

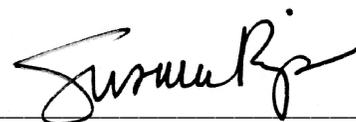
On a prior appeal, this Court affirmed an order, entered December 27, 2011, which, to the extent appealed from, declared that a policy issued by defendant Lancer did not provide coverage to plaintiff STA in certain underlying property damage actions against it (110 AD3d 512 [1st Dept 2013], *lv denied* 23 NY3d 902 [2014]). Lancer did not appeal from the portion of the December 27, 2011 order which held that, pursuant to the law of the case established by an earlier order issued in March 2010 (from which an appeal was noticed but eventually withdrawn), Lancer was obligated to provide a defense for STA in those actions until the date the issue of coverage was determined. While an appeal from a final judgment may bring up for review any intermediate nonfinal order that necessarily affects the final judgment and has not previously been reviewed by the appellate court (see CPLR 5501[a][1]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 20 NY3d 37, 41-42 [2012]), Lancer's failure to include the prior orders, or any of the papers submitted with respect to the underlying motions, in the appellate record renders meaningful review of those orders impossible (see CPLR 5526; *UBS Sec. LLC v Red Zone LLC*, 77 AD3d 575, 579 [1st Dept 2010], *lv denied* 17 NY3d 706 [2011]).

Thus, the only issue presented by this appeal is the

propriety of Supreme Court's determination of the amount of attorneys' fees incurred in plaintiff's defense up to the date of the coverage determination. After a very abbreviated hearing before the JHO, plaintiff's counsel was awarded attorneys' fees of \$196,372.33, the exact amount that was sought, to the penny. We find that a new hearing is required to develop the record as to the reasonableness of the attorneys' fees charged by plaintiff's counsel (see e.g. *Matter of Freeman*, 34 NY2d 1, 9 [1974] [in determining what constitutes reasonable attorneys' fees, the court should consider, among other things, the time, labor and skill required, the difficulties involved in the matter, the lawyer's experience, ability and reputation, the amount involved and the results obtained]; *Solow Mgt. Corp. v Tanger*, 19 AD3d 225, 226 [1st Dept 2005] ["the court always has the authority and responsibility to determine that the claim for fees is reasonable"]).

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

ENTERED: MAY 14, 2015



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Gonzalez, P.J., Acosta, Moskowitz, Richter, Feinman, JJ.

14631 Glenn J. Mendoza, M.D., Index 650771/12
Plaintiff-Appellant,

-against-

Akerman Senterfitt LLP, et al.,
Defendants-Respondents.

Zetlin & De Chiara LLP, New York (Loryn P. Riggiola of counsel),
for appellant.

Akerman LLP, New York (Martin Domb of counsel), for respondents.

Order, Supreme Court, New York County (Richard F. Braun,
J.), entered October 23, 2013, which, to the extent appealed
from, granted defendants' motion to dismiss the complaint
pursuant to CPLR 3211(a)(1) and (7) with prejudice, unanimously
affirmed, without costs.

Plaintiff is a doctor specializing in pediatric, prenatal,
and neonatal medicine. In April 2000, he joined nonparty
Children's and Women's Physicians of Westchester, LLP (CWPW). He
signed both an Amended and Restated Partnership Agreement dated,
January 29, 1999, and an employment agreement that was
subsequently amended in April 2002.

During the negotiations between CWPW and plaintiff, CWPW was
represented by defendant Eric W. Olson's prior law firm, and

plaintiff was represented by independent counsel.

CWPW's partnership agreement states, among other things, "The Partners acknowledge that the Law Firm is representing the Partnership with respect to this Partnership Agreement; and . . . EACH PARTNER HAS BEEN ADVISED TO RETAIN INDEPENDENT COUNSEL to advise him" (emphasis in original). The employment agreement contains a similar provision. The partnership and employment agreements also state that no partner or employee shall practice medicine "except as an employee of the Partnership."

On October 25, 2010, nonparty Dr. Leonard Newman, CWPW's president, sent an email to CWPW's managing partners, including plaintiff. Newman's email forwarded an email from defendant Olson, now a member of defendant Akerman Senterfitt LLP, regarding certain amendments to the partnership agreement:

"I am forwarding to each of you the recommendation of our attorney, Eric Olson . . . in the development of a tiered structure for Managing Partners

"Please review the explanation listed below from Eric Olson. Questions can be directed to Mr. Olson [at his office].

". . . You can come to [an office at CWPW's principal place of business] to review the documents. However, due to the confidential nature of the documents, we need to limit their distribution beyond the Chairman's Office. Please stop by before November 15th."

Olson's email stated, "This e-mail intends to summarize the

two major changes to CWPW's Partnership Agreement" - namely, "Implementation of a Tiered Managing Partner Structure" and "Entities as Partners" [to meet requirements in the agreement]. In addition to "the two major changes" that Olsen mentioned, the amendment also amended, as relevant here, the grounds for removal of managing partners and the grounds for dissociation of a partner.

On March 8, 2011, Olson sent plaintiff a notice that CWPW intended to terminate his employment based on breaches of the employment agreement - specifically, because of his "pranic healing" practice. Thereafter, plaintiff commenced the instant action asserting causes of action for aiding and abetting CWPW's breach of its fiduciary duty to plaintiff, breach of defendants' fiduciary duties to plaintiff, fraud, negligent misrepresentation, tortious interference with contract and/or prospective economic advantage, and legal malpractice. Plaintiff's allegations are based on his contention that defendants drafted certain amendments, not mentioned in the email, to expedite and facilitate his termination from the partnership. Defendants moved to dismiss the complaint under CPLR 3211(a)(1) and (a)(7).

Contrary to plaintiff's argument, the court applied the

correct standards on this motion to dismiss and did not effectively convert the motion into one for summary judgment (see *Zyskind v FaceCake Mktg. Tech., Inc.*, 110 AD3d 444 [1st Dept 2013]). The court properly deemed the above emails that were described and quoted in the complaint itself to be documentary evidence (see *Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 432-433 [1st Dept 2014]).

The claim for breach of fiduciary duty was correctly dismissed since defendants, who represented nonparty CWPW, did not owe a fiduciary duty to plaintiff, then a partner of CWPW (see *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 561-562 [2009]). Because defendants did not owe plaintiff a fiduciary duty, so much of the third cause of action as alleges fraudulent concealment was correctly dismissed (see e.g. *SNS Bank v Citibank*, 7 AD3d 352, 356 [1st Dept 2004]).

So much of the third cause of action as alleges fraudulent misrepresentation was correctly dismissed because defendants' email did not constitute a misrepresentation of fact (see *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178-179 [2011]; *Fortress Credit Corp. v Dechert LLP*, 89 AD3d 615, 617 [1st Dept 2011], *lv denied* 19 NY3d 805 [2012]). Nor did plaintiff show justifiable reliance. Whether the two major changes created by

the 2010 amendments to CWPW's partnership agreement were the two items mentioned in defendants' email was not a matter "peculiarly within [defendants'] knowledge" (*Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 278 [2011] [internal quotation marks omitted]). Plaintiff could have ascertained the truth "by the exercise of ordinary intelligence" (*id.* [internal quotation marks omitted]), viz., by reviewing the amendments at CWPW's office (see *Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 266 [1st Dept 2008], *lv dismissed* 12 NY3d 748 [2009]; *Vulcan Power Co. v Munson*, 89 AD3d 494 [1st Dept 2011], *lv denied* 19 NY3d 807 [2012]).

The claim for negligent misrepresentation was correctly dismissed because, even if an opinion or matter of judgment such as "the two major changes" could be incorrect, plaintiff, as indicated, did not reasonably rely on it (see *Mandarin*, 16 NY3d at 180).

The legal malpractice claim was correctly dismissed because, as plaintiff acknowledged in his opening brief on appeal, defendants were CWPW's attorneys, not his (see *Waggoner v Caruso*, 68 AD3d 1, 5 [1st Dept 2009], *affd* 14 NY3d 874 [2010]). Nor can plaintiff maintain a malpractice claim based on the fraud exception to the privity rule, since, as indicated, his fraud

claim is not viable (see *AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 595 [2005]; *Griffith v Medical Quadrangle*, 5 AD3d 151, 152 [1st Dept 2004]).

The claim of aiding and abetting CWPW's breach of its fiduciary duty to plaintiff fails because defendants' actions (e.g. conducting an investigation and drafting amendments to a partnership agreement) were "completely within the scope of [their] duties as . . . attorney[s]" (*Art Capital Group, LLC v Neuhaus*, 70 AD3d 605, 606 [1st Dept 2010]).

Having failed to make any specific arguments about his tortious interference claim in his appellate briefs, plaintiff has abandoned his appeal from the dismissal of that claim (see e.g. *Schneider v Jarmain*, 85 AD3d 581 [1st Dept 2011]).

The court properly denied plaintiff's request, at oral argument, for leave to amend. Since plaintiff failed to submit a proposed amended pleading, the motion court could not - nor can we - judge whether the proposed amendment would have merit or be sufficient (see *Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 25 [1st Dept 2003]). Even on appeal, plaintiff does not explain how an amended complaint would cure any defects (see *Cusack v Greenberg Traurig LLP*, 109 AD3d 747, 749 [1st Dept 2013]). On

the contrary, he contends that his original complaint is more than sufficient.

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: MAY 14, 2015

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complaint was not warranted. The record presents triable issues of fact including whether defendants were negligent in permitting a broken basketball hoop to remain in the gymnasium where classes, such as plaintiff's, were held (see *Llauger v Archdiocese of N.Y.*, 82 AD3d 656 [1st Dept 2011]).

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(*Bansbach v Zinn*, 1 NY3d 1, 8 [2003] [internal quotation marks omitted]). Demand is excused due to futility when a complaint alleges with particularity that: (1) “a majority of the board of directors is interested in the challenged transaction”; or (2) “the board of directors did not fully inform themselves about the challenged transaction to the extent reasonably appropriate under the circumstances”; or (3) “the challenged transaction was so egregious on its face that it could not have been the product of sound business judgment of the directors” (*Marx v Akers*, 88 NY2d 189, 200-201 [1996]). The demand requirement of Business Corporation Law § 626(c) also applies to members of New York limited liability companies (see *Najjar Group, LLC v West 56th Hotel LLC*, 110 AD3d 638, 639 [1st Dept 2013]).

The complaint alleges only that since Sowers owns 80% of the LLC, it would be futile for plaintiff to make a demand upon him to consent to the filing of an action on the LLC’s behalf. However, this Court has made clear that Business Corporation Law § 626(c) “does not differentiate between minority and majority shareholders for demand purposes” (see *Ocelot Capital Mgt., LLC v Hershkovitz*, 90 AD3d 464, 466 [1st Dept 2011]). We note that Sowers’ alleged concealment of financial information does not warrant a finding that demand was futile, since “[a]

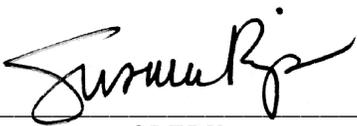
corporation's refusal to provide information to its shareholders is not on the [] list of circumstances where demand is excused" (*Wyatt v Inner City Broadcasting Corp.*, 118 AD3d 517, 517 [1st Dept 2014]).

We further note that plaintiff was not entitled to dissolution of the LLC, pursuant to New York Limited Liability Company Law § 702, since the stated purpose and business of the LLC was to "acquire, improve, own, manage, sell, dispose of, and otherwise realize on the value of" the premises, and the allegations in the complaint do not show that Sowers is "unable or unwilling to reasonably permit or promote the stated purpose of the entity to be realized or achieved, or [that] continuing the entity is financially unfeasible" (*Doyle v Icon, LLC*, 103 AD3d 440, 440 [1st Dept 2013]; *Matter of 1545 Ocean Ave., LLC*, 72 AD3d 121, 131 [2d Dept 2010]).

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: MAY 14, 2015


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established that he was prejudiced (see e.g. *People v Thomas*, 115 AD3d 496 [1st Dept 2014], *lv denied* 23 NY3d 969 [2014]). The witness revealed the impeachment material at issue while he was still on the witness stand, and defendant was able to make full use of the belatedly revealed material on cross-examination. Furthermore, defendant rejected the court's offer of a lengthy continuance for further investigation and preparation.

We have considered and rejected defendant's remaining claims.

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

ENTERED: MAY 14, 2015


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Tom, J.P., Sweeny, Andrias, Moskowitz, Gische, JJ.

15086 In re Isaac Ansimeon F.,
 etc.,

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

 Mark P.,
 Respondent-Appellant,

 Graham-Windham Services to
 Families and Children,
 Petitioner-Respondent.

Geoffrey P. Berman, Larchmont, for appellant.

Carrieri & Carrieri, P.C., Mineola (Ralph R. Carrieri of
counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (John A.
Newbery of counsel), attorney for the child.

Order of disposition, Family Court, Bronx County (Monica
Drinane, J.), entered on or about April 7, 2014, which, upon a
fact-finding determination that respondent father's consent is
not required for the subject child's adoption, that petitioner
agency was excused from providing diligent efforts to reunite the
father with the child, and that the father had permanently
neglected the child, terminated the father's parental rights to
the subject child, and committed the child's custody and
guardianship to petitioner agency and the Commissioner of Social

Services for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence supports the finding that the father's consent to adoption is not required under Domestic Relations Law § 111(1)(d). The father's admission that, after his incarceration, he failed to provide financial support for the child is fatal to his claim (see *Matter of Marc Jaleel G. [Marc E.G.]*, 74 AD3d 689, 690 [1st Dept 2010]). The father's incarceration did not excuse him of his obligations (*id.* at 689).

The finding of permanent neglect is also supported by clear and convincing evidence (see Social Services Law § 384-b[7]). The Family Court properly excused the agency from its duty to make diligent efforts to reunite the father and child, as such efforts would be detrimental to the best interests of the child given that the father's earliest possible release date from prison is 2019, when the child will be 20 years old (see § 384-b[7][a]; see also *Matter of Marino S.*, 100 NY2d 361, 372 [2003], *cert denied* 540 US 1059 [2003]). In addition, the father did not provide a realistic and feasible plan for the child's future, as his sole plan was for the child to remain in foster care until his release from prison (see *Matter of Sasha R.*, 246 AD2d 1, 7 [1st Dept 1998]).

A preponderance of the evidence demonstrates that it is in the child's best interests to terminate the father's parental rights and free the child for adoption, despite the 16-year-old child's indecision about whether he wants to be adopted (see *Matter of Teshana Tracey T. [Janet T.]*, 71 AD3d 1032, 1034 [2d Dept 2010], *lv denied* 14 NY3d 713 [2010]).

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Corporation Law § 1314(b) (5) (*see ABKCO Indus. v Lennon*, 52 AD2d 435, 440 [1st Dept 1976]).

Nor is there subject matter jurisdiction under Business Corporation Law § 1314(b) (4), which depends on personal jurisdiction under CPLR 302. CPLR 302 authorizes the exercise of personal jurisdiction over a nondomiciliary "if the cause of action at issue arose out of the transaction of business within the State" (*McGowan v Smith*, 52 NY2d 268, 271 [1981]). We find that defendant's visits to New York to promote its wine constitute the transaction of business here (*see Longines-Wittnauer Watch Co. v Barnes & Reinecke*, 15 NY2d 443, 455 [1965], *cert denied* 382 US 905 [1965]). However, there is no substantial nexus between plaintiff's claim for unpaid commissions in connection with the sales of that wine, pursuant to an agreement made and performed wholly in Spain, and those promotional activities (*see McGowan*, 52 NY2d at 268).

Defendant's request for sanctions was not raised before the motion court and was resolved against him on his pre-appeal motion before this Court. Were we to reach the merits again on this appeal, we would again deny the request.

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triable issue of fact as to whether the statute of limitations is tolled by the continuous treatment doctrine (CPLR 214-a; *Massie v Crawford*, 78 NY2d 516, 519 [1991]). Defendant and plaintiff Michaela Martens agreed in June 2002 to monitor plaintiff's fibroids in lieu of removing them, so as not to disrupt plaintiff's fertility. Further, defendant directed plaintiff to return for follow-up visits generally within a year, or sooner if she had fibroid-related symptoms. Defendant inquired about plaintiff's fibroids at each visit, ordered ultrasounds specifically for the fibroids, and monitored them through physical exams and in ultrasounds. When plaintiff ultimately sought surgery to remove the fibroids, she returned and consulted with defendant. Given the foregoing, there is at least a triable issue of fact whether defendant's monitoring of plaintiff amounted to continuous treatment (*Oksman v City of New York*, 271 AD2d 213, 215 [1st Dept 2000]; *Cherise v Braff*, 50 AD3d 724, 726 [2d Dept 2008]).

Although plaintiff did not consistently return for follow-ups each year, the gaps in treatment alone do not require

dismissal of plaintiff's claim (see *Richardson v Orentreich*, 64 NY2d 896, 898-899 [1985]), especially since there is evidence that the gaps were due to plaintiff's demanding work and travel schedule.

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

ENTERED: MAY 14, 2015

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Tom, J.P., Sweeny, Andrias, Moskowitz, Gische, JJ.

15089 Marilyn Hopeman, Index 313120/10
Plaintiff-Appellant,

-against-

Albert A. Hopeman III,
Defendant-Respondent.

Marilyn Hopeman, appellant pro se.

Barton LLP, New York (Orrit Hershkovitz of counsel), for
respondent.

Order, Supreme Court, New York County (Marilyn T. Sugarman,
Referee), entered on or about April 17, 2013, which granted
defendant husband Albert A. Hopeman's motion to dismiss the
complaint for lack of personal jurisdiction, unanimously
affirmed, without costs.

Plaintiff failed to demonstrate that the court could
exercise personal jurisdiction over defendant under CPLR 301 or
302(b), since there was no evidence that he had established
"physical presence in the State and an intention to make the
State a permanent home" (*Antone v Gen. Motors Corp., Buick Motor
Div.*, 64 NY2d 20, 28 [1984]; see also *Matter of Ranftle*, 108 AD3d
437, 441 [1st Dept 2013], *affd* 22 NY3d 1146 [2014], *cert denied*
__ US __, 135 S Ct 270 [2014]).

Defendant, a United States citizen, relocated to Shanghai China in 1987. The parties met in Shanghai in 1996 and were married in Hong Kong in 1998. Prior to the marriage, plaintiff, a Chinese citizen, moved to the United States to attend graduate school in Denver, Colorado. In 2000, following her graduation, plaintiff relocated with defendant's assistance to New York in order to obtain three years of work experience before returning to Shanghai. However, plaintiff never returned to Shanghai, and in 2009, defendant ceased providing financial support for her.

The evidence adduced at the hearing established that between 2000 and 2006, defendant spent 91 days in the New York apartment that he had leased for plaintiff, that he kept only a few personal belongings there, and that he had not been there since January 2006, approximately five years prior to the commencement of the instant divorce action. Supreme Court properly found that the limited time that defendant spent in the New York apartment with plaintiff during the course of the marriage was insufficient to find that it was the parties' marital domicile (see *Senhart v Senhart*, 4 Misc 3d 862, 870 [Sup Ct, Kings County 2004], *affd* 18 AD3d 642 [2d Dept 2005]; see also *Klette v Klette*, 167 AD2d 197, 199 [1st Dept 1990]).

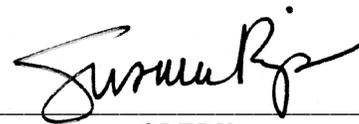
We note that defendant lived and worked in China at all

times during the marriage; he has never filed any New York State income tax returns, and did not have a New York driver's license, own property in New York, vote in New York, perform jury duty, or have any bank accounts in New York. Even if the New York apartment were regarded as one of the parties' marital residences, "New York has long recognized that 'residence' and 'domicile' are not interchangeable" and "while a person can have but one domicile he can have more than one residence" (*Antone*, 64 NY2d at 28; *Senhart*, 4 Misc3d at 870).

Plaintiff's claim of abandonment is not supported by the record, and her remaining contentions are either unpreserved or unavailing.

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

ENTERED: MAY 14, 2015

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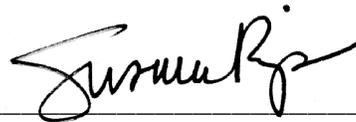
warrant affidavit" (*Franks*, 438 US at 155-156). Defendant only challenged the veracity of the information provided to the police officer affiant by an undercover detective, and not that of the affiant himself (see *People v Slaughter*, 37 NY2d 596, 600 [1975]; *People v Solimine*, 18 NY2d 477 [1966]).

We perceive no basis for reducing the sentence.

We have considered and rejected the arguments raised in defendant's supplemental pro se brief.

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

ENTERED: MAY 14, 2015

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Tom, J.P., Sweeny, Andrias, Moskowitz, Gische, JJ.

15093 In re Carol H.,
 Petitioner-Appellant,

-against-

 Shewanna H., et al.,
 Respondents-Respondents.

Geoffrey P. Berman, Larchmont, for appellant.

Kenneth M. Tuccillo, Hastings on Hudson, for Shewanna H.,
respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Judith Stern
of counsel), attorney for the children.

Order, Family Court, New York County (Susan M. Doherty,
Referee), entered on or about May 27, 2014, which dismissed the
petition by the subject children's maternal grandmother for
custody of the children, and denied petitioner's motion for leave
to amend the petition, unanimously affirmed, without costs.

Petitioner, who has no relationship with the children and
has not seen them for more than four years, failed to meet her
heavy burden of establishing "extraordinary circumstances" in
support of her custody application (see *Matter of Bennett v*
Jeffreys, 40 NY2d 543, 544 [1976]; *Matter of Jumper v Hemphill*,
75 AD3d 507 [2d Dept 2010], *lv denied* 15 NY3d 712 [2010]). The
petition fails to allege facts sufficient to make out

extraordinary circumstances; thus, Family Court was not required to hold a hearing on the issue (*Matter of Stephon M. [William W.]*, 84 AD3d 497 [1st Dept 2011], *lv denied* 17 NY3d 707 [2011]).

The proposed amended petition does not cure the defects of the petition. Although it alleges that petitioner witnessed evidence of the unfitness of the children's mother "years ago," it does not allege that she took steps to gain custody at that time or even that she tried to see the children on a regular basis.

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

ENTERED: MAY 14, 2015



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Tom, J.P., Sweeny, Andrias, Moskowitz, Gische, JJ.

15095	Waldemar Strojek, Plaintiff-Respondent, -against-	Index 107383/11 591016/11 590917/12 590123/13
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33 East 70th Street Corp.,
Defendant-Appellant.

[And Third-Party Actions]

Goldman & Grossman, New York (Eleanor R. Goldman of counsel), for
appellant.

Block, O'Toole & Murphy, LLP, New York (David L. Scher of
counsel), for respondent.

Order, Supreme Court, New York County (Donna M. Mills, J.),
entered October 9, 2014, which, insofar as appealed from as
limited by the briefs, granted plaintiff's motion for partial
summary judgment on the issue of liability on his Labor Law §
240(1) cause of action, unanimously affirmed, without costs.

Plaintiff established his entitlement to judgment as a
matter of law on the issue of liability in this action where he
sustained injuries when, while performing asbestos removal work
in a building owned by defendant, he fell from a baker's
scaffold. Plaintiff's testimony that he was standing on the
scaffold working, and then woke up on the ground with the
scaffold tipped over near him, established a prima facie

violation of the statute and that such violation proximately caused his injuries (see *Zengotita v JFK Intl. Air Term., LLC*, 67 AD3d 426 [1st Dept 2009]; *Vergara v SS 133 W. 21, LLC*, 21 AD3d 279 [1st Dept 2005]). That plaintiff could not remember how he fell does not bar summary judgment (see *Augustyn v City of New York*, 95 AD3d 683 [1st Dept 2012]). Nor does the fact that he was the only witness raise an issue as to his credibility where, as here, his proof was not inconsistent or contradictory as to how the accident occurred, or with any other evidence (see *Goreczny v 16 Ct. St. Owner LLC*, 110 AD3d 465, 466 [1st Dept 2013]; *Weber v Baccarat, Inc.*, 70 AD3d 487, 488 [1st Dept 2010]).

In opposition, defendant failed to raise a triable issue of fact. The affidavit of its expert does not raise a triable issue as to the ceiling height and whether plaintiff could stand straight up as he claimed, since the expert's measurements were based on his inspection of the premises almost three years after the accident and asbestos removal work (see *Santiago v Burlington Coat Factory*, 112 AD3d 514, 515 [1st Dept 2013]). Furthermore, defendant submitted evidence acknowledging that it had erected storage crates in the room since the accident, and the expert did not provide measurements of the exact area where plaintiff fell. The expert's conclusion that the scaffold tipped over because

plaintiff was trying to move it while remaining on it and by using the wall or ceiling as leverage, is speculative and unsupported by the evidence (see *Henningham v Highbridge Community Hous. Dev. Fund Corp.*, 91 AD3d 521 [1st Dept 2012]).

THIS CONSTITUTES THE DECISION AND ORDER
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It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: MAY 14, 2015

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

Tom, J.P., Sweeny, Andrias, Moskowitz, Gische, JJ.

15098 Sterling National Bank, Index 654357/13
Plaintiff-Appellant,

-against-

Deetown Entertainment, Inc.,
Defendant-Respondent.

Amos Weinberg, Great Neck, for appellant.

Siegel & Reiner, LLP, New York (Richard H. DelValle of counsel),
for respondent.

Order, Supreme Court, New York County (Ellen M. Coin, J.),
entered June 19, 2014, which denied plaintiff's motion for
summary judgment on its account stated cause of action,
unanimously affirmed, without costs.

Plaintiff seeks summary judgment on an account stated claim
based on its verified complaint alleging that an oral agreement
was entered into between its assignor, Procure USA, LLC, and
defendant Deetown, which acted through a fictional or nonexistent
entity, Gramercy Medical Solutions. Although defendant's
verified answer did not assert specific denials to any of the
enumerated account items alleged in the complaint (CPLR 3016[f]),
summary judgment was properly denied because defendant denied
each of the allegations concerning the existence of a business

relationship between Deetown and Procure with respect to the unpaid items (see *Epstein, Levinsohn, Bodine, Hurwitz & Weinstein, LLP v Shakedown Records, Ltd.*, 8 AD3d 34 [1st Dept 2004]; *Green v Harris Beach & Wilcox*, 202 AD2d 993 [4th Dept 1994]). Further, while plaintiff submitted a copy of a federal tax form 1099 issued to Procure by Deetown, which indicates that a business relationship did exist between those parties for some transactions, that form, by itself, does not establish that Deetown also undertook responsibility for payment of invoices addressed by Procure to Gramercy Medical Solutions.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 14, 2015


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substance, court records mistakenly indicated that the plea was to fourth-degree possession. Defendant received his promised sentence of probation, which was lawful under either of these class C felonies, and the motion court granted the only remedy necessary, which was a correction of the error in the records.

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

ENTERED: MAY 14, 2015

A handwritten signature in black ink, appearing to read "Susan R.", is written above a horizontal line.

CLERK

Tom, J.P., Sweeny, Andrias, Moskowitz, Gische, JJ.

15102N-		Index 768000/08E
15103N	In re Steam Pipe Explosion at	102536/08
	41st Street and Lexington Avenue	590495/08

- - - - -

Marjorie Kane Talenti, also known as
Margo Kane,
Plaintiff,

-against-

Consolidated Edison, Inc., et al.,
Defendants-Respondents,

The City of New York,
Defendant,

Team Industrial Services, Inc.,
Defendant-Appellant.

- - - - -

Consolidated Edison Company
of New York, Inc.,
Third-Party Plaintiff-Respondent,

-against-

Team Industrial Services, Inc.,
Third-Party Defendant-Appellant,

The City of New York,
Third-Party Defendant.

Shaub, Ahmuty, Citrin & Spratt, LLP, New York (Timothy R. Capowski of counsel), for appellant.

Davis Polk & Wardwell LLP, New York (Frances E. Bivens of counsel), for respondents.

Order, Supreme Court, New York County (Barbara Jaffe, J.),

entered December 24, 2014, which granted defendant Team Industrial Services, Inc.'s (TIS) motion to compel inspection of a confidential settlement agreement between plaintiff and defendant Consolidated Edison, Inc. (ConEd) to the extent of directing ConEd to produce the settlement agreement for in camera inspection by the court, unanimously dismissed, without costs, as academic. Order, same court and Justice, entered January 22, 2015, which, following the court's in camera inspection of the subject settlement agreement, denied TIS's motion for production of such agreement upon finding the agreement contained no information material or necessary to its defense, unanimously affirmed, without costs.

TIS failed to demonstrate that disclosure of the subject confidential settlement agreement, pre-verdict, is material and necessary to its defense (see CPLR 3101; *Matter of New York County Data Entry Worker Prod. Liability Litig.*, 222 AD2d 381 [1st Dept 1995]; see also *Allstate Insurance Company v Belt Parkway Imaging, P.C.*, 70 AD3d 530 [1st Dept 2010]). TIS's reliance on statutory provisions, including General Obligations Law 15-108(a), CPLR 4533-b and 4545, in support of its argument that the confidential agreement should be produced pre-verdict is unavailing. These provisions are either inapplicable to a damage

award (see CPLR 4545), or are relevant only once a damage verdict in plaintiff's favor has been reached (see General Obligations Law § 15-108[a]; CPLR 4533-b; *Matter of Data Entry Worker Prod. Liability Litig.*, 222 AD2d at 382).

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

ENTERED: MAY 14, 2015

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CLERK

Tom, J.P., Sweeny, Andrias, Moskowitz, Gische, JJ.

15104N Dr. Kenneth E. Mc Culloch, doing Index 155939/13
business as McCulloch Orthopedic
Surgical Services,
Plaintiff-Appellant,

-against-

Group Health Incorporated, also known as
EmblemHealth, also known as GHI,
Defendant-Respondent.

McCulloch Law Firm, New York (Kenneth J. McCulloch of counsel),
for appellant.

Carlos G. Manalansan, New York, for respondent.

Order, Supreme Court, New York County (Nancy M. Bannon, J.),
entered November 20, 2014, which, to the extent appealed from as
limited by the briefs, denied plaintiff's motion to compel the
production of documents, unanimously modified, on the law and the
facts, to compel the production of documents relevant to
plaintiff's request number 16 insofar as it seeks reimbursement
schedules of allowable charges for non-participating providers
such as plaintiff, and otherwise affirmed, without costs.

This is an action to recover \$14,722 in unpaid medical bills
upon the theory of promissory estoppel. Plaintiff's requests 12
through 15 pertain to materials furnished to GHI employees
instructing them to respond to benefit plan inquiries by other

physicians; payments made to other physicians; complaints by other physicians regarding payments; and documents related to reimbursement rates for in-network physicians. The motion court properly denied the motion to compel with respect to these requests, as these issues are not "in controversy" and would "hardly aid in the resolution of the question of [promissory estoppel]" (*Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 745 [2000]).

Request number 16, i.e., documents related to the calculation of the reimbursement rates for the various Current Procedural Terminology codes that were used by plaintiff on his billings to GHI, however, is relevant to the actual injury sustained by plaintiff. Thus, defendant must produce the relevant schedules of allowed charges for the surgical procedures that plaintiff performed on his patient.

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

ENTERED: MAY 14, 2015



CLERK

Friedman, J.P., Saxe, Richter, Manzanet-Daniels, JJ.

15105-
15105A & The People of the State of New York,
M-1675 Respondent,

Ind. 1348/06

-against-

Albert Javier,
Defendant-Appellant.

Cascione, Purcigliotti & Galluzzi, P.C., New York (Thomas G. Cascione of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Charles H. Solomon, J. at severance motion; Bonnie G. Wittner, J. at jury trial and sentencing), rendered January 16, 2007, as amended January 25, 2011, convicting defendant of criminal sale of a controlled substance in the first degree (four counts), criminal sale of a controlled substance in the second degree (three counts) and conspiracy in the second degree, and sentencing him to an aggregate term of 30 years, unanimously modified, on the law, to the extent of remanding for resentencing in accordance with this decision. Order, same court and Justice, entered on or about February 27, 2014, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

Defendant's argument that the evidence was legally insufficient as to three of the drug sale counts because the corroboration requirement of CPL 60.22 was not satisfied is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). With regard to the sales at issue, there is no basis for finding that the police informant could be viewed as an accomplice (*see People v Cona*, 49 NY2d 26, 35-36 [1979]). To the extent defendant is raising any other challenges to the sufficiency and weight of the evidence, we find them to be without merit.

Defendant's Confrontation Clause claim regarding lab reports that were received in evidence without objection is waived and unpreserved, and we decline to review it in the interest of justice; subsequent developments in the law do not excuse defendant's lack of objection (*People v Reynolds*, 25 NY2d 489, 495 [1969]). Defendant's claims regarding his severance motion and the court's handling of issues involving jurors are similar to arguments this Court rejected on a codefendant's appeal (*People v Council*, 98 AD3d 917 [1st Dept 2012], *lv denied* 20 NY3d 1060 [2013]), and we reach the same conclusions here.

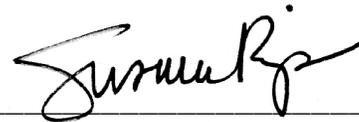
However, defendant's January 25, 2011 Drug Law Reform Act resentencing on his drug sale convictions was improper with regard to the court's direction that certain sentences that had been concurrent would become consecutive, and vice versa (see *People v Norris*, 20 NY3d 1068 [2013]). We remand the matter to the trial court for imposition, after compliance with any DRLA procedural requirements that may be applicable, of a sentence that comports with *Norris*.

M-1675 - *People v Javier*

Motion to file pro se supplemental brief
denied.

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

ENTERED: MAY 14, 2015

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CLERK

Friedman, J.P., Saxe, Richter, Manzanet-Daniels, JJ.

15106 Carlos Coronado, Index 300748/11
Plaintiff-Appellant,

-against-

3479 Associates LLC,
Defendant-Respondent,

Raul A. Jovel,
Defendant.

Peña & Kahn, PLLC, Bronx (Diane W. Bando of counsel), for
appellant.

Havkins Rosenfeld Ritzert & Varriale, LLP (Lindsay R. Kaplow of
counsel), for respondent.

Order, Supreme Court, Bronx County (Edgar G. Walker, J.),
entered November 29, 2013, which, insofar as appealed from as
limited by the briefs, granted the motion of defendant 3479
Associates LLC for summary judgment dismissing plaintiff's claims
for negligent retention and supervision, unanimously affirmed,
without costs.

The court properly dismissed plaintiff's claims that
defendant was negligent in retaining and supervising defendant
Raul A. Jovel, the superintendent of defendant's apartment
building, who allegedly assaulted plaintiff tenant. Plaintiff's
prior complaints that Jovel had used hostile language in

aggressively rebuffing plaintiff's request to fix the heating did not establish that defendant knew or should have known of Jovel's "propensity for the sort of conduct which caused the injury" (*Sheila C. v Povich*, 11 AD3d 120, 130 [1st Dept 2004]; see *Nouel v 325 Wadsworth Realty LLC*, 112 AD3d 493 [1st Dept 2013], *lv denied* 23 NY3d 904 [2014]). Plaintiff's reliance on his testimony that Jovel had previously brandished a large, metal keychain in a threatening manner, and that Jovel struck plaintiff's nose with the keychain during the subject incident, is unavailing in the absence of any evidence that defendant knew or should have known of Jovel's alleged prior conduct.

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

ENTERED: MAY 14, 2015

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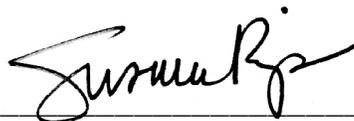
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custody was not a feasible option (see *Braiman v Brahman*, 44 NY2d 584, 589-590 [1978]; see also *Bliss v Ach*, 56 NY2d 995, 998 [1987]). The father had moved out of state during the course of the proceedings, and an award of sole custody to him would have required uprooting the child from her home, sibling, friends and school, where she was doing well. Moreover, there is no support for the father's claim of gender bias on the part of the Referee (see *Seborovski v Kirshtein*, 117 AD3d 627 [1st Dept 2014]).

We have considered the father's remaining arguments, including his claim that he was afforded ineffective assistance of counsel, and find them unavailing.

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

ENTERED: MAY 14, 2015

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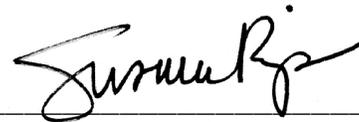
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Unicorn entered into a contract with the City of New York to perform certain work on the 149th Street bridge over the Long Island Railroad tracks in Queens. Gandhi Engineering was the City of New York's contracted resident engineer on the bridge rehabilitation project, and claims to be a third-party beneficiary of Unicorn's contract with the City. The issue centers on whether Gandhi was an "Other Contractor" within the meaning of Unicorn's contract with the City, which Unicorn must indemnify for any damages arising from its acts or omissions. The indemnification provision relied on by Gandhi Engineering is found in paragraph 12.5.1 of Unicorn's contract. However, Article 12 of the contract, titled "Coordination With Other Contractors," clearly distinguishes between "Other Contractors" and the "Engineer," whose responsibility it is to coordinate the work of Unicorn with "Other Contractors." Accordingly, paragraph 12.5.1, when read in the context of Article 12, does not include

Gandhi Engineering as an "Other Contractor" whom Unicorn must indemnify, and Gandhi Engineering is not a third-party beneficiary of Unicorn's contract with the City.

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

ENTERED: MAY 14, 2015

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CLERK

Friedman, J.P., Saxe, Richter, Manzanet-Daniels, JJ.

15109 Starlite Media LLC, Index 114163/10
Plaintiff-Appellant,

-against-

Suzanne Pope,
Defendant-Respondent.

Cullen and Dykman, Garden City (Kevin P. McDonough of counsel),
for appellant.

Law Office of William B. Baier, Bohemia (William B. Baier of
counsel), for respondent.

Order, Supreme Court, New York County (Eileen Bransten, J.),
entered April 15, 2014, which, to the extent appealed from,
denied plaintiff's cross motion for summary judgment dismissing
defendant's counterclaim for unpaid commissions, unanimously
affirmed, without costs.

It is true that plaintiff established that draws carried
over from year to year and that defendant failed to raise a
triable question of fact as to this issue. However, even if
defendant's draw carried over, plaintiff could still owe her
money, as admitted in the affidavit of one of its witnesses, if
she was entitled to commissions on business that came in on her
accounts after plaintiff terminated her. Plaintiff submitted
evidence of industry custom, but defendant denied this at her

deposition, creating an issue of fact (see generally *Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013] [on summary judgment motion, "(t)he evidence will be construed in the light most favorable to the one moved against"])).

Plaintiff's argument that its cross motion should have been granted due to deficiencies in defendant's opposition, is unavailing (see CPLR 2001).

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

ENTERED: MAY 14, 2015

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CLERK

readily discernible from the . . . record" (*People v Santiago*, 22 NY3d 900, 903 [2013]; see also *People v Samms*, 95 NY2d 52, 57 [2000]). The People do not dispute that defendant's New Jersey forgery conviction cannot serve as the basis for his second felony offender adjudication. As for defendant's New Jersey conspiracy conviction, it plainly fails to qualify as the equivalent of a New York felony, because in New York the crime underlying a felony conspiracy must be at least a class C felony Penal Law § 105.10), whereas New Jersey merely requires proof of a conspiracy to commit any "crime" (NJ Stat Ann § 2C:5-2[a]). The New Jersey statute thus includes conduct that could be either a felony or a misdemeanor in New York. Contrary to the People's contentions, this is readily discernible from the record, and does not require that this Court review the New Jersey accusatory instrument to discern whether the underlying crime was in fact a felony or misdemeanor. Such a review is permissible only when the foreign statute criminalizes specific, discrete acts, which

is not the case here (see *People v Muniz*, 74 NY2d 464, 467-469 [1989]).

We find it appropriate to modify the sentence rather than remanding for further proceedings.

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

ENTERED: MAY 14, 2015



CLERK

costs.

In this action, plaintiffs allege, among other things, that defendant doctors failed to diagnose an infection in plaintiff Marcus Otero's right knee. Defendants made a prima facie showing that they did not depart from good and accepted medical practice. Defendants submitted evidence, including testimony from experts in infectious diseases, showing that the infection was not present while plaintiff sought treatment from them, and that plaintiff did not exhibit the symptomology of an infection during such treatment, but rather exhibited the symptoms of a mechanical injury caused by a fall reported by plaintiff (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324-325 [1986]).

In opposition, plaintiff failed to submit evidence sufficient to raise a triable issue of fact (*see Alvarez*, 68 NY2d at 325). Plaintiff's expert's opinion was conclusory and unsupported by competent evidence (*see id.*; *see also Coronel v New York City Health & Hosps. Corp.*, 47 AD3d 456, 457 [1st Dept 2008]). In particular, plaintiff's expert failed to address that plaintiff had no symptomology that would indicate an infection, as opposed to a mechanical issue, such as a fever, pain to the skin on light touch, or a change in skin color. In addition, the expert failed to support his assertion that the infection was

present at the time of plaintiff's treatment with defendants
(*id.*).

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: MAY 14, 2015

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CLERK

Friedman, J.P., Saxe, Richter, Gische, JJ.

15117-

Index 301377/11

15117A Hilton O. Suarez, et al.,
Plaintiffs-Respondents,

-against-

JPMorgan Chase Bank,
Defendant-Respondent-Appellant,

Goodsons Tremont, LLC,
Defendant,

McGuire's Service Corp.,
Defendant-Appellant-Respondent.

Frenkel Lambert Weiss Weisman & Gordon, LLP, Bay Shore (Lawrence Lambert of counsel), for appellant-respondent.

White, Fleischner & Fino, LLP, New York (Walter Williamson of counsel), for respondent-appellant.

Zalman Schnurman & Miner PC, New York (Marc H. Miner of counsel), for respondents.

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered February 27, 2014, which, to the extent appealed from as limited by the briefs, upon renewal, denied defendant McGuire's Service Corp.'s (McGuire's) motion for summary judgment and reinstated the complaint as against it, and otherwise adhered to the prior order, same court and Justice, entered July 15, 2013, denying defendant JP Morgan Chase Bank's (JPMC) motion for summary judgment seeking dismissal of the complaint as against it

and judgment on its cross claims for indemnification against McGuire's, unanimously affirmed, without costs. Appeal from the July 15, 2013 order, unanimously dismissed, without costs, as academic.

In this action for personal injuries allegedly sustained by plaintiff Hilton O. Suarez when he slipped and fell on ice in the parking lot of JPMC's bank branch located on East Tremont Avenue in the Bronx, there are questions of fact precluding an award of summary judgment to defendant McGuire's, the snow removal contractor. Specifically, there is an issue of fact as to whether McGuire's entirely displaced JPMC's obligation to maintain the premises safely (see *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). Although the snow removal contract uses broad language suggesting that McGuire's "entirely absorb[ed]" JPMC's duty, there is evidence in the record that JPMC retained control over the snow removal services by directing

McGuire to stop using sand on the icy parking lot and to remove piles of snow from the premises (*Espinal*, 88 NY2d at 140-141).

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: MAY 14, 2015

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CLERK

Friedman, J.P., Saxe, Richter, Manzanet-Daniels, JJ.

15121-

15122 In re Commissioner of Social
Services of the City of New York,
on behalf of Melvenia H.,
Petitioner-Respondent,

-against-

Juan H. M.,
Respondent-Appellant.

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of
counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jonathan A.
Popolow of counsel), for respondent.

Appeal from order, Family Court, New York County (Clark V.
Richardson, J.), entered on or about December 27, 2012, which
granted petitioner's objection to the reduction of respondent's
arrears to \$100, vacated the September 20, 2012 support order,
and reinstated the arrears in the amount of \$1,104, unanimously
dismissed, without costs. Order, same court and Judge, entered
on or about June 4, 2013, which denied respondent's motion to
vacate an order of support entered on or about January 10, 2011,
on default, unanimously affirmed, without costs.

Respondent's June 20, 2013 notice of appeal from the
December 27, 2012 order is untimely, and no explanation has been

offered for the untimeliness (see CPLR 5513; *Harasim v Eljin Constr. of N.Y., Inc.*, 106 AD3d 642 [1st Dept 2013]).

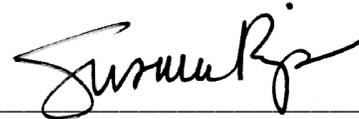
As to the June 4, 2013 order, respondent failed to demonstrate both a reasonable excuse for his default and a meritorious defense (see CPLR 5015[a][1]; *Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Corp.*, 67 NY2d 138, 141 [1986]). Respondent proffered as an excuse that he was not served with notice of entry of the January 10, 2011 order. However, the court's files indicate that the order was mailed to him at the Rikers Island address that he had provided at the previous court appearance. In any event, respondent failed to demonstrate a meritorious defense to petitioner's claim that he was not entitled to an adjustment of the child support arrears that had accrued before the May 2012 filing of his petition for modification. The law is well settled that child support arrears cannot be modified retroactively (see *Matter of Dox v Tynon*, 90 NY2d 166, 173-174 [1997]). "There is no exception for arrears accrued during a

period of incarceration" (*Matter of Zaid S. v Yolanda N.A.A.*, 24 AD3d 118 [1st Dept 2005]).

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

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

ENTERED: MAY 14, 2015

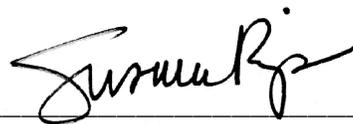
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CLERK

Dismissal of the Labor Law claim was warranted since plaintiffs' unpaid extra compensation does not constitute "wages" under Labor Law § 190(1). Such compensation depended on factors other than their personal productivity, including the efforts of defendant Paul Touradji and a team of analysts (see *Truelove v Northeast Capital & Advisory*, 95 NY2d 220 [2000]; *Guiry v Goldman, Sachs & Co.*, 31 AD3d 70, 73 [1st Dept 2006]).

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

ENTERED: MAY 14, 2015

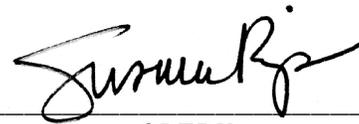
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CLERK

the court's determination is reasonable in the circumstances (see *Greenwald v Greenwald*, 164 AD2d 706, 713 [1st Dept 1991], *lv denied* 78 NY2d 855 [1991]; Domestic Relations Law § 236[B][5]). Defendant's income is higher than plaintiff's, she was awarded the entirety of her UBS brokerage account of more than \$1.6 million, and she shared in the money given to the parties by plaintiff's parents.

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

ENTERED: MAY 14, 2015

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CLERK

Friedman, J.P., Saxe, Richter, Manzanet-Daniels, JJ.

15125 Bestin Realty, S.A., Index 602705/08
Plaintiff-Respondent,

-against-

SCI Claridge,
Defendant-Appellant.

Law Offices of Lawrence H. Schoenbach, PLLC, New York (Lawrence H. Schoenbach of counsel), for appellant.

Teitler & Teitler, LLP, New York (Nicholas W. Lobenthal of counsel), for respondent.

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered October 23, 2013, which denied defendant's motion to vacate a default judgment entered against it, unanimously affirmed, without costs.

The court properly denied defendant's motion to vacate the default judgment pursuant to CPLR 5015(a)(3), because defendant failed to show that plaintiff committed fraud in procuring the judgment. Rather, defendant attempted to show that there was fraud in the underlying transaction (*see Nichols v Curtis*, 104

AD3d 526, 529 [1st Dept 2013]; *Jericho Group, Ltd. v Midtown Dev., L.P.*, 47 AD3d 463 [1st Dept 2008], *lv dismissed* 11 NY3d 801 [2008]).

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

ENTERED: MAY 14, 2015

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CLERK

cure these deficiencies so as to enable the lawful operation of a cabaret, relies on the principle that, “‘when premises are leased for an expressed purpose, everything necessary to the use and enjoyment of the demised premises for such expressed purpose must be implied where it is not expressed in the lease’” (*Second on Second Café, Inc. v Hing Sing Trading, Inc.*, 66 AD3d 255, 256 [1st Dept 2009], quoting *Gans v Hughes*, 14 NYS 930, 931 [Brooklyn City Ct 1891]). While that is accurate as a general statement of the law, we agree with the motion court that, under the particular circumstances of this case, and as the record now stands, defendant is apparently “unable to create a second means of egress for the upper floors.” Therefore plaintiff has not shown a likelihood of success on the merits at this stage.

Finally, in a commercial lease such as this, where the tenant has contractually agreed not to interpose counterclaims in

a summary proceeding, this provision of the lease may not be circumvented by consolidating the summary proceeding with a Supreme Court action for damages (see *107-48 Queens Blvd. Holding Corp. v ABC Brokerage Inc.*, 238 AD2d 557, 557 [2d Dept 1997]).

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

ENTERED: MAY 14, 2015

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CLERK

under Real Property Law § 254(10) to authorize the appointment of a receiver, was not properly raised below (see *Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992]).

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

ENTERED: MAY 14, 2015

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