SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

**JANUARY 23, 2020**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Renwick, J.P., Kern, Oing, González, JJ.

10831- Ind. 5646/14
10831A The People of the State of New York, 48/15
Respondent,

-against-

Janner Torres,
Defendant-Appellant.

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

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

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Judgments, Supreme Court, New York County (Gregory Carro, J.), rendered April 29, 2016, as amended May 13, 2016, convicting defendant, after a jury trial, of predatory sexual assault against a child (three counts), course of sexual conduct against a child in the first degree (two counts), rape in the first degree (two counts), criminal sexual act in the third degree, rape in the second degree and incest in the second and third degrees, and sentencing him to an aggregate term of 42⅓ years to life, unanimously modified, as a matter of discretion in the interest of justice, to the extent of vacating the convictions

under counts 7, 8, and 10 of Indictment 48/15 and dismissing those counts, reducing the conviction of second-degree incest to incest (former Penal Law § 255.25) and remanding for resentencing on that conviction only, and otherwise affirmed.

The People concede that the counts indicated should be dismissed as inclusory concurrent counts. They also concede that the conviction of second-degree incest (Penal Law § 255.26) violated the Ex Post Facto Clause, because it was based on conduct occurring before the statute creating that crime became effective. Accordingly, we reduce this count to incest (not divided into degrees), which was the equivalent offense at the time of defendant's conduct (former Penal Law § 255.25). Because incest was a class E felony with a different sentencing range than the class D felony of which defendant was convicted, we remand for resentencing on the modified count (*see People v Young*, 66 AD2d 666 [1st Dept 1978]). We reach these unpreserved issues in the interest of justice.

However, defendant's remaining Ex Post Facto claim is unavailing. One of the counts of first-degree course of sexual conduct against a child was based on conduct that ended before a statutory amendment expanded the definition of "sexual conduct," which is an element of this offense (Penal Law § 130.75[1][b]). Nevertheless, the particular conduct cited by defendant as being

added by the amendment had no relevance to the factual allegations of this case. Accordingly, there was no Ex Post Facto violation because the statutory change at issue "had no effect on the defendant" (*Dobbert v Florida*, 432 US 282, 300 [1977]).

After a lengthy colloquy in which defendant received a full opportunity to be heard, the court providently exercised its discretion in denying defendant's request for assignment of new counsel, which was made shortly before trial. Defendant did not establish good cause for a substitution, and the court properly denied the request in light of "the timing of the motion" and the court's expression of "confidence in the abilities of defense counsel" (*People v Porto*, 16 NY3d 93, 101 [2010]). While defendant's main specific complaint involved a lack of communication about a list of witnesses he wanted his counsel to interview, there is no reason to believe that a change of counsel would have improved this situation. We note that counsel went on to call appropriate witnesses at trial, and that there is no indication that any witnesses with information material to the defense were omitted. We also note that counsel's permissible explanation of his own performance did not create a conflict (*see People v Nelson*, 7 NY3d 883 [2006]).

The court's final jury charge properly "referred to

defendant as an interested witness and permitted the jury to consider whether any witness's interest or lack of interest in the outcome of the case affected the witness's truthfulness" (*People v Wilson*, 93 AD3d 483, 484 [1st Dept], *lv denied* 19 NY3d 978 [2012]; *see also People v Inniss*, 83 NY2d 653, 659 [1994]).

The court's denial of defense counsel's request to repeat in the final jury charge its instruction that the indictment is not evidence, as the court had told the jury during jury selection and again at the outset of trial, does not warrant reversal (*see People v Hernandez*, 294 AD2d 230 [1st Dept 2002]). The court's preliminary instructions that the indictment is not evidence was clear and unambiguous, and the final jury charge instructed the jury to consider only the evidence, defined evidence appropriately, and reminded the jury of the presumption of innocence (*see People v Greaves*, 94 NY2d 775 [1999]).

The court properly denied defendant's application pursuant to *Batson v Kentucky* (476 US 79 [1986]). After the prosecution explained its reasons for the challenge at issue, defense counsel remained silent and raised no objection when the court accepted these reasons as nonpretextual. Although the court ruled on the issue of pretext, defendant failed to preserve the particular arguments to the contrary that he raises on appeal (*People v Allen*, 86 NY2d 101, 111 [1995]). Defendant likewise failed to

preserve his claim that the court failed to follow the proper *Batson* protocols (*see People v Richardson*, 100 NY2d 847, 853 [2003]). We decline to review these claims in the interest of justice. As an alternative holding, we find them unavailing.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 23, 2020

CLERK

Renwick, J.P., Manzanet-Daniels, Kern, Oing, González, JJ.

10832 In re Marie Dieng, Index 100964/17
Petitioner,

-against-

Marie Torres-Springer, etc., et al.,
Respondents.

_____

Janet E. Sabel, The Legal Aid Society, Kew Gardens (Katie Redmon of counsel), for petitioner.

Georgina M. Pestana, Acting Corporation Counsel, New York (Eva L. Jerome of counsel), for respondents.

_____

Determination of respondent New York City Department of Housing Preservation and Development dated March 20, 2017, finding that petitioner caused or permitted a nuisance in her apartment that caused a threat to the safety of others, and issuing a certificate of eviction against petitioner and petitioner's daughter, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Arlene P. Bluth, J.], entered December 7, 2017), dismissed, without costs.

Respondent's determination that petitioner caused or permitted a nuisance in her apartment is supported by substantial evidence (*see Matter of Haug v State Univ. of N.Y. at Pottsdam*,

32 NY3d 1044, 1045-1046 [2018]). Respondent reasonably credited the fire marshal's reports which concluded, following investigations or examinations, that the two fires in petitioner's apartment were caused by unsupervised lit candles (*id.*; *Matter of Rosa v New York City Hous. Auth., Straus Houses*, 160 AD3d 499, 500 [1st Dept 2018]). Respondent also reasonably concluded that the testimony of petitioner and her daughter, that they never lit candles and did not know what caused the fires, was not credible (*see generally Matter of Riel v State of N.Y. Off. of Children & Family Servs.*, 175 AD3d 1166, 1167 [1st Dept 2019]). Petitioner's argument that the fire marshal's reports were inconsistent with separate amended incident reports is unpreserved, and we decline to review in the interest of justice. As an alternative holding, we find that it was in the province of the hearing officer to resolve such inconsistencies (*Haug* at 1046), and his determination is supported by the record. Although issuance of a certificate of eviction against petitioner and her daughter is a significant sanction, in light of the

circumstances of this case, including the risk posed to the safety of other residents and petitioner's denial of any culpability, the sanction does not shock the conscience (*see Matter of Featherstone v Franco*, 95 NY2d 550, 554-555 [2000]).

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

ENTERED: JANUARY 23, 2020

CLERK

Renwick, J.P., Manzanet-Daniels, Kern, Oing, González, JJ.

10833 In re Maxine B.,
Petitioner-Respondent,

-against-

Richard C.,
Respondent-Appellant.

_____

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

Leslie S. Lowenstein, Woodmere, for respondent.

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Order of protection, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about July 31, 2018, in favor of petitioner against respondent, upon a finding, after a fact-finding hearing, that respondent committed menacing in the third degree, unanimously affirmed, without costs.

Respondent, who is petitioner's son, contends that the court erred in issuing the order of protection because petitioner stated in court that she did not want or need the order. However, a review of the record as a whole demonstrates that the statements cited by respondent, which petitioner made in a courtroom in which respondent was present and listening to her testimony, do not, in and of themselves, fully reflect petitioner's wishes. The record contains multiple temporary orders of protection obtained on petitioner's behalf and the

sworn testimony of a social worker, which the court found credible, about the various ways that respondent isolated, controlled, and abused his mother. It also contains transcripts of proceedings on May 18, 2018, during which, in petitioner's presence, her counsel stated that petitioner was afraid to return home because respondent was living there and that she needed a stay-away order that would expressly apply to the home. At this appearance, during which respondent was not in the courtroom but in the hallway outside, petitioner did not object to her counsel's representations.

Nor do the cases that respondent cites support his argument, as they involve applications to withdraw or dismiss family offense proceedings.

Contrary to respondent's contention, petitioner established by a preponderance of the evidence that respondent committed menacing in the third degree, i.e., that, by physical menace, he intentionally placed her in fear of physical injury (which he then caused her) (Penal Law § 120.15; Family Court Act § 832; *see Matter of Kristina L. v Elizabeth M.*, 156 AD3d 1162, 1165 [3d Dept 2017], *lv denied* 31 NY3d 901 [2018]). Petitioner testified that, in December 2016, after respondent became angry with her for making noise while cooking at 2:00 a.m., "we struggled together." Although she could not recall details, she testified

that during the struggle she sustained a black eye. Respondent acknowledged that he had "probably" caused the black eye, but testified that he had acted in self-defense. The court found that his testimony lacked credibility; we accord deference to this and the court's other credibility assessments (*see Matter of Hany A. v Eric A.*, 158 AD3d 545 [1st Dept 2018], *lv denied* 31 NY3d 904 [2018]). We note that respondent also claimed not even to have noticed that petitioner, with whom he resided, had a black eye.

Respondent failed to demonstrate that the admission of evidence concerning his alleged violence against his girlfriends was prejudicial. The court did not rely on, or even mention, the evidence in its decision.

Respondent failed to preserve his argument that he was deprived of the right to counsel by the court's generic directive, at the close of proceedings, that he not consult with anyone about his still incomplete testimony. In any event, the argument is unavailing. Respondent has articulated no specific prejudice resulting from the court's directive, which, moreover, the court never said applied to consultations with counsel (*see People v Riddick* (307 AD2d 821 [1st Dept 2003], *lv denied* 1 NY3d 540, 541 [2003]).

We decline to consider respondent's unpreserved argument that the social worker who filed the petition on behalf of petitioner lacked the authority to commence these proceedings (*see* Family Court Act § 822).

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

ENTERED: JANUARY 23, 2020

CLERK

Renwick, J.P., Manzanet-Daniels, Kern, Oing, González, JJ.

10834 Polaris Venture Partners VI L.P., et al.,
Plaintiffs-Respondents,

-against-

AD-Venture Capital Partners L.P., et al.,
Defendants-Appellants.

Index 650623/18

_____

Arnold & Porter Kaye Scholer LLP, New York (James M. Catterson of counsel), for appellants.

Goodwin Procter LLP, New York (Charles A. Brown of counsel), for respondents.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered December 26, 2018, which denied defendants' motion to dismiss, unanimously modified, on the law, to dismiss the causes of action for unjust enrichment and breach of the covenant of good faith and fair dealing, and otherwise affirmed, without costs.

The IAS court properly found that plaintiffs adequately stated a claim for breach of the agreement. However, the existence of an express contract governing the subject matter precludes plaintiffs claim for unjust enrichment (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). Similarly, the claim for breach of the implied covenant of good faith and fair dealing should have been dismissed as

duplicative, because it arises from the same facts and seeks the same damages as the contract claim (*Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 [1st Dept 2010], *lv denied* 15 NY3d 704 [2010]).

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

ENTERED: JANUARY 23, 2020

CLERK

Renwick, J.P., Manzanet-Daniels, Kern, Oing, González, JJ.

10835 Michael Vega, Index 156296/13
Plaintiff-Appellant,

-against-

Beacon 109 207-209 LLC,
Defendant-Respondent.
- - - - -
Beacon 109 207-209 LLC,
Third-Party Plaintiff-Respondent,

-against-

Amaco Management and Consulting, Inc.,
Third-Party Defendant.

_____

Law Office of Charles E. Finelli & Associates, PLLC, Bronx (David Gordon of counsel), for appellant.

Melcer Newman, PLLC, New York (Fabio A. Gomez of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered August 13, 2018, which granted defendant's motion to dismiss the complaint pursuant to CPLR 3126, unanimously affirmed, without costs.

The court providently exercised its discretion in granting the motion to dismiss the complaint based on a clear showing that plaintiff had repeatedly failed to comply with multiple discovery orders, which was "dilatory, evasive, obstructive and ultimately contumacious" (*CDR Créances S.A.S v Cohen*, 23 NY3d 307, 318 [2014] [internal quotation marks omitted]). Willfulness may be

inferred when a party repeatedly fails to respond to discovery demands and/or comply with discovery orders, coupled with inadequate excuses (*see International Brain Research Found., Inc. v Cavalier*, 158 AD3d 464, 465 [1st Dept 2018], *lv dismissed* 32 NY3d 1074 [2018]), and while plaintiff may have ultimately provided the requested document discovery, he unduly delayed the progress of the action and failed to appear for a court-ordered deposition despite several adjournments. Furthermore, the court provided him with many opportunities to comply with its discovery orders and, despite three years of effort, plaintiff still did not met those obligations (*see Kihl v Pfeffer*, 94 NY2d 118, 122 [1999]).

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

ENTERED: JANUARY 23, 2020

CLERK

Renwick, J.P., Manzanet-Daniels, Kern, Oing, González, JJ.

10836 The People of the State of New York, Respondent, Ind. 4158N/13

-against-

Charles Evans, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered June 21, 2016, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing him to a term of five years' probation, unanimously affirmed.

Based on our review of the record, including our in camera review of sealed or redacted materials, we find no basis on which to controvert the search warrant at issue or to grant any other relief. The record establishes a proper basis for minimal redactions to the search warrant application and sealing of the minutes of the examination of a confidential informant by the issuing judge (*see People v Castillo*, 80 NY2d 578, 583-584 [1992], *cert denied* 507 US 1033 [1993]). The record further establishes probable cause for the issuance of the warrant (*see*

*id.* at 585). The motion court was able to review the transcript of the issuing judge's examination of the informant, and no further proceedings on the motion were necessary under the circumstances (*see People v Serrano*, 93 NY2d 73, 76-77 [1999]).

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 23, 2020

CLERK

Renwick, J.P., Manzanet-Daniels, Kern, Oing, González, JJ.

10837 The People of the State of New York, Respondent, Ind. 1956/16

-against-

Roner A., Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered September 8, 2016, unanimously affirmed.

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

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

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

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

ENTERED: JANUARY 23, 2020

CLERK

Renwick, J.P., Manzanet-Daniels, Kern, Oing, González, JJ.

10838 In re MTA Bus Company, Index 451207/18
Petitioner-Respondent,

-against-

Responsive Auto Insurance Company,
Respondent-Appellant.

_____

Law Offices of James F. Sullivan, P.C., New York (William R. Larkin of counsel), for appellant.

Jones Jones LLC, New York (Jacqueline R. Mancino of counsel), for respondent.

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Judgment (denominated decision and order), Supreme Court, New York County (Debra A. James, J.), entered December 21, 2018, which granted MTA Bus Company's (MTA) petition to confirm an arbitration award, dated April 5, 2018, in favor of MTA and against respondent insurer in the amount of $50,000 plus statutory interest, and denied the insurer's cross petition, inter alia, to vacate the arbitration award, unanimously reversed, on the law, without costs, the petition denied and the cross petition granted, and the arbitration award vacated.

The self-insured petitioner commenced an arbitration proceeding in New York against respondent insurer pursuant to New York Insurance Law § 5105 for reimbursement of worker's compensation benefits it paid to its employee in connection with a motor vehicle accident that involved respondent insurer's

insured's vehicle. The arbitration panel rejected respondent insurer's argument that the panel did not have personal jurisdiction over it. The arbitration panel then found respondent insurer's insured to be 100% liable for the cause of the accident.

Contrary to the panel's finding, respondent insurer, based in Florida, established a prima facie case that New York lacked jurisdiction over it as it did not do business in New York or otherwise transact business in New York (CPLR 301, 302), was not licensed to do business in New York, and did not own property in New York (*see generally ABKO Music, Inc. v McMahon*, 175 AD3d 1201 [1st Dept 2019]; *Matter of American Tr. Ins. Co. v Hoque*, 45 AD3d 329 [1st Dept 2007]). The petitioner, in response, failed to present sufficient evidence to demonstrate jurisdiction (*ABKO Music* at 1202). Under these circumstances, the arbitrator's finding of personal jurisdiction was arbitrary and capricious. Petitioner's argument that the panel had personal jurisdiction over respondent insurer simply because the arbitration occurred

in New York and respondent fully participated in such proceeding without seeking a stay, is unavailing (*see generally Matter of Hereford Ins. Co. v American Ind. Ins.*, 136 AD3d 551 [1st Dept 2016]).

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

ENTERED: JANUARY 23, 2020

CLERK

Renwick, J.P., Manzanet-Daniels, Kern, Oing, González, JJ.

10839-
10839A-
10839B Index 155837/14

Tiffani Johnson,
Plaintiff-Appellant,

-against-

IAC/InterActiveCorp, et al.,
Defendants-Respondents.

_____

Law Office of Sandra D. Parker, New York (Sandra D. Parker of counsel), for appellant.

Kauff McGuire & Margolis LLP, New York (Michele A. Coyne of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered July 31, 2018, inter alia, dismissing the complaint, and bringing up for review orders, same court and Justice, entered July 26 and 23, 2018, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs. Appeals from aforesaid orders, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The law of the case doctrine did not preclude the court, in the exercise of its discretion, from considering defendants' argument, in support of their summary judgment motion, that relitigation of certain issues is barred by collateral estoppel, notwithstanding that they previously made similar arguments in

support of their motion to dismiss on res judicata and collateral estoppel grounds (*see generally Martin v City of Cohoes*, 37 NY2d 162, 165 [1975]; *Friedman v Connecticut Gen. Life Ins. Co.*, 30 AD3d 349, 349-350 [1st Dept 2006], *affd as modified* 9 NY3d 105 [2007]).

The motion court correctly held that collateral estoppel applied to issues of fact in this state action that are identical to issues of fact necessarily resolved by the United States District Court for the Southern District of New York in granting summary judgment dismissing plaintiff's federal employment discrimination claims (*see Simmons-Grant v Quinn Emanuel Urquhart & Sullivan, LLP*, 116 AD3d 134, 140 [1st Dept 2014]; *Sanders v Grenadier Realty, Inc.*, 102 AD3d 460, 461 [1st Dept 2013]). In applying collateral estoppel to such purely factual issues, the motion court properly evaluated plaintiff's claims of discrimination and disparate treatment under the more liberal analysis of the City Human Rights Law (Administrative Code of City of NY § 8-107) and did not conflate it with the federal analysis (*Williams v New York City Hous. Auth.*, 61 AD3d 62 [1st Dept 2009], *lv denied* 13 NY3d 702 [2009]; *see* Administrative Code § 8-130). The court cited the applicable "mixed motive standard" under the City HRL (*Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 514 [1st Dept 2016], *lv denied* 28 NY3d 902 [2016]; *Williams*,

61 AD3d at 78, n 27), and correctly concluded that plaintiff failed to raise a triable issue of discrimination based on the termination of her employment or any disparate treatment.

The motion court correctly concluded that plaintiff failed to raise an issue of fact as to whether defendants' reason for terminating her, namely, defendants' dissatisfaction with her skills as a video editor, and her failure to improve significantly during her final two-week probationary period, was a pretext for discharging her (*see Melman v Montefiore*, 98 AD3d 107, 113-114 [1st Dept 2012]).

In rejecting plaintiff's claim of disparate treatment based on gender and race, the motion court properly relied on the federal court's findings that the record belied plaintiff's claim of unequal support and feedback compared to the male video editors. The motion court correctly concluded that certain sexual and/or racial content in a photo and some videos shown at meetings was insufficient to establish disparate treatment, as such content was displayed in the course of the company's creative work on the CollegeHumor website, and the Human Resources Policy Manual that plaintiff received when she was hired cautioned that such potentially offensive content existed on the website and that she may be exposed to it in the course of her work.

To the extent that plaintiff argues that she was unlawfully discharged on account of her gender, the motion court correctly concluded that she cannot establish a prima facie case of gender discrimination because the evidence shows that she was replaced by another woman, not a man (*see Kapila v Divney*, 269 AD2d 127 [1st Dept 2000]). It is noted that the motion court erroneously deemed plaintiff's admission at her deposition in the federal action, that she was replaced by another woman, conclusive of her City HRL claim. Such an informal judicial admission is "not conclusive in the litigation but is merely evidence of the fact or facts admitted" (*GJF Constr., Inc. v Sirius Am. Ins. Co.*, 89 AD3d 622, 626 [1st Dept 2011] [citations and internal punctuation omitted]). The federal complaint did not refer to plaintiff's replacement by a woman and thus, also was not conclusive of her claim. Nevertheless, other evidence in the record shows that she was replaced by a woman.

The court applied the correct standard under the City HRL in dismissing plaintiff's hostile work environment claim (*Williams*, 61 AD3d 62, 80; *see Hernandez v Kaisman*, 103 AD3d 106, 113-115 [1st Dept 2012]).

Plaintiff's retaliation claim, based on defendants' placing her on probation and purportedly fabricating a record of poor work performance, also was properly dismissed. Even assuming

that her complaints of unequal treatment amounted to protected activity, she failed to raise any triable issue whether defendants retaliated against her by, inter alia, generating a false record of poor performance in response to her complaints, as she cites no evidence that such extensive, detailed, contemporaneous records were fabricated.

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 23, 2020

CLERK

Renwick, J.P., Manzanet-Daniels, Kern, Oing, González, JJ.

10840 In re Eric R.,
Petitioner-Respondent,

-against-

Henry R.,
Respondent-Appellant.

_____

Ethan Steward, New York, for appellant.

Diaz & Moskowitz, PLLC, New York (Hani M. Moskowitz of counsel), for respondent.

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Order, Family Court, New York County (Christopher W. Coffey, Referee), entered on or about October 19, 2016, which denied respondent grandfather's motion to vacate a prior order, same court and Referee, entered on or about May 26, 2016, which, upon respondent's default, found that he committed the family offenses of harassment in the second degree and attempted assault in the third degree, and granted a final order of protection against him on behalf of petitioner for a period of one year, unanimously affirmed, without costs.

Although the order of protection has expired, the appeal is not moot given the "enduring consequences" of an order of protection (*Matter of Veronica P. v Radcliff A.*, 24 NY3d 668, 671 [2015]). On the merits, the court providently exercised its discretion in denying respondent's motion to vacate his default.

Respondent failed to set forth a meritorious defense, as he did not deny the allegations in the petition (*see e.g. Matter of Evan Matthew A. [Jocelyn Yvette A.]*, 91 AD3d 538 [1st Dept 2012]).

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

ENTERED: JANUARY 23, 2020

CLERK

Renwick, J.P., Manzanet-Daniels, Kern, Oing, González, JJ.

10841 The People of the State of New York, Ind. 834N/15
Respondent,

-against-

Carl Bell,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin 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 (Michael Sonberg, J.), rendered September 6, 2016,

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

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

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

ENTERED: JANUARY 23, 2020

CLERK

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

Renwick, J.P., Manzanet-Daniels, Kern, Oing, González, JJ.

10843 Yochanan Bulka, Index 657560/17
Plaintiff-Respondent,

-against-

Metropolitan Life Insurance Company,
Defendant-Appellant.

_____

Rivkin Radler LLP, Uniondale (Stuart M. Bodoff of counsel), for appellant.

Jaroslawicz & Jaros PLLC, New York (David Tolchin of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered March 11, 2019, which denied defendant's motion to dismiss plaintiff's cause of action under the New Jersey Consumer Fraud Act (NJ Stat Ann § 56:8-1, *et seq.*), and his claims for punitive damages, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff, a resident of New Jersey, commenced this action for breach of contract and violation of the New Jersey Consumer Fraud Act (NJCFA) when, after paying him disability benefits for two years, defendant determined after an investigation that he was no longer fully disabled and ceased paying him benefits. Defendant moved to dismiss plaintiff's claim for punitive damages on both counts, as well as his NJCFA claim. The parties concede that New Jersey law governs.

On appeal, plaintiff abandons his claim for punitive damages in connection with his cause of action alleging breach of contract. Moreover, the complaint fails to establish a claim for punitive damages under the New Jersey Punitive Damages Act (NJ Stat Ann § 2A:15-5.9-5.17), as there is no allegation that defendant's actions were motivated by "[a]ctual malice" or accompanied by a "[w]anton and willful disregard" of resulting harm (NJ Stat Ann § 2A:15-5.10).

A claimed wrongful denial of insurance benefits is not actionable under the NJCFA (*see Myska v New Jersey Mfrs. Ins. Co.*, 440 NJ Super 458, 484-485, 114 A3d 761, 776-777 [2015], *appeal dismissed* 224 NJ 524, 135 A3d 144 [2016]), and the complaint, even when read in a light most favorable to plaintiff, fails to adequately allege misleading or deceitful conduct in the procurement and issuance of the policies at issue *(compare Oravsky v Encompass Ins. Co.*, 804 F Supp 2d 228, 240 [D NJ 2011]). Furthermore, dismissal of a claim is warranted where, as

here, the opposition is based solely on conjecture and speculation as to what discovery might reveal (*see Milosevic v O'Donnell*, 89 AD3d 628 [1st Dept 2011]).

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

ENTERED: JANUARY 23, 2020

CLERK

Renwick, J.P., Manzanet-Daniels, Kern, Oing, González, JJ.

10844 Fiordaliza Rosario, Index 24128/17E
Plaintiff-Appellant, 26989/16E

-against-

Carlos David Duran Gonzalez, et al.,
Defendants-Respondents.

_____

The Law Office of Charles C. DeStefano, Staten Island (Charles C. DeStefano of counsel), for appellant.

Majorie E. Bornes, Brooklyn, for Carlos David Duran Gonzalez and Dennis Salinas, respondents.

James G. Bilello & Associates, Hicksville (Yamile Al-Sullami of counsel), for Juan Carlos Pichardo and Paulino Agramonte, respondents.

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Order, Supreme Court, Bronx County (John R. Higgitt, J.), entered April 15, 2019, which, inter alia, granted defendants' motions for summary judgment dismissing the complaint due to plaintiff's inability to demonstrate that she sustained a serious injury to her right knee within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants satisfied their prima facie burden of showing that plaintiff did not sustain a serious injury to her right knee by submitting the report of their orthopaedic surgeon, who found that she had normal range of motion in her right knee (*see Diakite v PSAJA Corp.*, 173 AD3d 535 [1st Dept 2019]; *Mendoza v L. Two Go, Inc.*, 171 AD3d 462 [1st Dept 2019]), and opined that

plaintiff's emergency room records were inconsistent with her claimed right knee injury (*see Streety v Toure*, 173 AD3d 462 [1st Dept 2019]). Defendants also demonstrated that the claimed knee injury was not causally related to the accident by submitting the report of their radiologist, who found that the MRI of plaintiff's right knee showed degenerative conditions not related to the accident (*see Rodriguez v Konate*, 161 AD3d 565 [1st Dept 2018]). Defendants also submitted the operative report of plaintiff's orthopedic surgeon, which included findings of degenerative conditions and noted that plaintiff ceased treating about eight months after the accident.

In opposition, plaintiff failed to raise an issue of fact. Although her orthopedic surgeon found recent limitations in range of motion of her right knee that could be considered significant (*see Collazo v Anderson*, 103 AD3d 527, 528 [1st Dept 2013]), he provided only a conclusory opinion that her osteoarthritis was caused by the accident. He did not address the degenerative conditions he found during surgery or explain why plaintiff's current symptoms were not related to preexisting conditions (*see Auquilla v Singh*, 162 AD3d 463, 464 [1st Dept 2018]; *Acosta v Traore*, 136 AD3d 533, 534 [1st Dept 2016]).

Furthermore, the photographs submitted by plaintiff show that the scar on her right knee does not constitute a "significant disfigurement" within the meaning of Insurance Law § 5102(d) (*see Hutchinson v Beth Cab Corp.*, 207 AD2d 283 [1st Dept 1994]).

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

ENTERED: JANUARY 23, 2020

CLERK

Renwick, J.P., Manzanet-Daniels, Kern, Oing, González, JJ.

10845 The People of the State of New York, Respondent,
Ind. 2413/16
1140/17
SCI 4156/16

-against-

Alan Panzano,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Alexander Michaels 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 (Bonnie G. Wittner, J.), rendered May 1, 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 23, 2020

CLERK

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

Renwick, J.P., Manzanet-Daniels, Kern, Oing, González, JJ.

10846 Cheryl Kennedy, Index 157375/15
Plaintiff-Appellant,

-against-

30W26 Land, L.P.,
Defendant,

Hill Country New York, LLC, et al.,
Defendants-Respondents.

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Morgan Levine Dolan, P.C., New York (Simon Q. Ramone of counsel), for appellant.

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

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Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered March 22, 2019, which granted the motion of defendants Hill Country New York, LLC and Hill Country Barbecue Market for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Plaintiff alleges that she was injured when she slipped and fell on a puddle of water on the floor near the table where she was sitting at defendants' restaurant. Defendants established their prima facie entitlement to judgment as matter of law by showing that they neither created nor had notice of the wet condition that caused plaintiff's fall. Defendants submitted evidence including their employee's testimony that she did not

see any puddles when she checked the area 5-to-10 minutes before the accident and that she had not received any complaints (*see Gagliardi v Compass Group, USA, Inc.*, 173 AD3d 574 [1st Dept 2019]; *Gomez v J.C. Penny Corp., Inc.*, 113 AD3d 571 [1st Dept 2014]). In addition, plaintiff, her daughter and her daughter's then-fiancé stated they did not notice anyone spill water, or see any water on the floor before the accident. Under the circumstances, the condition "was not sufficiently visible and apparent to charge defendants with constructive notice" (*Valenta v Spring St. Natural*, 172 AD3d 623, 623 [1st Dept 2019]; *see Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

In opposition, plaintiff failed to raise a triable issue of fact. She did not dispute that defendants established that they did not have actual notice of or create the condition, and the testimony of plaintiff and her daughter that the water was dirty and had footprints is insufficient to raise an issue of fact as to constructive notice. All of the witnesses testified that the condition was neither visible nor apparent shortly before the accident (*see Valenta* at 623-624; *Mehta v Stop & Shop Supermarket*

*Co., LLC,* 129 AD3d 1037, 1039 [2d Dept 2015]).

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

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

ENTERED: JANUARY 23, 2020

CLERK

Renwick, J.P., Manzanet-Daniels, Kern, Oing, González, JJ.

10849 Maria A. Cestone, Index 155070/17
Plaintiff-Appellant,

-against-

Sarah Johnson, et al.,
Defendants-Respondents,

Christopher Woodrow,
Defendant.

_____

Schenck, Price, Smith & King LLP, New York (Ryder T. Ulon of counsel), for appellant.

Judd Burstein, P.C., New York (G. William Bartholomew of counsel), for respondents.

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Order, Supreme Court, New York County (Gerald Lebovitz, J.), entered on or about March 6, 2018, to the extent it granted defendants Sarah Johnson and Holly Bartlett Johnson's CPLR 3211(a)(7) motion to dismiss the causes of action for fraud in the inducement, fraud, conspiracy to commit fraud, and aiding and abetting fraud, unanimously affirmed, without costs.

This action arises from a loan made by defendant Holly Bartlett Johnson (Holly) to nonparty Worldview Entertainment Holdings Inc. (Worldview). Plaintiff Maria Cestone claims that Holly and her sister, Sarah Johnson (Sarah), fraudulently induced her into purchasing the note that memorialized a loan, by failing to disclose that Sarah, a guarantor on the loan, had already

repaid Holly the loan prior to the purchase.

The court properly dismissed the fraud-based claims based on paragraph 6(b) of the note purchase agreement, which specifically disclaimed reliance on the alleged misrepresentation or omission that plaintiff now claims had defrauded her (*see Danaan Realty Corp. v Harris*, 5 NY2d 317, 320-321 [1959]). Under that provision, plaintiff represented that she had "adequate information concerning the business and financial condition of Borrower [Worldview] and . . . guarantor under the Note" and "independently and without reliance upon Seller . . . made her own analysis and decision to enter into this Agreement." She also disclaimed reliance on "any documents or other information regarding the credit, affairs, financial condition or business of or any other matter concerning the Borrower or any obligor."

Further, the alleged misrepresentation or omission regarding Sarah's repayment of the loan was not "peculiarly within" defendants' knowledge (*see Loreley Fin. [Jersey] No. 3 Ltd. v Citigroup Global Mkts. Inc.*, 119 AD3d 136, 143 [1st Dept 2014]; *Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128, 137 [1st Dept 2014]). Plaintiff, who was admittedly the sole director of Worldview, as well as the chair of Worldview's sole shareholder, Worldview Entertainment Holdings LLC, occupied a position that afforded her reasonable access to

information about Worldview's finances, including whether the loan had been repaid by Sarah as the guarantor, before plaintiff purchased the note. Plaintiff cannot argue justifiable reliance on defendants' misrepresentation or omission where she had the means available to ascertain the status of the loan (*see ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1044 [2015]; *HSH Nordbank AG v UBS AG*, 95 AD3d 185, 194-195 [1st Dept 2012]).

In any event, the disclaimer aside, dismissal of the fraud claims is warranted on the alternative ground that plaintiff's contention that the note had been satisfied in advance of her purchase of it is "wholly speculative" (*Katz 737 Corp. v Cohen*, 104 AD3d 144, 151 [1st Dept 2012], *lv denied* 21 NY3d 864 [2013]). Plaintiff has not attempted to collect payment from any of the remaining guarantors, or from the borrower, Worldview, itself.

In view of the foregoing, we need not reach the parties' remaining contentions.

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

ENTERED: JANUARY 23, 2020

CLERK

Renwick, J.P., Manzanet-Daniels, Kern, Oing, González, JJ.

10850N Laura Leon, Index 153936/15
Plaintiff-Appellant,

-against-

Wyatt Harlan, et al.,
Defendants-Respondents.

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Stuart Perry, P.C., New York (Stuart S. Perry of counsel), for appellant.

O'Donnell & Fox, P.C., New York (William G. O'Donnell, Jr. of counsel), for respondents.

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Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered on or about February 13, 2019, which denied plaintiff's motion for leave to amend the complaint, unanimously affirmed, with costs.

The IAS court properly exercised its discretion in denying plaintiff's motion for leave to amend the complaint against defendant Harlan, her former neighbor (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]). Plaintiff previously settled with defendant's insurance carrier and signed a release that settled all of its "causes of action . . . claims and demands" that plaintiff "ever had . . or hereafter can, shall or may have . . ." against defendant. Plaintiff's proposed cause of action for constructive eviction is clearly barred by the plain terms of the release (*Centro Empresarial Cempresa S.A. v America*

*Movil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011]).

Moreover, notwithstanding the release, the proposed constructive eviction claim is also "palpably insufficient" and "devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 499 [1st Dept 2010]). Among other infirmities, plaintiff has failed to properly allege a cause of action for a constructive eviction, which requires a wrongful act by a landlord that deprives the tenant of the beneficial enjoyment or actual possession of the demised premises (*Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 82-83 [1970]).

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

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

ENTERED: JANUARY 23, 2020

CLERK

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

10852 The People of the State of New York, Ind. 162/17
Respondent,

-against-

David Thompson,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Amanda Katherine Regan 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 (Daniel Konviser, J. at plea; Kevin McGrath, J. at sentencing), rendered January 2, 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 23, 2020

CLERK

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

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

10854 In Dave D.,
Petitioner-Appellant,

-against-

Cara C.,
Respondent-Respondent.

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Geoffrey P. Berman, Larchmont, for appellant.

Law Office of Lewis S. Calderon, Jamaica (Lewis S. Calderon of counsel), for respondent.

Janet Neustaetter, The Children's Law Center, Brooklyn (Nesta N. Johnson of counsel), attorney for the child.

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Order, Family Court, Bronx County (Jennifer S. Burtt, Referee), entered on or about March 1, 2019, which, to the extent appealed from as limited by the briefs, denied petitioner father's request for a modification of custody with respect to the subject child, unanimously affirmed, without costs.

Family Court properly determined that there was no change in circumstances to warrant a modification of the 2016 custody order, and that a change in custody would not be in the best interests of the child (*see Matter of Luis F. v Dayhana D.*, 109 AD3d 731, 731 [1st Dept 2013]; *see also McGinnis v McGinnis*, 159 AD3d 475, 476 [1st Dept 2018]).

The child has struggled academically since 2011, which undermines the father's claim that there has been a change in

circumstances with respect to her education since the entry of the 2016 order (*see Matter of Tiffany H.-C. v Martin B.*, 155 AD3d 501, 502 [1st Dept 2017]). Moreover, the record shows that the mother helped the child with her homework each night, obtained and continuously renewed an individualized education plan for the child, attended parent-teacher conferences, and regularly communicated with the child's teachers. By contrast, the father failed to demonstrate that the child's academic problems would be ameliorated if custody were transferred to him (*see Matter of Liza R. v Lin F.*, 110 AD3d 513, 513 [1st Dept 2013]).

Moreover, the record established that the father had court-ordered scheduled visitation on the first three weekends of each month, but the parties continuously argued about where and when the pickup would occur. During this proceeding, the court altered the visitation schedule numerous times, but as a result of both parties' work schedules and obstinance, numerous visits were missed. The court found the father particularly intransigent on accommodations offered to make visitation pickups and dropoffs go more smoothly. In addition, even though the father was entitled to the entire weekend with the child, if pickup did not occur on Friday evening or Saturday morning, the record shows that he made no further attempt to see his child.

Furthermore, in this case, both parties are fit to act as

custodial parent, but the mother's actions demonstrating an ability to nurture a relationship between the child and father tips the scales in the mother's favor (*see Matthew W. v Meagan R.*, 68 AD3d 468, 468 [1st Dept 2009]; *Matter of Damien P.C. v Jennifer H.S.*, 57 AD3d 295, 296 [1st Dept 2008], *lv denied* 12 NY3d 710 [2009]). The mother acknowledged that the child loved her father, she had "no problem" with them having a relationship, and she tried to call the father on holidays such as Christmas and the child's birthday to allow them to speak. Accordingly, the Family Court properly exercised its discretion in denying the modification of custody (*see Sequeira v Sequeira*, 105 AD3d 504 [1st Dept 2013], *lv denied* 21 NY3d 1052 [2013]).

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

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

ENTERED: JANUARY 23, 2020

CLERK

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

10855 Starlight Rainbow, Index 152477/15
Plaintiff-Appellant,

-against-

WPIX, Inc.,
Defendant-Respondent,

Jeremy Tanner, et al.,
Defendants.

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The Reporters Committee for Freedom of the Press; Advance Publications, Inc.; The Associated Press; Courthouse News Service; Daily News, LP; First Look Media Works, Inc.; Gannett Co., Inc.; International Documentary Assn.; Investigative Reporting Workshop at American University; The Media Institute; MPA - The Association of Magazine Media; National Press Photographers Association; National Public Radio., Inc.; The New York Times Company; Newsday LLC; Online News Association; POLITICO LLC; Radio Television Digital News Association; Reveal From the Center for Investigative Reporting; Society of Professional Journalists and Tully Center for Free Speech,
Amici Curiae.

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Lewis Clifton & Nikolaidis, P.C., New York (Daniel E. Clifton of counsel), for appellant.

McCusker, Anselmi, Rosen & Carvelli, P.C., New York (Bruce S. Rosen of counsel), for respondent.

Holland & Knight LLP, New York (Christine Walz of counsel), for amici curiae.

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Order, Supreme Court, New York County (Robert D. Kalish, J.), entered October 22, 2018, which, to the extent appealed from, granted defendant WPIX's motion for summary judgment

dismissing the complaint, unanimously affirmed, without costs.

Plaintiff, a teacher with the unusual and distinctive name, Starlight Rainbow, alleges that WPIX published an online article mistakenly naming her as the public school teacher who was bullying a PS 235 fifth grader. The teacher who was the subject of the accusations had the same last name as plaintiff. The parties do not dispute that the article was defamatory per se, in that it injured her in her profession as a teacher.

The parties also agree that the article concerned a matter of public concern, and that plaintiff is not a public figure. Thus, to prevail on a defamation claim, plaintiff must show, by a preponderance of the evidence, that WPIX was "grossly irresponsible" in publishing the article on its website, in that it acted "without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties" (*Chapadeau v Utica Observer-Dispatch*, 38 NY2d 196, 199 [1975]). The gross irresponsibility standard of *Chapadeau* is more lenient than the actual malice standard applicable to public figures (*Rivera v Time Warner Inc.*, 56 AD3d 298 [1st Dept 2008]; *see also Karaduman v Newsday, Inc.*, 51 NY2d 531, 539 [1980]; *Trump Vil. Section 4, Inc. v Bezvoleva*, 2015 WL 9916879 [Sup Ct, NY County 2015], at *7, *affd as modified* 161 AD3d 916 [2d Dept 2018]). The motion court properly held

plaintiff cannot meet even this more lenient standard.

The student's mother, the primary source for information about the bullying teacher's name, was not personally known to WPIX reporter Magee Hickey, nor recommended as a reliable source by others (*cf. Gaeta v New York News, Inc.*, 62 NY2d 340 [1984]). However, the court appropriately accorded great significance to her close personal relationship to the victim, her daughter, in assessing whether Hickey was responsible in relying on her (*see e.g. Weiner v Doubleday & Co.*, 142 AD2d 100, 105-107 [1st Dept 1988], *affd* 74 NY2d 586 [1989]; *Grobe v Three Vil. Herald*, 69 AD2d 175 [2d Dept 1979], *affd* 49 NY2d 932 [1980]). The court reasonably surmised that Hickey appropriately assumed the concerned mother would know the first and last names of the teacher who had allegedly acted in such an extreme way that the child had expressed a wish to leave the school, or even to die.

Community activist Tony Herbert's affidavit also supports the court's conclusion. Herbert pointed out that he heard the mother respond unequivocally and "immediately" with the name "Starlight" in response to Hickey's inquiry about the teacher's first name. This assertion lends further credence to Hickey's reliance on the mother's response. Moreover, Herbert attested that he, along with the mother and student, repeated the mother's response. Although Herbert claims that he had no personal

knowledge of the teacher's first name, the record does not show that Hickey was, or had any reason to be, aware of Herbert's lack of such knowledge at the time. Moreover, Hickey had previously relied upon Herbert as a reliable source. Therefore, with Herbert's apparent endorsement of the mother's information, Hickey had no reason to doubt its veracity, and WPIX was thus properly granted summary judgment on this point (*Robart v Post-Standard*, 74 AD2d 963 [3d Dept 1980], *affd* 52 NY2d 843 [1981]; *Campo Lind for Dogs v New York Post Corp.*, 65 AD2d 650 [3d Dept 1978]; *see also Karaduman v Newsday, Inc.*, 51 NY2d 531, 549 [1980]).

Plaintiff faults Hickey for not doing more follow-up, but Hickey provided credible reasons to explain why she did not reach out to the teacher or to the PS 235 principal directly. She testified, based on her extensive experience, that she was essentially not allowed to reach out to the teacher, or that she would have been routed to DOE had she done so. She similarly cited her extensive experience reporting on school issues in testifying that seeking information from the school principal would have been fruitless. It would not, in other words, have been "normal procedure" under these circumstances to seek verification from the offending teacher or principal (*see Hawks v Record Print & Publ. Co.*, 109 AD2d 972 [3d Dept 1985]). It was,

in contrast, Hickey's normal procedure to reach out to DOE Press Office, as she did here, and she cannot be faulted for that office's refusal to respond to her questions. Plaintiff made no effort to rebut Hickey's reasons for not inquiring further.

The court properly found that WPIX could not be held liable for failure to retract the article during the nearly seven months that elapsed from her August 2014 retraction demand to its removal of the article from its website in March, 2015 upon her commencement of this case. Plaintiff provides "no authority to support [her] argument that the *Chapadeau* standard imposes a duty to correct previously-acquired information – and the law does not recognize such an obligation" (*Thomas v City of New York*, 2018 US Dist LEXIS 189305, at *29) [ED NY 2018]).

Plaintiff's position is inconsistent with the single publication rule since she, in effect, seeks to assert causes of action arising from both the initial publication and the

continued publication of the article after she demanded a retraction (*see Firth v State*, 98 NY2d 365 [2002]; *see also Roberts v McAfee, Inc.*, 660 F3d 1156 [9th Cir 2011].

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

ENTERED: JANUARY 23, 2020

CLERK

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

10856 In re Ameriprise Insurance Company, Index 570192/17
Petitioner-Respondent,

-against-

Kensington Radiology Group, P.C.,
as assignee of Zoila McBean,
Respondent-Appellant.

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New York Insurance Association, Inc.
and Property Casualty Insurers Association
of America,
Amici Curiae.

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

Bruno, Gerbino & Soriano, LLP, Melville (Nathan M. Shapiro of counsel), for respondent.

Rivkin Radler, LLP, Uniondale (Barry I Levy of counsel), for amici curiae.

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Order, Appellate Term, First Department, entered January 2, 2018, which reversed an order of the Civil Court, New York County (Erika M. Edwards, J.), entered on or about November 30, 2016, denying the petition to vacate a master arbitrator's award and confirming the award, and remanded the matter to Civil Court for a framed issue hearing on whether the policy limit was exhausted before petitioner became obligated to pay respondent's claims, unanimously affirmed, without costs.

Generally, courts will not set aside an award where "there

is a rational view to support it" (*Country-Wide Ins. Co. v May*, 282 AD2d 298, 298 [1st Dept 2001]; *see also Matter of Carty v Nationwide Ins. Co.*, 212 AD2d 462 [1st Dept 1995]). However, in addition to irrationality, an award may be vacated if the arbitrator exceeds his or her power (*see* CPLR 7511[b][1][iii]). An arbitrator exceeds his/her power if the award is "beyond the policy limits" (*Matter of Brijmohan v State Farm Ins. Co.*, 92 NY2d 821, 823 [1998]; *see also e.g. Countrywide Ins. Co. v Sawh*, 272 AD2d 245 [1st Dept 2000]).

Respondent contends that its claims were complete before the policy issued by petitioner was exhausted. This argument is unavailing. The Court of Appeals has interpreted the word "claims" in 11 NYCRR 65-3.15 to mean "verified claims" (*Nyack Hosp. v General Motors Acceptance Corp.*, 8 NY3d 294, 300 [2007]), i.e., claims as to which the healthcare provider has submitted additional information requested by the insurer (*see id.* at 297-298, 300-301). Petitioner requested verification in the form of an examination under oath (EUO). Since respondent never appeared for an EUO, its claims were never verified. The defense that an award exceeds an arbitrator's power is so important that a party may introduce evidence for the first time when the other party tries to confirm the award (*see Brijmohan*, 92 NY2d at 822-823).

Respondent may also raise on appeal the purely legal

argument that Appellate Term lacked the power to remand to Civil Court for a framed issue hearing (*see generally Branham v Loews Orpheum Cinemas, Inc.*, 31 AD3d 319, 323 n 2 [1st Dept 2006], *affd* 8 NY3d 931 [2007]). On the merits, however, this argument is unavailing (*see Allstate Prop. & Cas. Ins. Co. v Northeast Anesthesia & Pain Mgt.*, 2016 NY Slip Op 50828[U], 51 Misc 3d 149[A] [Appellate Term, 1st Dept, 2016]; *Allstate Ins. Co. v DeMoura*, 2011 NY Slip Op 50430[U], 30 Misc 3d 145[A] [Appellate Term, 1st Dept, 2011]).

In view of the foregoing, respondent is not entitled to the attorneys' fees it requested.

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

ENTERED: JANUARY 23, 2020

CLERK

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

10857 The People of the State of New York, Ind. 3307/16
Respondent,

-against-

Fernando Rios,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Kyle R. Silverstein 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 (Jeanette Rodriguez-Morick, J.), rendered January 25, 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 23, 2020

CLERK

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

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

10858 The People of the State of New York, Respondent, Ind. 1786N/16

-against-

Ralph Samuel, Defendant-Appellant.

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

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Judgment, Supreme Court, New York County (Kevin McGrath, J. at plea; Richard M. Weinberg, J. at sentencing), rendered September 6, 2016, unanimously affirmed.

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

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

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

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

ENTERED: JANUARY 23, 2020

CLERK

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

10859 Zurich American Insurance Company, Index 651579/16
Plaintiff-Appellant,

-against-

ACE American Insurance Company, et al.,
Defendants,

Drive New Jersey Insurance Company,
Defendant-Respondent.

_____

Coughlin Duffy, LLP, New York(Gabriel E. Darwick of counsel), for appellant.

Barclay Damon LLP, New York (Laurence J. Rabinovich of counsel), for respondent.

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Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered July 2, 2019, which denied plaintiff's (Zurich) motion for partial summary judgment seeking a declaration that defendant Drive New Jersey Insurance Company (Drive NJ) is obligated to defend Zurich's insureds in one underlying lawsuit (the *Quinn* action) on a primary, non-contributory basis and to reimburse Zurich for its costs in defending its insureds in both the *Quinn* action and a second action (the *Lobozza* action), and granted Drive NJ's cross motion for summary judgment seeking a declaration that it had no duty to defend those insureds in the underlying actions or to reimburse Zurich for the defense costs, unanimously reversed, on the law, without costs, to grant

Zurich's motion, deny Drive NJ's motion, and to declare that Drive NJ had a primary obligation to defend the Zurich insureds in the *Quinn* action and to reimburse the Zurich insureds in the *Lobozza* action.

Pursuant to its plain language, the "Any Auto Legal Liability" endorsement of the Drive NJ policy extended the definition of "insured auto" to include "any auto, if you are a partnership, corporation, or any other entity," which included the trailer driven by its additional insureds (*see Greene v General Cas. Co. of Wisconsin*, 576 NW2d 56, 60 [WI 1997]). Although liability has yet to be determined in this case, based on the allegations of the underlying complaint, which alleged injuries sustained while loading and unloading rebar cages constructed by Drive NJ's insured, the tractor-trailer owned by the Zurich insureds was covered under the Drive NJ policy, and Drive NJ's obligation to defend was triggered.

Nevertheless, the "Employer's Liability" exclusion within the NJ Drive policy, which excludes bodily injury to "[a]n employee of any insured arising out of or within the course of: (i) that employee's employment by any insured; or (ii) Performing duties related to the conduct of any insured's business," unambiguously referred to any entity insured under the policy, whether as the named insured or as an additional insured (*see*

*J.J. White, Inc. v American Safety Cas. Ins. Co.*, 2012 WL 2789586, *2 2012 US Dist LEXIS 94417, *6 [DNJ 2012]). Even if this language precludes coverage for lawsuits against B&R by B&R employees (the *Quinn* action) and lawsuits against the Zurich insureds by their employees (the *Lobozza* action), such language would not preclude Drive NJ's defense obligations to the Zurich insureds for vicarious liability imposed as a result of its named insured's action (*see Arthur Kill Power v American Cas. Safety*, 80 AD3d 502, 503 [1st Dept 2011]). Drive NJ's defense obligation to Zurich is primary (*see American Nurses Assn. v Passaic Gen. Hosp.*, 98 NJ 83, 484 A2d 670, 673 [1984]).

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

ENTERED: JANUARY 23, 2020

CLERK

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

10860-
10860A Alison Bianchi,
Plaintiff-Appellant,

-against-

Richard Mason, et al.,
Defendants-Respondents.

Index 22789/16E

Bergman, Bergman, Fields & Lamonsoff, LLP, Hicksville (Michael E. Bergman of counsel), for appellant.

Marjorie E. Bornes, Brooklyn, for respondents.

Order, Supreme Court, Bronx County (John R. Higgitt, J.), entered October 30, 2018, which granted defendants' motion for summary judgment dismissing the complaint for failure to meet the serious injury threshold of Insurance Law § 5102(d), unanimously modified, on the law, to deny the motion as to the claim of significant limitation of use of the cervical spine, and otherwise affirmed, without costs. Order, same court and Justice, entered April 11, 2019, to the extent it denied plaintiff's motion for leave to renew with respect to the gap in treatment, unanimously affirmed, without costs.

Defendants established prima facie that plaintiff did not suffer a serious injury to her cervical spine or left hip through the opinions of their orthopedic surgeon and neurologist that she had normal range of motion and her claimed injuries had resolved

(*see e.g. Cattouse v Smith*, 146 AD3d 670 [1st Dept 2017]). The orthopedist's findings of minor limitations did not defeat defendants' initial showing that plaintiff did not have either significant or permanent limitation in the use of her cervical spine (*see Alverio v Martinez*, 160 AD3d 454, 454 [1st Dept 2018]). Defendants also established prima facie that plaintiff's claimed injuries were not causally related to the subject accident through the affirmation of their radiologist, who found only degenerative conditions, and no bulging or herniated discs, in the MRIs (*see e.g. Blake v Cadet*, 175 AD3d 1199, 1199-1200 [1st Dept 2019]). Moreover, defendants identified a gap in plaintiff's treatment, thus shifting the burden to plaintiff to "offer some reasonable explanation" for the cessation of her treatment (*Pommells v Perez*, 4 NY3d 566, 574 [2005]).

In opposition, plaintiff raised an issue of fact as to her claim of "significant" limitation of use of her cervical spine (*see Arias v Martinez*, 176 AD3d 548, 549 [1st Dept 2019]; *Blake*, 175 AD3d at 1200; *Tejada v LKQ Hunts Point Parts*, 166 AD3d 436, 437 [1st Dept 2018]). She submitted her radiologist's affirmed MRI report, which found bulging and herniated discs, as well as her treating physicians' records documenting limitations in range of motion shortly after the accident, nine months later, and recently, which they causally related to the accident. Given

plaintiff's relatively young age at the time of the accident, and the lack of any evidence of prior treatment or symptoms in her own medical records, these opinions were sufficient to raise an issue of fact as to causation (*see Blake*, 175 AD3d at 1200; *Fathi v Sodhi*, 146 AD3d 445, 446 [1st Dept 2017]). However, since plaintiff offered no explanation for the 16-month gap in her treatment beginning more than a year after the accident, she failed to raise an issue of fact as to whether she sustained a cervical spine injury in the "permanent consequential" limitation of use category (*see Blake*, 175 AD3d at 1200; *Holmes v Brini Tr. Inc.*, 123 AD3d 628, 628-629 [1st Dept 2014]).

Plaintiff failed to raise an issue of fact as to any serious injury to her left hip, since her own medical records indicated that she had full range of motion in the hip within four months after the accident (*see Heywood v New York City Tr. Auth.*, 164 AD3d 1181 [1st Dept 2018], *lv denied* 32 NY3d 913 [2019]). Moreover, she failed to submit any medical evidence to dispute the opinion of defendants' radiologist that tendinosis, a condition noted in plaintiff's own MRI report, is a degenerative condition unrelated to the accident (*see Paduani v Rodriguez*, 101 AD3d 470, 471 [1st Dept 2012]). Since plaintiff did not raise an issue of fact as to causation with respect to her left hip injury, she cannot recover for that injury, regardless of whether

a jury finds that her cervical spine injury constitutes a serious injury (*Taylor v Delgado*, 154 AD3d 620, 621 [1st Dept 2017]).

Plaintiff's 90/180-day claim was correctly dismissed based on her deposition testimony that she was not confined to bed or home, and did not miss more than five days of work, as a result of the accident (*see Pouchie v Pichardo*, 173 AD3d 643, 645 [1st Dept 2019]; *see also Rosa-Diaz v Maria Auto Corp.*, 79 AD3d 463, 464 [1st Dept 2010]).

The court correctly denied plaintiff's motion for leave to renew with respect to the gap-in-treatment issue, because her "new facts" would not change the prior determination, and she failed to provide reasonable justification for failing to present those facts on the prior motion (CPLR 2221[e][2], [3]).

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

ENTERED: JANUARY 23, 2020

CLERK

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

10861 The People of the State of New York, Respondent, Ind. 571/15

-against-

Maurice Robinson, Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Felicia A. Yancey of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Diane Kiesel, J. at plea; Denis J. Boyle, J. at sentencing), rendered June 22, 2016, convicting defendant of assault in the second degree, and sentencing him, as a second violent felony offender, to a term of five years, unanimously affirmed.

Defendant's challenges to his plea do not fall within the narrow exception to the preservation requirement (*see People v Conceicao*, 26 NY3d 375, 381-382 [2015]), and we decline to review these unpreserved claims in the interest of justice. As an alternative holding, we find that, unlike *People v Mox* (20 NY3d 936 [2012]), there was nothing in the plea allocution that triggered a duty to inquire into a potential psychiatric defense. We find that defendant's remaining challenges to the plea are unavailing (*see People v Tyrell*, 22 NY3d 359, 365 [2013]).

In any event, the only relief defendant requests is dismissal of the indictment rather than vacatur of the plea, and he expressly requests this Court to affirm the conviction if it does not grant a dismissal. Since we do not find that dismissal would be appropriate, we affirm on this basis as well (*see e.g. People v Teron*, 139 AD3d 450 [1st Dept 2016]).

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

ENTERED: JANUARY 23, 2020

CLERK

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

10862 In re Dariel M.,
Petitioner-Respondent,

-against-

Aurelyn Z.G.,
Respondent-Appellant.

- - - - -

Aurelyn Z.G.,
Petitioner-Appellant,

-against-

Dariel M.,
Respondent-Respondent.

_____

Carol Kahn, New York, for appellant.

Law Office of Ava G. Gutfriend, Bronx (Ava G. Gutfriend of counsel), for respondent.

Janet Neustaetter, The Children's Law Center, Brooklyn (Rachel J. Stanton of counsel), attorney for the child.

_____

Order, Family Court, Bronx County (Sue Levy, Referee), entered on or about December 20, 2018, which, inter alia, after a hearing, granted petitioner father's petition for primary physical custody of the parties' child, unanimously affirmed, without costs.

The court's determination awarding physical custody of the subject child to the father has a sound and substantial basis in the record (*see Eschbach v Eschbach*, 56 NY2d 167 [1982]). The court properly considered the totality of the circumstances and

concluded that the best interests of the child would be served if she were to remain with the father (*id.* at 171-174). The record shows that the father was better able to provide a stable environment for the child as well as address her educational and medical needs. Additionally the father had been the child's primary caregiver for over two years, since the mother's departure from the family home (*see Matter of David C. v Laniece J.*, 102 AD3d 542 [1st Dept 2013]). In contrast, the mother had not been involved in the child's educational or medical life since 2016, had no realistic plan to meet the child's educational needs, had allowed the child's health insurance coverage to lapse, and exhibited a lack of stability in her life both in employment and in housing. The record further indicated that the father would foster the relationship between the mother and the child (*see id.* at 543).

The mother's argument that the court did not possess sufficient information to properly determine the child's best interests because it did not have the child's academic and IEP records, a forensic evaluation, and testimony from the parents' current partners, is unpreserved (*see Matter of Maureen H. v Samuel G.*, 104 AD3d 470, 471 [1st Dept 2013]), and we decline to

review in the interest of justice. Were we to review the argument, we would find that the court had sufficient information to determine the child's best interests after it had conducted a full evidentiary hearing.

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

ENTERED: JANUARY 23, 2020

CLERK

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

10863 In re Jennifer Smith, et al., Index 101618/17
Petitioners-Respondents,

-against-

James P. O'Neill, etc., et al.,
Respondents-Appellants.

_____

Zachary W. Carter, Corporation Counsel, New York (Janet L. Zaleon of counsel), for appellants.

Valli Kane & Vagnini LLP, Garden City (Matthew L. Berman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered May 17, 2018, which, upon the petition to annul respondent police commissioner's denial of petitioners' request to be designated detectives, third grade, referred to a special referee the issue of whether petitioners, in the 18 months immediately preceding November 14, 2017, performed work comparable to that of New York City police officers holding the rank of detective, third grade, and held the proceeding brought pursuant to CPLR article 78 in abeyance pending the special referee's report and recommendation, unanimously affirmed, without costs.

The article 78 court correctly concluded that a hearing was necessary to determine the rationality of the police commissioner's denial of the request by members of the New York

City Police Department's Evidence Collection Team (ECT) to be designated detectives, third grade, pursuant to Administrative Code of City of NY § 14-103(b)(2). For purposes of that section, the rationality of respondent's classification of the ECT as a nondetective track unit "is tested by whether an individual officer, for a period of 18 months, performed work comparable to that performed by police officers classified as detectives" (*Matter of Finelli v Bratton*, 298 AD2d 197, 198 [1st Dept 2002], *lv denied* 100 NY2d 505 [2003]). The parties' submissions present issues of fact as to whether petitioners' work was comparable to detectives' work. Thus, a hearing must be held before that determination can be made (*see Matter of Ryff v Safir*, 264 AD2d 349 [1st Dept 1999]; *Matter of Marti v Kerik*, 307 AD2d 836 [1st Dept 2003]).

Respondents failed to make a showing of unexcused delay in petitioners' commencement of this proceeding (*see Matter of Sheerin v New York Fire Dept. Arts. 1 & 1B Pension Funds*, 46 NY2d 488, 495-496 [1979]). The record does not establish when petitioners first knew, or should have known, of facts giving rise to their alleged right of relief. Moreover, petitioners

allege that they were informed in late 2014 that, due to their additional duties and training, they would be placed onto the detective track and promoted to the rank of detective after 18 months. They commenced this proceeding after that did not occur and their ensuing grievance was denied.

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

ENTERED: JANUARY 23, 2020

CLERK

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

10864 Henryk Lampkowski, Index 805213/15
Plaintiff-Appellant,

-against-

Raul Parra, M.D., et al.,
Defendants-Respondents.

_____

Marzec Law Firm, PC, Brooklyn (Jerome Noll of counsel), for appellant.

Dopf, P.C., New York (Martin B. Adams of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered February 15, 2018, upon a jury verdict, in favor of defendants, unanimously affirmed, without costs.

Contrary to plaintiff's contention, the verdict was not against the weight of the evidence (*see* CPLR 4404[a]), and the evidence supports the jury's findings that defendant Dr. Parra did not depart from the applicable standard of care or fail to obtain informed consent from plaintiff in providing treatment for his prostate cancer. The trial court providently exercised its discretion in precluding plaintiff's expert from testifying about which treatment option should have been "recommended" to plaintiff, as this is not a proper basis for either a lack of informed consent claim (*see* Public Health Law § 2805-d), or a medical malpractice claim. Further, an expert's testimony that

one treatment option is preferable does not establish that a doctor deviated from the standard of care in following a different medically accepted treatment (*see A.C. v Sylvestre*, 144 AD3d 417, 418 [1st Dept 2016]). Accordingly, we find no basis for setting aside the jury's verdict, which is accorded deference (*see Cordero v Yeung*, 143 AD3d 472, 473 [1st Dept 2016]; *see also Angel R. v New York City Tr. Auth.*, 139 AD3d 590 [1st Dept 2016], *lv denied* 28 NY3d 909 [2016]).

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

ENTERED: JANUARY 23, 2020

CLERK

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

10865 Navezda Giraldo, Index 159689/14
Plaintiff-Appellant,

-against-

Brookfield Financial Properties, L.P., et al.,
Defendants-Respondents,

The City of New York,
Defendant.

_____

Edelman, Krasin & Jaye, PLLC, Westbury (Monica P. Becker of counsel), for appellant.

Law Office of Robert J. Brown, PLLC, New York (Robert J. Brown of counsel), for respondents.

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Order, Supreme Court, New York County (Gerald Lebovits, J.), entered December 6, 2018, which, in this action for personal injuries sustained when plaintiff tripped and fell on the cobblestone area of the sidewalk abutting defendants Brookfield Financial Properties, L.P. and Battery Park City Authority's building, granted said defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The motion court properly determined that the sidewalk was not a defective condition and granted defendants summary judgment dismissing the complaint. The regulations cited by plaintiff's expert, Administrative Code of City of NY § 19-152(a) and the New York City Department of Transportation's (DOT) Highway Rules § 2-

09(f)(4) and (5) (34 RCNY 2-09[f][4], [5]), by their plain terms, govern concrete sidewalk flags, and are inapplicable to the cobblestone area of the sidewalk at issue here. Defendants submitted documents that establish that the DOT had approved the subject area as a "non-conforming distinctive sidewalk," consistent with Highway Rule § 2-09(f)(4)'s approval process for such sidewalks. Moreover, defendants' expert demonstrated that section 6.06 of the Department of Highways of the City of NY Standard Specifications, entitled Granite Block Sidewalk, more aptly governs cobblestone sidewalks, and that the 1-1/8-inch gap observed by plaintiff's expert complies with section 6.06.4(C)'s requirement that joints between blocks be "approximately one inch in width."

Defendants further demonstrated that they did not violate Administrative Code § 7-210 by failing to maintain the sidewalk in a "reasonably safe condition." As discussed, the cobblestone sidewalk did not violate any applicable regulations, and it is undisputed that the building had not received any violation citations from the DOT regarding the sidewalk. Furthermore, the

building's assistant property manager testified that he never noticed any problems with the cobblestones when he inspected the sidewalk on a weekly or biweekly basis, and plaintiff testified that there were no missing or defective cobblestones.

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

ENTERED: JANUARY 23, 2020

CLERK

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

10866 In re NYC Health + Hospitals, Index 450553/18
Petitioner-Appellant,

-against-

Organization of Staff Analysts, et al.,
Respondents-Respondents.

- - - - -

New York City Municipal Labor Committee,
Amicus Curiae

_____

Proskauer Rose LLP, New York (Nicole A. Eichberger of the bar of the State of Louisiana, admitted pro hac vice, of counsel), for appellant.

Law Offices of Leonard A. Shrier, PC, New York (Leonard A. Shrier of counsel), for Organization of Staff Analysts, respondent.

Michael T. Fois, New York, for the New York City Office of Collective Bargaining and Susan Panepento, respondents.

Stroock & Stroock & Lavan LLP, New York (Alan M. Klinger of counsel), for amicus curiae.

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Judgment (denominated an order), Supreme Court, New York County (Melissa A. Crane, J.), entered on or about February 27, 2019, which denied the petition seeking an order vacating a determination of the New York City Office of Collective Bargaining's (OCB) Board of Certification (the Board), dated March 7, 2018, adding petitioner's Director of Planning (DP) job title to the collective bargaining unit of respondent Organization of Staff Analysts (the Union), and dismissed the proceeding brought pursuant to CPLR article 78, unanimously

affirmed, without costs.

We accord deference to the Board's rational interpretation of the governing statutes (*see* Civil Service Law § 201[7][a]; McKinney's Unconsol Laws of NY §§ 7385[11], 7390[5]; Administrative Code of City of NY §§ 12-303[g][2], 12-305, 12-309[b][4]), including its determination that the Health & Hospitals Corporation Act incorporates the Taylor Law's definition of "managerial or confidential" status for purposes of assessing HHC employees' eligibility for collective bargaining (*Matter of NYC Health + Hosps. v Organization of Staff Analysts* (*HHC I*), 171 AD3d 529, 530 [1st Dept 2019]).

The Board's determination that DPs do not serve in a managerial capacity was rationally based in the administrative record (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231 [1974]). The record showed that the DPs, while highly expert, functioned substantially in advisory capacities, making recommendations and working collaboratively to carry out responsibilities delegated to them, but not having authority to make policy on their own (*see HHC I*, 171 AD3d at 530). Nor is there any evidence that any of the DPs engaged in activities which would qualify them for confidential (as distinct

from managerial) status, such as preparing for or conducting collective negotiations (*see* Civil Service Law § 201[7][a]; *Matter of Lippman v Public Empl. Relations Bd.*, 263 AD2d 891, 902 [3d Dept 1999]).

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

ENTERED: JANUARY 23, 2020

CLERK

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

10867 Cinthia Berganzo, Index 23072/15E
Plaintiff-Respondent,

-against-

Bronx Realty Group LLC,
Defendant,

Melrose Site D-1 Houses, Inc., et al.,
Defendants-Appellants.

_____

Black Marjieh & Sanford, LLP, Elmsford (Brendan Patrick Lanigan of counsel), for appellants.

McHale Law Firm, LLC, New York (Paul A. Burg of counsel), for respondent.

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Order, Supreme Court, Bronx County (Paul L. Alpert, J.), entered April 5, 2019, which denied defendants Melrose Site D-1 Houses, Inc. and Melrose Site D-1 Realty Associates, L.P.'s motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Supreme Court correctly found that defendants met their prima facie burden by demonstrating that a storm was in progress the night before plaintiff's accident and that a reasonable time had not elapsed to allow defendants' workers to clear the courtyard before then (*see Powell v MLG Hillside Assoc.*, 290 AD2d 345 [1st Dept 2002]). Plaintiff raised triable issues of fact through admissible evidence, including eyewitness and expert

affidavits, as to whether the area was covered with ice from a prior storm and whether defendants created the icy or slushy conditions through their negligent removal and piling of snow after the prior storm (*see Perez v Raymours Furniture Co., Inc.*, 173 AD3d 597, 598 [1st Dept 2019]; *Bagnoli v 3GR/228 LLC*, 147 AD3d 504, 504-505 [1st Dept 2017]; *Guzman v Broadway 922 Enters., LLC*, 130 AD3d 431, 432 [1st Dept 2015]). We have considered defendants' remaining arguments and find them unavailing.

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

ENTERED: JANUARY 23, 2020

CLERK

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

10868 The People of the State of New York, Ind. 1842/16
Respondent,

-against-

Remulo Fernandez,
Defendant-Appellant.

_____

Christina A. Swarns, Office of The Appellate Defender, New York (Stephen R. Strother of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Noreen M. Stackhouse 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 (Neil Ross, J.), rendered March 13, 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 23, 2020

CLERK

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

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

10869 In re Nestor Dominguez, Index 100728/16
Petitioner-Appellant,

-against-

James O'Neill, etc., et al.,
Respondents-Respondents.

_____

Goldberg & McEnaney, Port Washington (Timothy McEnaney of counsel), for appellant.

Georgia M. Pestana, Acting Corporation Counsel, New York (Anna Wolonciej Gottlieb of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Nancy M. Bannon, J.), entered August 2, 2018, which, inter alia, denied the petition to annul respondents' determination denying petitioner accidental disability retirement (ADR) benefits, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The denial of ADR benefits was not arbitrary and capricious. The Medical Board was entitled to rely on its own examination of petitioner, which provided credible evidence for its finding that he was not disabled (*see Matter of Khurana v Kelly*, 73 AD3d 497 [1st Dept 2010], *lv denied* 15 NY3d 715 [2010]). Furthermore, petitioner did not provide any medical evidence to the contrary.

Petitioner's argument that the Medical Board was biased

against him and that he was entitled to a Board that did not include the doctors who participated in a prior determination that he suffered from mental illness is without merit. Participation in the prior proceedings involving petitioner is insufficient to demonstrate bias, and nothing in the record supports this claim (*see Matter of Ortega v Kelly*, 15 AD3d 313, 314 [1st Dept 2005]).

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

ENTERED: JANUARY 23, 2020

CLERK

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

10870-
10870A Lawrence Crimlis,
Plaintiff,

-against-

The City of New York,
Defendant-Respondent,

Bleecker Tower Tenants Corp.,
Defendant-Appellant,

Atrium and The Atrium Trading Group, Inc., et al.,
Defendants.

- - - - -

[And Third-Party Actions]

Index 150341/15
595169/17

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Joseph A. H. McGovern of counsel), for appellant.

James E. Johnson, Corporation Counsel, New York (D. Alan Rosinus, Jr. of counsel), for respondent.

Order, Supreme Court, New York County (Verna L. Saunders, J.), entered May 21, 2018, which granted defendant the City of New York's motion for summary judgment dismissing the complaint and all cross claims against it, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered February 27, 2019, which denied defendant/second third-party plaintiff Bleecker Tower Tenants Corp.'s motion to reargue (denominated a motion to renew and reargue), unanimously dismissed, without costs, as taken from a nonappealable order.

The City established its prima facie entitlement to judgment as a matter of law by submitting evidence demonstrating, among other things, that it did not own the property abutting the sidewalk where plaintiff slipped and fell, and that the abutting property was not an owner-occupied residential property with three or fewer units (Administrative Code of City of NY § 7-210; *see Cohen v City of New York*, 101 AD3d 426, 426 [1st Dept 2012]).

In opposition, Bleecker failed to raise an issue of fact. Its argument that the City could be liable for improperly maintaining the area around plates or gratings in the sidewalk, is improperly raised for the first time on appeal and thus not preserved for review (*see Pirraglia v CCC Realty NY Corp.*, 35 AD3d 234, 235 [1st Dept 2006]; *Tortorello v Carlin*, 260 AD2d 201, 205 [1st Dept 1999]). Bleecker's contention that the motion was premature because the City's witnesses had not yet been deposed is unavailing. Bleecker's assertion that further discovery may uncover facts essential to establish opposition is based on nothing more than speculation. Additionally, Bleecker failed to show that evidence necessary to defeat the motion was within the City's exclusive control (*see Fulton v Allstate Ins. Co.*, 14 AD3d 380, 381 [1st Dept 2005]; *Denby v Pace Univ.*, 294 AD2d 156, 156-157 [1st Dept 2002]).

Bleecker's motion denominated as one for leave to renew and

reargue was not based on new facts unavailable at the time of the City's summary judgment motion, and was therefore actually a motion to reargue, the denial of which is not appealable (*see Matter of Pettus v Board of Directors*, 155 AD3d 485, 485-486 [1st Dept 2017], *lv denied* 31 NY3d 1113 [2018]).

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

ENTERED: JANUARY 23, 2020

CLERK

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

10871N Epifania Hichez, et al., Index 653250/17
Plaintiffs-Respondents,

-against-

United Jewish Council of the East Side,
Home Attendant Service Corp.,
Defendant-Appellant.

_____

Hogan Lovells US LLP, New York (Kenneth Kirschner of counsel), for appellant.

Fisher Taubenfeld LLP, New York (Michael Taubenfeld of counsel), for respondents.

_____

Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered September 30, 2018, which denied defendant's motion to compel arbitration and stay this class action, unanimously affirmed, without costs.

Plaintiffs assert wage-hour and wage-parity claims under the Labor Law, and breaches of contracts requiring defendant's compliance with the Home Care Worker Wage Parity Act (Public Health Law § 3614-c), and the New York City Fair Wages for Workers Act (Administrative Code of City of NY § 6-109). Defendant moved to compel arbitration under the terms of a memorandum of agreement (MOA) between defendant and 1199 SEIU United Healthcare Workers East (Union), which became effective December 1, 2015.

Plaintiffs are not prohibited from bringing this action by the arbitration provision in article XXVI of the collective bargaining agreement (CBA) between defendant and the Union, which "limits mandatory arbitration to disputes between an employee and employer concerning the interpretation or application of [a specific] term of the CBA" (*Lorentti-Herrera v Alliance for Health, Inc.*, 173 AD3d 596, 596 [1st Dept 2019] [internal quotation marks omitted])). Here, plaintiffs assert claims outside of the CBA.

Nor are plaintiffs bound by the new article "hereby created" by the MOA that was intended to govern wage-hour and wage-parity disputes "exclusively." Although the MOA requires arbitration of the statutory claims asserted in the complaint (see *Tamburino v Madison Sq. Garden, LP*, 115 AD3d 217, 223 [1st Dept 2014]; *see Abdullayeva v Attending Homecare Servs., LLC*, 928 F3d 218, 222 [2d Cir 2019]), plaintiffs "were no longer defendant's employees when it was executed, they were not parties to that agreement, and there is no evidence that the Union was authorized to proceed on their behalf" (*Konstantynovska v Caring Professionals, Inc.*, 172 AD3d 486, 487 [1st Dept 2019]; *see Lorentti-Herrera*, 173 AD3d at 596; *Chu v Chinese-American Planning Council Home Attendant Program, Inc.*, 194 F Supp 3d 221, 228 [SD NY 2016]). As former employees or retirees "whose work has ceased with no expectation

of return," plaintiffs were not members of the bargaining unit represented by the Union (*Allied Chem. & Alkali Workers of Am., Local Union No. 1 v Pittsburgh Plate Glass Co., Chem. Div.*, 404 US 157, 172 [1971]).

Contrary to defendant's contention, the new article in the MOA does not "clearly and unmistakably" delegate the determination of arbitrability to the arbitrator. It neither incorporates the arbitration procedures of CBA article XXVI nor adopts the procedural rules of the American Arbitration Association.

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

ENTERED: JANUARY 23, 2020

CLERK

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

10872N Gene Berardelli, Index 651720/18
Plaintiff-Appellant,

-against-

Novo Law Firm P.C.,
Defendant-Respondent.

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Treybich Law, P.C., New York (Michael Treybich of counsel), for appellant.

Natalia Gourari, Scarsdale, for respondent.

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Order, Supreme Court, New York County (Alan C. Marin, J.), entered on or about March 1, 2019, which denied plaintiff's motion for a default judgment against defendant, unanimously affirmed, without costs.

The motion court providently exercised its discretion in denying plaintiff's motion for a default judgment. Defendant's delay in answering the complaint was excusable and minimal, and it caused no prejudice to plaintiff (*see New Media Holding Co. LLC v Kagalovsky*, 97 AD3d 463, 465 [1st Dept 2012]). Indeed, plaintiff moved for a default judgment only one day after defendant's time to appear had expired, and defendant timely responded to the motion. Moreover, the motion court's order is in keeping with the strong public policy favoring litigation of claims on their merits (*see Higgins v Bellet Constr. Co.*, 287

AD2d 377 [1st Dept 2001]). Defendant also presented a meritorious defense to the action.

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 23, 2020

CLERK