SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 2, 2020

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

10531 & M-8500 — Index 150147/17

In re Jay Sarkar,
Petitioner-Appellant,

-against-

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

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Jay Sarkar, appellant pro se.

Georgia M. Pestana, Acting Corporation Counsel, New York (Antonella Karlin of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Carmen Victoria St. George, J.), entered August 7, 2017, denying the petition to compel respondent New York City Office of Special Commissioner of Investigation (SCI) to remove from its website an investigation report dated December 12, 2006, that substantiated allegations against petitioner of theft of services and recommended that he be deemed ineligible to work as a contractor for respondent New York City Department of Education (DOE), and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The decision not to remove the report upon petitioner's request was not arbitrary and capricious (*Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 232 [1974]). The record demonstrates that SCI considered petitioner's refusal to participate in its investigation, the nature of the conduct it substantiated, and the public interest in exposing misconduct. It was not unreasonable for SCI to conclude that petitioner's untimely rebuttal, submitted to the DOE months after it adopted SCI's recommendations, and the almost 10 years that passed from the report's publication before petitioner's current request, did not compel the report's removal.

Petitioner's challenge to SCI's authorization to publish reports online is unpreserved and, in any event, unavailing (*see Matter of WE 223 Ralph LLC v New York City Dept. of Hous. Preserv. & Dev.*, 173 AD3d 436, 437 [1st Dept 2019]). The Special Commissioner is authorized to "issue such reports regarding corruption or other criminal activity, unethical conduct, conflicts of interest, and misconduct, that he or she deems to be in the best interest of the school district" (NYC Executive Order No. 11, § 3[a] [1990]). The power to publish substantiated

misconduct is necessarily implied (*see Matter of City of New York v State of N.Y. Commn. on Cable Tel.*, 47 NY2d 89, 92 [1979]).

M-8500 ***In re Sarkar v City of New York***

Motion for reconsideration denied.

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

ENTERED: JANUARY 2, 2020

CLERK

Friedman, J.P., Webber, Kern, Moulton, JJ.

10670 Garey Gordon, Index 5116/10
Plaintiff-Respondent,

-against-

Hope Anderson,
Defendant-Appellant.

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Dikman & Dikman, Lake Success (David S. Dikman of counsel), for appellant.

Fuchs & Eichen, Harrison (Linda A. Eichen of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered on or about January 5, 2018, insofar as appealed from as limited by the briefs, awarding plaintiff husband 50% of the appreciation of defendant wife's separate real property, 50% of the cash surrender value of the wife's life insurance policies, and directing the wife to pay the husband outstanding counsel fees in the amount of $41,355.31, unanimously modified, on the law and the facts, to deny the husband any portion of the appreciation of the wife's separate real property, and otherwise affirmed, without costs.

The court improperly distributed 50% of the appreciation of the wife's separate real property because the husband failed to establish his entitlement to it. The husband argues that he is entitled to 50% of the appreciation of the property on the ground

that he actively contributed toward the renovations of the property. However, the husband fails to provide any nexus between his alleged contributions and the property's appreciation in value. The husband relies on the testimony of a city tax assessor, who testified only as to the property's passive appreciation, specifically, that the property appreciated in value based on comparative sales in the area, and did not testify that any appreciation in value was due to the renovations done to the property. Indeed, the assessor could not have testified as to whether the property appreciated due to the renovations because he never entered the property to view any of the renovations and he did not take such renovations into account when making his assessment.

Regarding the wife's life insurance policies obtained before the marriage, the court distributed the total cash surrender value as set forth in documents subpoenaed by the husband and entered into evidence at trial. Thus, contrary to the wife's contention, there was an evidentiary basis for its valuation. While generally only the appreciated cash value of the policies would be subject to equitable distribution if made with marital funds (*see Sheehan v Sheehan*, 161 AD3d 912, 914 [2d Dept 2018]), here the wife was precluded from entering into evidence any related documentation at trial, after refusing to comply with the

husband's discovery demands. As a result, the wife was unable to establish the separate property component of these policies, and thus the court acted within its discretion in treating the total cash surrender value as marital property to be divided equally (*see Behan v Kornstein*, 164 AD3d 1113, 1116 [1st Dept 2018], *lv dismissed in part and denied in part* 32 NY3d 1078 [2018]).

The court properly considered the financial circumstances of the parties together with all the circumstances of the case, including the relative merit of the parties' positions, in directing the wife to pay the husband's outstanding counsel fees (*see DeCabrera v Cabrera-Rosete*, 70 NY2d 879 [1987]). Furthermore, the court considered the wife's obstructionist tactics in needlessly prolonging this litigation, such as failing to disclose assets and comply with discovery demands, and disrupting the courtroom during trial (*see Johnson v Chapin*, 12 NY3d 461, 467 [2009]. Under these circumstances, the counsel fee award, representing approximately 60% of the husband's total fees, was not excessive (*see Behan* at 1116).

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

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

ENTERED: JANUARY 2, 2020

CLERK

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10676 The People of the State of New York, Ind. 3756/14
Respondent,

-against-

Anonymous,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Ryan R. McCabe 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 (Steven L. Barrett, J.), rendered January 6, 2016,

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

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

ENTERED: JANUARY 2, 2020

CLERK

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

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10677N Ruben D. Aquino, Index 28282/17E
Plaintiff-Appellant,

-against-

Alan G. Taylor,
Defendant-Respondent.

_____

The Arce Law Office, PLLC, Bronx (Yolanda Castro-Arce of counsel), for appellant.

Gentile & Tambasco, Melville (Katie A. Walsh of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Maryann Brigantti, J.), entered March 20, 2019, which granted plaintiff's motion to strike defendant's answer to the extent of directing defendant to appear for a deposition by date certain or be precluded from testifying at trial or submitting an affidavit for any purpose, unanimously affirmed, without costs.

Plaintiff failed to demonstrate that defendant's alleged failure to comply with his disclosure obligations was willful, contumacious, or in bad faith (*see Perez v New York City Tr. Auth.*, 73 AD3d 529 [1st Dept 2010]). Although defendant delayed before providing discovery and the responses he owed were exchanged in response to the motion to strike, a conditional order was a proper exercise of discretion since plaintiff has not been prejudiced by the delay (*see Curiel v Loews Cineplex*

Theaters, Inc., 68 AD3d 415 [1st Dept 2009]; *Rosen v Corvalon*, 309 AD2d 723 [1st Dept 2003]).

Furthermore, the court providently exercised its discretion in directing defendant to appear for deposition by a date certain or be precluded from testifying or submitting an affidavit for any purpose because plaintiff sought compliance with the discovery orders, which all directed that defendant appear for deposition and plaintiff's moving papers do not state that plaintiff no longer wished to depose defendant.

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

ENTERED: JANUARY 2, 2020

CLERK

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10678 In re Elizabeth L.,
Petitioner-Respondent,

-against-

Kevin O.,
Respondent-Appellant.

_____

Larry S. Bachner, New York, for appellant.

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Order, Family Court, New York County (Patria Frias-Colon, J.), entered on or about September 25, 2018, which, upon a finding that respondent father willfully violated a court order mandating child support payments, sentenced him to incarceration for a term of six months to be served on weekends, set the purge amount at $10,000, and set the arrears at $55,549.37, unanimously modified, on the facts, to the extent of crediting payments actually made and setting the amount of arrears at $50,482.31, and otherwise affirmed, without costs. Appeal from so much of the order that committed the father to the custody of the New York City Department of Corrections and from that part of the order that confirmed the Support Magistrate's finding of willful violation of the order of support, unanimously dismissed, without costs.

The appeal from that part of the order of commitment that committed the father to the custody of the Department of

Corrections for a period of six months unless he paid the purge amount is dismissed as academic, as the period of incarceration has expired (*see Matter of Schad v Schad*, 158 AD3d 705 [2d Dept 2018]). Furthermore, the father's appeal from the finding of willful violation made by the Support Magistrate and confirmed by Family Court must likewise be dismissed, inasmuch as the Support Magistrate's finding was made upon the father's default, and the father did not move before the Support Magistrate to vacate the default (Family Ct Act § 439[e]; *Matter of Reaves v Jones*, 110 AD3d 1276, 1277 [3d Dept 2013]).

In any event, the court properly confirmed the Support Magistrate's finding that the father willfully violated the support order. Failure to pay support, as ordered, constitutes prima facie evidence of a willful violation (*see* Family Ct Act § 454[3][a]). The burden then shifted to the father to present "some competent, credible evidence of his inability to make the required payments" (*Matter of Powers v Powers*, 86 NY2d 63, 70 [1995]). The father did not meet this burden because he failed to appear before the Support Magistrate and present evidence (*see Matter of Jennifer D. v Artise C.J.*, 154 AD3d 578 [1st Dept 2017]). His later arguments before the court were insufficient and improper.

However, in calculating the amount of arrears owed, the

court failed to credit the father $5,067.06 in payments made. Accordingly, the arrears are set at $50,482.31.

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

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

ENTERED: JANUARY 2, 2020

CLERK

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10679N Country-Wide Insurance Company, et al., Plaintiffs-Respondents, Index 106110/11

-against-

Power Supply, Inc., Defendant-Appellant.

Gary Tsirelman, P.C., Brooklyn (Gary Tsirelman of counsel), for appellant.

Thomas Torto, New York, for respondents.

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered July 31, 2017, which denied defendant's motion to vacate a default judgment against it, unanimously affirmed, with costs.

Defendant failed to show that its default should be vacated under either CPLR 317 or CPLR 5015[a][1]). Under CPLR 317, defendant was required to demonstrate that it did not receive notice of the summons in time to defend and that it had a meritorious defense (*see Gonzalez v City of New York*, 106 AD3d 436, 437 [1st Dept 2013]). Defendant's conclusory denial of receipt of the summons and complaint from the Secretary of State, although the address used was defendant's correct business address, is insufficient to rebut the presumption of service created by the Secretary of State's affidavit of service (*see Gourvitch v 92nd & 3rd Rest Corp*, 146 AD3d 431 [1st Dept 2017]).

Moreover, defendant's attorney was aware of the action since he received a courtesy copy of the summons and complaint. (*Residential Bd. Of Mgrs. Of 99 Jane St. Condominium v Rockrose Dev. Corp., 17 Ad3d 194 [1st Dept. 2005*]).

Defendant's proffered defense to failing to appear for two Examinations Under Oath (EUO) is that the location was inconvenient, it needed time to comply with the voluminous document request, its counsel withdrew at the last moment due to intimidation by plaintiffs, and plaintiffs failed to provide a sufficient explanation for the EUOs. However, the record demonstrates that defendant agreed to the location, had sufficient time to search its records, and did not cite the need for additional time to find documents in its request for an adjournment. As to the adjournment of the second scheduled EUO purportedly because of counsel's withdrawal, it is undisputed that the attorney appeared for the EUO and defendant did not. The withdrawal occurred after the second aborted EOU. Defendant contends that the request for the EUOs was improper because plaintiffs failed to show how all the claims were related to an allegedly staged accident involving a single claimant and his passenger, but its principal did not deny knowledge of fraudulent claims or staged accidents, and the EUOs reasonably sought to determine whether defendant's claims were legitimate.

Under CPLR 5015(a)(1), defendant was required to demonstrate both a reasonable excuse for its default and a meritorious defense (*Benson Park Assoc., LLC v Herman*, 73 AD3d 464, 465 [1st Dept 2010]). As indicated, defendant failed to demonstrate a meritorious defense. Although we need not consider its proffered excuse, we note that defendant's conclusory denial of receipt of process does not constitute a reasonable excuse (*State Farm Mut. Auto. Ins. Co. v Dr. Ibrahim Fatiha Chiropractic, P.C.*, 147 AD3d 696, 697 [1st Dept 2017], *lv denied* 29 NY3d 912 [2017]).

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

ENTERED: JANUARY 2, 2020

CLERK

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10680N Deutsche Bank National Trust Company, etc., Plaintiff-Respondent, Index 850141/14

-against-

Joshua Kirschenbaum, Defendant-Appellant,

Winston Capital, LLC, et al., Defendants.

_____

Richland & Falkowski, PLLC, Washingtonville (Daniel H. Richland of counsel), for appellant.

Davidson Fink LLP, Rochester (Richard N. Franco of counsel) for respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered January 3, 2018, which granted plaintiff's motion to vacate an order of dismissal with prejudice entered on default (same court and Justice), unanimously affirmed, without costs.

The motion court's determination to vacate a judgment is a discretionary one (*Nash v Port Auth. of N.Y.& N.J.*, 22 NY3d 220, 226 [2013]; *Horan v New York Tel. Co.*, 309 AD2d 642 [1st Dept 2003]). Plaintiff provided a reasonable excuse for its default (CPLR 5015[1]), in that its having missed a single conference was unintentional and a result of law office failure. Under the circumstances here the court appropriately vacated the default.

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: JANUARY 2, 2020

CLERK

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10681 The People of the State of New York, Ind. 4472/15
Respondent,

-against-

Xavier F.,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Thomas A. Farber, J.), rendered May 17, 2016,

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

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

ENTERED: JANUARY 2, 2020

CLERK

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

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10683N Jessica Fisher, Index 655224/18
Plaintiff-Respondent,

-against-

Lewis Construction NYC Inc.,
Defendant-Appellant.

_____

William M. Pinzler, New York, for appellant.

Law Office of Steven R. Goldberg, New York (Steven R. Goldberg of counsel), for respondent.

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Order, Supreme Court, New York County (Andrew Borrok, J.), entered June 18, 2019, which denied defendant's motion to vacate the default judgment against it, unanimously affirmed, with costs.

Defendant failed to establish a reasonable excuse for its default (*see* CPLR 5015[a][1]). Plaintiff properly served defendant corporation "by means of service upon the Secretary of State, and the records indicate that [it] was a viable corporation at the time" (*Residential Bd. of Mgrs. of 99 Jane St. Condominium v Rockrose Dev. Corp.*, 17 AD3d 194, 194 [1st Dept 2005]). Service of process was complete when plaintiff served the Secretary of State (Business Corporation Law § 306[b][1]), "irrespective of whether the process subsequently reache[d] the corporate defendant" (*Associated Imports v Amiel Publ.*, 168 AD2d

354, 354 [1st Dept 1990], *appeal dismissed* 77 NY2d 873 [1991]). Defendant's conclusory denial of receipt of service fails to rebut the presumption of proper service created by the affidavit of service (*see Matter of de Sanchez*, 57 AD3d 452, 454 [1st Dept 2008]), and defendant's excuse that its registered address, where plaintiff mailed "additional service" and subsequent notices (Business Corporation Law § 306[b][2]; *see* CPLR 3215[g][4][I]), was not a reliable mail drop, is unavailing. By its own account, defendant's failure to answer appears to have been willful and dilatory (*see John Wiley & Sons, Inc. v Grossman*, 132 AD3d 559 [1st Dept 2015]).

Defendant also failed to show a lack of actual notice of the action (*see* CPLR 317). Both its principal and its attorney acknowledged they had actual notice before plaintiff served the Secretary of State, thereby giving it sufficient time to defend (*see Matter of Renaissance Economic Dev. Corp. v Jin Hua Lin*, 126 AD3d 465, 465 [1st Dept 2015], *lv dismissed* 26 NY3d 953 [2015]).

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

ENTERED: JANUARY 2, 2020

CLERK

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10684N JW 70th Street LLC, Index 154514/16
Plaintiff-Respondent,

-against-

Jean P. Simon, M.D.,
Defendant-Appellant.

_____

Jean P. Simon, appellant pro se.

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

_____

Appeal from order, Supreme Court, New York County (Manuel J. Mendez, J.), entered October 4, 2018, which denied defendant's motion for reargument and renewal, deemed appeal from judgment, same court and Justice, entered March 22, 2018, awarding plaintiff a sum of money representing unpaid rent and additional rent, interest and costs, and, so considered, the judgment unanimously reversed, on the law and the facts and in the exercise of discretion, without costs, and the matter remanded for a determination whether the late fees, of which additional rent is primarily comprised, amounted to impermissible usurious interest rates, and if so, a determination of the amount, if any, of late fees due, and, if any late fees are found due, entry of a judgment reflecting that amount.

In the exercise of our discretion to hear the merits of this

appeal notwithstanding the entry of judgment and the failure of defendant pro se to perfect his appeal from the judgment (*see Faricelli v TSS Seedman's*, 94 NY2d 772 [1999]), we deem the appeal from the order an appeal from the judgment. The appeal from the judgment brings up for review the order that denied defendant's motion to reargue and renew, which the court in effect granted by addressing its merits (*see Lipsky v Manhattan Plaza, Inc.*, 103 AD3d 418, 419 [1st Dept 2013]), and the order that decided the motion that defendant moved to reargue and renew, i.e., plaintiff's motion for summary judgment (CPLR 5501[a][1]).

The motion court correctly determined that the record demonstrated as a matter of law that defendant tenant defaulted on its obligation to pay base rent and additional rent under the parties' lease agreement. On reargument and renewal, defendant submitted his own ledger, which, however, did not constitute "new facts" (CPLR 2221[e][2]), as the ledgers showed the same payments as those recorded in plaintiff's ledger showing the amounts due and unpaid.

Nevertheless, on reargument and renewal, the court should have considered defendant's argument that the late fees, which along with returned check fees, constitute additional rent under the lease, amount to unenforceable usurious interest rates (*see*

Sandra's Jewel Box v 401 Hotel, 273 AD2d 1, 3 [1st Dept 2000] ["the late charge provision of the lease . . . while not technically interest, is unreasonable and confiscatory in nature and therefore unenforceable"]; *Cleo Realty Assoc., L.P. v Papagiannakis*, 151 AD3d 418, 419 [1st Dept 2017]). Although defendant raised this argument for the first time in reply, we consider it because the issue is determinative and is purely legal (*see Bank of N.Y. Mellon v Arthur*, 125 AD3d 492 [1st Dept 2015]).

Plaintiff defined additional rent as "primarily late fees," and it appears that the late fee lease provision permitting a 5% charge on amounts due actually resulted in what would amount to a 60% interest rate or higher, depending on plaintiff's accounting practices. Moreover, even with plaintiff's voluntary reduction of the late fee to 2%, additional rent comprises nearly half the sum demanded for the relevant 27-month period. Accordingly, we remand the matter to the motion court for a determination whether the late fees were "unreasonable and grossly disproportionate to the amount of actual unpaid rent" (*see 176 PM, LLC v Heights*

Stor. Garage, Inc., 157 AD3d 490, 493, 494-495 [1st Dept 2018]), and, if so, a determination of the amount, if any, of late fees due.

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

ENTERED: JANUARY 2, 2020

CLERK

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10685 The People of the State of New York, Ind. 4374/14
Respondent,

-against-

Tyree Gibbs,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes 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 (Mark Dwyer, J.), rendered February 3, 2016,

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

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

ENTERED: JANUARY 2, 2020

CLERK

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

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10686 In re Michael A.M., etc.,

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

Michael M.,
Respondent-Appellant,

MercyFirst,
Petitioner-Respondent,

Administration for Children's Services,
Respondent.

_____

John R. Eyerman, New York, for appellant.

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

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

_____

Order, Family Court, New York County (Jane Pearl, J.), entered on or about May 3, 2018, which, after a hearing, determined that respondent father's consent was not required for his child's adoption and, in the alternative, that he permanently neglected the child, and terminated his parental rights, and transferred custody and guardianship jointly to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

Family Court's finding of permanent neglect is supported by clear and convincing evidence that, despite the agency's diligent

efforts to encourage and strengthen the parental relationship, the father failed to plan for the child's future (*see* Social Services Law § 384-b[7][a]). Throughout the relevant time period, respondent refused to provide the agency with his contact information (*see Matter of Harold Ali D.-E.[Rubin Louis E.]*, 94 AD3d 449, 450 [1st Dept 2012]), and failed to visit the child consistently, attending few of the permitted scheduled visits (*see Matter of Angelica S.[Cynthia C.]*, 144 AD3d 484, 485 [1st Dept 2016], *lv denied* 28 NY3d 1128 [2017]).

A preponderance of the evidence supports the determination that termination of respondent's parental rights is in the best interests of the child in order to permit adoption by the child's long-term foster mother (*Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]; *see Matter of Cameron W.[Lakeisha E.W.]*, 139 AD3d 494, 494-495 [1st Dept 2016]; *Matter of Autumn P.[Alisa R.]*, 129 AD3d 519 [1st Dept 2015]).

Under the circumstance, here we need not address family court's initial determination that the father was a notice only

father. We perceive no error in the court's ruling on alternative grounds.

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

ENTERED: JANUARY 2, 2020

CLERK

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10687 The People of the State of New York, Ind. 2765/16
Respondent,

-against-

Trayvon Little,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered October 4, 2016, convicting defendant, upon his plea of guilty, of attempted robbery in the second degree, and sentencing him to a term of 2½ years, with three years postrelease supervision, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the supervision component to two years, and otherwise affirmed.

We find the sentence excessive to the extent indicated.

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

ENTERED: JANUARY 2, 2020

CLERK

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10688 The People of the State of New York, Respondent, Ind. 2088/16

-against-

Adell Hardwick, Defendant-Appellant.

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

Judgment, Supreme Court, Bronx County (Steven L. Barrett, J.), rendered October 2, 2017, unanimously affirmed.

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

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

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

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

ENTERED: JANUARY 2, 2020

CLERK

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10690N Barbara Robins, Index 805644/15
Plaintiff-Respondent,

-against-

Procure Treatment Centers, Inc., et al.,
Defendants,

Princeton Procure Management, LLC, et al.,
Defendants-Appellants.

_____

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Roland T. Koke of counsel), for Princeton Procure Management, LLC, and Procure Proton Therapy Center, appellants.

Amabile & Erman, P.C., Staten Island (Charles A. Franchini of counsel), for Henry K. Tsai, M.D., and Brian H. Chon, M.D., appellants.

Law Office of Robert F. Danzi, Jericho (Robert F. Danzi of counsel), for respondent.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered January 17, 2019, which to the extent appealed from, upon reargument, determined that personal jurisdiction existed over defendants Princeton Procure Management, LLC and Procure Proton Therapy Center (together, PPM), and over defendants Henry K. Tsai, M.D., and Brian H. Chon, M.D., and dismissed PPM's affirmative defense of lack of personal jurisdiction, unanimously reversed, on the law, without costs, PPM's affirmative defense reinstated, and the action dismissed as against Drs. Tsai and Chon. The Clerk is directed to enter judgment in favor of Drs.

Tsai and Chon.

In this medical malpractice action, plaintiff alleges that in 2013 she was referred by defendant Mount Sinai Hospital, a New York entity, for proton therapy treatment at a facility in New Jersey owned by PPM, and that the treatment resulted in bilateral blindness. Plaintiff alleges that defendant Princeton Radiology Associates, P.A. (PRO), is comprised of doctors, including Drs. Tsai and Chon, who specialize in radiation oncology and provide services at the proton therapy facility in New Jersey.

After defendants PPM, PRO, Tsai and Chon moved to dismiss for lack of personal jurisdiction, the motion court found that plaintiff had made a "substantial start" in demonstrating a basis for personal jurisdiction over those defendants. PPM appealed and this Court affirmed, noting the evidence that PPM had identified a principal place of business in New York, and that it "marketed its Somerset, New Jersey, location to target New York residents, touting its proximity to New York in advertising," and "entered into an agreement with a consortium of New York City hospitals for the referral of cancer patients for treatment at its facility" (*Robins v Procure Treatment Ctrs., Inc.*, 157 AD3d 606, 607 [1st Dept 2018]).

Following jurisdictional discovery, the parties, at the direction of the court, made submissions on the issue of whether

plaintiff could meet her ultimate burden of showing that personal jurisdiction existed over appellants (*see O'Brien v Hackensack Univ. Med. Ctr.*, 305 AD2d 199, 200 [1st Dept 2003]). After the court issued orders that did not determine all issues presented, PPM and Drs. Tsai and Chon moved to reargue and plaintiff cross-moved to strike their affirmative defenses of lack of personal jurisdiction. The court then held that plaintiff had demonstrated that personal jurisdiction could be exercised over those defendants and granted the cross motion. We reverse.

Plaintiff did not meet her ultimate burden of establishing that Drs. Tsai and Chon, New Jersey doctors who treated her in New Jersey, projected themselves, on their own initiative, into New York to engage in a sustained and substantial transaction of business related to her claims, such that specific long-arm jurisdiction existed over them under CPLR 302(a)(1) (*see William v Beemiller Inc., 33 NY3d 523 [May 9, 2019]; Paterno v Laser Spine Inst.*, 24 NY3d 370, 372 [2014]; *O'Brien*, 305 AD2d at 200-201). Plaintiff submitted evidence that they participated in radio interviews intended to solicit New York residents, but those interviews occurred after the alleged malpractice and therefore, do not relate to plaintiff's claims (*see Paterno*, 24 NY3d at 379). Nor do the billing records establish that PRO physicians actually managed plaintiff's care with Dr.

Shrivastava, and any co-management of care was insufficient to serve as a basis for jurisdiction because it did not occur in New York, but only in New Jersey. Whether Drs. Tsai and Chon were employees or members of PRO, the evidence does not demonstrate that they engaged in activities in New York sufficient to exert personal jurisdiction over them as individuals (*compare Fischbarg v Doucet*, 9 NY3d 375, 380 [2007]; *see generally Ferrante Equip. Co. v Lasker-Goldman Corp.*, 26 NY2d 280, 283 [1970]).

As to PPM, it urges that plaintiff did not meet its ultimate burden and asks this Court to reinstate its affirmative defense so that issues of fact concerning jurisdiction may be decided by the trier of fact. On review of the record, we conclude that the evidence submitted by plaintiff following discovery is no greater than that presented in opposition to the original motion (*see Robins* at 607), and therefore does not warrant dismissal of PPM's affirmative defense of lack of jurisdiction. As to general jurisdiction under CPLR 301, plaintiff presented documents in which PPM listed a New York place of business, but PPM submitted an affidavit of its president, who identified PPM's principal place of business as in New Jersey and denied having a New York principal office. While the affidavit was cursory, plaintiff's evidence did not establish that PPM's principal place of business, or "nerve center," was in New York (*AlbaniaBEG Ambient*

Sh.p.k. v Enel S.p.A., 160 AD3d 93, 102 [1st Dept 2018], quoting *Daimler AG v Bauman*, 571 US 117, 137-138 [2014]; *Hertz Corp. v Friend*, 559 US 77, 97 [2010]).

Plaintiff also failed to establish that specific long-arm jurisdiction exists over PPM under CPLR 302(a)(1). The evidence presented by plaintiff, including various contracts and the radio interviews and billing documents discussed above, provides a "sufficient start" in demonstrating a basis for asserting personal jurisdiction (*see Robins, supra*), but does not warrant dismissal of PPM's affirmative defense (*see Paterno, supra*; *O'Brien, supra*).

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: JANUARY 2, 2020

CLERK

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10691N In re Country-Wide Insurance Company, Index 157967/15
Petitioner-Respondent,

-against-

TC Acupuncture P.C., as asignee of
Corey Crichlow,
Respondent-Appellant.

_____

Gary Tsirelman, P.C., Brooklyn (Gary Tsirelman of counsel), for appellant.

Jaffe & Velazquez, LLP, New York (Jean H. Kang of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Lynn R. Kotler, J.), entered November 30, 2018, awarding respondent attorney's fees in the sum total of $980 in connection with a no-fault arbitration award, unanimously modified, on the law, to remand the matter to Supreme Court for a determination of respondent's reasonable attorney's fees incurred in the article 75 proceeding brought by petitioner to vacate the arbitration award and on this appeal, and otherwise affirmed, without costs.

"The attorney's fee for services rendered ... in a court appeal from a master arbitration award and any further appeals, shall be fixed by the court adjudicating the matter" (11 NYCRR § 65-4.10[j][4]). The term "court appeal" applies to a proceeding taken pursuant to CPLR article 75 to vacate or confirm a master

arbitration award (*see Matter of GEICO Ins. Co. v AAAMG Leasing Corp.*, 148 AD3d 703, 705 [2d Dept 2017]). Accordingly, respondent TC Acupuncture, as a prevailing applicant for payment by petitioner insurer of attorney's fees in an article 75 proceeding reviewing an arbitration award, is entitled to an additional award of attorney's fees, as fixed by the court, for its motion to modify the order, in a 2015 article 75 proceeding denying Countrywide's petition to vacate the arbitration award, to include a ruling confirming the arbitration and its opposition to Countrywide's motion to reargue that order. Supreme Court erred in failing to award these additional fees.

Respondent is also entitled to the attorney's fees incurred in this appeal to this Court of the order issued in the article 75 proceeding, to be fixed by the court, upon remand, pursuant to 11 NYCRR § 65-4.10(j)(4)(*see Matter of Country-Wide Ins. Co. v Bay Needle Care Acupuncture, P.C.*, 162 AD3d 407, 408 [1st Dept 2018]).

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

ENTERED: JANUARY 2, 2020

CLERK

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10692 The People of the State of New York, Ind. 2881/16
Respondent,

-against-

Anthony Muhammad,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Rebecca Hausner 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 (Gregory Carro, J.), rendered March 29, 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.

ENTERED: JANUARY 2, 2020

CLERK

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

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10693N Gianfranco Arena, etc., Index 850095/17
Plaintiff-Respondent,

-against-

Lester Noah Shaw, M.D.,
Defendant-Appellant.

_____

Mauro Lilling Naparty LLP, Woodbury (Caryn L. Lilling of counsel), for appellant.

Goldstein & Goldstein, P.C., Brooklyn (Cindy A. Moonsammy of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about June 6, 2018, which granted plaintiffs' motion to renew and, upon renewal, denied defendant's motion to compel discovery, unanimously reversed, on the law, without costs, and the motion to renew denied.

Plaintiff's motion to renew should have been denied because it was not "based upon new facts not offered on the prior motion" and did not "contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221[e][2], [3]; *Sullivan v Harnisch*, 100 AD3d 513, 514 [1st Dept 2012]). Plaintiff's claimed ignorance of a confidentiality order entered for his benefit in a related case raising identical issues (the New Jersey Action) does not constitute reasonable justification.

In any event, the motion should have been denied on the

merits. The decedent's mental state preceding her death and the degree to which her psychological injuries were associated with defendant's alleged psychiatric malpractice were the primary issues in the New Jersey Action, just as they are the primary issue in this action. Plaintiff waived the confidentiality of the documents produced in the New Jersey Action by bringing this action against defendant and alleging a nearly identical theory of causation for the decedent's suicide (*see Velez v Daar*, 41 AD3d 164 [1st Dept 2007]). He cannot credibly argue that the decedent's mental state is not relevant in this action, which necessarily implicates the decedent's mental state before and during defendant's treatment of her and the contributing factors that may have played a role in her suicide. The documents produced in the New Jersey Action, which include sensitive financial records, are also relevant to the issue of damages (*see Fell v Presbyterian Hosp. in City of N.Y. at Columbia-Presbyt. Med. Ctr.*, 98 AD2d 624, 625 [1st Dept 1983]).

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

ENTERED: JANUARY 2, 2020

CLERK

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10694 The People of the State of New York, Ind. 1745N/16
Respondent,

-against-

Christopher Rodriguez,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Richard Weinberg, J. at plea; Kevin McGrath, J., at sentencing), rendered August 11, 2016,

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

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

ENTERED: JANUARY 2, 2020

CLERK

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

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10695N Nikolaos Kaiafas, Index 650847/17
Plaintiff-Appellant,

-against-

Ammos NYC LLC, et al.,
Defendants-Respondents.
- - - - -
[And a Third-Party Action]

_____

Sipsas P.C., Astoria (Ioannis P. Sipsas of counsel), for appellant.

Studin Young PC, Hauppage (Tamir Young of counsel), for respondents.

_____

Order, Supreme Court, New York County (Tanya R. Kennedy, J.), entered November 28, 2018, which, to the extent appealed from as limited by the briefs, granted defendants' motion to quash plaintiff's subpoena, and denied plaintiff's cross motion to modify the subpoena and amend the complaint to add causes of action numbered "ninth" through "thirteenth" related to an alleged breach of a partnership agreement, unanimously reversed, on the law, the facts, and in the exercise of discretion, without costs, to grant plaintiff's cross motion to modify his subpoena and amend his complaint as requested.

Plaintiff's proposed modified subpoena requesting specified bank documents from defendants' nonparty bank contained sufficient language to afford the bank requisite notice of the

relevance underlying the document request (*see generally* CPLR 3101[a][4]; *Matter of Kapon v Koch*, 23 NY3d 32 [2014]). On this record, including plaintiff's allegations and the documentary proof, the requested bank documents were material and necessary to plaintiff's claims of partnering with defendant Dimitris Konstantinos Nakos to purportedly contribute to and share equally in the profits and losses of certain restaurant ventures, including defendant Ammos NYC LLC.

Plaintiff's request for leave to amend his complaint to add new causes of action alleging breach of a partnership agreement, entitlement to an accounting and constructive trust, and for declaratory relief and a declaratory judgment determining, inter alia, the extent, if at all, of plaintiff's alleged partnership interests in the claimed restaurant ventures, and for dissolution of the partnership if warranted, is supported by sufficient factual pleadings to support the new causes of action alleged

(*see Risk Control Assocs. Ins. Group v Lebowitz*, 151 AD3d 527 [1st Dept 2017], *lv denied* 32 NY3d 1196 [2019]).

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

ENTERED: JANUARY 2, 2020

CLERK

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10696N Dorothea Wilson, Index 21764/16E
Plaintiff-Respondent,

-against-

Simpson West Realty, LLC,
Defendant,

The Alhambra Ballroom, Inc.,
Defendant-Appellant.

_____

Cascone & Kluepfel, LLP, Garden City (Pamela Wolff Cohen of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Laura Douglas, J.), entered December 5, 2018, which granted the motion of defendant The Alhambra Ballroom, Inc. to compel plaintiff to comply with certain discovery demands concerning medical and employment records to the extent of directing plaintiff to provide authorizations with respect to her 2008 and 2017 knee replacements, unanimously affirmed, without costs.

The court providently exercised its discretion by denying defendant's motion to compel production of plaintiff's entire employment file for a three-year period prior to her accident. Discovery of plaintiff's entire employment file would have been overly broad and was not material or necessary to her claims that

she had a traumatic brain injury, where she testified that she was informed by her employer that she was not improperly performing her work duties as a result of her accident (*see Almonte v Mancuso*, 132 AD3d 529 [1st Dept 2015]). To the extent that plaintiff claimed that as a result of the accident she had impaired instability and balance, disclosure of records regarding her two knee replacements was appropriate, as they are sufficiently related to that claim (*see Allen v Crowell-Collier Publ. Co.*, 21 NY3d 403, 406-407 [1968]).

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

ENTERED: JANUARY 2, 2020

CLERK

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10697N- Index 300960/15
10697NA Bradford Rom,
Plaintiff-Appellant,

-against-

Eurostruct, Inc., et al.,
Defendants-Respondents.

_____

Oresky & Associates, PLLC, Bronx (John J. Nonnenmacher of counsel), for appellant.

Morris Duffy Alonso & Faley, New York (Iryna S. Krauchanka of counsel), for respondents.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about June 21, 2019, which, inter alia, granted defendants' motion seeking authorizations for plaintiff's public health insurance records from 2004 to the present, and stayed his deposition as to injuries contained in the fourth, fifth, and sixth supplemental bills of particulars, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about June 4, 2019, unanimously dismissed, without costs, as superseded by the June 21, 2019 order.

The court providently exercised its discretion in compelling additional discovery. Defendants established substantial prejudice where unusual or unanticipated circumstances developed subsequent to the filing of the note of issue (*see Bermel v*

Dagostino, 50 AD3d 303 [1st Dept 2008]; *Esteva v Catsimatidis*, 4 AD3d 210 [1st Dept 2004]). Plaintiff raised specific and significant injuries to his lumbar spine for the first time after the note of issue had been filed, warranting a further deposition and medical examination (*see Jenkins v 312 W. 121st St.*, 30 AD2d 937 [1st Dept 1968]). Furthermore, plaintiff's claims of aggravation and exacerbation of a preexisting, latent, and asymptomatic degenerative condition entitled defendants to authorizations unrestricted by date (*see McGlone v Port Auth. of N.Y. & N.J.*, 90 AD3d 479, 480 [1st Dept 2011]; *Rega v Avon Prods., Inc.*, 49 AD3d 329, 330 [1st Dept 2008]).

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

ENTERED: JANUARY 2, 2020

CLERK

Kapnick, J.P., Webber, Singh, Moulton, JJ.

10715 In re Estate of Chi-Chuan Wang, Deceased. File 2550/

- - - - -

Shou-Kung Wang,
Petitioner-Respondent,

-against-

Yien-Koo Wang King,
Respondent-Appellant,

Public Administrator of
New York County, et al.,
Respondents.

_____

Withers Bergman, LLP, New York (Chaya F. Weinberg-Brodt of counsel), for appellant.

Kamerman, Uncyk, Soniker & Klein P.C., New York (Akiva M. Cohen of counsel), for respondent.

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Order, Surrogate's Court, New York County (Rita Mella, S.), entered on or about April 16, 2019, which denied respondent Yien-Koo Wang King's (King) motion to dismiss the petition to probate a codicil dated February 10, 2003, unanimously reversed, on the law, without costs, and the motion granted.

The petition to probate the February 10, 2003 codicil is barred by the doctrine of collateral estoppel (*see Conason v Megan Holding, LLC*, 25 NY3d 1, 17 [2015]). A jury found that petitioner and respondent Andrew Wang had engaged in fraudulent conduct and exerted undue influence on the decedent to induce him

to eliminate respondent King as a beneficiary of his estate and increase the percentage bequeathed to them. This finding is dispositive of the issue of the validity of the codicil, the first document that embodied the changed testamentary plan and was the consummation of petitioner and Andrew's scheme. The trial evidence, which was accepted by the jury, demonstrated that petitioner and Andrew achieved their goal when the codicil was executed by the decedent and that the February 18, 2003 will was merely a more formal codification of the change in the testamentary plan. As the factual predicate for the finding of fraud and undue influence was petitioner's and Andrew's conduct preceding the execution of the codicil, the decedent's testamentary capacity at the time the codicil was executed does not affect the jury's independent alternative finding as to petitioner's and Andrew's conduct preceding the change in the decedent's testamentary plan (*see Malloy v Trombley*, 50 NY2d 46, 52 [1980]).

Petitioner's claim that he did not have a full and fair opportunity to litigate the issue of fraud and undue influence because he received ineffective assistance of counsel is insufficiently supported by his complaints about counsel's

performance, which amount to nothing more than disagreement with counsel's various strategic and tactical decisions.

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

ENTERED: JANUARY 2, 2020

CLERK

Renwick, J.P., Kapnick, Mazzarelli, Webber, JJ.

10780 Mikhail Sandomirsky, Index 30018/18E
Plaintiff-Respondent,

-against-

Blanca I. Velasquez,
Defendant-Appellant,

Financial Services Vehicle Trust
also known as Financial SVS
Vehicle Trust,
Defendant.

_____

O'Connor McGuinness Conte Doyle Oleson Watson & Loftus, LLP, White Plains (Montgomery L. Effinger of counsel), for appellant.

Kulik Law Firm, P.C., New York (Kenneth G. Esehak of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (John R. Higgitt, J.), entered January 7, 2019, which denied defendant Blanca I. Velasquez's motion to dismiss the complaint as against her, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

A plain reading of the release between plaintiff and Velasquez's insurer, nonparty GEICO General Insurance Company (GEICO), unambiguously reveals that plaintiff released and discharged defendant Velasquez from any claims arising out of the October 16, 2017 motor vehicle accident. The release identifies plaintiff Sandomirsky as releasor. It also clearly refers to "In

Re: Geico Insured: Blanca Velasquez" in the handwritten note at the top of the release, under which plaintiff's counsel wrote his initials, and signed his name. Further, the settlement check (which plaintiff negotiated) has the same claim number that was used in the release, which is the same claim number specified in paragraph 3 of the complaint as Velasquez's "active claim number" with GEICO, and states that it is payment for full and final settlement of all claims for the October 16, 2017 accident. Finally, it is evident from the letter sent by plaintiff's counsel to GEICO only days after the release was signed, in which he refers to plaintiff as the claimant and Velasquez as the insured and purports to rescind the settlement, that plaintiff and his counsel understood that the release settled the claims against defendant.

Accordingly, plaintiff's complaint against Velasquez for injuries sustained in the accident should have been dismissed

pursuant to CPLR 3211(a)(5) (*see generally Bernard v Sayegh*, 104 AD3d 600 [1st Dept 2013]).

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

ENTERED: JANUARY 2, 2020

CLERK