent), who was no longer alive at the time the notice was given; the agreement is silent as to notice to Liss's estate, heirs, successors and/or assigns, unlike references made in other sections of the agreement (i.e., ¶ 13.07, Successors and Assigns). Moreover, defendant's counsel was diligent in sending the notice by letter to Christopher Raimondi, Esq., via multiple delivery methods, with a copy to plaintiff's offices, particularly as counsel had previously been

in contact with Raimondi.

Plaintiff's arguments are also inconsistent. Plaintiff argues that the March 31, 2011 notice was invalid and ineffectual, yet simultaneously argues that the notice triggered the 30-day deadline for the closing. Plaintiff also failed to rebut Chekijian's statement that, by 2011, it had been decades since the decedent was at 767 Lexington Avenue, and plaintiff never stated to whom, during the limbo period in which the notice was sent (no executor named, no counsel to plaintiff yet retained) the notice should have been sent, and to what address. Moreover, the record shows that Michael Liss, the eventual executor of Liss's estate, had actual notice of defendant's election shortly after the letter was sent; in his April 7 letter, Raimondi says that he is responding to defendant's counsel's letter regarding the election to purchase "at the request of Michael Liss" (*see Kaplan v Lippman*, 75 NY2d 320 [1990]).

Plaintiff offers no support for its argument that delays in closing would not have been excusable under ¶ 13.08 of the partnership agreement. That paragraph plainly provides that no delay in the exercise of any right will impair or affect a partner's right thereafter to exercise that right. Plaintiff contends that where a right is limited by certain conditions

specifically set forth in the agreement, ¶ 13.08 does not apply, and those obligations must be followed. However, ¶ 13.08 does not say this, and plaintiff offers no other support for its argument.

The motion court was correct in adopting defendant's interpretation of the "Fixed Price" amount as $469,169.22, as calculated pursuant to ¶ 11.01 of the agreement, which provides, in relevant part, as follows:

> "The Fixed Price shall be an amount equal to the product of (i) the sum of (y) One Hundred Twelve Thousand Five Hundred Dollars ($112,500), increased by a factor of six percent (6%) per annum from the date hereof to the date of Notice, and (z) any amounts contributed to the Partnership by the Partners on account of (aa) the renovation plan and (bb) any Building or Unit mortgage, all as increased by a factor of six percent (6%) per annum from the date of contribution to the date of Notice, and (ii) the Partnership Interest of the Offering Partner."

As the motion court found, while it is undisputed that the partners contributed monthly with pro-rata contributions to the partnership for the co-op's monthly maintenance fees, those fees were paid to the co-op, not to the partnership. Nor were any amounts contributed by the individual partners to the partnership "on account of" the unit mortgage. The mortgage note dated as of February 21, 1984 reflects that any interest and/or principal payments made during the four-year period from March 1984 to February 1988 were to be paid directly to the note holder and not

to the partnership. Similarly, the record does not reflect that the individual partners ever made any contributions to the partnership "on account of" the building mortgage.

The court correctly declined to dismiss the indemnification counterclaim. On the record before us, it cannot be determined whether, for instance, defendant might prevail on the aspect of the claim arising from the decedent's alleged commencement of proceedings against the cooperative without its consent. Plaintiff argues that the partnership agreement did not expressly prohibit him from doing so. However, the agreement also does not indicate that the 43.07% partner could do so unilaterally. Moreover, plaintiff does not address the merits of that aspect of the indemnification claim arising from the decedent's failed dissolution proceedings.

The court appropriately denied plaintiff's motion to dismiss the separate case pending between the parties, captioned *Sage Systems, Inc. v Liss* (Sup Ct, NY County, Index No. 650745/2010). We note, however, that judicial economy would be better served if

these cases were consolidated.

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: SEPTEMBER 10, 2019

CLERK