SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 21, 2020

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Manzanet-Daniels, J.P., Gesmer, Oing, Moulton, González, JJ.

10807 The People of the State of New York, Respondent, Ind. 3239/14

-against-

Kenneth Washington,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Matthew B. White of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Barbara F. Newman, J.), rendered March 30, 2016, as amended April 5, 2016, convicting defendant, after a jury trial, of criminal sexual act in the first degree, rape in the third degree (two counts), grand larceny in the fourth degree (two counts), unlawful imprisonment in the second degree, assault in the third degree, criminal possession of stolen property in the fifth degree, unauthorized use of a vehicle in the third degree, operating a motor vehicle under the influence of alcohol (two counts), reckless endangerment in the second degree, reckless driving and leaving the scene of an accident, and sentencing him, as a second felony

offender, to an aggregate term of 17 years, unanimously affirmed.

The court providently exercised its discretion in admitting a series of text messages exchanged between a person purporting to be defendant's mother and the victim two days after the crime. There was sufficient authentication, because an extensive chain of circumstantial evidence left no doubt that the texts came from defendant (*see People v Lynes*, 49 NY2d 286, 291-293 [1980]). Among other things, these intimidating texts, which contained damaging admissions, reached the victim at a disguised phone number that she had shared with defendant shortly after the crime, but had not shared with anyone else. The texts revealed a detailed knowledge of the incident and the relationship between defendant and the victim, and they explicitly discussed the sexual encounter. The sender admitted having the victim's car, bag and phone, which were taken during the incident, and defendant was apprehended a day later driving the victim's car. Viewed as a whole, and not as individual fragments, the circumstantial evidence made it highly improbable that anyone other than defendant (including the unapprehended second participant in the crime) sent the texts. In addition, the sender's phone number was registered to a former female friend of defendant.

The court properly denied defendant's motion to dismiss one

count of third-degree rape. The two rapes were separate and distinct acts, notwithstanding that they occurred in the course of a continuous incident, because they were separated by the unapprehended accomplice's act of first-degree sexual abuse (*see People v Alonzo*, 16 NY3d 267, 269 [2011]).

The court properly exercised its discretion in declining to conduct an inquiry of a juror about whether she had violated the court's instructions not to discuss the case. The court conducted a sufficient inquiry when it ascertained from a court officer that the juror had only made an expression of annoyance at being shown a photograph in evidence without any forewarning about its explicit content. This innocuous remark fell far short of constituting a prohibited discussion of the case, the court's inquiry of the court officer sufficed to establish the content of the remark, and an inquiry of the juror herself might have been counterproductive (*see People v Kuzdzal*, 31 NY3d 478, 484-486 [2018]).

Defendant did not preserve the specific challenge that he raises on appeal to annotations on the verdict sheet, and we decline to review it in the interest of justice. We have considered and rejected defendant's arguments on the issue of preservation. As an alternative holding, we reject defendant's claim on the merits. The annotations placed by the court on the

verdict sheet, which served to distinguish between counts without providing any legal instructions, fell within the category of permissible annotations set forth by the Court of Appeals in *People v Lewis* (23 NY3d 179, 187 [2014]).

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

ENTERED: JANUARY 21, 2020

CLERK

Manzanet-Daniels, J.P., Gesmer, Oing, Moulton, González, JJ.

10808-
10808A Philippe Boccara,
Plaintiff-Appellant,

-against-

Joan S. Beinart as Trustee of
the Jooan S. Beinart Personal
Qualified Trust, et al.,
Defendants-Respondents.

Index 653083/14

Katz Melinger PLLC, New York (Kenneth J. Katz of counsel), for appellant.

Jonathan Fisher, New York, for respondents.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about March 22, 2017, which denied plaintiff prospective purchaser's motion for summary judgment on his claims for, inter alia, breach of contract and a return of his $200,000 down payment, unanimously affirmed, without costs. Order, same court and Justice, entered on or about August 29, 2018, which, insofar as appealed from, denied plaintiff's motion to renew, unanimously affirmed, without costs.

Plaintiff established his prima facie entitlement to judgment as a matter of law. The cooperative board refused to approve plaintiff's purchase of the shares to the subject apartment, and the parties' contract allowed in such instances for plaintiff to cancel the contract and be refunded his down

payment. In opposition, defendants raised triable issues as to whether the board's refusal to approve the sale was due to bad faith on the part of plaintiff. Plaintiff's argument that the motion court should not have considered the affidavit of defendant Jonathan Fisher because it was not notarized is not preserved, and we decline to review it (*see Matter of Brodsky v New York City Campaign Fin. Bd.*, 107 AD3d 544, 545 [1st Dept 2013]; *see also Stewart v Goldstein*, 175 AD3d 1214, 1215 [1st Dept 2019]).

The motion court properly denied the motion to renew. Plaintiff did not explain the failure to offer the purportedly new evidence on his initial motion (*see Estate of Brown v Pullman Group*, 60 AD3d 481 [1st Dept 2009], *lv dismissed in part, denied in part* 13 NY3d 789 [2009]).

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

ENTERED: JANUARY 21, 2020

CLERK

Manzanet-Daniels, J.P., Gesmer, Oing, Moulton, González, JJ.

10809 In re Jaquiya F.,

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

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

James E. Johnson, Corporation Counsel, New York (Deborah A. Brenner of counsel), for presentment agency.

_____

Order, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about July 3, 2018, which, to the extent appealed from as limited by the briefs, at the conclusion of a violation of probation proceeding, adjudicated appellant a juvenile delinquent and placed her on probation for three months while also continuing the original October 4, 2017 order of disposition which adjudicated appellant a juvenile delinquent and placed her on probation for a period of 12 months, unanimously reversed, on the law, without costs, and the violation of probation petition dismissed.

Upon the conclusion of a violation of probation proceeding, the Family Court "may revoke, continue or modify the order of probation" (Family Court Act § 360.3[6]). "If the court revokes the order, it shall order a different disposition pursuant to

section 352.2" (*id.*). However, "[i]f the court continues the order of probation ... it shall dismiss the petition of violation" (*id.*). Here, the Family Court entered a different disposition despite continuing, and not revoking, the original order of disposition, and the new adjudication of delinquency and period of probation was not authorized by law.

The order on appeal constitutes a dispositional order, and is thus appealable as of right (Family Court Act § 365.1). The appeal has not been rendered moot by the expiration of the term of probation, because the second delinquency adjudication remains (*see Matter of William A.*, 72 AD3d 587 [1st Dept 2010]).

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

ENTERED: JANUARY 21, 2020

CLERK

Manzanet-Daniels, J.P., Gesmer, Oing, Moulton, González, JJ.

10810-
10810A &
M-8503

Index 153312/18

A'Seelah Diamond, et al.,
Plaintiffs-Appellants,

-against-

New York City Housing Authority, et al.,
Defendants-Respondents.

- - - - -

The State of New York,
Amicus Curiae.

_____

Willkie Farr & Gallagher LLP, New York (Shaimaa Hussein of counsel), for appellants.

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

Letitia James, Attorney General, New York (Blair J. Greenwald of counsel), for amicus curiae.

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Judgment, Supreme Court, New York County (Carol R. Edmead, J.), entered February 28, 2019, dismissing the cause of action for breach of the warranty of habitability, without prejudice, and dismissing the cause of action for injunctive relief, unanimously reversed, on the law and the facts, without costs, the judgment vacated, the cause of action for breach of the warranty of habitability reinstated, and plaintiffs' motion for certification of the "damages class" granted. Appeal from order, same court and Justice, entered February 7, 2019, unanimously dismissed, without costs, as subsumed in the appeal from the

judgment.

Unless Congress manifestly and clearly intends to preempt the States' exercise of jurisdiction over matters relating to the welfare of their citizens under the Supremacy Clause of article VI of the Constitution, the States' police powers are not superseded by federal law. A federal law can preempt a State or local law in three ways: (1) by an express provision in the federal statute; (2) by inference, where the federal scheme is so pervasive and the character and obligations imposed leave no room for the State or local government to legislate; and (3) to the extent that the State or local law actually conflicts with the federal law, for example, where compliance with both is impossible or where adherence to the State or local law would thwart the objectives of the federal law (*see City of New York v Job-Lot Pushcart*, 88 NY2d 163, 166-167 [1996], *cert denied sub nom JA-RU v City of New York*, 519 US 871 [1996]).

The motion court correctly concluded that the injunctive relief sought by plaintiffs conflicted with the administrative agreement, which empowered a Monitor to oversee and work with NYCHA and coordinate and consult with HUD and the US Attorney, to correct deficiencies in NYCHA's facilities. Requiring NYCHA to devise and implement a plan to remediate the heat and hot water problems and report to plaintiffs would interfere with the powers

and discretion of the Monitor to direct and oversee NYCHA's compliance with HUD regulations.

Plaintiffs and amicus assert that there is no actual conflict between the proposed injunctive relief and the administrative agreement because the goals are the same. However, even if the goals of the federal and state law are the same, a state law may be preempted if it interferes with the methods by which the federal statute was designed to reach that goal (*see Guice v Charles Schwab & Co.*, 89 NY2d 31, 33 [1996], *cert denied* 520 US 1118 [1997]). Here, the administrative agreement provided a specific structure and method for reaching the goal of compliance with health and safety requirements. The injunctive relief sought by the class would interfere with the powers of the Monitor and the program mandated by the administrative agreement.

Plaintiffs and amicus assert that paragraph 105 of the administrative agreement expressly preserved their right to bring the instant action. Paragraph 105 stated that the administrative agreement did not limit the rights of non-parties to bring claims against NYCHA, except as otherwise provided by law. Here, the law relating to preemption provides otherwise (*see 435 Cent. Park W. Tenant Assn. v Park Front Apts., LLC*, 164 AD3d 411, 414 [1st Dept 2018]).

However, the court erred in declining to certify the damages class in that common questions of law and fact predominate in connection with plaintiffs' damages and declaratory judgment claims.

Commonality cannot be determined by an mechanical test, and fact questions pertaining to individual class members may remain after resolution of common questions, but this is not fatal to class action status (*see City of New York v Maul*, 14 NY3d 499, 514 [2010]).

The class action statute should be liberally construed (*see Pruitt v Rockefeller Center Properties, Inc.*, 167 AD2d 14, 21 [1991]).

In order to prove a claim for breach of the warranty of habitability, plaintiffs must show the extensiveness of the breach, the manner in which it affected the health, welfare or safety of the tenants, and the measures taken by the landlord to alleviate the violation (*see Park W. Mgt. Corp. v Mitchell*, 47 NY2d 316, 328 [1979], *cert denied* 444 US 992 [1979]).

NYCHA conceded that 80% of its housing units experienced heat and/or hot water outages during the relevant period, which demonstrates that the problems that affected each class member were system-wide. Thus, much of the proof will likely concern NYCHA's overall deficiencies, rather than the breakdown of

individual heating systems in individual buildings. The need to conduct individualized damages inquiries does not prevent class certification as long as common issues of liability predominate (*see Borden v 400 E. 55th St. Assoc., L. P.*, 105 AD3d 630, 631 [1st Dept 2013]).

In any event, the heating systems that failed served multiple housing units, and proof of NYCHA's efforts to repair each system will be common to numerous class members. In order to address any concerns with the size or disparity of the class, the court can designate subclasses consisting of tenants of a particular NYCHA complex, development or building (*see Roberts v Ocean Prime, LLC*, 148 AD3d 525 [1st Dept 2017]).

Moreover, class action treatment is the most efficient method for adjudicating the claims of class members who lack the resources to bring individual actions for the small recovery they might obtain (*see Weinberg v Hertz Corp.*, 116 AD2d 1, 7 [1st Dept 1986], *affd* 69 NY2d 979 [1987]).

M—8503 - *Diamond v New York City Housing Authority*

Motion to file amicus curiae brief granted.

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

ENTERED: JANUARY 21, 2020

CLERK

Manzanet-Daniels, J.P., Gesmer, Oing, Moulton, González, JJ.

10812 The People of the State of New York, Ind. 3949/16
Respondent,

-against-

Jose Reyes,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered March 20, 2017, convicting defendant, upon his plea of guilty, of assault in the second degree, and sentencing him to a term of three years, with three years' postrelease supervision, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the term of postrelease supervision 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 21, 2020

CLERK

Manzanet-Daniels, J.P., Gesmer, Oing, Moulton, González, JJ.

10813 In re Margaret M.W.S.,
Petitioner-Appellant,

-against-

Richard A.M.,
Respondent-Respondent.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

Law Offices of Randall S. Carmel, Jericho (Randall S. Carmel of counsel), for respondent.

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

_____

Order, Family Court, New York County (Marva A. Burnett, Referee), entered on or about May 9, 2018, which granted respondent father's motion to dismiss the petition to modify an order of custody and visitation, unanimously affirmed, without costs.

The court properly dismissed the petition without conducting an evidentiary hearing (*see Matter of Ronald S. v Deirdre R.*, 62 AD3d 593 [1st Dept 2009]). This Court previously affirmed an order granting the father full custody, citing the mother's history of psychiatric hospitalizations and her continued irrational conduct, which had placed the child in danger (*see* 119 AD3d 435 [1st Dept 2014]). Thereafter, the mother filed several petitions to modify the custody order to grant her visitation

with her daughter. The instant petition was filed one month after Family Court conducted a full evidentiary hearing on the mother's request for identical relief. That petition was dismissed, and this Court affirmed, finding that although the mother testified that her mental condition had improved, she provided no medical testimony to substantiate her claim (*see* 168 AD3d 521 [1st Dept 2019]).

In the instant petition, the mother has failed to demonstrate a material change in circumstances since the most recent dismissal, sufficient to show that visitation would be in the child's best interests (*see Matter of Savage v Morales*, 147 AD3d 861 [2d Dept 2017]).

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

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

ENTERED: JANUARY 21, 2020

CLERK

Manzanet-Daniels, J.P., Gesmer, Oing, Moulton, González, JJ.

10814- Index 162797/14
10815-
10815A Arleen P. Schloss,
Plaintiff-Appellant/Respondent,

-against-

Tears Realty Corp.,
Defendant-Respondent/Appellant.

_____

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Brian J. Isaac of counsel), for Arleen P. Schloss, appellant/respondent.

Law Office of Fern Flomenhaft PLLC, New York (Fern Flomenhaft of counsel), for Tears Realty Corp., respondent/appellant.

_____

Order, Supreme Court, New York County (James E. d'Auguste, J.), entered June 11, 2018, which denied plaintiff's motion for an order setting aside the jury verdict, unanimously affirmed, without costs. Appeal from order, same court (Nancy M. Bannon, J.), entered May 1, 2017, which, to the extent appealed from, denied defendant's motion for summary judgment dismissing the complaint, unanimously dismissed, without costs, as academic. Appeal from order, same court and Justice, entered May 10, 2017, which, to the extent appealed from as limited by the briefs, denied defendant's motion for a hearing on the issue of plaintiff's competency to testify at trial and to strike plaintiff's deposition testimony, unanimously dismissed, without costs, as academic.

Plaintiff was injured when she fell down a flight of stairs leading down from her apartment, striking her head and suffering traumatic brain injury and consequent memory loss. There were no witnesses to her fall. The record demonstrates that the trial court properly denied plaintiff's motion to set aside the jury's verdict in favor of defendants.

In light of our disposition of the appeal from the order denying plaintiff's motion to set aside the jury's verdict, we dismiss the appeals from the remaining orders as academic.

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

ENTERED: JANUARY 21, 2020

CLERK

Manzanet-Daniels, J.P., Gesmer, Oing, Moulton, González, JJ.

10816 The People of the State of New York, Ind. 366/17
Respondent,

-against-

Jordan Davis,
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 (Michael D. Tarbutton 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 (Abraham L. Clott, J.), rendered March 22, 2017,

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

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

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

ENTERED: JANUARY 21, 2020

CLERK

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

Manzanet-Daniels, J.P., Gesmer, Oing, Moulton, González, JJ.

10817 Nathaniel Myers, Index 101341/11
Plaintiff-Respondent,

-against-

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

Police Officers John Doe(s)#'s
9th Precinct,
Defendants.

_____

James E. Johnson, Corporation Counsel, New York (Eva L. Jerome of counsel), for appellants.

Law Office of David A. Zelman, Brooklyn (Ephrem J. Wertenteil of counsel), for respondent.

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Order, Supreme Court, New York County (Verna L. Saunders, J.), entered August 21, 2018, which, inter alia, denied the City defendants' motion for summary judgment dismissing plaintiff's causes of action alleging excessive force under federal and state law and for respondeat superior, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

Collateral estoppel barred plaintiff's claim that an officer used excessive force by pushing him in a stairwell. Defendants demonstrated that the same issue existed and was decided against plaintiff in the criminal action, and plaintiff failed to show that he lacked a full and fair opportunity to litigate that issue

in the criminal action (*see Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 [1985]; *Grayes v DiStasio*, 166 AD2d 261, 262-263 [1st Dept 1990]). The remaining allegations of excessive force, and the claim of respondeat superior, should have been dismissed since there was no competent proof to show that the alleged excessive actions by the police were unreasonable under the circumstances or caused plaintiff compensable injury (*see Graham v Connor*, 490 US 386, 396-397 [1989]; *Davidson v City of New York*, 155 AD3d 544 [1st Dept 2017]).

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

ENTERED: JANUARY 21, 2020

CLERK

Manzanet-Daniels, J.P., Gesmer, Oing, Moulton, González, JJ.

10818 In re Anthony S.,
Petitioner-Respondent,

-against-

Monique T.B.,
Respondent-Appellant.

_____

Orrick Herrington & Sutcliffe LLP, Washington, DC (Peter E. Davis of the bar of the State of California, admitted pro hac vice, of counsel), for appellant.

Goetz L. Vilsaint, Bronx, for respondent.

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Order, Family Court, Bronx County (Leticia M. Ramirez, J.), entered on or about September 4, 2019, which denied respondent mother's objection to the order of a Support Magistrate awarding retroactive child support to petitioner father for one child and awarding petitioner child support and retroactive child support for the other child, unanimously affirmed, without costs.

The parties have been engaged in extensive litigation over child support since 2014. In the most recent appeal to this Court, in which respondent sought to dismiss the support petitions, we determined that the Family Court providently exercised its discretion in remanding the matter to the Support Magistrate for further proceedings "to determine whether petitioner was a custodial parent or otherwise a proper party to file a support petition on behalf of the child" (*Matter of*

Anthony S. v Monique T.B., 167 AD3d 408, 409 [1st Dept 2018]). Upon remand, the Support Magistrate determined that petitioner was a proper party to originate the support proceedings, despite insufficient documentary evidence that the children lived primarily with him and not their paternal grandmother during the relevant period.

Contrary to respondent's contention, the Family Court Act (FCA) does not prohibit a non-custodial parent from commencing a support proceeding (*see* FCA § 422[a] ["A parent or guardian, of a child, or other person in loco parentis, ... may file a petition in behalf of a dependent relative"]). While respondent is correct that, in a shared custodial arrangement, the custodial parent cannot be required to pay child support as a matter of law (*see* FCA § 413; *Bast v Rosoff*, 91 NY2d 723, 728 [1998]; *Rubin v Della Salla*, 107 AD3d 60, 67 [1st Dept 2013]), we find that the unusual facts of this case do not demonstrate a shared custodial arrangement. Respondent is admittedly the non-custodial parent and has not contributed toward the children's support since the filing of the petitions; no other party has stepped forward to file a support petition, including the paternal grandmother who respondent claims is acting as the children's primary caretaker; and no evidence was submitted that either child was emancipated for the purposes of child support at the time the petitions were

filed.

Thus, under the circumstances, we find no reason to disturb the Support Magistrate's determination that petitioner was credibly seeking support on behalf of the subject children and their paternal grandmother (*see e.g. Matter of Nasir J.*, 35 AD3d 299 [1st Dept 2006]). We further note, as we did in the prior appeal, that to accept respondent's argument that the petitions must be dismissed would be to improperly release her from her undisputed support obligations, to the children's detriment (*see Anthony S.*, 167 AD3d at 409).

Respondent argues in the alternative that the support petitions should have been dismissed under CPLR 3126 for petitioner's willful failure to comply with discovery orders. This issue was not determined by the Family Court in the order on appeal and is thus not properly before us. In any event, we considered and rejected it in the prior appeal (*see Anthony S.*, 167 AD3d at 409; *see generally* CPLR 5501[a]).

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

ENTERED: JANUARY 21, 2020

CLERK

Manzanet-Daniels, J.P., Gesmer, Oing, Moulton, González, JJ.

10819-
10819A U-Trend New York Investment L.P., etc.,
Plaintiff-Appellant-Respondent,

-against-

US Suite LLC, et al.,
Defendants,

Aura Investments Ltd.,
Defendant-Respondent-Appellant,

Hospitality Suite International, S.A., et al.,
Nominal Defendants.

- - - - -

U-Trend New York Investment L.P., etc.,
Plaintiff-Appellant-Respondent,

-against-

Aura Investments Ltd.,
Defendant-Respondent-Appellant,

Yaacov Atrakchi, et al.,
Defendants-Respondents,

Hospitality Suite International, S.A., et al.,
Nominal Defendants.

- - - - -

[And Other Actions]

Index 652082/14
650498/15

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Morrison Cohen LLP, New York (Y. David Scharf of counsel), for appellant-respondent.

Schulman & Charish LLP, New York (Michael A. Charish of counsel), for respondent-appellant and respondents.

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Judgment, Supreme Court, New York County (Charles E. Ramos,

J.), entered January 3, 2019, which, insofar appealed from as limited by the briefs, awarded plaintiff (U-Trend) the principal sum of $1,998,711.31 as mortgage damages, limited defendant Aura Investments Ltd.'s liability for looting damages to the period before October 4, 2012, declined to award sale damages and attorneys' fees, and directed that all amounts be paid directly to U-Trend, unanimously modified, on the law and the facts, to reduce the principal amount of mortgage damages so that they represent interest at 13.5% rather than 20%, and otherwise affirmed, without costs. Appeal from order, same court (Andrew Borrok, J.), entered on or about September 24, 2019, which denied Aura's motion to correct or vacate the judgment and for a new trial on mortgage damages, unanimously dismissed, without costs, as academic.

Aura makes various arguments as to why U-Trend should have recovered no damages at all, but they are unavailing.

First, the exculpatory clause in the operating agreement for defendant (in the 2014 case) US Suite LLC (Suite LLC) does not help Aura because it limits the liability of Members, Affiliates, and officers and directors of the above to *Suite LLC and the other Member* of that limited liability company (defendant [in the 2014 case] 440 West 41st LLC [440]). Aura was not held liable to Suite LLC or 440; rather, it was held liable to U-Trend.

Second, while "he who seeks equity must do equity" (*Klaassen v Allegro Dev. Corp.*, 106 A3d 1035, 1046 [Del 2014] [internal quotation marks omitted]), the looting and mortgage damages were based on breach of contract (a legal claim), not just on breach of fiduciary duty (an equitable claim). As for estoppel, U-Trend did sometimes tell Aura not to remove nonparty Benzion Suky (the principal of 440); that is why the court limited the looting damages that U-Trend could recover against Aura. However, at other times, U-Trend implored Aura to remove Suky; hence, Aura cannot eliminate damages entirely on the basis of estoppel. As for mortgage damages, U-Trend never told Aura to let the mortgage go into default.

In its reply brief, Aura invokes in pari delicto. However, "[i]t is not every minor wrongdoing in the course of contract performance that will insulate the other party from liability" (*McConnell v Commonwealth Pictures Corp.*, 7 NY2d 465, 471 [1960]).[1] U-Trend did not engage in "commercial bribery or similar conduct" (*id.*) or other activities forbidden by law (*see In re LJM2 Co-Inv., L.P.*, 866 A2d 762, 775 [Del Ch 2004]).

Third, Aura contends that, under Delaware law, it cannot be liable for aiding and abetting 440/Suky's breaches of fiduciary

[1] Although the contract at issue (the Founders' Agreement) is governed by Israeli law, the parties cite only New York and Delaware law.

duty because Aura itself is a fiduciary (*see e.g. Gotham Partners, L.P. v Hallwood Realty Partners, L.P.*, 817 A2d 160, 172 [Del 2002]). While claims for *breach of fiduciary duty* are governed by Delaware law because Suite LLC is a Delaware entity (*see e.g. Schroeder v Pinterest Inc.*, 133 AD3d 12, 22 [1st Dept 2015]), it is far from clear that Delaware law would govern claims for *aiding and abetting* breach of fiduciary duty (*see Solow v Stone*, 994 F Supp 173, 177 [SD NY 1998], *affd* 163 F3d 151 [2d Cir 1998]). Even though Suite LLC is a Delaware entity, it owned and operated property located in New York. To the extent Aura aided and abetted 440/Suky's breaches of fiduciary duty, it did so in Israel or New York, not Delaware.

Fourth, Aura contends that it was not the proximate cause of mortgage damages. If one starts at a later point, Aura's argument that it could not have refinanced the mortgage without 440's consent has merit (*see e.g. Thorpe v CERBCO, Inc.*, 676 A2d 436, 444 [Del 1996]). However, if one starts at an earlier point, one could reason – as the trial court did – that if Aura had done its job, the mortgage would not have gone into default in the first place, so there would have been no need to refinance.

The court did not err by limiting Aura's liability for damages caused by Suky's looting to the period before October 2,

2012, as the record supports its conclusion that U-Trend at that time requested Aura to delay taking action against Suky.

Aura contends that, instead of awarding mortgage damages in the principal amount of $1,998,711.31 (representing the *gross* amount of 20% default interest), the court should have awarded the difference between the default rate and the non-default rate (i.e., *net* damages). Aura is correct.

If the theory underlying the mortgage damages is that Aura should have refinanced after the loan went into default, the mortgage damages cannot stand due to lack of proximate cause (because 440 had veto power over refinancing). The only way to uphold mortgage damages is on the theory that Aura breached its responsibility under the Founders' Agreement to manage Suite LLC; if it had managed Suite LLC properly, the loan would not have gone into default in the first place.

The purpose of contract damages is to put the non-breaching party in the position it would have been in if its counterparty had performed. If Aura had not breached the Founders' Agreement, Suite LLC would have paid interest at the regular rate of 6.5%, not the default rate of 20%. Thus, mortgage damages should represent interest at 13.5%, i.e., the difference between 20% and 6.5% (*see generally Al-Ev Constr. Corp. v Ahern Maintenance & Supply Corp.*, 141 AD2d 591, 593 [2d Dept 1988]; *WaveDivision*

Holdings, LLC v Millennium Digital Media Sys., L.L.C., 2010 WL 3706624, *20, 2010 Del Ch LEXIS 194, *66 [Sept. 17, 2010, C.A. No. 2993-VCS]).

U-Trend contends that the court should have awarded $4 million in sales damages against Aura and defendants (in the 2015 case) Yaacov Atrakchi, Michael Kleiner, and Yohai Abtan. This argument is unavailing, for multiple reasons.

First, due to Suite LLC's operating agreement, 440 had veto power over sales of the property at issue. In its complaint, U-Trend said 440 supported only a sale to the eventual buyer and objected to auctioning the property so that it could be sold to another buyer. "Facts admitted in a party's pleadings constitute formal judicial admissions, and are conclusive of the facts admitted in the action in which they are made" (*Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 412 [2014] [internal quotation marks omitted]). In addition, in his direct testimony affidavit, U-Trend's principal said 440 refused to sell to any other buyer. A statement in an affidavit is an informal judicial admission (*see People v Brown*, 98 NY2d 226, 232 [2002]).

Second, each side presented expert testimony on the value of the property. The trial court, which heard and saw the witnesses, was in the best position to judge their credibility (*see e.g. Frame v Maynard*, 83 AD3d 599, 602 [1st Dept 2011]).

U-Trend relies on the fact that when Atrakchi's group bought Aura out of bankruptcy, it valued Aura's indirect 35% stake in the property at $4 million. However, in its complaint, U-Trend alleged, "whatever amount the Defendants paid to Aura's creditors in the bankruptcy – and whatever arbitrary 'value' they placed on the ... stock [of derivative plaintiff/nominal defendant Hospitality Suite International, S.A. (HSI), which indirectly owns 70% of Suite LLC] – has no bearing on what they are entitled to receive from a sale of the Property." Again, this constitutes a formal judicial admission (*see e.g. Kimso,* 24 NY3d at 412).

Third, Atrakchi, Kleiner, and Abtan are protected by the business judgment rule (*see e.g. Asbestos Workers Phila. Pension Fund v Bell,* 137 AD3d 680, 683 [1st Dept 2016]; *McMullin v Beran,* 765 A2d 910, 917, 920 [Del 2000]; *In re Citigroup Inc. Shareholder Derivative Litig.,* 964 A2d 106, 125-126 [Del Ch 2009]).[2]

Aura contends that, if any damages are awarded, they should not go directly to U-Trend because all of its claims were derivative, not direct. This argument is unavailing (*see e.g. NAF Holdings, LLC v Li & Fung [Trading] Ltd.,* 118 A3d 175, 176,

[2] The individual defendants were directors of HSI, a Luxembourg company; Abtan was also a director of double-derivative plaintiff/nominal defendant US Suite Corp. (Suite Corp.), a Delaware corporation. However, neither side cites Luxembourg law.

179-180, 182 [Del 2015]). U-Trend did not merely sue derivatively on behalf of HSI and Suite Corp.; it also sued in its own right for breach of the Founders' Agreement between itself and Aura.

Finally, U-Trend contends that the court improvidently exercised its discretion by failing to award attorneys' fees. This issue is governed by New York law (*see Central Laborers' Pension Fund v Blankfein*, 111 AD3d 40, 45 n 8 [1st Dept 2013]). Since the court awarded damages directly to U-Trend, it properly denied attorneys' fees (*see* Business Corporation Law § 626[e]). Moreover, U-Trend's lawsuits did not confer "material, lasting benefits to the company and its shareholders" (*Gusinsky v Bailey*, 66 AD3d 614, 615 [1st Dept 2009]). Suite LLC existed solely to own and operate the property; Suite Corp. existed solely to own Suite LLC; and HSI existed solely to own Suite Corp. Thus, the companies on whose behalf U-Trend sued (HSI and Suite Corp.) basically became defunct after the property was sold.

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

ENTERED: JANUARY 21, 2020

CLERK

Manzanet-Daniels, J.P., Gesmer, Oing, Moulton, González, JJ.

10820 The People of the State of New York, Respondent, Ind. 2094/16

-against-

Derrick Lennon, Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Emily Anne Aldridge of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Raymond L. Bruce, J.) rendered March 9, 2017, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of three years, unanimously affirmed.

The court's oral colloquy, taken together with a detailed written waiver, which defendant signed after consulting with counsel, established a valid waiver of defendant's right to appeal (*see People v Bryant*, 28 NY3d 1094, 1096 [2016]; *see also People v Thomas*, __NY3d__, 2019 NY Slip Op 08545 [2019]). The waiver forecloses review of defendant's claims relating to presentencing procedure (*see People v Davis*, 145 AD3d 623 [1st Dept 2016], *lv denied* 28 NY3d 1183 [2017]).

Regardless of the validity of defendant's waiver of the

right to appeal, or whether it forecloses defendant's claims, we find that the court properly found that defendant had violated the terms of his plea agreement, thereby forfeiting the opportunity for a misdemeanor disposition, and that none of defendant's remaining claims warrant a remand for resentencing or other relief.

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

ENTERED: JANUARY 21, 2020

CLERK

Manzanet-Daniels, J.P., Gesmer, Oing, Moulton, González, JJ.

10822-
10822A Maxim Inc., et al.,
Plaintiffs-Respondents,

-against-

Wayne Gross,
Defendant,

Jason Feifer,
Defendant-Appellant.

Index 654137/15

_____

Schoeman Updike Kaufman & Gerber LLP, New York (Beth L. Kaufman of counsel), for appellant.

Sack & Sack, LLP, New York (Alex Seidenberg of counsel), for respondents.

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Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered on or about March 6, 2018, which, insofar as appealed from as limited by the briefs, denied defendant Feifer's cross motions for discovery sanctions under CPLR 3126 and for a default judgment against plaintiff Maxim Inc. on his fraudulent inducement counterclaim, granted Maxim's motion to dismiss that counterclaim, and granted plaintiffs' motion to amend the complaint to add a defamation per se cause of action, and order, same court and Justice, entered on or about January 8, 2019, which denied Feifer's second motion for discovery sanctions under CPLR 3126 and his motion for a default judgment against Maxim on his amended counterclaims, and granted Maxim's motion to dismiss

the amended counterclaims, unanimously modified, on the law and the facts and in the exercise of discretion, to grant defendant's motion for discovery sanctions to the extent of imposing monetary sanctions on plaintiffs in the amount of defendant's reasonable legal fees expended in discovery on the defamation claim, to condition the grant of plaintiffs' amendment to the defamation cause of action on reimbursement to defendant of the reasonable legal fees he incurred in pursuing discovery on that claim and remand the matter for a hearing to determine the reasonable value of attorneys' fees due defendant, and to deny plaintiffs' motion to dismiss the amended counterclaim for fraudulent inducement, and otherwise affirmed, without costs.

This Court previously imposed discovery sanctions on plaintiffs in the amount of a $10,000 monetary sanction pursuant to CPLR 3126 (*see Maxim, Inc. v Feifer*, 161 AD3d 551 [1st Dept 2018]). Plaintiffs' continued discovery abuses, including their refusal to produce proper witnesses for depositions, withholding of responsive documents, and refusal to properly answer interrogatories, and their general obstructionist behavior and cavalier attitude with respect to discovery obligations and deadlines warrant the further exercise of this Court's discretion to impose monetary sanctions on them in the amount of defendant's reasonable legal fees incurred in discovery (*see Figdor v City of*

New York, 33 AD3d 560, 561 [1st Dept 2006]).

Relatedly, plaintiffs' motion to amend their defamation cause of action sought in reality to discontinue the defamation claim and leave only the claim for defamation per se in place. Defendant has expended considerable resources seeking discovery into plaintiffs' goodwill, standing, reputations, and the re-brand of Maxim magazine to support his defense to the defamation claim, which plaintiffs have resisted and now, at this late date, seek to avoid entirely by limiting the cause of action to a claim for defamation per se. Accordingly, the grant of the amendment should be conditioned on plaintiffs' reimbursement to defendant of the reasonable legal fees he incurred in pursuing discovery into the defamation claim (*see New York Downtown Hosp. v Terry*, 80 AD3d 493, 494 [1st Dept 2011]; *see also Beigel v Cohen*, 158 AD2d 339, 340 [1st Dept 1990]).

Although the court providently exercised its discretion in denying defendant's motion for a default judgment on his amended counterclaims, it erred to the extent it dismissed the fraudulent

inducement counterclaim for failure to state a cause of action (*see Laduzinski v Alvarez & Marsal Taxand LLC*, 132 AD3d 164, 168 [1st Dept 2015]).

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

ENTERED: JANUARY 21, 2020

CLERK

Manzanet-Daniels, J.P., Gesmer, Oing, Moulton, González, JJ.

10823 The City of New York, et al., Index 452025/18
Plaintiffs-Respondents,

-against-

Berkeley Educational Services
of New York, Inc.,
Defendant-Appellant.

_____

Akerman LLP, New York (David F. Bayne of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Andrew Borrok, J.), entered August 14, 2019, which, to the extent appealed from, denied defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

Defendant is a "for-profit" college with campuses in Manhattan, Brooklyn, and elsewhere. Plaintiff New York City Department of Consumer Affairs (the Department) contends that it opened an investigation into Berkeley's conduct after receiving numerous complaints from members of the public. The Department claims that its investigation revealed numerous acts of misconduct and deceptive practices that were in violation of the New York City Consumer Protection Law (Administrative Code of City of NY § 20-700, *et seq.*) and the associated Rules of the Department, codified in Rules of City of NY Department of

Consumer Affairs (6 RCNY 5A) (collectively, the CPL). The complaint alleges six causes of action and seeks civil penalties (including daily penalties for statements contained on Berkeley's website), restitution, disgorgement and injunctive relief.

The IAS court properly found that the Department's allegations were sufficient to support its causes of action. The first cause of action was correctly sustained because the complaint plausibly alleges that Berkeley misled prospective students about whether an accounting degree from Berkeley would prepare them for the CPA exam or to qualify to work as a CPA. The IAS court also properly declined to dismiss the second cause of action, which sufficiently alleges violations of Department Rule § 5-09(a) (6 RCNY § 5-09[a]). Berkeley argues that the second cause of action should be dismissed because the webpage containing the institutional aid statement was not "print advertising and promotional literature" to which Rule 5-09(a) is expressly limited. The Department's interpretation that statements on Berkeley's website fell within this provision was rational, however, and is entitled to deference (*see e.g. Andryeyeva v New York Health Care, Inc.*, 33 NY3d 152, 174 [2019]). As set forth above, the Department sufficiently alleged violations of Rule 5-09(a) in the second cause of action.

The Department's third through sixth causes of action also

properly stated claims under the CPL, which prohibits, among other things, misleading conduct in the "extension of consumer credit or in the collection of consumer debts" (Administrative Code § 20-701[a]). The City Council drafted the CPL broadly to cover "the collection of consumer debts," and authorized the Department to regulate such conduct (Administrative Code §§ 20-700; 20-702). The collection rules promulgated by the Department in this vein do not require that the debt to be collected be that "of another," and as such Berkeley qualifies as a "debt collector" under this definition (6 RCNY § 5-76).

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 21, 2020

CLERK

Manzanet-Daniels, J.P., Gesmer, Oing, Moulton, González, JJ.

10824 The People of the State of New York, Respondent, Ind. 3568/13

-against-

Carlos Guillen, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

_____

Appeal from judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered September 29, 2016, convicting defendant, after a jury trial, of attempted murder in the second degree, assault in the first degree and criminal possession of a weapon in the second degree (two counts), and sentencing him, as a second felony offender, to an aggregate term of 25 years, held in abeyance, and the matter remitted for a hearing on defendant's CPL 330.30(2) motion in accordance with this decision.

The court improvidently exercised its discretion in denying, without a hearing, that branch of defendant's motion to set aside the verdict on the ground of alleged misconduct by two jurors (*see* CPL 330.40[2][f]).

The People's trial preparation assistant, who assisted the trial prosecutors, disclosed that some time after the trial and

before sentencing, he received a handwritten note in the mail from the jury foreperson, stating: "Now that the trial is over . . ." (ellipsis in original), followed by the juror's first and last name, her juror number, the court part in which the trial had occurred, her phone number, and her address. The note also included a crossed-out phrase from which it could be inferred that the original version of the note had been written during the trial.

Under the circumstances, the note itself was sufficient evidence to raise an issue of fact about whether the foreperson's apparent romantic interest in the trial preparation assistant prevented her from deliberating fairly (*see People v McGregor*, __ AD3d __, 2019 NY Slip Op 08283 [1st Dept 2019]; *see also People v Southall*, 156 AD3d 111 [1st Dept 2017], *lv denied* 30 NY3d 1120 [2018]). The assistant's affidavit stating that he did not respond to the juror's note or otherwise communicate with her at any time is not dispositive, as the issue is the juror's misconduct or bias during the trial.

The court also erred with regard to a second juror. That juror had a sufficiently close relationship with a witness to warrant a hearing as to whether that juror engaged in misconduct by failing to disclose the relationship to the court.

Accordingly, we direct a hearing as to both jurors. At this stage of the appeal, we do not address defendant's remaining claims.

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

ENTERED: JANUARY 21, 2020

CLERK

Manzanet-Daniels, J.P., Gesmer, Oing, Moulton, González, JJ.

10825 United Capital Real Estate Development Corp., Plaintiff-Appellant, Index 155910/18

-against-

Sahara US Corporation, et al., Defendants-Respondents,

Subrata Roy, et al., Defendants.

_____

Tarter Krinsky & Drogin, LLP, New York (Richard C. Schoenstein of counsel), for appellant.

Milbank LLP, New York (Alan J. Stone of counsel), for respondents.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered October 22, 2018, which, insofar as appealed from as limited by the briefs, granted the motion of defendants Sahara US Corporation, Sahara Plaza LLC and Sahara Dreams LLC to dismiss the complaint with prejudice, unanimously affirmed, with costs.

While the parties' memorandum of understanding (MOU) does contain the material terms for the transaction, it is not a binding agreement because it expressly contemplates the negotiation of both an escrow agreement and purchase and sale agreement (*see Argent Acquisitions, LLC v First Church of Religious Science*, 118 AD3d 441, 444-445 [1st Dept 2014]). Regardless, the correspondence between the parties regarding

whether plaintiff had funded an escrow, provided draft documents and provided proof of funds, in this instance, constituted documentary evidence for purposes of CPLR 3211(a)(1) (*see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 432 [1st Dept 2014]). This evidence, as well as plaintiff's concessions below and on appeal are sufficient to establish that plaintiff did not meet its own obligations under the MOU. As such, even were the MOU binding, plaintiff's own breaches preclude an action to enforce it.

Furthermore, the motion court's off-hand comments at oral argument do not raise an issue as to whether the court intended to dismiss the complaint with prejudice. The court was presented with competing orders, and signed the order providing for a dismissal "with prejudice."

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

ENTERED: JANUARY 21, 2020

CLERK

Manzanet-Daniels, J.P., Gesmer, Oing, Moulton, González, JJ.

10826 Nationstar Mortgage, LLC, Index 381260/12
Plaintiff-Respondent,

-against-

June Thompson,
Defendant-Appellant,

Darlene Bennett, et al.,
Defendants.

_____

The Rosenfeld Law Office, Lawrence (Avi Rosenfeld of counsel), for appellant.

Sandelands Eyet LLP, New York (Michael T. Madaio of counsel), for respondent.

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Judgment of foreclosure and sale, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about March 20, 2018, granting plaintiff's motion for a judgment of foreclosure and sale of the mortgaged premises, and affirming the Referee's report of the amount owed plaintiff, unanimously affirmed, without costs.

Defendant Thompson first appeared in this foreclosure action by opposing plaintiff's motion for judgment of foreclosure and sale and to confirm the referee's report. We note, among other things, that she did not seek to vacate her default in answering or appearing (*see* CPLR 5015[a][1]; *Bank of Am. N.A. v Patino*, 128 AD3d 994, 994 [2d Dept], *lv dismissed* 26 NY3d 975 [2015]). In opposition to plaintiff's motion for judgment of foreclosure and

sale, Thompson failed to submit sufficient evidence for the motion court to consider, since she only submitted an attorney affirmation with no basis in personal knowledge (*see Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]).

Under these circumstances, the motion court providently exercised its discretion in awarding plaintiff the interest that accrued on the mortgage from the date of the referee's report to the date of entry of judgment (*see BAC Home Loans Servicing, L.P. v Jackson*, 159 AD3d 861, 862 [2d Dept 2018]).

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

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

ENTERED: JANUARY 21, 2020

CLERK

Manzanet-Daniels, J.P., Gesmer, Oing, Moulton, González, JJ.

10828N Ricky Zegelstein, M.D., et al., Index 651198/14
Plaintiffs-Appellants,

-against-

Michael J. Faust, M.D., et al.,
Defendants-Respondents,

Jed Kaminetsky, M.D., et al.,
Defendants.

_____

The Law Office of Tamara M. Harris, New York (Tamara Harris of counsel), for appellants.

Ann R. Starer, Scarsdale, for Michael J. Faust, M.D., respondent.

Garfunkel Wild, P.C., Great Neck (Gillon Barkins of counsel), for Michael P. Krumholz, M.D., respondent.

Swidler & Messi LLP, New York (Steven A. Swidler of counsel), for Alan Raymond, M.D., respondent.

Law Offices of John V. Golaszewski, New York (John V. Golaszewski of counsel), for Haroon Chaudhry, M.D., respondent.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered June 12, 2017, which, insofar as appealed from as limited by the briefs, denied plaintiffs' cross motions for an extension of time to serve a summons and/or complaint, unanimously affirmed, with costs.

Plaintiffs provided patient anesthesia services at the offices of defendants Michael J. Faust, M.D., Michael P. Krumholz, M.D., Jed Kaminetsky, M.D., and Alan Raymond, M.D. (the Specialist Defendants) for various periods between 2002 and 2011.

Defendant Haroon Chaudhry, M.D. was employed by plaintiffs as an anesthesiologist between 2002 and 2004. Plaintiffs allege that the Specialist Defendants secretly collected fees from insurers and patients that were due to plaintiffs in breach of their agreements not to collect payments on behalf of or due to plaintiffs. Plaintiffs also allege that, after his departure from their employ, Chaudhry falsely identified himself as being affiliated with plaintiffs and re-directed payments due to plaintiffs to himself.

In support of their motions for an extension of time for service pursuant to CPLR 306-b, plaintiffs failed to demonstrate either "good cause" for not timely serving defendants or that an extension of time was warranted "in the interest of justice." Plaintiffs' lack of diligence precludes a finding of good cause (*see generally Henneberry v Borstein*, 91 AD3d 493, 496 [1st Dept 2012]). Their excuses for not timely serving defendants amount at best to law office failure, which is insufficient (*see id.* at 495-496; *Rodriguez v Consolidated Edison Co. of N.Y., Inc.*, 163 AD3d 734, 736 [2d Dept 2018]). Moreover, although plaintiffs were alerted to a potential service issue months earlier, they did not move for an extension until after defendants brought their motions to dismiss (*see Johnson v Concourse Vil., Inc.*, 69 AD3d 410, 410-11 [1st Dept 2010], *lv denied* 15 NY3d 707 [2010]).

An "interest of justice" extension is also unwarranted (*see generally Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105-106 [2001]). In addition to plaintiffs' extreme lack of diligence, the statute of limitations on the majority of plaintiffs' claims appears to have expired prior to initiation of this action, although it is difficult to say with certainty due to the lack of specificity in the complaint (*see Yardeni v Manhattan Eye, Ear & Throat Hosp.*, 9 AD3d 296, 297-298 [1st Dept 2004], *lv denied* 4 NY3d 704 [2005]). This lack of specificity also weighs against allowing an extension, as does the prejudice suffered by defendants, who were unable to timely investigate plaintiffs' claims (*see Johnson*, 69 AD3d at 411).

We decline to address defendants' arguments regarding mootness, which are raised for the first time on appeal. We also do not find that sanctions are warranted at this time.

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

ENTERED: JANUARY 21, 2020

CLERK

Manzanet-Daniels, J.P., Gesmer, Oing, Moulton, González, JJ.

10829 In re Gabriel Kabak, Index 100924/18
Petitioner-Appellant,

-against-

New York City Department of Finance,
Respondent-Respondent.

_____

Gabriel Kabak, appellant pro se.

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

_____

Judgment (denominated an order), Supreme Court, New York County (Carol R. Edmead, J.), entered October 16, 2018, denying the petition to vacate the determination of respondent New York City Department of Finance's Parking Violations Adjudication Division, dated April 18, 2018, which upheld the finding that petitioner had violated 34 RCNY 4-08(d), and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondent's determination that petitioner violated 34 RCNY 4-08(d) was rational (*see generally Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). While petitioner's conduct may have constituted a violation of both 34 RCNY 4-08(d) and 4-08(m)(6), respondent was not prohibited from only charging petitioner with violating 34 RCNY 4-08(d) (*see*

People v Eboli, 34 NY2d 281, 287 [1974]; *People v Lacay*, 115 AD2d 450, 452 [1st Dept 1985]).

Although respondent's determination was concise, it included a statement of the evidence relied upon, the specific conduct which constituted the violation, and addressed petitioner's legal argument, thereby giving petitioner notice of the basis for respondent's determination (*see Matter of Ferraro v State Univ. of N.Y. at Purchase Coll.*, 162 AD3d 766, 767 [2d Dept 2018]; *see also Matter of Young v Village of Gouverneur*, 145 AD3d 1285, 1287 [3d Dept 2016]).

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

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

ENTERED: JANUARY 21, 2020

CLERK