SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 5, 2020

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Richter, J.P., Mazzarelli, Oing, Moulton, JJ.

11200 Jonathan Dalmasi, etc., Index 24177/13
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Appellant.

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Georgia M. Pestana, Acting Corporation Counsel, New York (Diana Lawless of counsel), for appellant.

Law Office of Stephen B. Kaufman, P.C., Bronx (John V. Decolator of counsel), for respondent.

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Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about October 19, 2017, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendant established its prima facie entitlement to summary judgment in this action where plaintiff's decedent was injured when she tripped and fell due to a pothole in the roadway. Defendant submitted evidence showing that it did not have prior

written notice of the alleged defect, as required by Administrative Code of City of NY § 7-201(c)(2).

In opposition, plaintiff failed to raise a triable issue of fact as to whether an exception to the prior written notice requirement applies (*see Yarborough v City of New York*, 10 NY3d 726, 728 [2008]). There is no evidence that the alleged negligent repair of the accident site immediately caused the defect at issue (*see Martin v City of New York*, 158 AD3d 527, 528 [1st Dept 2018]; *Wald v City of New York*, 115 AD3d 939, 941 [2d Dept 2014]). Plaintiff's expert's theory as to how defendant departed from good and accepted practice when it allegedly repaired the subject roadway months earlier is speculative (*see Worthman v City of New York*, 150 AD3d 553 [1st Dept 2017]; *see also Flynn v City of New York*, 154 AD3d 488, 488-489 [1st Dept 2017]).

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

ENTERED: MARCH 5, 2020

CLERK

Richter, J.P., Oing, Moulton, González, JJ.

11199 The People of the State of New York, Ind. 2234/15
Respondent, 279/16

-against-

Margie Mercado also known as
Marjie Mojica,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Matthew B. White 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 (Robert A. Neary, J.), rendered February 26, 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: MARCH 5, 2020

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

Richter, J.P., Oing, Moulton, González, JJ.

11201 In re Stanley G.M., V-03865-14
Petitioner-Appellant, 03866/14

-against-

Ivette B.,
Responent-Respondent.

_____

The Law Offices of Salihah R. Denman, PLLC, Harrison (Salihah R. Denman of counsel), for appellant.

Bruce A. Young, New York, for respondent.

The Children's Law Center, Brooklyn (Eva D. Stein of counsel), attorney for the children.

_____

Order, Family Court, Bronx County (Rosanna Mazzotta, Referee), entered on or about September 21, 2018, which, upon a finding that it would be contrary to the children's best interests to grant the father's petition for an order of visitation, dismissed the petition with prejudice, unanimously affirmed, without costs.

Family Court providently exercised its discretion in refusing to order an in camera interview of the children, who have significant medical and emotional needs (*see Matter of Paul P. v Tonisha J.*, 149 AD3d 409, 409 [1st Dept 2017]; *Matter of DeRuzzio v Ruggles*, 88 AD3d 1091, 1092 [3d Dept 2011]). In addition, no party, including the father, requested a forensic

evaluation in this case. Regardless, the court was aware of the children's preferences through the mother's testimony and the attorney for the children's statements in court (*see Paul P.*, 149 AD3d at 409). The mother testified credibly that the children did not want to see or speak with their father.

Moreover, the Family Court's finding that it was in the children's best interest to deny the father's petition for visitation had a sound and substantial basis in the record (*Matter of James Joseph M. v. Rosana R.*, 32 AD3d 725 [1st Dept 2006], *lv denied* 7 NY3d 717 [2006]). "The determination as to whether or not a court should award visitation to a noncustodial parent lies within the sound discretion of the trial court, and must be based upon the best interests of the child" (*see Matter of Michael Evan W. v Pamela Lyn B.*, 152 AD3d 414, 414 [1st Dept 2017], *lv denied* 30 NY3d 910 [2018]; *Matter of Ronald C. v Sherry B.*, 144 AD3d 545, 546 [1st Dept 2016], *lv dismissed* 29 NY3d 965 [2017]). The trial court's findings should be accorded great deference since that court was in the best position to evaluate the testimony, character, and sincerity of the parties (*Matter of Gilyard v Gilyard*, 266 AD2d 289 [2nd Dept 1999]).

The evidence showed that the father was inconsistently involved with the children during their first few years of life.

In 2008, when the children were 5 years old and 2 years old, the father moved to Florida. As of the time of the hearing, he had not seen or spoken to the children in over 9 years. He admitted that he "gave up" trying to communicate with them for a period of 5 years and did not attempt any contact. At this time, the children, who at the beginning of the hearing were 13 years old and 10 years old, expressed a strong preference not to have a relationship with their father. Moreover, the two boys suffer from significant special needs including, inter alia, Asperger's syndrome, seizures, asthma, and anxiety, and the evidence showed that the father failed to take any steps to learn how to address these needs.

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

ENTERED: MARCH 5, 2020

CLERK

Richter, J.P., Oing, Moulton, González, JJ.

11202 Ashleigh Abreu, etc., et al., Index 22344/12E
Plaintiffs,

Belkys Sosa, etc.,
Plaintiff-Appellant,

-against-

Su-Wang Miller, et al.,
Defendants-Respondents.

_____

Law Offices of Donald M. Zolin, New York (Donald M. Zolin of counsel), for appellant.

Maroney O'Connor, LLP, New York (Darian A. Bryan of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered July 23, 2018, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing plaintiff Belkys Sosa's 90/180-day claim, unanimously affirmed, without costs.

Defendants established prima facie entitlement to judgment as a matter of law on the 90/180-day claim. Defendants submitted the affirmed report of an orthopedic surgeon, showing normal range of motion in plaintiff's cervical and lumbar spine with no evidence of tenderness or spasm, and plaintiff's own records showing only minor limitations in range of motion. Defendants

therefore showed the absence of serious injury that would prevent plaintiff from performing substantially all of her usual and daily customary activities during the relevant time period (*see Galarza v J.N. Eaglet Publ. Group, Inc.*, 117 AD3d 488, 489 [1st Dept 2014]; Insurance Law § 5102[d]). Moreover, plaintiff's bill of particulars noted that she was not confined to her bed or home for any period of time, and plaintiff testified that she was confined to her home for only a few weeks following the accident (*see Merrick v Lopez-Garcia*, 100 AD3d 456, 457 [1st Dept 2012]).

In opposition, plaintiff failed to raise a triable issue of fact. Her subjective complaints of continuing pain and the inability to work are insufficient to demonstrate a 90/180-day injury without objective support in the record (*see Rosa-Diaz v Maria Auto Corp.*, 79 AD3d 463, 464 [1st Dept 2010]). The statement of plaintiff's physician that she is "disabled" is insufficient to sustain her 90/180-day claim, as this statement related only to her ability to perform her prior work as a mail carrier (*see e.g. De La Rosa v Okwan*, 146 AD3d 644 [1st Dept 2017], *lv denied* 29 NY3d 908 [2017]). He did not indicate why plaintiff was "disabled" from this job, explain which aspects of the job she could not perform, or address her ability to perform activities of daily living. Furthermore, the physician's 2012

notation that plaintiff could perform her customary activities as tolerated is at least partially inconsistent with his opinion as to her disability.

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

ENTERED: MARCH 5, 2020

CLERK

Richter, J.P., Oing, Moulton, González, JJ.

11203 Wendy Berkowitz, Index 26431/15E
Plaintiff-Respondent,

-against-

Equinox One Park Avenue, Inc.,
Defendant-Appellant,

Equinox Holdings LLC, et al.,
Defendants.

_____

LaRocca Hornik Rosen & Greenberg LLP, New York (Sherry S. Hamilton of counsel), for appellant.

Ogen & Sedaghati, P.C., New York (Eitan Alexander Ogen of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Donna Mills, J.), entered on March 6, 2019, which, to the extent appealed from as limited by the briefs, denied defendant Equinox One Park Avenue, Inc.'s motion for summary judgment dismissing the complaint as against it, unanimously modified, at the law, the motion granted as to the causes of action for failure to provide informed consent and negligent hiring, supervision, and training, and otherwise affirmed, without costs.

Defendant failed to establish its entitlement to summary judgment on the entire complaint. When the "gravamen of the action concerns the alleged failure to exercise ordinary and

reasonable care to insure that no unnecessary harm befell the patient, the claim sounds in ordinary negligence" (*D'Elia v Menorah Home & Hosp. for the Aged & Infirm*, 51 AD3d 848, 851 [2d Dept 2008][internal quotation marks omitted]). Here, plaintiff alleged that defendant "failed to perform the services in a competent and professional manner," and "failed to properly test, perform services, and perform laser hair removal and treat plaintiff." Although defendant offered an expert affidavit in support of its motion, plaintiff raised an issue of fact by submitting photographs of her injuries and provided testimony attesting to the effects and injuries arising from defendant's alleged negligence. Thus, defendant's motion for summary judgment as to plaintiff's first cause of action for negligence was properly denied since the laser treatment was not medical in nature and did not involve "specialized knowledge of medical science or diagnosis and instead seeks to hold [defendant] liable for failing to exercise reasonable care" (*id.* at 851-852).

The causes of action for failure to provide informed consent and negligent hiring, supervision, and training should have been dismissed. Plaintiff's informed consent claim is not based on treatments that are medical procedures. Moreover, plaintiff failed to establish that the employee acted outside the scope of

her employment and as such, plaintiff's claim for negligent hiring, supervision and training cannot be sustained (*Marshall v Darrick E. Antell, MD, P.C.*, 147 AD3d 478, 479 [1st Dept 2017]).

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

ENTERED: MARCH 5, 2020

CLERK

Richter, J.P., Oing, Moulton, González, JJ.

11204 The People of the State of New York, Ind. 3084/15
Respondent,

-against-

Habib Jalloh,
Defendant-Appellant.

_____

Marianne Karas, Thornwood, for appellant.

Darcel D. Clark, District Attorney, Bronx (Robert L. Myers of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Michael A. Gross, J. at motion; Eugene Oliver, J. at plea; Robert E. Torres, J. at sentencing), rendered April 25, 2017, convicting defendant of attempted criminal possession of a weapon in the second degree, and sentencing him to a term of two years, unanimously affirmed.

Defendant made a valid waiver of his right to appeal (*see People v Thomas*, ___ NY3d ___, 2019 NY Slip Op 08545 [2019]; *People v Bryant*, 28 NY3d 1094, 1096 [2016];. *People v Lopez*, 6 NY3d 248 [2006]), which forecloses his suppression claims. As an alternative holding, we reject those claims on the merits.

The valid appeal waiver also forecloses defendant's claim that his counsel rendered ineffective assistance regarding suppression matters. Although defendant's ineffectiveness claim

could survive the waiver to the extent that it implicated the voluntariness of the plea and the waiver itself (*see People v Parilla*, 8 NY3d 654, 660 [2007]), defendant does not appear to be making such an argument. In any event, defendant's ineffective assistance claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal.

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

ENTERED: MARCH 5, 2020

CLERK

Richter, J.P., Oing, Moulton, González, JJ.

11205 Vanessa DeCarbo, Index 25702/17E
Plaintiff-Respondent,

-against-

Omonia Realty Corp., et al.,
Defendants-Appellants.

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Rebore Thorpe & Pisarello, Farmingdale (Michelle S. Russo of counsel), for appellants.

Alexander J. Wulwick, New York, for respondent.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about July 2, 2019, which, insofar as appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the cause of action alleging negligent ownership, management and maintenance of the premises, unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Defendants established their entitlement to judgment as a matter of law in this action where plaintiff was injured when, while descending interior stairs in defendants' building, she slipped and fell on a marble step that had a worn tread. A worn marble tread, without more, is not an actionable defect (*see Sims*

v 3349 Hull Ave. Realty Co. LLC, 106 AD3d 466 [1st Dept 2013]; *Savio v Rose Flower Chinese Rest., Inc.*, 103 AD3d 575 [1st Dept 2013]).

In opposition, plaintiff failed to raise a triable issue of fact. Having abandoned her claim that defendants were negligent in keeping the stairs free of moisture, plaintiff cannot now argue that the existence of moisture on the stairs would be an actionable condition. Nor did plaintiff's experts establish that in addition to the worn marble stair treads, they lacked adequate slip resistance, as the coefficient of friction value that the experts used as a standard value was not shown to be an accepted industry standard (*see e.g. Clarke v Verizon N.Y., Inc.*, 138 AD3d 505, 506 [1st Dept 2016], *lv denied* 28 NY3d 906 [2016]; *Jenkins v New York City Hous. Auth.*, 11 AD3d 358, 360 [1st Dept 2004]). Nor did the experts' affidavits raise a triable issue of fact,

since the opinions concerning the cause of plaintiff's slip were speculative (*see Sarmiento v C & E Assoc.*, 40 AD3d 524, 526-527 [1st Dept 2007]).

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

ENTERED: MARCH 5, 2020

CLERK

Richter, J.P., Oing, Moulton, González, JJ.

11208 The People of the State of New York, Ind. 3668/15
Respondent,

-against-

Wesley Francois,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Kyle R. Silverstein of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (April A. Newbauer, J.), rendered February 16, 2017, convicting defendant, after a jury trial, of attempted assault in the second degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

This conviction arises out of an altercation that occurred when defendant allegedly attempted to deprive the victim of money in her possession. On appeal, defendant contends that the evidence was legally insufficient to sustain a guilty verdict, and that the verdict was against the weight of the evidence. Since defendant failed to preserve the issue of legal sufficiency, we decline to review that issue in the interest of justice (*see People v Graves*, 171 AD3d 674 [1st Dept 2019], *lv*

denied 33 NY3d 1069 [2019]; *People v Carter*, 46 AD3d 376 [1st Dept 2007], *lv denied* 10 NY3d 838 [2008]).

When determining whether a verdict is against the weight of the evidence, "great deference is accorded to the factfinder's opportunity to view the witnesses, hear the testimony and observe demeanor" (*People v Mateo*, 2 NY3d 383, 410 [2004]). Upon review of the record, we are satisfied that the verdict was not against the weight of the evidence and find no basis to disturb the jury's credibility determinations. The victim, who was 67 years old, stated that defendant, who was decades younger than she, grabbed her by her shoulders and forced her to sit down on the stairs leading to the subway. He then attempted to take money from her closed fist. She testified that as a result of defendant's actions, she sustained pain "in the lower rump" and described the pain as "hard and strong." The victim also testified that defendant scratched her hand, and when asked if she had any pain in her hand at the time she replied, "Yes, it was a burning, burning sensation." Thus, there was a reasonable view of the evidence that defendant, by grabbing the victim, forcing her to sit down on concrete, and prying money from her hand,

engaged in conduct that tended to cause physical injury to a person who is 65 years of age or older (*see* Penal Law §§ 110.00, 120.05[12]).

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

ENTERED: MARCH 5, 2020

CLERK

Richter, J.P., Kern, Moulton, González, JJ.

11209- Index 304226/12
11209A Mario Martinez, etc.,
Plaintiff-Respondent,

-against-

Premium Laundry Corporation,
Defendant-Appellant.

_____

Martin, Fallon & Mullé, Huntington (Michael P. Ross of counsel), for appellant.

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Kenneth J. Gorman of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Donna Mills, J.), entered August 3, 2017, upon a jury verdict, to the extent appealed from as limited by the briefs, awarding plaintiff damages in the amount of $10.5 million for the decedent's conscious pain and suffering, unanimously modified, on the facts, to vacate the award and remand the matter for a new trial on conscious pain and suffering, unless plaintiff stipulates, within 30 days after entry of this order, to reduce the award to $3 million, and to the entry of an amended judgment in accordance therewith, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered on or about July 13, 2018, unanimously dismissed, without costs, as subsumed in the appeal

from the judgment.

The jury's finding that defendant was solely at fault for the decedent's death is supported by legally sufficient evidence and is not against the weight of the evidence (*see generally Killon v Parrotta*, 28 NY3d 101, 108 [2016]; *Cohen v Hallmark Cards*, 45 NY2d 493, 498-499 [1978]). Plaintiff's evidence established that the decedent was crossing the street with the right-of-way when she was struck by a van operated by defendant's employee making a left turn. Defendant presented no evidence to rebut plaintiff's evidence. Its argument that the decedent may have been crossing the street outside of the crosswalk is speculative, given that its employee did not see the decedent until after the accident (*see Bush v Kovacevic*, 140 AD3d 1651, 1653 [4th Dept 2016]; *France Herly Bien-Aime v Clare*, 124 AD3d 814, 815 [2d Dept 2015]). "[T]he position of [the decedent's] body after impact is not probative as to whether she was walking in the cross-walk prior to being struck" (*Hines v New York City Tr. Auth.*, 112 AD3d 528, 529 [1st Dept 2013]). In light of this determination, we do not reach defendant's arguments about the propriety of testimony elicited, and statements made by plaintiff's counsel, about its hiring practices generally and its hiring of the driver involved in the accident specifically.

We find the award for the decedent's conscious pain and suffering excessive to the extent indicated (CPLR 5501[c]; *see Vargas v Crown Container Co., Inc.*, 155 AD3d 989 [2d Dept 2017]; *Dowd v New York City Tr. Auth.*, 78 AD3d 884 [2d Dept 2010]; *Filipinas v Action Auto Leasing*, 48 AD3d 333 [1st Dept 2008]).

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

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

ENTERED: MARCH 5, 2020

CLERK

Richter, J.P., Oing, Moulton, González, JJ.

11210 Roy Ruland, Index 158908/15
Plaintiff-Appellant,

-against-

130 FG, LLC,
Defendant-Respondent.
- - - - -
[And a Third-Party Action]

Melcer Newman PLLC, New York (Beth S. Gereg of counsel), for appellant.

Law Office of Kevin J. Philbin, New York (Katherine J. Zellinger of counsel), for respondent.

Order, Supreme Court, New York County (W. Franc Perry, J.), entered on or about September 18, 2019, which granted defendant's motion for summary judgment dismissing the complaint, and denied plaintiff's cross motion for summary judgment on liability, unanimously modified, on the law, to deny defendant's motion, and otherwise affirmed, without costs.

Plaintiff commenced this negligence action to recover for personal injuries he allegedly sustained when he slipped and fell on ice on the sidewalk in front of a building on East 45th Street in Manhattan, owned by defendant. Plaintiff indicated in his deposition that there was fresh snow on the ground at the time of the accident, which occurred around 7:30 or 7:45 in the morning.

Because it snowed overnight, defendant had until 11 a.m. to clear any fresh snow and ice (*Colon v 36 Rivington St., Inc.*, 107 AD3d 508 [1st Dept 2013]; Administrative Code of City of NY § 16-123). However, an issue of fact exists regarding whether the ice on which plaintiff slipped was preexisting. Plaintiff testified and submitted witness affidavits to the effect that the ice was dirty and trod upon, and had been present for days (*see Perez v Raymours Furniture Co., Inc.*, 173 AD3d 597 [1st Dept 2019]; *Ralat v New York City Hous. Auth.*, 265 AD2d 185, 186 [1st Dept 1999]).

Moreover, while defendant submitted certified climatological records from Central Park in reply and in opposition to plaintiff's cross motion, defendant cannot remedy a fundamental deficiency in its moving papers with evidence submitted in reply *(Migdol v City of New York*, 291 AD2d 201 [1st Dept 2002]), although they may be considered in opposition to plaintiff's cross motion. In any event, the records show that the temperatures remained below or only slightly above freezing

during much of the six days after defendant asserts that the last snow fall occurred, and defendant offers only speculation that such temperatures would have melted previous accumulations of snow and ice.

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

ENTERED: MARCH 5, 2020

CLERK

Richter, J.P., Oing, Moulton, González, JJ.

11211 The People of the State of New York, Respondent,

-against-

William Soler, Defendant-Appellant.

Ind. 1237/15

_____

Robert S. Dean, Center for Appellate Litigation, New York (Megan D. Byrne of counsel), for appellant.

Letitia James, Attorney General, New York (Alyson J. Gill of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Martin Marcus, J.), rendered June 23, 2016, convicting defendant, upon his plea of guilty, of criminal sale of a firearm in the first degree, criminal possession of a weapon in the second degree, 17 counts of criminal possession of a weapon in the third degree, and 2 counts of conspiracy in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of 15 years, unanimously reversed, on the law, the plea vacated, and the matter remanded to Supreme Court for further proceedings.

In this case governed by Executive Law § 70-a(7), the Attorney General has jurisdiction based on the uncontested representation, in an affirmation responding to defendant's omnibus motion, that the Organized Crime Task Force received the

necessary approvals from the Governor and the Bronx County District Attorney. Accordingly, defendant is not entitled to dismissal of the indictment (*see People v Blase*, 112 AD2d 943, 945 [2d Dept 1985], *lv denied* 66 NY2d 761 [1985]).

However, as the People concede, defendant is entitled to vacatur of his plea on the ground of lack of advice that the sentence would include a five-year term of postrelease supervision (*see People v Catu*, 4 NY3d 242 [2005]).

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

ENTERED: MARCH 5, 2020

CLERK

Richter, J.P., Oing, Moulton, González, JJ.

11212 & M-475 Adelhardt Construction Corp., Plaintiff-Respondent, Index 655186/18

-against-

Citicorp North America, Inc., et al., Defendants-Appellants.

_____

Alonso Andalkar & Facher, P.C., New York (Mark J. Alonso of counsel), for appellants.

Darger Errante Yavitz & Blau LLP, New York (Eric Statman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered on or about June 24, 2019, which, to the extent appealed from, denied defendants' motion to dismiss the breach of contract claims, unanimously affirmed, without costs.

Plaintiff allegedly was an authorized contractor performing work for defendants over the course of more than 60 years. The complaint alleges that between 2012 and 2014, defendants' director of global construction, John Cassisi, demanded that plaintiff perform work at his home and facilitate construction work for defendants by unapproved contractors by falsifying records, while threatening to withhold or delay payments for work already performed and to not award future projects to plaintiff.

Following an investigation, Cassisi was charged with, and pleaded guilty to, third-degree money laundering and first-degree commercial bribe receiving for his conduct vis-à-vis various contracting companies. Plaintiff and its corporate president were later charged with, and pleaded guilty to, first-degree falsifying business records, in furtherance of a scheme whereby Cassisi requested and received benefits in exchange for using his position to maintain plaintiff as an approved vendor.

Defendants moved to dismiss the breach of contract claims on the ground of "gravely immoral and illegal conduct" in plaintiff's performance of its contracts (*see McConnell v Commonwealth Pictures Corp.*, 7 NY2d 465, 471 [1960]; *Prote Contr. Co. v Board of Educ. of City of N.Y.*, 230 AD2d 32, 40 [1st Dept 1997]). The motion was correctly denied, as Cassisi's alleged threats, if proved, would be sufficient to establish extortion (*People v Kacer*, 113 Misc 2d 338, 346-347 [Sup Ct, NY County 1982]), which precludes dismissal (*see Kraft Gen. Foods, Inc. v Cattell*, 18 F Supp 2d 280, 285 [SD NY 1998]; *J.M. Deutsch, Inc. v Robert Paper Co.*, 13 AD2d 768 [1st Dept 1961]). The plea agreements relied upon do not utterly refute plaintiff's allegations of extortion so as to establish bribery conclusively (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). At this early stage

of the litigation, it is unclear whether there is "a direct connection between the illegal transaction and the obligation sued upon" (*McConnell*, 7 NY2d at 471).

Defendants also failed to establish conclusively that Cassisi's actions cannot be imputed to them because he "*totally abandoned* his principal's interests and [was] acting *entirely* for his own or another's purposes" (*Kirschner v KPMG LLP*, 15 NY3d 446, 466 [2010] [internal quotation marks omitted]). Not every bribe satisfies this standard, as an errant employee may also have been promoting his employer's interests (*see id.* at 466-467; *Prudential-Bache Sec. v Citibank*, 73 NY2d 263, 277 [1989]). Whether or not Cassisi induced plaintiff's actions by improper threats, and whether or not his actions may be imputed to

defendants so that the parties cannot be considered in pari delicto, can only be determined upon the full development of the facts.

M-475 — *Adelhardt Construction Corp. v Citicorp North America, Inc.*

Motion to enlarge the record denied.

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

ENTERED: MARCH 5, 2020

CLERK

Richter, J.P., Oing, Moulton, González, JJ.

11213 David Goldberg, Index 151425/18
Plaintiff-Appellant,

-against-

Shloime Torim,
Defendant-Respondent.

_____

Law Offices of Jonathan E. Neuman, Fresh Meadows (Jonathan E. Neuman of counsel), for appellant.

Cohen Labarbera & Landrigan LLP, Chester (Philip C. Landrigan of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered on or about January 4, 2019, which, to the extent appealed from as limited by the briefs, upon granting defendant's motion to vacate his default, granted defendant's motion to dismiss plaintiff's fraud and breach of fiduciary duty claims, pursuant to CPLR 3211(a)(7), unanimously affirmed, without costs.

Defendant's motion to dismiss under CPLR 3211(a)(7) for failure to state a cause of action was properly decided by the motion court, as such motion may be made at any time (*see* CPLR 3211(e); *see e.g. McMahon v Cobblestone Lofts Condominium*, 161 AD3d 536 [1st Dept 2018]).

Plaintiff's complaint alleges, in conclusory fashion, that defendant assumed a role as plaintiff's agent when defendant

allegedly purchased property in order to turn a quick profit, using money provided by plaintiff. The complaint, however, is devoid of anything other than this bare allegation regarding the agency and fiduciary duties arising thereunder, and includes no allegations that warrant imposition of the "higher realm of relationship" (*Oddo Asset Mgt. v Barclay's Bank PLC*, 19 NY3d 584, 593 [2012]). As such, it is not entitled to the liberal interpretation urged by plaintiff, and his breach of fiduciary duty claim was properly dismissed.

With respect to plaintiff's fraud claim, his complaint alleges, essentially, that defendant did precisely what he represented he would do, specifically that he would be purchasing real estate that would turn a 10% profit to plaintiff within a year. Plaintiff's complaint is devoid of any allegation that defendant represented how much, in addition to the 10%, if any, defendant agreed to remit to plaintiff after the sale. As such, plaintiff has alleged no material misrepresentation, justifiable reliance or damages (see *Connaughton v Chipotle Mexican Grill,*

Inc., 29 NY3d 137, 142-143 [2017]; *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]).

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: MARCH 5, 2020

CLERK

Richter, J.P., Oing, Moulton, González, JJ.

11214 Paul Durstenberg, Index 157809/15
Plaintiff-Respondent,

Hermitage Insurance Company as Subrogee
of Paul Durstenberg, et al.,
Plaintiffs,

-against-

Electrolux Home Products, Inc.,
et al.,
Defendants,

A.J. Richard & Sons, Inc., et al.,
Defendants-Appellants.

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Chesney, Nicholas & Brower, LLP, Syosset (Jeffrey M. Burkhoff of counsel), for appellants.

Landy Wolf, PLLC, New York (David A. Wolf of counsel), for respondent.

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Order, Supreme Court, New York County (James E. D'Auguste, J.), entered January 8, 2019, which, inter alia, denied the motion of defendants A.J. Richard & Sons, Inc., P.C., P.C. Richard & Son, LLC and P.C. Richard & Son Long Island Corp. (collectively P.C. Richard) to dismiss the causes of action against them sounding in strict liability, negligence, and negligent infliction of emotional distress, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint against the

P.C. Richard defendants.

Plaintiff, Paul Durstenberg, commenced this action for personal injuries sustained as a result of a refrigerator catching fire on December 12, 2012. The refrigerator was manufactured by Electrolux and sold to plaintiff by P.C. Richard. Plaintiff commenced an action against Electrolux in October 2015, and Electrolux had the action removed to federal court. On December 8, 2015, plaintiff moved for leave to amend the complaint to add P.C. Richard as defendants and remand the action to state court. On February 23, 2016, plaintiff's application was granted, and on February 29, 2016, plaintiff filed an amended complaint. Thereafter, plaintiff filed a supplemental summons on March 18, 2016.

Under these circumstances, plaintiff's claims sounding in strict liability, negligence and negligent infliction of emotional distress were interposed against P.C. Richard on March 18, 2016, at the earliest (CPLR 305; *Long v Sowande*, 27 AD3d 247, 248 [1st Dept 2006]; *Benn v Losquadro Ice Co., Inc.*, 65 AD3d 655, 656 [2d Dept 2009]), and thus, the claims are time-barred (CPLR 214). Plaintiff's arguments that the federal court order granting him leave to amend the complaint to add P.C. Richard and to remand the case to state court overrode the statute of

limitations, that the CPLR does not provide a deadline for the filing of a supplemental summons, and that his failure to timely file a supplemental summons was caused by the fact that the state court docket was marked inactive, are unavailing.

Plaintiff also failed to show that his causes of action against P.C. Richard related back to any timely claims (*see Buran v Coupal*, 87 NY2d 173, 178 [1995]), since he did not establish that P.C. Richard was wholly united in interest with the Electrolux defendants. Although Electrolux's and P.C. Richard's defenses to the strict liability causes of action would likely rise and fall together, as manufacturer and retailer, their defenses to the remaining claims for negligence and negligent infliction of emotional distress would likely be different. Furthermore, plaintiff failed to explain why he did not name P.C. Richard in his initial complaint despite the fact that he knew

that he purchased the refrigerator from it (*Buran* at 181), and plaintiff's arguments regarding notice are also not persuasive (*see Parker v Mach*, 61 NY2d 114, 118-119 [1984]; *Garcia v New York-Presbyt. Hosp.*, 114 AD3d 615, 616 [1st Dept 2014]).

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

ENTERED: MARCH 5, 2020

CLERK

Richter, J.P., Oing, Moulton, Gonzalez, JJ.

11215 Kristen Salomon, Index 153060/15
Plaintiff-Respondent,

-against-

United States Tennis Association,
et al.,
Defendants-Respondents,

Levy Restaurants,
Defendant-Appellant.

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Shook Hardy & Bacon, LLP, Kansas City, MI (Charles C. Eblen of the bar of the State of Missouri and the State of New Jersey, admitted pro hac vice, of counsel), for appellant.

Burns & Harris, New York (Blake G. Goldfarb of counsel), for Kristen Salomon, respondent.

Goldberg Segalla LLP, White Plains (William T. O'Connell and Brendan T. Fitzpatrick of counsel), for United States Tennis Association and United States Tennis Association National Tennis Center, Inc., respondents.

Harris Beach PLLC, New York (Svetlana K. Ivy of counsel), for A&A Maintenance & Contracting, Inc., respondent.

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Order, Supreme Court, New York County (Robert D. Kalish, J.), entered April 26, 2018, which denied defendant Levy Restaurants' (Levy) motion for summary judgment dismissing the complaint and all cross claims against it, unanimously affirmed, without costs.

Plaintiff commenced this action alleging personal injuries

proximately caused by, inter alia, purported negligence by Levy in the performance of its obligations under an agreement with defendant United Stated Tennis Association (USTA) to provide food services, as well as to manage and clean the venues, at the US Open Tennis Center where its food services were offered. Levy contends that, as a contractor, it does not owe a duty of care to plaintiff, a non-contracting third party, and that none of the exceptions to the general rule apply (*see generally Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002]). Levy demonstrated that two of the *Espinal* exceptions do not apply, because the terms of its food services agreement with USTA show that it did not entirely displace USTA's duty to safely maintain the premises, and there is no evidence that plaintiff relied on Levy's performance of its contractual duties. However, plaintiff's factual allegations further claimed that Levy, in the negligent performance of its food services obligations, launched an instrument of harm by creating or exacerbating an alleged hazardous wet condition of the carpet next to the tiled floor where she slipped and fell.

Levy's moving papers did not establish prima facie that it did not create or exacerbate the wet condition through negligent performance of its contractual duties. Inasmuch as there is

evidence in the record that the carpet on which plaintiff walked immediately prior to her accident was wet, that Levy's own representative acknowledged that air blowers were operating in the immediate vicinity where plaintiff fell, and that the source of the watery condition in the carpet was not established, Levy could not meet its burden by relying solely on the limited duty owed by a contractor (*see Lopez v New York Life Ins. Co.*, 90 AD3d 446 [1st Dept 2011]). Upon a movant's failure to establish prima facie entitlement to summary judgment, the motion is to be denied notwithstanding the strength of the opponent's evidence (*see generally Penava Mech. Corp. v Afgo Mech. Servs., Inc.*, 71 AD3d 493, 495-496 [1st Dept 2010]). Further, to the extent Levy's prima facie case was reliant upon hearsay in identifying the purported cause of the wet condition, and since there was conflicting information as to the potential cause of the watery condition, credibility and factual issues are raised.

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

ENTERED: MARCH 5, 2020

CLERK

Richter, J.P., Manzanet-Daniels, Singh, Moulton, JJ.

11248 In re Deborah R., F-01967/01/17D
Petitioner-Respondent,

-against-

Dean E.H.,
Respondent-Appellant.

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Dean E. Hart, appellant pro se.

Dobrish Michaels Gross LLP, New York (Robert S. Michaels of counsel), for respondent.

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Order, Family Court, New York County (J. Machelle Sweeting, J.), entered on or about February 22, 2019, which, after a hearing, denied respondent father's objections to an order of support, same court (Cheryl Weir-Reeves, Support Magistrate), entered on or about November 16, 2018, to the extent it denied his request for credit against his support obligation for the parties' child's college room and board expenses and for any income the child might earn during his co-op program of study, unanimously affirmed, without costs.

Respondent is not entitled to a credit against his support obligation for any income the parties' child might earn during his co-op program of study (*see Matter of Kent v Kent*, 29 AD3d 123, 134 [1st Dept 2006] ["Financial aid in the form of loans and

work study shall have no bearing on (the) respondent's financial obligation (for college expenses) and he thus shall not be entitled to any credits therefor"]).

The Family Court properly denied respondent's request for a credit for the child's college room and board expenses. A credit against child support for room and board expenses "is not mandatory but depends upon the facts and circumstances in the particular case, taking into account the needs of the custodial parent to maintain a household and provide certain necessaries" (*Matter of Wheeler v Wheeler*, 174 AD3d 1507, 1510 [4th Dept 2019] [internal quotation marks omitted]). Here, there is sufficient support in the record to show that there is no basis for a credit. Respondent testified that he contributed "more than $400,000 dollars" of his own money to his campaign for County Legislator, State Assembly and Town Clerk, and offered to pay one million dollars to erect a Billy Joel statute at Nassau County Coliseum. Moreover, respondent's 2016 income tax return indicates that respondent received approximately $280,000 in supplemental, income for that year. Respondent also owns two properties with one being valued at over two million dollars, and he is currently enrolled in a master's degree program at Columbia University and pays an annual tuition of approximately $80,000

dollars. Further, the Magistrate found incredible respondent's testimony in which he attempted to minimize his assets. For the foregoing reasons, we find no basis to reduce his child support obligations.

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

ENTERED: MARCH 5, 2020

CLERK