SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 9, 2020

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

10500 In re Jaquan L., et al.,
Appellants,

Pearl L.,
Petitioner-Respondent,

Administration for Children's Services,
Respondent-Respondent.

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Dawne A. Mitchell, The Legal Aid Society, New York (Claire V. Merkine of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Diana Lawless of counsel), for Administration for Children's Services, respondent.

Proskauer Rose LLP, New York (Lucas Kowalczyk of counsel), for Pearl L., respondent.

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Order, Family Court, Bronx County (Valerie A. Pels, J.), entered on or about May 14, 2018, which denied petitioner's motion to extend kinship guardianship assistance payments for the subject children until they reach the age of 21, unanimously reversed, on the law, without costs, and the motion granted.

Respondent, Pearl L. (grandmother), executed kinship

guardianship petitions pursuant to the Subsidized Kinship Guardian Program (KinGap) for her two grandchildren. Pursuant to Social Services Law § 458-b (the statute), the Administration for Children's Services (ACS) and the grandmother were required to enter into and execute Kinship Guardianship Assistance and Non-Recurring Guardianship Agreements (the contract), which provided monthly subsidies for each child (Social Services Law § 458-b[3]). The contract stated that subsidies will be provided until the children turn 18 if the children were under 16 at the time that the contract was executed. However, if the children were older than 16 at the time of execution, the subsidies would continue until the children turned 21, provided that certain statutory conditions were met. When the grandmother executed the contract, her grandchildren were both under 16 years of age. The Family Court approved the guardianship petitions and the children were discharged from foster care.

The grandmother subsequently moved pro se to extend KinGap subsidies for both children until they reach 21 years of age. While the motion was pending, the Legislature amended the statute to expand the legal definition of a "prospective relative guardian" and made subsidies available to all children until the age of 21 when certain conditions are met regardless of the

child's age at the time the contract was executed (*see* S 4833-A, L 2017, c 384, § 2). The Legislature, however, was silent as to the retroactivity of the law. After reviewing the parties' submissions, the court denied the motion and declined to apply the statute retroactively. This appeal ensued, and we now reverse.

As an initial matter, the order is appealable as of right, because it is an order of disposition that terminates the children's guardianship placement once the children reach the age of 18 and terminates the proceeding itself (*see Matter of Geraldine B. v Louis B.*, 32 AD2d 808, 809 [2d Dept 1969]; *Matter of Taylor v Taylor*, 23 AD2d 747 [1st Dept 1965]). In any event, this Court can deem a notice of appeal from the denial of the motion a request for permission to appeal and we would grant that request (*see Matter of Mariama J. [Jainaba C.]*, 160 AD3d 593 [1st Dept 2018], *lv denied* 31 NY3d 912 [2018]).

An exception to the general principle that statutes are to be applied prospectively unless the language expressly, or by necessary implication, requires otherwise is commonly made for "remedial legislation or statutes governing procedural matters" (*Majewski v Broadalbin-Perth Central School District*, 91 NY2d 577, 584 [1998]). If a statute is remedial in nature, it "should

be liberally construed to carry out the reform intended and spread its beneficial effects as widely as possible, and therefore should be accorded retroactive effect" (*Lesser v Park 65 Realty Corp.*, 140 AD2d 169, 173 [1st Dept 1988]). "Other factors in the retroactivity analysis include whether the Legislature...conveyed a sense of urgency" (*Matter of Gleason [Michael Vee, Ltd.]*, 96 NY2d 117, 122 [2001]). Because the amended statute in this case is silent as to its retroactive application, we turn to the legislative history to discern the intent of the Legislature and the purpose of the amended statute (*see Matter of Duell v Condon*, 84 NY2d 773, 783 [1995] ["the reach of the statute ultimately becomes a matter of judgment made upon review of the legislative goal"].

A review of the legislative history supports the conclusion that the amended statute is remedial in nature. The Sponsor's Memorandum states that the purpose of the amendment is to "rectify an anomaly" in the original legislation (Sponsor's Memorandum, SB 4833, L 2017, ch 384). Moreover, we can discern from the legislative history that the intent was to remove the disparity created between foster/adoptive parents and guardians since foster/adoptive parents are able to obtain subsidies notwithstanding the age of the child at the time of fostering or

adoption.

The mere fact that the amended statute is remedial in nature is not determinative as to whether it should be applied retroactively (*see Majewski*, 91 NY2d 577, 584 [1998] ["[c]lassifying a statute as 'remedial' does not automatically overcome the strong presumption of prospectivity"]). As such, a remedial amendment will only be applied retroactively if it does not impair vested rights (*Matter of Rudin Mgt. Co. v Commissioner of Dept. of Consumer Affairs of City of N.Y.*, 213 AD2d 185, 186 [1st Dept 1995]; McKinney's Cons Laws of NY, Book 1, Statutes § 54).

Contrary to ACS's argument, the amendment does not create a new entitlement; rather it expands "existing benefits to a class of persons arbitrarily denied those benefits by the original legislation" (*Matter of Cady v County of Broome*, 87 AD2d 964, 965 [3rd Dept 1982], *lv denied* 57 NY2d 602 [1982]). There is no dispute that had the children been adopted by the grandmother and remained with her under the auspices of foster care, or had the grandmother proceeded with guardianship after they turned 16, they would have been entitled to subsidies until the children turned 21.

Moreover, ACS's contention that the amendment should not be

applied retroactively because it increases ACS's liabilities is unconvincing. The Sponsor's Memorandum states that "even if federal reimbursement is foreclosed for a limited number of youth, it would clearly be cost-effective to make the KinGap permanency option available to the youth in order to expedite permanency for them and permit their exit from foster care" (Sponsor's Memorandum, SB 4833, L 2017, ch 384). This memorandum also states that the amended statute will not have a fiscal impact on the State (*id.*). Although we recognize that there might be some financial impact despite the sponsor's statement, such impact would be minimal given the limited number of children that are affected by the disparities created by the original law. Even assuming arguendo that the amended statute impaired ACS's vested contractual rights or increased its financial liabilities, impairment of a contract will be upheld if the impairment "is reasonable and necessary to accomplish a legitimate public purpose" (*Association of Surrogates & Supreme Ct. Reporters Within the City of New York v State of New York*, 79 NY2d 39, 46 [1992]).

ACS further argues that the amendment was intended to apply prospectively because the amended statute's effective date was postponed until 60 days after the federal government approves the

amendment. We are not persuaded by this argument because the statute also states that the amendment "shall be effective immediately" (NY Senate Bill 4833-A, L 2017, ch 384 § 3) and that this amendment "shall not take effect until sixty days following the date that the United States Department of Health and Human Services, Administration for Children, Youth and Families approves a Title IV-E state plan amendment regarding the provisions of this act *that are eligible* for Title IV-E reimbursement" (*id.* at § 3[b] [emphasis added]). Similarly, the Sponsor's Memorandum states that the amendment "shall take effect 60 days after the U.S. Department of Health and Human Services has approved a Title IV-E State Plan Amendment for *federally reimbursable expenditure*" (Sponsor's Memorandum, SB 4833, L 2017, ch 384)(emphasis added)). It is evident by the language cited that the amendment was made with the understanding and acknowledgment that the State will not be reimbursed by the Federal Government for monies given to this specific class of children, or to any child that is under the age of 16 when a contact is executed. Since the amendment indicates a sense of urgency, this further supports the conclusion that the amendment should be applied retroactively (*see Gleason*, 96 NY2d 117, 122).

Lastly, ACS argues that this Court does not have

jurisdiction to extend the subsidies because only the parties to the contract can modify the contract. This argument is misplaced because the issue here is not whether the subsidy should be extended; rather, it is whether the statute should be applied retroactively.

Accordingly, "the remedial purpose of the amendment should be effectuated through retroactive application" (*id.* at 123). Holding otherwise will not further the statute's purpose because the disparity created by the original law would still exist, which will lead to an absurd legal conclusion.

We have reviewed ACS's remaining contentions and find them unavailing.

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

ENTERED: JANUARY 9, 2020

CLERK

Renwick, J.P., Manzanet-Daniels, Kapnick, Oing, JJ.

10727 Molly Murphy, et al., Index 805259/15
Plaintiffs-Appellants,

-against-

Sophia Drosinos, M.D., et al.,
Defendants-Respondents.

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Kramer, Dillof, Livingston & Moore, New York (Matthew Gaier of counsel), for appellants.

Heidell, Pittoni, Murphy & Bach, LLP, New York (Daniel S. Ratner of counsel), for Sophia Drosinos, M.D., respondent.

McAloon & Friedman, P.C., New York (Gina Bernardi Di Folco of counsel), for Emilie Vander Haar, M.D., Silvana Ribaudo, M.D. and New York Presbyterian Hospital, respondents.

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Judgment, Supreme Court, New York County (Martin J. Shulman, J.), entered February 4, 2019, dismissing the complaint pursuant to an order, same court and Justice, entered on or about January 15, 2019, which granted the motions of defendants Sophia Drosinos, M.D., Emilie Vander Haar, M.D., Silvana Ribaudo, M.D., and New York Presbyterian Hospital for summary judgment dismissing the complaint, unanimously modified, on the law, to vacate the dismissal of the complaint as against defendants Drosinos and Ribaudo, and otherwise affirmed, without costs.

Dr. Drosinos failed to make a prima facie showing of entitlement to summary judgment. In reaching the conclusion that

Drosinos did not depart from accepted practice in repairing plaintiff's fourth-degree laceration, a tear that extends past the anal sphincter and into the anus that can occur during childbirth, her expert relied solely on testimony that Drosinos was actively involved in suturing the tear and directed the proper placement of every stitch. The expert failed to address plaintiffs' contradictory testimony that Drosinos was moving around the delivery room and was only intermittently at the suture site. Drosinos, meanwhile, testified that it was accepted practice at the time to have "two pairs of hands" performing a fourth-degree laceration repair and denied that she would have stepped away during the suturing. Under these circumstances, Drosinos failed to eliminate all issues of fact, thus precluding summary judgment as to plaintiffs' medical malpractice claim (*see Zapata v Buitriago*, 107 AD3d 977, 978-979 [2d Dept 2013]).

Moreover, plaintiffs' expert raised a triable issue of fact by opining that, given the timing of her symptoms and the absence of an infection, the patient developed an anovaginal fistula, an improper connection between the vagina and anus resulting in fecal incontinence, due to the negligent repair of her fourth-degree laceration (*see Uchitel v Fleischer*, 137 AD3d 1111, 1112-1113 [2d Dept 2016]). Drosinos' expert did not address causation

in his moving affirmation, nor did the expert submit an affirmation in reply to plaintiffs' expert's opinion.

Summary judgment was properly granted to defendant Vander Haar, a resident who performed the repair. The record shows that Vander Haar was under the supervision of Drosinos, and she did not exercise her own medical judgment or otherwise operate outside the realm of "ordinary prudence" to trigger individual liability (*Filippone v St. Vincent's Hosp. & Med. Ctr. of N.Y.*, 253 AD2d 616, 618 [1st Dept 1998]). Similarly, defendant hospital cannot be held vicariously liable for Vander Haar's care and treatment of plaintiff, and therefore was also entitled to summary judgment (*id.*)

Summary judgment was improperly granted to defendant Ribaudo, plaintiff's obstetrician who managed her postpartum care. Plaintiffs raised issues of fact as to whether Ribaudo departed from accepted practice in failing to refer plaintiff to a colorectal surgeon upon first hearing her complaints of fecal incontinence and stool coming out of her vagina. Ribaudo's

expert opinion that the surgical repair was timely performed within a three-to-six-month time period was contradicted by plaintiff's expert, who was qualified to render an opinion on this issue.

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

ENTERED: JANUARY 9, 2020

CLERK

Richter, J.P., Gische, Gesmer, Kern, González, JJ.

10742 The People of the State of New York, Ind. 2469/16
Respondent,

-against-

Rashuan Bell,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Thomas Farber, J. at denial of *Dunaway* hearing; Daniel P. Conviser, J. at suppression hearing; Daniel P. FitzGerald, J. at jury trial and sentencing), rendered May 19, 2017, convicting defendant of criminal contempt in the first degree, and sentencing him to a term of 1⅓ to 4 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Among other things, the evidence supports reasonable inferences that defendant signed the order of protection at issue, that he was aware of its duration and requirements, and that, in particular, he knew the order prohibited him from assaulting the victim.

The hearing court, which suppressed defendant's initial oral

statement as involuntary, properly denied suppression of defendant's subsequent videotaped statement, made after such attenuating factors as a pronounced break of at least nine hours, a change of locations, a change of interrogators (with the original interrogator merely present), and renewed *Miranda* warnings (*see People v Paulman*, 5 NY3d 122, 131 [2005]). The court also properly determined that the existence of defendant's pending case in Queens County, and the order of protection issued in that case against the same victim in this case, which gave rise to the contempt charge here, did not preclude the videotaped questioning (*see People v Cohen*, 90 NY2d 632, 638-640 [1997]). In the first place, as the hearing court found, there was no evidence that defendant was represented by counsel on the Queens case at the time of his interrogation on the present case; defendant bore the burden of proof on this factual matter (*see People v Rosa*, 65 NY2d 380, 386-387 [1985]), which was not expressly conceded by the People. In any event, even assuming such representation existed, there were no circumstances warranting imputation to the interrogators of constructive knowledge of the representation at the time the questioning took place (*see People v Lopez*, 16 NY3d 375, 382-386 [2011]). Furthermore, the Queens case was not so related to the present

case as to preclude inquiry (*see People v Henry*, 31 NY3d 364, 368 [2018]), because even though the Queens order of protection ultimately became the basis of the contempt charge at issue on appeal, defendant was only questioned about whether he had assaulted the victim that day.

The motion court correctly determined that defendant's conclusory claim of a lack of probable cause did not raise a factual dispute warranting a hearing on the branch of defendant's suppression motion seeking to suppress his statements as the fruit of an allegedly unlawful arrest (*see Dunaway v New York*, 442 US 200 [1979]). At the time of his motion, defendant had ample information about the basis for his arrest, and he had the "burden to supply the motion court with any relevant facts he did possess" (*People v Jones*, 95 NY2d 721, 729 [2001]).

After conducting a sufficient inquiry, the court providently exercised its discretion in denying defendant's midtrial request for new counsel. Defendant did not demonstrate good cause for a substitution (*see generally People v Linares*, 2 NY3d 507, 510 [2004]), and defendant was not entitled to circumvent the requirement of good cause by using a meritless disciplinary

complaint against his attorney as a device to manufacture an artificial conflict (*see e.g. People v Walton*, 14 AD3d 419, 420 [1st Dept 2005], *lv denied* 5 NY3d 796 [2005]).

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 9, 2020

CLERK

Richter, J.P., Gische, Gesmer, Kern, González, JJ.

10744 In re Matthew T.,

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

Tiffany S.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

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Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for appellant.

Georgia M. Pestana, Acting Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for respondent.

Dawne A. Mitchell, The Legal Aid Society, New York (Judith Stern of counsel), and Wilmer Cutler Pickering Hale and Dorr LLP, New York (Adam Amir of counsel), attorneys for the child.

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Order of disposition, Family Court, Bronx County (Elenor C. Reid, J.), entered on or about December 10, 2018, which, inter alia, after a hearing, determined that respondent mother neglected the subject child, unanimously affirmed, without costs.

The finding of neglect was supported by a preponderance of the evidence (*see* Family Ct Act §§ 1012[f]; 1046[b]). Respondent was found on the street rolling on the ground, laughing and talking to herself in the rain with the then-infant child. She appeared incoherent and her bizarre behavior was associated with

intoxication (*see Matter of Pedro C. [Josephine B.]*, 1 AD3d 267 [1st Dept 2003]). The evidence further established that respondent's intoxication was part of a long-standing pattern of substance abuse. The mother had prior neglect findings entered against her on behalf of her four older children, which resulted in her permanent loss of custody of those children (*see e.g. Matter Oscar Alejandro C.L. [Nicauris L.]*, 161 AD3d 705, 706 [1st Dept 2018]). Furthermore, respondent failed to introduce competent evidence of her participation in a drug treatment program (*see Matter of Jeremy M. [Roque A.M.]*, 145 AD3d 637, 638 [1st Dept 2016]).

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

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

ENTERED: JANUARY 9, 2020

CLERK

Richter, J.P., Gische, Gesmer, Kern, González, JJ.

10746 Mountain Valley Indemnity Company, Index 150751/17
Plaintiff-Respondent,

-against-

John Battaglia,
Defendant-Appellant,

Alessandra Zavaglia, et al.,
Defendants.

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Barbara Jaffe, J.), entered on or about October 1, 2018,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated December 4, 2019,

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

ENTERED: JANUARY 9, 2020

CLERK

Richter, J.P., Gische, Gesmer, Kern, González, JJ.

10748 In re Vuksan Realty, LLC, Index 100965/16
Petitioner-Appellant,

-against-

Shola Olatoye, as Chair of the New York City Housing Authority, et al.,
Respondents-Respondents.

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Lazarus Karp, LLP, New York (Charles J. Siegel of counsel), for appellant.

Kelly D. MacNeal, New York (Byron S. Menegakis of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Nancy M. Bannon, J.), entered on or about July 6, 2018, which denied the petition to annul a determination of respondent New York City Housing Authority (NYCHA), dated April 17, 2014, terminating Section 8 rent subsidies in connection with an apartment owned and leased by petitioner, and granted NYCHA's cross motion to dismiss the proceeding brought pursuant to CPLR article 78 as time-barred, unanimously affirmed, without costs.

The proceeding was properly dismissed as time-barred because petitioner did not commence the proceeding within four months of April 28, 2014, when it received the NE-1 Notice. The April 2014 NE-1 Notice sent to petitioner was a final and binding

determination to suspend payment of the subsidy because it notified petitioner of NYCHA's definitive position that the apartment did not comply with Housing Quality Standards and that NYCHA would suspend payment unless petitioner corrected the violations verified by NYCHA.

In the alternative, even if petitioner's time to commence the proceeding did not begin to run from its receipt of the NE-1 Notice, the proceeding was properly dismissed as time-barred because petitioner did not commence the proceeding within four months of April 28, 2014, when it received the NE-1 Notice, or June 1, 2014, when NYCHA actually suspended payment, or June 25, 2015, when petitioner wrote a letter indicating that repairs to the subject apartment were completed and it knew subsidies were suspended, or January 1, 2016, when NYCHA reinstated payments without making any retroactive payments for the June 2014 through December 2015 suspension period (CPLR 217).

Accordingly, the petition, brought in June 2016, was untimely under any conceivable accrual date (*see Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34 [2005]; *Matter of Baloy v Kelly*, 92 AD3d 521, 522 [1st Dept 2012]; *Matter of Bramble Weilders, Inc. v New York City Hous. Auth.*, 2012 NY Slip Op 32181(U) [Sup Ct, NY County

2012]). Petitioner provided no basis to extend the statute of limitations pursuant to CPLR 2004; nor was an evidentiary hearing required (*cf. R. Bernstein Co. v Popolizio*, 97 AD2d 735 [1st Dept 1983]).

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

ENTERED: JANUARY 9, 2020

CLERK

Richter, J.P., Gische, Gesmer, Kern, González, JJ.

10750 In re Howard Partman, etc., Index 158766/17
Petitioner-Respondent,

-against-

New York State Division of Housing
and Community Renewal,
Respondent,

BLDG Management Co., Inc.,
Respondent-Appellant.

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Kucker Marino Winiarsky & Bittens, New York (Nativ Winiarsky of counsel), for appellant.

Collins Dobkin & Miller, LLP, New York (W. Miller Hall of counsel), for respondent.

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Judgment, Supreme Court, New York County (Arlene P. Bluth, J.), entered on or about September 17, 2018, which granted the petition brought pursuant to CPLR article 78 seeking to annul the determination of respondent New York State Division of Housing and Community Renewal (DHCR), dated August 3, 2017, granting BLDG Management Co., Inc.'s application for a major capital improvement rent increase, unanimously reversed, on the law and in the exercise of discretion, without costs, and the matter remanded to DHCR for further proceedings in accordance with this opinion.

In granting respondent BLDG Management Co., Inc.'s (owner)

application for a major capital improvement rent increase based on evidence that "C" violations were removed after the conclusion of the proceedings before the Rent Administrator (RA), respondent DHCR improperly deviated from its own established rules without explanation (*see Matter of Terrace Ct., LLC v New York State Div. of Hous. & Community Renewal*, 18 NY3d 446, 453 [2012]). Although DHCR may consider evidence not before the RA where (as is at least arguably the case here) it "could not reasonably have been offered or included in the proceeding prior," DHCR must remand the matter to allow the RA to consider the new evidence in the first instance (*see* Rent Stabilization Code [9 NYCRR] § 2529.6*; Matter of Gilman v New York State Div. of Hous. & Community Renewal*, 99 NY2d 144, 150 [2002]). Because DHCR did not order such a remand here, the new evidence was not properly considered.

To the extent the DCHR failed to follow its own rules its

actions were arbitrary and capricious. Accordingly, we order that the case be remanded to DHCR to evaluate whether good cause exists to remand to the RA for consideration of the new evidence.

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

ENTERED: JANUARY 9, 2020

CLERK

Richter, J.P., Gische, Gesmer, Kern, González, JJ.

10751 The People of the State of New York, Ind. 1647/15
Respondent,

-against-

Danny Horne,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Anthony M. Beneduce, Jr. 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 (Alvin Yearwood, J.), rendered March 12, 2018,

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

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

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

ENTERED: JANUARY 9, 2020

CLERK

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

Richter, J.P., Gische, Gesmer, Kern, González, JJ.

10752 In re Tony U.,
Petitioner-Appellant,

-against-

Amy J.P., et al.,
Respondents-Respondents.

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Blank Rome LLP, New York (Lois J. Liberman of counsel), for appellant.

James E. Johnson, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondents.

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Order, Family Court, New York County (Emily M. Olshansky, J.), entered on or about December 5, 2017, which denied petitioner father's objections to an order, same court (Serena Rosario, Support Magistrate), entered on or about June 7, 2017, after a hearing, denying his motion to vacate a prior order, dated July 20, 2016, which dismissed his petition for a downward modification of child support due to his failure to appear, unanimously affirmed, without costs.

A party seeking to vacate a default order must demonstrate both a reasonable excuse and a potentially meritorious defense or claim (CPLR 5015[a][1]; *Matter of Messiah G. [Giselle F.]*, 168 AD3d 420, 420 [1st Dept 2019], *lv dismissed in part, denied in part* 32 NY3d 1212 [2019]). The father failed to demonstrate that

he had a potentially meritorious claim for downward modification of the support order based on a medical disability or the child's emancipation. Although the father had been given multiple adjournments over the course of a year to obtain certified medical records and other competent evidence in support of his petition, he still had not obtained such evidence and was not ready to proceed on the day the proceeding was dismissed, even though the matter had been marked final for trial that day.

In denying the father's objections, the Family Court properly declined to consider the child's affidavit, certified medical records, and a financial disclosure affidavit, which had not been submitted with the motion to vacate the default or during the oral argument, and were presented for the first time with the objections (*see Matter of Loveless v Goldbloom*, 141 AD3d 662, 663 [2d Dept 2016]; *Matter of Carene S. v Kendall S.*, 96 AD3d 767, 768 [2d Dept 2012]).

The denial of the requested adjournment was a provident exercise of discretion by the Family Court (*see Matter of Steven B.*, 6 NY3d 888, 889 [2006]).

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

ENTERED: JANUARY 9, 2020

CLERK

Richter, J.P., Gische, Gesmer, Kern, González, JJ.

10753-
10753A The People of the State of New York, Respondent,

Ind. 3241/09
489/14

-against-

Charles Sleet,
Defendant-Appellant.

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

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

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Judgments, Supreme Court, New York County (Gregory Carro, J.), rendered September 9, 2014, convicting defendant, upon his pleas of guilty, of criminal possession of a forged instrument in the second degree, grand larceny in the fourth degree and attempted grand larceny in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of 3½ to 7 years, unanimously affirmed.

The court did not decline to exercise sentencing discretion (*see People v Farrar,* 52 NY2d 302 [1981]) when it imposed the term that had been agreed to at the plea in the event that defendant both failed to complete a drug program and failed to return to court. The record is clear that the sentencing court

was well aware that it was not compelled to impose the previously agreed-upon sentence, and that it decided to do so based on proper considerations.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 9, 2020

CLERK

Richter, J.P., Gische, Gesmer, Kern, González, JJ.

10754- Index 303405/10
10755- Karima Gregory, et al.,
Plaintiffs-Respondents-Appellants,

-against-

National Amusements, Inc. doing business as Whitestone Multiplex Cinemas, et al.,
Defendants,

Safe Environment Business Solutions, Inc.
Defendant-Appellant-Respondent.

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Furman Kornfeld & Brennan LLP, New York (Tracy S. Katz of counsel), for appellant-respondent.

Fred Lichtmacher, New York, for respondents-appellants.

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Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about October 26, 2018, which denied defendant Safe Environment Business Solutions, Inc.'s (SEB) motion for summary judgment dismissing the complaint as against it, and order, same court and Justice, entered on or about April 8, 2019, which granted SEB's motion for reargument and, upon reargument, granted its motion for summary judgment to the extent of dismissing plaintiff Little's claims against it, unanimously modified, on the law, to grant SEB's motion to the extent of dismissing plaintiff Gregory's claims against it, and otherwise affirmed, without costs. The Clerk is directed to enter judgment

dismissing the complaint as against SEB.

Contrary to plaintiffs' contention that the motion court should not have granted SEB's motion for reargument because it had not overlooked any facts in determining the prior motion (CPLR 2221[d][2]), the court implicitly found that it had overlooked matters of either fact or law in addressing the substance of defendant's original argument and determining that it should have dismissed plaintiff Little's claims.

Plaintiff Gregory testified that SEB's employee, a security guard who was then working at a movie theater, attacked her with a box cutter and slashed her face and body with it after she tapped him on the shoulder and told him she had enjoyed the movie she had just seen. The security guard gave a different version of events and claimed that he was acting in self defense after plaintiffs and others attacked him with box cutters. However, neither version of events would give rise to liability on the part of SEB. Under plaintiff's version of events, SEB could not be held liable because SEB's employee's unprovoked assault on Gregory with a box cutter was not within the scope of any duties he may have had as a security guard and was not done in furtherance of SEB's business interests (*see Wallace v Gomez*, 296 AD2d 306, 307 [1st Dept 2002]; *cf. Fauntleroy v EMM Group*

Holdings LLC, 133 AD3d 452 [1st Dept 2015] [reinstating claims based on respondeat superior where the record showed that a bouncer hired to maintain order was acting within the scope of his employment when he punched the plaintiff]). Under the security guard's version of events, even assuming for purposes of this appeal that his actions were within the scope of his duties as a security guard and were done in furtherance of SEB's business interests, SEB would not be held liable because the security guard's actions were taken in self-defense after being attacked by patrons of the movie theater.

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

ENTERED: JANUARY 9, 2020

CLERK

Richter, J.P., Gische, Gesmer, Kern, González, JJ.

10756 Wendy Ull, as Trustee of the Jeffrey Ull 2009 Management Trust, Plaintiff-Appellant, Index 654541/17

-against-

Royal Car Park LLC, et al., Defendants-Respondents.

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DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, White Plains (Peter S. Dawson of counsel), for appellant.

Smith Gambrell & Russell, LLP, New York (Donald Rosenthal of counsel), for Royal Car Park LLC, Fiesta Car Park LLC, Sharp Car Park LLC, Paramount Car Park LLC, Sunny Car Park LLC, Crest Car Park LLC, Chelsea Car Park LLC, Noble Car Park LLC, Richard Ull and Jennifer Ull, respondents.

Rosenberg Calica & Birney LLP, Garden City (John S. Ciulla of counsel), for Jeffrey Ull, respondent.

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Order, Supreme Court, New York County (John J. Kelley, J.), entered on or about September 26, 2018, which granted defendants' motions for summary judgment dismissing the complaint in its entirety pursuant to CPLR 3212, unanimously modified, on the law, to deny the motion as the claim for an accounting against defendants Richard Ull and Jennifer Ull, and otherwise affirmed, without costs.

Plaintiff claims that distributions from the defendant LLCs were required to be paid in one-third shares to her children,

defendants Richard Ull and Jennifer Ull, and to the Jeffrey Ull 2009 Management Trust (Trust), of which her third child, defendant Jeffrey Ull, was the beneficiary, and that instead, Richard and Jennifer, who manage the LLCs, diverted distributions from the Trust in order to pay Jeffrey directly or to pay other individuals on his behalf.

The court properly granted summary judgment dismissing the claim of breach of fiduciary duty against defendants Richard and Jennifer. They established prima facie entitlement to summary judgment by submitting evidence that distributions paid to the Trust were comparable to those paid to Richard and Jennifer, that certain nonequal distributions were made to account for repayment of loans made by Jennifer and the Trust, and that other characterizations of income or funds were based on their accountant's advice and tax concerns. They also averred that Jeffrey did not receive any payments, directly or through other individuals. The business judgment rule "bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes" (*Auerbach v Bennett*, 47 NY2d 619, 629 [1979]). In seeking to rebut defendants' prima facie case, and to overcome the business judgment rule, plaintiff cited

certain discrepancies in the financial documents, but those, without more, did not raise any triable issue whether Richard or Jennifer acted in bad faith and/or diverted funds from the Trust to Jeffrey directly or to others on his behalf.

In light of the foregoing, the claim against Jeffrey for aiding and abetting breach of fiduciary duty also was properly dismissed (*Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003]), as was the claim of conversion against all defendants (*Lemle v Lemle*, 92 AD3d 494, 497 [1st Dept 2012]; *see Thyroff v Nationwide Mut. Ins. Co.*, 8 NY3d 283, 288-289 [2007]).

The court also properly dismissed the accounting cause of action against Jeffrey. There is no evidence that Jeffrey, who did not manage the LLCs, has any fiduciary relationship to plaintiff (*Saunders v AOL Time Warner, Inc.*, 18 AD3d 216, 217 [1st Dept 2005]; *see Unitel Telecard Distrib. Corp. v Nunez*, 90 AD3d 568, 569 [1st Dept 2011]). Regarding Richard and Jennifer, they owe the Trust fiduciary obligations and consequently, the Trust has a right to an accounting. The trustee need not show that she does not have an adequate remedy at law (*see Mullin v WL Ross & Co. LLC*, 173 AD3d 520 [1st Dept 2019]

Finally, the court properly concluded that there was no basis to deny summary judgment on the ground that discovery was

not complete (CPLR 3212[f]; *Frierson v Concourse Plaza Assoc.*, 189 AD2d 609, 610 [1st Dept 1993]). Her vague allegations that her children colluded in order to pay Jeffrey directly rather than pay the Trust, of which she is the trustee, do not support a request for disclosure pursuant to CPLR 3212(f) (*Citibank, N.A. v Furlong*, 81 AD2d 803, 804 [1st Dept 1981]; *see Fulton v Allstate Ins. Co.*, 14 AD3d 380, 381 [1st Dept 2005]).

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: JANUARY 9, 2020

CLERK

Richter, J.P., Gische, Gesmer, Kern, González, JJ.

10757 Yonina Siegal, etc., et al., Index 301315/07
Plaintiffs-Respondents,

-against-

Dr. Howard Adler,
Defendant-Appellant,

Howard Adler, M.D., P.C., et al.,
Defendants.

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KL Rotondo & Associates, Rye (Kathi L. Rotondo of counsel), for appellant.

Lisa M. Comeau, Garden City, for respondents.

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Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered on or about January 18, 2018, which denied defendant Dr. Howard Adler's motion for summary judgment dismissing the complaint as against him, unanimously modified, on the law, to grant the motion solely as to the claims based upon Dr. Adler's examination of the decedent, and otherwise affirmed, without costs.

The decedent, a 43-year-old male attorney, presented to defendant Dr. Adler, his primary care physician, on March 31, 2005, complaining of headaches during the preceding three weeks. After examining him, Dr. Adler drew blood for lab work and recommended that the decedent make quality-of-life changes. Dr.

Adler also advised the decedent to have his eyes checked, especially to rule out glaucoma, and to see a neurologist if the headaches continued.

Plaintiff's expert affidavit raised a triable issue of fact as to whether Dr. Adler departed from good and accepted standards of medical practice in failing to refer the decedent for rapid cranial imaging and/or neurological assessment (*see Bradley v Soundview Healthcenter*, 4 AD3d 194, 194 [1st Dept 2004]). The expert opined that "[w]hen an otherwise healthy 40 year old [sic] male patient presents with complaints of new headaches over a course of three weeks that are not improving, good and accepted standards of medical care and practice require that the patient be referred for head imaging for a structural lesion or to an emergency room for a thorough rapid neurological assessment." Dr. Adler does not dispute this description of the decedent on March 31, 2005. Although he takes issue with the factual bases of several other statements made by plaintiff's expert, those statements do not contradict or negate the expert's broader opinion. The remainder of Dr. Adler's arguments are addressed to the credibility of plaintiff's expert and the weight that should be afforded to the expert's opinion, which are matters for the factfinder.

Plaintiff's expert affidavit also raised an issue of fact as to whether Dr. Adler's assessment of decedent's headache history deviated from good and accepted standards of medical practice. Plaintiff's expert opined that when a patient presents with "a new onset, persistent headache," good and accepted standards of medical care require that the doctor take "a headache history with attention to the timing and severity of the headache," and that Dr. Adler's headache history was inadequate because he did not make findings as to whether the headaches began suddenly, whether they became progressively worse, how long they lasted, how frequent they were, or whether there were any exacerbating or relieving factors. Dr. Adler does not reasonably dispute that the decedent presented with "a new onset, persistent headache" on March 31, 2005. He argues that he made the findings that the expert listed. However, he does not cite any evidence that he inquired as to how long the decedent's headaches lasted or whether there were any exacerbating or relieving factors.

However, plaintiff's expert opinion failed to raise a triable issue of fact as to whether Dr. Adler departed from good and accepted standards of medical practice in his examination of the decedent except as to his taking decedent's headache history. The expert's opinion that Dr. Adler's examination was "inadequate

in elucidating subtle neurologic signs of cerebral dysfunction, including memory function, coordination assessments, limb drift, ataxia, and dysmetria" is conclusory. It does not set forth the requirements under good and accepted standards of medical practice that Dr. Adler failed to meet (*see Kaplan v Karpfen*, 57 AD3d 409, 409-410 [1st Dept 2008], *lv denied* 12 NY3d 716 [2009]).

Dr. Adler failed to demonstrate as a matter of law that the nonparty ophthalmologist's treatment of the decedent on April 3, 2005 was the superseding cause of his injuries (*see Hain v Jamison*, 28 NY3d 524, 529 [2016]).

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

ENTERED: JANUARY 9, 2020

CLERK

Richter, J.P., Gische, Gesmer, Kern, González, JJ.

10758 The People of the State of New York, Ind. 4513/15
Respondent,

-against-

Guielmo Smith,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Katherine Kulkarni 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 (Roger Hayes, J.), rendered June 14, 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.

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ENTERED: JANUARY 9, 2020

CLERK

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

Richter, J.P., Gische, Gesmer, Kern, González, JJ.

10759 Nestor Ramos, et al., Index 155667/18
Plaintiffs,

-against-

200 West 86 Apartments Corp.,
Defendant-Appellant.

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200 West 86 Apartments Corp.,
Third-Party Plaintiff-Appellant,

-against-

Ben Sevier, et al.,
Third-Party Defendants-Respondents.

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Barclay Damon LLP, Albany (Colm P. Ryan of counsel), for appellant.

David A. Kaminsky & Associates, P.C., New York (James A. English of counsel), for respondents.

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Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered July 9, 2019, which, inter alia, granted third-party defendants' motion to dismiss the third-party complaint, unanimously affirmed, without costs.

The court properly dismissed the claim for contractual indemnification. The alteration agreement could not serve as the basis for the contractual indemnification claim against the third-party defendant shareholders because paragraph 33 of the unsigned alteration agreement explicitly required its execution

by third-party plaintiff cooperative to be enforceable (*see Stonehill Capital Mgt. LLC v Bank of the W.*, 28 NY3d 439, 451 [2016]). The lease also could not serve as a basis for the contractual indemnification claim because the third-party complaint failed to sufficiently allege a violation of the lease's indemnification provision in that it did not allege the shareholders' failure to comply with any provision of the lease, any act or omission by the shareholders or any act or omission by the cooperative while serving as the shareholders' agent.

The court also properly dismissed the claims for negligence, common-law indemnification and contribution as the third-party complaint failed to allege any duty, act, or omission of the shareholders (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 375 [2011]*; Raquet v Braun*, 90 NY2d 177, 182 [1997]).

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 9, 2020

CLERK

Richter, J.P., Gische, Gesmer, Kern, González, JJ.

10761 The People of the State of New York, Ind. 4854/16
Respondent,

-against-

Tykaine Webb Thompson,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Amanda Katherine Regan of counsel), for respondent.

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Judgment, Supreme Court, New York County (Robert M. Mandelbaum, J.), rendered September 15, 2017, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him, as a second violent felony offender, to a term of seven years, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations, including those relating to the victim's description of his injuries.

The element of physical injury was established by the injured correction officer's testimony that he sustained a laceration to his lip, felt pain and soreness in his hands and knees, and remained out of work for several days. Despite the brevity of the altercation, this testimony, corroborated by the injured officer's medical records, amply supported the jury's finding that the officer sustained "more than slight or trivial pain" (*People v Chiddick*, 8 NY3d 445, 447 [2007]) as the result of defendant's assault (*see e.g. People v Ross*, 163 AD3d 428, 429 [1st Dept 2018]).

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 9, 2020

CLERK

CORRECTED OPINION - JANUARY 9, 2020

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, P.J.
Dianne T. Renwick
Sallie Manzanet-Daniels
Anil C. Singh, JJ.

10320-
10320A-
10320B
Index 161240/13

_____x

Eita (Itty) Pruss,
Plaintiff-Appellant-Respondent,

-against-

Infiniti of Manhattan, Inc., et al.,
Defendants-Respondents-Appellants,

Infiniti Financial Services, et al.,
Defendants.

_____x

Plaintiff appeals from the judgment of the Supreme Court, New York County (George J. Silver, J.), entered February 9, 2018, awarding her $5 million as against defendants Infiniti of Manhattan, Inc. and Massamba Seck, and defendants Infiniti of Manhattan, Inc. and Massamba Seck appeal from the order of the same court (Adam Silvera, J.), entered June 5, 2018, which denied their motion to vacate the judgment, and from the amended judgment of the same court (Adam **Silvera**, J.), entered June 14, 2018, awarding plaintiff $4 million as against them.

The Edelsteins, Faegenbury & Brown, LLP, New York (Paul J. Edelstein, Daniel A. Thomas and Judah Z. Cohen of counsel), for appellant-respondent.

Lester Schwab Katz & Dwyer, LLP, New York (Paul M. Tarr of counsel), for respondents-appellants.

ACOSTA, P.J.

I write to highlight the fundamental principle that parties are bound by stipulations signed in open court by their attorneys. The issue arose in the context of a negligence case, where plaintiff was seriously injured when she was struck by a motor vehicle while standing on a sidewalk median in Brooklyn. The vehicle was owned by defendant Infiniti of Manhattan, Inc. and driven by defendant Massamba Seck[1] (the Infiniti defendants). Plaintiff suffered serious injuries and required extensive hospitalization and multiple surgeries. At issue in this case is whether the Infiniti defendants are bound by a settlement agreement entered into by their attorneys. We find that the Infiniti defendants are bound, because their attorneys had apparent authority to bind them to the $8,875,000 judgment. Significantly, there is no affidavit or testimony by Infiniti stating that Infiniti, or any of its employees, was unaware of the settlement or that Infiniti did not authorize the settlement. The only ones making this claim are the lawyers from the firm that was hired by the insurance companies to defend the Infiniti defendants. The fact that one of the insurers is now unable to

[1]Plaintiff's briefs, and the judgment awarding plaintiff damages as against Infiniti and Seck, erroneously refer to Seck as "Beck."

pay its intended $5 million portion does not inure to the Infiniti defendants' benefit. Rather, the Infiniti defendants are responsible for the portion of the agreed-upon amounts that the insurers do not pay. To accept their position would alter the way litigation is conducted in New York State. Courts would have to conduct colloquies in every case to make sure that the parties, notwithstanding their attorneys' actions in appearing for them on numerous occasions and signing stipulations, acquiesced in the terms of the stipulations. That is unacceptable, especially here, where the Infiniti defendants never objected to the stipulation until the filing of the instant order to show cause more than a year and six months after the stipulation was signed in open court.

The facts herein are largely undisputed. On December 5, 2013, plaintiff commenced this action in Supreme Court, New York County, against, inter alia, Infiniti of Manhattan, Inc., Massamba Seck, Dennis Blanchette, and Jon-Paul Rorech, sounding in negligence.

Tower Insurance Company of New York was the Infiniti defendants' primary insurer, and Great American Insurance Company was their excess insurance carrier. Tower retained Lester, Schwab, Katz & Dwyer, LLP as trial counsel for the Infiniti defendants. On April 20, 2016, the parties' counsel and

representatives of the insurers appeared in Supreme Court, New York County (George J. Silver, J.), to attempt settlement. This included an offer of $9,000,000, to be apportioned $5,000,000 from Tower, $3,875,000 from Great American, and the balance from GEICO on behalf of the remaining individual defendants, Blanchette and Rorech. The matter did not settle at that time, and was adjourned to August 10, 2016.

On July 28, 2016, a conservator was appointed for Tower in an action in California.

Two weeks later, on August 10, 2016, counsel for the parties entered into a stipulation of settlement for $9,000,000, so ordered by Justice Silver, that stated, "Infini[ti] & Seck - $8,875,000." In parentheses, the stipulation noted "Tower - $5 mil; Great American $3.875 mil." The stipulation also stated that defendant Blanchette would pay $100,000 and defendant Rorech would pay $25,000.

Blanchette, Rorech, and Great American paid their portions of the settlement, leaving $5,000,000 owed by the Infiniti defendants to be paid by Tower.

On August 24, 2016, after certain negotiations regarding the form of the release, plaintiff's counsel sent the executed general release to Lester Schwab Katz & Dwyer LLP and Fabiani Cohen & Hall, the Infiniti defendants' trial cocounsel, which

were retained by Great American. Plaintiff's counsel provided a CPLR 5003-a notice stating that if payment was not received in 21 days, judgment would be entered against the Infiniti defendants, including interest, costs, and disbursements.

On September 13, 2016, the court in the California action approved a proposed conservation and liquidation plan for Tower, which by merger became CastlePoint National Insurance Company.

On October 30, 2016, plaintiff's counsel received an email from a senior claim analyst for AmTrust North America (Tower's third-party administrator), stating that CastlePoint's conservator had analyzed the claim settlement and advised that they would not honor the settlement because it occurred after the conservancy order. The analyst stated that the conservator offered to pay $1,000,000 cash and would provide a pre-approved claim against the estate for the $4,000,000 balance.

On March 30, 2017, CastlePoint was declared insolvent by the California Superior Court, and it was placed into liquidation.

Almost a full year after the settlement, on August 9, 2017, Justice Silver conducted an on-the-record factual hearing with all the attorneys who were present at the August 10, 2016 settlement conference. The attorney representing CastlePoint both then and at the August 10, 2016 settlement stated:

> "On July 28th of 2016, CastlePoint was placed into

> conservation. I and my law firm did not learn about that conservation [order] until August 8th of 2016 [two days before the settlement agreement was signed by the parties]. Neither I, nor my law firm, were ever provided with the Conservation Order that was issued on July 29th of 2016. However, before I appeared on August 10th of 2016, I can't recall whether it was Monday, Tuesday or Wednesday, August 8, August 9 or August 10, but I had a conversation with AmTrust, who was the third-party administrator managing CastlePoints' policies, and confirmed that I still had the authority to appear in this Court and represent that that $5 million that had previously been offered was still available to be offered and paid in cash to Pruss.
>
> * * *
>
> "I didn't receive any instructions or communications from AmTrust, CastlePoint or the conservator relating to how the conservation might impact the settlements or any settlement authority, and no one ever communicated to me that that $5 million was not available in cash for purposes of the settlement. Therefore, I appeared, I made that representation to Your Honor and to all counsel and I stand by that representation."

In 2017, plaintiff commenced an action against the Superintendent of Financial Services of the State of New York as Ancillary Receiver of CastlePoint for the remaining $5,000,000, and on November 6, 2017, the Superintendent settled with plaintiff for $1,000,000. Significantly, the settlement explicitly stated that the one million was "in partial satisfaction of the plaintiff's claims against CastlePoint National Insurance Company [and the Infiniti defendants] to the extent of the payment."

Approximately three months later, on February 9, 2018,

plaintiff submitted a proposed judgment against the Infiniti defendants for $5,000,000. The Clerk, sua sponte, struck the portions of the judgment that awarded interest, costs, and disbursements, and entered the judgment.

Twelve days later, on February 21, 2018, the Infiniti defendants moved by order to show cause to vacate the February 9, 2018 judgment, stay plaintiff from entering a judgment against them, or enter a proposed counter judgment of $0.00. They argued that they were unaware of and did not participate in the settlement negotiations and did not authorize the settlement and that counsel who signed on their behalf did not have authority to settle on their behalf. In addition, the Infiniti defendants argued that article 74 of the Insurance Law exempts prompt payment of the settlement amount pursuant to CPLR 5003-a(f). The order to show cause to vacate the judgment was denied by the court (Adam Silvera, J.).

I agree with the court's denial of Infiniti defendants' order to show cause. The Infiniti defendants' argument that their counsel was not authorized to enter into the settlement and that they did not participate in the settlement negotiations is without merit, inasmuch as their attorneys had apparent authority to bind them to the settlement agreement (*see Hallock v State of New York*, 64 NY2d 224, 230 [1984]; *see also Weil, Gotshal &*

Manges LLP v Fashion Boutique of Short Hills, 56 AD3d 334 [1st Dept 2008]; *Hawkins v City of New York*, 40 AD3d 327 [1st Dept 2007]; *Matter of Silicone Breast Implant Litig.*, 306 AD2d 82 [1st Dept 2003] ["A settlement is considered binding . . . even where a client is not present at the time it is entered, and where the attorney does not have actual authority, if the court concludes that counsel's actions indicate 'apparent authority' to act on his or her client's behalf"], citng *Stoll v Port Auth. of N.Y. & N.J.*, 268 AD2d 379, 380 [1st Dept 2000]; *Popovic v New York City Health & Hosps. Corp.*, 180 AD2d 493 [1st Dept 1992). "Only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation" (*Hallock*, 64 NY2d at 230). Thus, the correct standard in reviewing an attorney's ability to settle a case is whether he had the apparent authority to do so, and, in order for a client not to be bound by the actions of his attorney, he must demonstrate that the attorney "was without authority of any sort to enter into the settlement" (*Hallock*, 64 NY2d at 230).

Accordingly, the burden was on the Infiniti defendants to show that their attorneys were without authority to settle the case on their behalf, and they failed to meet the burden in their motion to dismiss. Indeed, there is no evidence in the record to

support the Infiniti defendants' position. As the court stated,

> "Noticeably absent from the Infiniti Defendants['] papers is any contract between them and Tower Insurance or Great American which demonstrates that Tower Insurance or Great American did not have the authority to hire an attorney on behalf of the Infiniti Defendants and to enter a settlement agreement. *Notably, the Infiniti Defendants' papers are devoid of any affidavit from someone with personal knowledge stating that they had no knowledge of the settlement and did not authorize such*. Rather, the only supporting affirmation is from a member of the law firm of Lester Schwab Katz & Dwyer, LLP, the same firm that the Infiniti Defendants are now claiming did not have authority to enter into the Stipulation of Settlement on their behalf [emphasis added]."

The court went on to note that

> "since January 2014, the Infiniti Defendants either personally, or through their insurance, hired several attorneys to represent them in this action and, for over 2 and a half years, the Infiniti Defendants did not personally appear in any of the 11 appearances in this action to defend the case or state that such attorneys did not represent them. Instead, the Infiniti Defendants let such attorneys appear on their behalf on numerous conferences with the court, and never objected to the Stipulation of Settlement until the filing of the instant Order to Show Cause, over a year and 6 months after the Stipulation of Settlement was signed in open court and so ordered by Justice Silver."

Thus, the Infiniti defendants "implicitly ratified the settlement by making no formal objection" for more than 1½ years (*Hawkins*, 40 AD3d at 327; *Silicone Breast Implant Litig.*, 306 AD2d at 85). Given their attorneys' apparent authority, the Infiniti defendants "must bear [the] responsibility [for the lawyers entering into a settlement agreement]" (*Hallock*, 64 NY2d at 230).

Nor do the cases cited by the Infiniti defendants support

their position. Those cases involved insurance carriers in insolvency or conservatorship, and the recognition that the settlement would be paid out of funds from the liquidation bureau as a result, not from the individual defendants. Accordingly, those defendants could not be held responsible for any unpaid claims by the insurers. For instance, in *Jankoff Joint Venture II, LLC v Bayside Fuel Oil Corp* (74 AD3d 886, 887 [2nd Dept 2010]), "the record as a whole unequivocally establishe[d] that it was the intent and understanding of the parties that *a settlement would be paid out of funds of the Liquidation Bureau* of the New York State Department of Insurance that were set aside for the payment of claims against insolvent insurance carriers." Here, however, the Infiniti defendants' were always at risk inasmuch as it was understood that the settlement amounts would not be paid by a state insurance fund. In fact, it was made clear by an attorney representing the Infiniti defendants that the $8,875,000 would be paid in cash, i.e., not from any state fund.

Furthermore, the Infiniti defendants cannot rely on CPLR 5003-a(f). CPLR 5003-a(f) exempts settlement agreements involving insurance companies that have been declared insolvent from prompt payment because of the delays inherent in a liquidation process. Here, the Superintendent of Financial

Services (the ancillary receiver for CastlePoint) settled plaintiff's claim for $1,000,000 on November 6, 2017. CPLR 5003-a(f) precluded plaintiffs from seeking prompt payment on that $1,000,000. In fact, the stipulation of settlement with the Superintendent specifically states that the agreement is subject to CPLR 5003-a(f). The remaining $4,000,000, however, is not subject to CPLR 5003-a(f) because plaintiff is seeking payment from the Infiniti defendants, not from an insurance company. In fact, the settlement explicitly stated that the $1,000,000 was "in partial satisfaction of the plaintiff's claims against CastlePoint National Insurance Company [and the Infiniti defendants] to the extent of the payment." Accordingly, after November 6, 2017, plaintiff was free to exercise her legal rights to obtain the unpaid amounts from the Infiniti defendants. She did so by having judgment entered against the Infiniti defendants on February 9, 2018, three months after she settled with the Superintendent.

Plaintiff is correct that she is entitled to interest, costs and disbursements. As plaintiff had previously been paid $1,000,000 in partial satisfaction of the $5,000,000, the court properly directed that the judgment be amended to reflect the $4,000,000 remaining due. However, the Clerk should have included statutory interest, costs and disbursements.

Accordingly, plaintiff's appeal from the judgment of the Supreme Court, New York County (George J. Silver, J.), entered February 9, 2018, awarding plaintiff $5 million as against the Infiniti defendants, should be deemed an appeal from the amended judgment of the same court (Adam Silvera, J.), entered June 14, 2018, awarding plaintiff $4 million as against said defendants, and so considered, said amended judgment should be modified, on the law, to add interest, costs and disbursements, and otherwise affirmed, without costs. The appeal from the order of the same court (Adam Silvera, J.), entered June 5, 2018, which denied the Infiniti defendants' motion to vacate the judgment, should be

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

All concur.

Plaintiff's appeal from judgment, Supreme Court, New York County (George J. Silver, J.), entered February 9, 2018, deemed appeal from amended judgment, same court (Adam Silvera, J.), entered June 14, 2018, and so considered, said amended judgment modified, on the law, to add interest, costs and disbursements, and otherwise affirmed, without costs. Appeal from order, same court (Adam Silvera, J.), entered June 5, 2018, dismissed, without costs, as subsumed in appeal from amended judgment.

Opinion by Acosta, P.J. All concur.

Acosta, P.J., Renwick, Manzanet-Daniels, Singh, JJ.

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

ENTERED: JANUARY 9, 2020

CLERK