

SUPREME COURT, APPELLATE DIVISION  
FIRST DEPARTMENT

**OCTOBER 22, 2015**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

15347 Blanca Soltero, Index 305833/09  
Plaintiff-Respondent,

-against-

City of New York,  
Defendant-Appellant.

---

Lawrence Heisler, Brooklyn (Anna J. Ervolina of counsel), for  
appellant.

Law Offices of Lawrence P. Biondi, Garden City (Lisa M. Comeau of  
counsel), for respondent.

---

Judgment, Supreme Court, Bronx County (Alison Y. Tuitt, J.),  
entered November 19, 2013, after a jury trial, to the extent  
appealed from as limited by the briefs, awarding plaintiff  
\$246,000 for past loss of earnings, plus interest at the rate of  
9% per year from the date of the liability verdict of October 4,  
2010, unanimously modified, on the law, to vacate the award of  
interest, and remand the matter to calculate interest at the rate  
of 3% per year from the date of the liability verdict of October  
4, 2010, and otherwise affirmed, without costs.

The jury's award for past loss of earnings was not speculative or excessive, as it was based on the evidence adduced at trial, including, among other things, plaintiff's testimony and income tax returns (see *Estate of Ferguson v City of New York*, 73 AD3d 649, 650 [1st Dept 2010]).

Pursuant to Public Authorities Law § 1212(6), the rate of interest on the judgment may be no more than 3% per year. Although the judgment is against the City, and not the New York City Transit Authority, which is not a party to this action, the Transit Authority is the real party in interest, as it is bound to indemnify the City pursuant to a lease, and will ultimately pay the judgment (see *Ebert v New York City Health & Hosps. Corp.*, 82 NY2d 863, 866-867 [1993]; see also *Williams v City of New York*, 111 AD3d 420 [1st Dept 2013]). Therefore, the interest rate set forth in Public Authorities Law § 1212(6) applies to the judgment (*Williams*, 111 AD3d at 420). Although the City did not object to the interest rate when the judgment was proposed for settlement, the 3% interest rate is mandated by statute, and the error should be corrected (see *id.*).

The Decision and Order of this Court entered herein on June 9, 2015 is hereby recalled and vacated (see M-3234 decided simultaneously herewith).

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

ENTERED: OCTOBER 22, 2015

  
CLERK



Upon our in camera review of the records at issue, we find that NYPD's determination denying petitioner's FOIL request was not affected by an error of law as to pages 1, 2 and the aforementioned portion of page 5 (see *Mulgrew v Board of Educ. of the City School Dist. of the City of N.Y.*, 87 AD3d 506, 507 [1st Dept 2011], *lv denied* 18 NY3d 806 [2012]). In light of the particular circumstances of this case involving an underlying conviction of attempted murder by shooting, the disclosure of identifying information about two witnesses and further details provided in the account of one of those witnesses, "could endanger the life or safety" (Public Officers Law § 87[2][f]) of those witnesses (see *Matter of Exoneration Initiative v New York City Police Dept.*, 114 AD3d 436, 438-439 [1st Dept 2014]; *Matter of Bellamy v New York City Police Dept.*, 87 AD3d 874 [1st Dept 2011], *affd* 20 NY3d 1028 [2013]; *Matter of Laporte v Morgenthau*, 11 AD3d 410 [1st Dept 2004]; *Matter of Johnson v New York City Police Dept.*, 257 AD2d 343, 348-349 [1st Dept 1999], *lv dismissed* 94 NY2d 791 [1999]). The identifying information is also covered

by the exemption for records whose disclosure would “constitute an unwarranted invasion of personal privacy” (Public Officers Law § 87[2][b]), in light of those public safety concerns, as well as the potential “chilling effect the release of such personal information to the general public would have on future witnesses to intentional murder from cooperating with the police” (*Exoneration Initiative*, 114 AD3d at 439).

Though academic, respondent’s argument based on the confidentiality exemption (Public Officers Law § 87[2][e][iii]) is not properly before us, since respondent failed to cite that exemption at the administrative level (see *Matter of Law Offs. of Adam D. Perlmutter, P.C. v New York City Police Dept.*, 123 AD3d 500 [1st Dept 2014]; see generally *Matter of Natural Fuel Gas Distrib. Corp. v Public Serv. Commn. of the State of N.Y.*, 16 NY3d 360, 368 [2011]).

Since petitioner has not substantially prevailed, it is not entitled to attorney's fees pursuant to Public Officers Law § 89(4)(c).

The Decision and Order of this Court entered herein on June 11, 2015 is hereby recalled and vacated (see M-3258 decided simultaneously herewith).

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

ENTERED: OCTOBER 22, 2015

  
\_\_\_\_\_  
CLERK



Richard Wynn, Flushing, for Tully Environmental, Inc.,  
respondent.

---

Order, Supreme Court, New York County (Kathryn Freed, J.),  
entered March 26, 2015, which, to the extent appealed from, upon  
granting third-party defendant Bovis Lend Lease LMB, Inc.'s  
motion to reargue a prior order (Louis B. York, J.), entered  
February 3, 2014, adhered to the terms of the prior order and,  
further, denied Bovis's motion to renew its prior motion to  
dismiss defendant Tully Environmental, Inc. d/b/a Evergreen  
Recycling of Corona's (EROC) cross claims against it, unanimously  
affirmed, with costs.

This action arises from plaintiff Mazzocchi Wrecking Inc.'s  
involvement in clean-up of lower Manhattan following the  
terrorist attacks of September 11, 2001. Mazzocchi brought  
actions against the City, EROC, AMEC Construction Management,  
Inc. (AMEC), and Bovis for nonpayment. Bovis and AMEC had served  
as the general contractors overseeing the cleanup of the World  
Trade Center site. EROC oversaw certain subcontractors on behalf  
of Bovis and AMEC, including Mazzocchi. EROC's role was fairly  
limited, however; it provided general oversight of the  
subcontractors, forwarded the subcontractors' invoices to Bovis  
and AMEC, who in turn forwarded them to the City, and remitted

payments received from the City and Bovis to the subcontractors.

Mazzocchi settled its nonpayment claims with the City and expressly received leave from the court (Barbara Jaffe, J.) to bring amended claims against EROC, AMEC and Bovis, the remaining defendants. Based on these amended claims, EROC brought amended cross claims against Bovis for indemnification and restitution, reasoning that because it paid Mazzocchi only according to Bovis's instructions, it should have no direct liability itself, or that Bovis should reimburse it for that liability.

EROC, AMEC and Bovis then moved to dismiss Mazzocchi's amended claims. Bovis also sought to dismiss EROC's amended cross claims. EROC, AMEC, and Bovis argued that Mazzocchi's amended claims were barred by res judicata - specifically, by Mazzocchi's settlement of claims against the City. Bovis also sought dismissal of Mazzocchi's claims as time barred and dismissal of EROC's amended cross claims on res judicata grounds.

In an order entered February 3, 2014, the motion court (Louis B. York, J.) granted Bovis's motion to dismiss Mazzocchi's amended complaint as against it as time-barred by the statute of limitations. At the same time, the motion court denied AMEC and EROC's motion to dismiss Mazzocchi's amended complaint against them based on res judicata. The motion court concluded that res

judicata did not bar Mazzocchi's amended complaint, because following the settlement with the City, Mazzocchi expressly received leave from the court to proceed with its remaining claims. Thus, the settlement between the City and Mazzocchi had been without prejudice to its remaining claims against the other defendants.

The February 3, 2014 order, however, failed to resolve Bovis's motion to dismiss EROC's amended cross claims. EROC apparently neglected to respond to Bovis's motion to dismiss its amended cross claims. Bovis then sought leave to renew and reargue. The motion court granted leave to reargue, but upon reargument, adhered to the terms of the initial order. In so doing, the motion court found that even though it had failed in its initial order to address the motion to dismiss the amended cross claims, had it done so, it still would have denied the motion, since it was based on the rejected res judicata argument. The motion court also denied the motion to renew.

This appeal followed. Bovis contends that the motion court erred in adhering to the terms of the prior order because EROC, apparently, failed to oppose Bovis's motion to dismiss the amended cross claims. Bovis contends that it was therefore entitled to dismissal of those claims on EROC's default. This

argument is unavailing.

To be entitled to judgment as a matter of law on default, the moving party must first establish its prima facie entitlement to the relief (see *Liberty Taxi Mgt., Inc. v Gincheran*, 32 AD3d 276, 277, n1 [2006]). This Bovis did not do. Its motion to dismiss the cross claims was based solely on the res judicata argument, which Supreme Court has now rejected. Accordingly, even though EROC admits that it failed to oppose the motion to dismiss the cross claims, there is no reason to consider the opposition or lack thereof since Bovis did not establish its prima facie entitlement to the relief sought.

The motion court also properly denied Bovis's motion to renew, which was based upon EROC's alleged failure to serve a supplemental summons with its amended cross claims. The Court correctly concluded that a supplemental summons is required only when a party is being newly added to an action.

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

ENTERED: OCTOBER 22, 2015

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", is written over a horizontal line.

CLERK

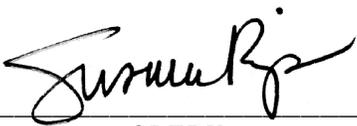


mother passed away on November 3, 2012. Thus, petitioner did not occupy the apartment with respondent's written permission for one year prior to the death of her mother, the tenant of record (*Matter of Saad v New York City Hous. Auth.*, 105 AD3d 672 [1st Dept 2013]). That respondent's determination might constitute a hardship for petitioner does not afford a basis for annulment (see *Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]; *Matter of McFarlane v New York City Hous. Auth.*, 9 AD3d 289, 290 [1st Dept 2004]). Petitioner's contention that the one-year requirement to succeed to a tenancy required the Hearing Officer to consider the totality of the circumstances and mitigating factors has previously been rejected and is unpreserved (*Matter of Fermin v New York City Hous. Auth.*, 67 AD3d 433 [1st Dept 2009]). Review is confined to issues raised in the administrative proceedings (*Matter of Rozmae Realty v State Div. of Hous. & Community Renewal*, 160 AD2d 343 [1990], *lv denied* 76 NY2d 712 [1990]), and "the court may not consider arguments or evidence not contained in the administrative record" (*Brusco v New York State Div. of Hous. & Community Renewal*, 170 AD2d 184, 185 [1991], *appeal dismissed* 77 NY2d 939 [1991], *cert denied* 502 US 857 [1991]).

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

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

ENTERED: OCTOBER 22, 2015

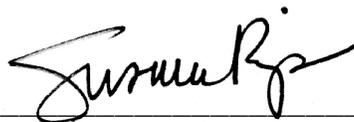
  
\_\_\_\_\_  
CLERK



[2013]), defendant had the opportunity to raise the issue, and the deficiency was far short of a mode of proceedings error. As an alternative holding, we find that the record establishes the voluntariness of the plea (see *Tyrell*, 22 NY3d at 365; see also *People v Harris*, 61 NY2d 9, 16-19 [1983]). The plea court's slip of the tongue in rendering the right to confront witnesses as the essentially similar "right to be confronted by" witnesses could not have undermined the validity of the plea.

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

ENTERED: OCTOBER 22, 2015

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

CLERK



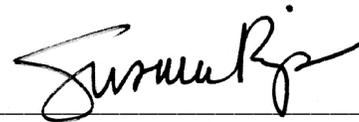
preservation with the principle of retroactivity to pending cases. We decline to review this unpreserved claim in the interest of justice. As an alternative holding, we reject it on the merits. While first-degree criminal contempt under Penal Law § 215.51(b)(iv) includes the same intent standard - "with intent to harass, annoy, threaten or alarm" - that was held to be unconstitutionally vague in *Golb*, the contempt statute criminalizes conduct, not pure speech. Thus, unlike the aggravated harassment statute (former Penal Law § 240.30[1][a]), which "criminalize[d], in broad strokes, any communication that has the intent to annoy," (*Golb*, 23 NY3d at 467) the contempt statute proscribes conduct, and is not unconstitutional (see *People v Shack*, 86 NY2d 529, 535-537 [1995]).

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (see *People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence supports reasonable inferences that defendant intended to harass, annoy, threaten or alarm the victim, given the hundreds of calls he made and texts he sent to her in violation of an order of protection, and that he lacked any legitimate purpose for doing so.

The evidentiary rulings challenged on appeal were appropriate exercises of discretion that did not cause defendant any prejudice.

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

ENTERED: OCTOBER 22, 2015

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

CLERK



*Aid Socy. of City of N.Y. v Loveridge*, 70 NY 387, 394 [1877]; *Matter of Walther*, 6 NY2d 49, 53-54 [1959]). Objectants admitted that they had no direct knowledge that petitioner, their sister, was present for discussions concerning decedent's will or its execution. Objectants also failed to present evidence sufficient to raise a triable issue of fact as to decedent's mental capacity at the time of the will's execution. Decedent's attorney and numerous witnesses stated that decedent was capable of understanding the will, which was explained to her in detail by her counsel on several occasions prior to and during the date of its execution.

The court properly rejected objectants' claim that undue influence could be inferred by the confidential relationship between petitioner and decedent, her mother. A close familial relationship may operate to negate the inference, and objectants themselves acknowledged the closeness between decedent and petitioner (see *Matter of Zirinsky*, 43 AD3d 946, 948 [2d Dept 2007], *lv denied* 9 NY3d 815 [2007]).

Objectants' fraud claim is deficient, because it is based on speculation and hearsay. Further, objectants failed to present evidence that decedent would have disposed of her property differently but for the alleged misrepresentations (see *Matter of*

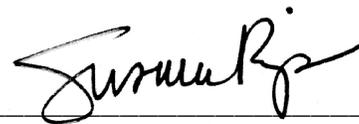
*Ryan*, 34 AD3d 212, 215 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]).

The court providently exercised its discretion in discrediting the housekeeper's affidavit, since it conflicted with her deposition testimony and was largely based on hearsay (see *LoBianco v Lake*, 62 AD3d 590, 591 [1st Dept 2009]).

We have considered objectants' remaining arguments and find them unavailing.

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

ENTERED: OCTOBER 22, 2015

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

CLERK

Tom, J.P., Andrias, Moskowitz, Kapnick, JJ.

15926-

Index 20679/10

15926A Northeast Restoration Corp.,  
Plaintiff-Respondent,

-against-

T.A. Ahern Contractors Corp., et al.,  
Defendants-Appellants,

New York City School Construction  
Authority, et al.,  
Defendants.

---

Westermann Sheehy Keenan Samaan & Aydelott, LLP, Uniondale  
(Robert J. Fryman of counsel), for appellants.

BahnMulter LLP, New York (Martin I. Gold of counsel), for  
respondent.

---

Judgment, Supreme Court, Bronx County (Barry Salman, J.),  
entered April 18, 2014, after a nonjury trial, awarding plaintiff  
damages as against defendants T.A. Ahern Contractors Corp. and  
Safeco Insurance Company of America, unanimously affirmed, with  
costs. Appeal from order, same court and Justice, entered on or  
about April 15, 2014, unanimously dismissed, without costs, as  
subsumed in the appeal from the aforesaid judgment.

There is no basis for disturbing the trial court's finding  
in favor of plaintiff on its claim for unpaid change orders and  
work completed but not billed before the termination date of its  
contract with defendant Ahern (*see generally Nagel v Nagel*, 85

AD3d 559 [1st Dept 2011]). Contrary to defendants' contention, plaintiff was justified in refusing to continue performing work that it deemed outside the scope of the contract, absent a Notice of Direction (NOD) from Ahern, which would have protected its right to claim additional compensation for that work (*compare Kalisch-Jarcho, Inc. v City of New York*, 72 NY2d 727 [1988] [contractor was permitted to file a written protest to preserve its right to claim compensation for disputed work]). The testimony of defendants' witness that the contract did not require an NOD under the circumstances was contradicted by the language of the contract, and was effectively an improper expert opinion as to a legal conclusion (*see Colon v Rent-A-Center*, 276 AD2d 58, 61 [1st Dept 2000]).

Plaintiff's evidence of its damages, including the work it performed from the last billing cycle to the termination, was sufficient. Further, the calculation used to determine the value of that work, i.e., the percentage of completion of the total contract price, was proper (*see e.g. Schultz Constr. v Franbilt, Inc.*, 285 AD2d 936 [3d Dept 2001]).

The dismissal of Ahern's counterclaims is supported by evidence that plaintiff neither caused the claimed damages nor was responsible for them under the contract.

We have considered defendants' remaining contentions and find them unavailing.

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

ENTERED: OCTOBER 22, 2015

  
\_\_\_\_\_  
CLERK

Tom, J.P., Andrias, Moskowitz, Kapnick, JJ.

15927        In re Mayra L.,  
                  Petitioner-Appellant,

-against-

              Jose Ramon M., Sr.,  
                  Respondent-Respondent.

---

Larry S. Bachner, Jamaica, for appellant.

---

Order, Family Court, New York County (Susan R. Larabee, J.), entered on or about September 27, 2013, which denied petitioner's objections to a support magistrate's order denying her motion to vacate an order of child support, entered upon her default, unanimously reversed, on the law, without costs, and petitioner's objections granted to the extent of dismissing petitioner's motion to vacate, without prejudice.

Because the father was not served with petitioner's motion to vacate, the Support Magistrate lacked jurisdiction to entertain the motion, and its order denying the motion is void (see e.g. *Crown Waterproofing, Inc. v Tadco Constr. Corp.*, 99

AD3d 964, 965 [2d Dept 2012]; *Golden v Golden*, 128 AD2d 672, 673 [2d Dept 1987]). Petitioner is free to renew her motion to vacate upon proper service to the father (see *Golden*, 128 AD2d at 673).

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

ENTERED: OCTOBER 22, 2015

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", written over a horizontal line.

CLERK



AD3d 415, 416 [2014])). Here, however, defendant was overdue to be released from incarceration but remained in prison pending his SORA hearing. Under the circumstances, an adjournment would not have provided "a meaningful opportunity to respond" (*People v Inghilleri*, 21 AD3d 404, 405 [2d Dept 2005]), because defendant had to choose between the adjournment and release from custody. Furthermore, the People's explanation for the lack of notice amounted to law office failure. Accordingly, 20 points for the risk factor at issue should not have been assessed, and without those points defendant only qualifies as a level one offender.

We find it unnecessary to reach any other issues.

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

ENTERED: OCTOBER 22, 2015

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", written over a horizontal line.

CLERK



defendant did not claim he was still entitled to dismissal of the indictment under the terms of the agreement, he rejected the court's offer to conduct a hearing to resolve any factual issues, and he instead merely requested a lenient sentence (see *People v Feliciano*, 22 NY3d 986 [2013]).

We decline to review defendant's claims in the interest of justice. As an alternative holding, we find that the court correctly concluded that defendant had violated his plea agreement and thus forfeited the opportunity for dismissal of the indictment. The People were entitled to insist on strict compliance with the agreement (see *People v Jenkins*, 11 NY3d 282 [2008]), and, in any event, the record fails to support defendant's claim that he substantially complied with the agreement or that the violations involved matters that the agreement did not cover.

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

ENTERED: OCTOBER 22, 2015



CLERK

Tom, J.P., Andrias, Moskowitz, Kapnick, JJ.

15930 Jennifer Chaitman, et al., Index 653037/12  
Plaintiffs-Appellants,

-against-

Francis Moezinia, et al.,  
Defendants-Respondents.

- - - - -

[And A Third-Party Action]

---

Chaitman LLP, New York (Helen Davis Chaitman of counsel), for appellants.

Bonner Kiernan Trebach & Crociata LLP, New York (Mindy L. Jayne of counsel), for respondents.

---

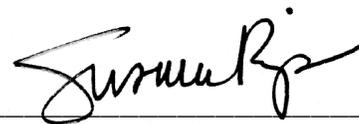
Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered September 17, 2014, which denied plaintiffs' motion for leave to amend the complaint, unanimously affirmed, with costs.

The proposed amendments are palpably insufficient and devoid of merit (*see MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 499 [1st Dept 2010]). The allegations do not show that defendants "acted solely out of malice" or that they "used improper or illegal means" so as to support the proposed claim for tortious interference with business relations (*Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 [1st Dept 2009], *lv dismissed in part, denied in part* 14 NY3d 736 [2010]). To the

extent plaintiffs contend that they may recover damages for the "non-nominative tort for intentional and unprivileged infliction of temporal harm," even assuming, without deciding, that we recognize such a claim, the conduct alleged does not amount to intentional infliction of harm (see *Board of Educ. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Assn., Local 1889, AFT AFL-CIO*, 38 NY2d 397, 406 [1975]; *Morrison v National Broadcasting Co.*, 24 AD2d 284, 291 [1st Dept 1965]). As the proposed amended complaint failed to adequately state a tort claim against the individual or corporate defendants, the proposed claim for punitive damages is nonviable (see *Prote Contr. Co. v Board of Educ. of City of N.Y.*, 276 AD2d 309, 310 [1st Dept 2000]; see also *Nutri Cheese & Foods v Slavin & Sons*, 184 AD2d 330, 330 [1st Dept 1992]).

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

ENTERED: OCTOBER 22, 2015



CLERK

Tom, J.P., Andrias, Moskowitz, Kapnick, JJ.

15931- Ind. 5569/11  
15932 The People of the State of New York, 6121/11  
Respondent,

-against-

Hugo Diplan, also know as Carlos Benitiz,  
Defendant-Appellant.

---

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

---

Judgment, Supreme Court, New York County (Bonnie G. Witner, J.), rendered May 2, 2013, as amended May 16, 2013, unanimously affirmed.

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

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

service of a copy of this order.

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

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

ENTERED: OCTOBER 22, 2015

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", written over a horizontal line.

CLERK

Tom, J.P., Andrias, Moskowitz, Kapnick, JJ.

15933-

15934 In re Starlaylah C.,

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

Josephine F.,  
Respondent-Appellant,

Little Flower Children and  
Family Services of New York,  
Petitioner-Respondent.

---

Andrew J. Baer, New York, for appellant.

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

Law Office of Cabelly & Calderon, Jamaica (Luis S. Calderon of  
counsel), attorney for the child.

---

Order, Family Court, Bronx County (Karen I. Lupuloff, J.),  
entered on or about January 10, 2014, which, upon a fact-finding  
determination that respondent mother had permanently neglected  
the subject child, terminated the mother's parental rights, and  
transferred custody and guardianship of the child to petitioner  
agency and the Commissioner of Social Services for the purpose of  
adoption, unanimously affirmed, without costs.

The mother failed to preserve her due process arguments and,  
in any event, her arguments are unavailing (see *Matter of Rodney  
W. v Josephine F.*, 126 AD3d 605, 606 [1st Dept 2015], *lv*

*dismissed* 25 NY3d 1187 [2015]). Her attorneys were relieved due to her own misconduct, "and she effectively exhausted her right to assigned counsel" (*id.*). Further, Family Court sufficiently advised the mother of the risks of self-representation (*People v EL*, 250 AD2d 395, 396 [1st Dept 1998], *lv denied* 92 NY2d 851 [1998]), and it had no obligation to assist the mother in litigating her defense (*see e.g. Perez v Time Moving & Stor.*, 28 AD3d 326, 329 [1st Dept 2006], *lv dismissed* 7 NY3d 862 [2006]).

Family Court providently exercised its discretion in denying the mother's request for an adjournment, as the mother gave no indication that she intended to retain counsel (*see Matter of Sara KK.*, 226 AD2d 766, 767 [3d Dept 1996], *lv denied* 88 NY2d 808 [1996]).

The finding of permanent neglect is supported by clear and convincing evidence that, despite the agency's diligent efforts to strengthen the mother's relationship with the child, she failed during the relevant time period to plan for the child's future (*see Social Services Law* § 384-b[7][a]; *Matter of Sheila G.*, 61 NY2d 368, 373 [1984]). The record shows that the agency, among other things, arranged scheduled visitation with the child and provided referrals for required counseling programs, but the mother failed to cooperate (*see e.g. Matter of Travis Devon B.*,

295 AD2d 205, 205 [1st Dept 2002]).

A preponderance of the evidence supports Family Court's determination that termination of the mother's parental rights is in the child's best interests (see *Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The child has bonded with her kinship foster mother and the foster mother's son, with whom she has resided for more than five years. The foster mother wants to adopt the child, and the child has thrived in the foster home (see *Matter of Travis Devon B.*, 295 AD2d at 205). Further, Family Court suspended the mother's visitation with the child due to the mother's belligerent behavior, and the mother failed to cooperate with the agency.

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

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

ENTERED: OCTOBER 22, 2015

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

CLERK



as distinct from those rights normally waived by pleading guilty (*id.* at 256). The written waiver clearly states that defendant is giving up the distinct right to appeal; however, it was executed at sentencing, not at the time of the plea, and does not suffice to show that defendant knowingly and intelligently waived appeal at the time his plea was entered, as part of the plea agreement (see *People v Frysinger*, 111 AD3d 1397, 1398 [4th Dept 2013]; *People v Williams*, 102 AD3d 1055 [3d Dept 2013], *lv denied* 22 NY3d 1044 [2013]).

Defendant's suppression motion should have been granted. The police officers' initial approach and their intrusion upon defendant's freedom by directing that he drop the bag were unsupported by a founded suspicion that criminality was afoot necessary to the exercise of the common-law right to inquire (see *People v Hollman*, 79 NY2d 181, 191-192 [1992]). The officers approached defendant based solely on their observation of him carrying a shopping bag or gift bag that seemed rigid. While one officer testified that, based on his experience, he thought it might be a "booster bag" used for shoplifting, he essentially described an ordinary shopping bag. Further, it was conceded that defendant was not free to leave at the time he was ordered to drop the bag and its use as a booster bag became

apparent. Defendant's innocuous behavior in walking in and out of a store with the bag and his ensuing behavior did not justify further interference to obtain explanatory information (see *People v De Bour*, 40 NY2d 210, 223 [1976]).

In view of the foregoing, we find it unnecessary to reach defendant's other arguments for vacatur of his plea.

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

ENTERED: OCTOBER 22, 2015

  
\_\_\_\_\_  
CLERK



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

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

ENTERED: OCTOBER 22, 2015

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", written over a horizontal line.

CLERK

Tom, J.P., Andrias, Moskowitz, Kapnick, JJ.

15939N      John Wiley & Sons, Inc., et al.,                      Index 650375/13  
                 Plaintiffs-Appellants,

-against-

Pierre Grossman,  
Defendant-Respondent.

---

Balber Pickard Maldonado & Van Der Tuin, PC, New York (James A. Moss of counsel), for appellants.

Rivkin Randler LLP, Uniondale (Merril S. Biscone of counsel), for respondent.

---

Order, Supreme Court, New York County (Joan A. Madden, J.), entered January 29, 2015, which, to the extent appealed from, granted defendant's motion to vacate the default judgment against him, unanimously reversed, on the law, with costs, and the motion denied.

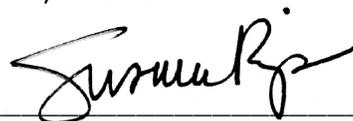
The motion to vacate the default judgment should not have been granted since defendant failed to demonstrate a reasonable excuse for his delay in appearing (*see generally Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]; CPLR 5015[a][1]). The record shows that plaintiffs commenced this action on February 4, 2013 and served defendant pursuant to CPLR 308(2) on February 11. As can be seen from defendant's February 27, 2013 email to plaintiffs, in which he threatened

them with litigation in Brazil if they did not withdraw the instant action, he had actual notice of this lawsuit by that date. Furthermore, by his own admission, defendant was aware by September 2013 that the court had granted plaintiffs' motion for a default judgment, yet he did not try to vacate it until January 8, 2014 at the earliest. This delay, coupled with defendant's conduct in a similar federal litigation, demonstrates that his failure to answer the complaint was willful and "part of a pattern of dilatory behavior" (*D&R Global Selections, S.L. v Bodega Olegario Falcón Piñeiro*, 90 AD3d 403, 405 [1st Dept 2011] internal quotation marks omitted]; see also *Cipriano v Hank*, 197 AD2d 295, 297-298 [1994]).

Defendant's belief, based on his own research, that he did not have to answer the complaint because plaintiffs had not served him either in person in New York or via letters rogatory in Brazil, does not constitute a reasonable excuse (see *Morgenthau v Avion Resources Ltd.*, 11 NY3d 383, 390-391 [2008]; see also *D&R Global Selections, S.L.*, 90 AD3d at 405).

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

ENTERED: OCTOBER 22, 2015



CLERK

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

15940-

Ind. 4937/09

15941 The People of the State of New York,  
Respondent,

-against-

Mario Quintana,  
Defendant-Appellant.

---

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

Robert T. Johnson, District Attorney, Bronx (Katherine A. Gregory  
of counsel), for respondent.

---

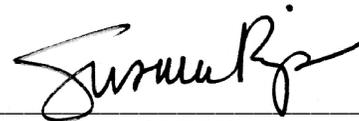
Judgment, Supreme Court, Bronx County (Megan Tallmer, J.),  
rendered May 31, 2013, convicting defendant, upon his plea of  
guilty, of criminal sexual act in the second degree, and  
sentencing him to a term of 10 years' probation, unanimously  
affirmed. Order, same court and Justice, entered on or about  
August 6, 2013, which adjudicated defendant a level two sex  
offender pursuant to the Sex Offender Registration Act  
(Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion in declining to  
grant a downward departure (see *People v Gillotti*, 23 NY3d 841  
[2014]). Defendant's lack of a sex crime history was adequately  
taken into account by the risk assessment instrument, and his  
claims that his advanced age and familial-like relationship with

the child victim tend to minimize his risk of reoffending are unpersuasive (see *People v McFarland*, 120 AD3d 1121, 1122 [1st Dept 2014], *lv denied* 24 NY3d 1053 [2014]; *People v Rodriguez*, 67 AD3d 596, 597 [1st Dept 2009], *lv denied* 15 NY3d 706 [2010]).

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

ENTERED: OCTOBER 22, 2015

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

CLERK

Sweeny, J.P., Renwick, Saxe, Gische, JJ.

15942      13th & 14th Street Realty LLC,  
                 Plaintiff-Appellant,

Index 155269/13

-against-

The Board of Managers of  
the A Building Condominium,  
Defendant-Respondent.

---

Goldberg Weprin Finkel Goldstein, New York (Matthew Hearle of  
counsel), for appellant.

Cozen O'Connor, New York (Edward Hayum of counsel), for  
respondent.

---

Order, Supreme Court, New York County (Barbara Jaffe, J.),  
entered June 2, 2014, which, among other things, denied  
plaintiff's motion for summary judgment in lieu of complaint,  
unanimously reversed, on the law, without costs, and the motion  
granted. The Clerk is directed to enter judgment accordingly.

In opposition to plaintiff's prima facie showing of its  
entitlement to judgment as a matter of law, defendant failed to  
raise a triable issue of fact (*Zyskind v FaceCake Mktg. Tech.,  
Inc.*, 101 AD3d 550, 551 [1st Dept 2012]). We agree with  
plaintiff's argument that defendant, by making 60 monthly  
interest payments under a note, even after it was aware of  
plaintiff's alleged wrongdoing, ratified the note and waived any  
defenses of fraud, self-dealing or breach of fiduciary duty (see

*Scharf v Idaho Farmers Mkt. Inc.*, 115 AD3d 500, 501-502 [1st Dept 2014]; see also *Davis & Davis v Morson*, 286 AD2d 584, 585 [1st Dept 2001]). We may consider plaintiff's argument, which was raised during oral argument on the motion but was excluded from the parties' briefs to the motion court, because it is determinative and because the record on appeal is sufficient to permit appellate review (*Facie Libre Assoc. I, LLC v SecondMarket Holdings, Inc.*, 103 AD3d 565, 565 [1st Dept 2013], lv denied 21 NY3d 866 [2013]).

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

ENTERED: OCTOBER 22, 2015

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", written over a horizontal line.

CLERK

Sweeny, J.P., Renwick, Saxe, Gische, JJ.

15943        In re Farhan A.,  
                  Petitioner-Respondent,

-against-

              Inci A.,  
                  Respondent-Appellant.

---

Leslie S. Lowenstein, Woodmere, for appellant.

---

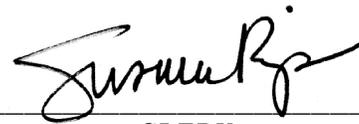
Order, Family Court, New York County (Carol J. Goldstein, Referee), entered on or about January 7, 2014, which, upon a fact-finding determination that respondent-appellant (respondent) had committed the family offense of harassment in the second degree, directed her to refrain from any communications with petitioner except through an attorney and to observe certain other conditions for a one-year period, unanimously affirmed, without costs.

Petitioner showed by a fair preponderance of the evidence that respondent, his sister, had committed acts warranting an order of protection in his favor (see Family Ct Act § 832).

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: OCTOBER 22, 2015

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

CLERK

Sweeny, J.P., Renwick, Saxe, Gische, JJ.

15944 Dolly Ragoo,  
Plaintiff-Appellant,

Index 101970/08

-against-

New York City Taxi and Limousine  
Commission, et al.,  
Defendants-Respondents.

---

Kreisberg & Maitland, LLP, New York (Jeffrey L. Kreisberg of  
counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Diana Lawless  
of counsel), for respondents.

---

Order, Supreme Court, New York County (Jeffrey K. Oing, J.),  
entered February 13, 2014, which granted defendants' motion for  
summary judgment dismissing the complaint asserting causes of  
action for retaliation and disability discrimination by failure  
to accommodate under the New York State Human Rights Law (State  
HRL), unanimously affirmed, without costs.

Plaintiff's transfer from defendant Taxi and Limousine  
Commission's (TLC) office in Manhattan, to its office in Long  
Island City, Queens, and corresponding reassignment from the  
position of administrative assistant to TLC's First Deputy  
Commissioner to administrative assistant to TLC's Chief  
Administrative Law Judge was not an adverse employment action  
under the State HRL (*see Forrest v Jewish Guild for the Blind*, 3

NY3d 295, 312-313 [2004]). Even assuming that the transfer and reassignment resulted in a change of plaintiff's duties, the transfer was at most "an alteration of her responsibilities, and not an adverse employment action" (*Silvis v City of New York*, 95 AD3d 665, 665 [1st Dept 2012] [internal quotation marks omitted], *lv denied* 20 NY3d 861 [2013]), as she "retained the terms and conditions of her employment, and her salary remained the same" (*Matter of Block v Gatling*, 84 AD3d 445, 445 [1st Dept 2011], 17 NY3d 709 [2011]).

Furthermore, assuming that plaintiff's medical condition constituted a "disability" for purposes of the State HRL (see Executive Law §§ 292[21], 292[21-e]), denying her request to be assigned to a specific work location does not constitute a refusal to make a reasonable accommodation for her disability (see *Porter v City of New York*, 128 AD3d 448 [1st Dept 2015]).

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

ENTERED: OCTOBER 22, 2015

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", written over a horizontal line.

CLERK



*People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence supports the conclusion that defendant personally cut the victim and was accessorially liable for the acts of her codefendant (see *People v Cabey*, 85 NY2d 417 [1995]).

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

ENTERED: OCTOBER 22, 2015

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

CLERK

Sweeny, J.P., Renwick, Saxe, Gische, JJ.

15948	Zoran Scekcic, et al., Plaintiffs-Respondents,  -against-	Index 113386/10 590275/11 590815/11 590948/12
	SL Green Realty Corp, et al., Defendants-Appellants,	
	SITQ Systems Inc., et al., Defendants. - - - - -	
	Structure Tone, Inc., Third Party Plaintiff- Respondent-Appellant,  -against-	
	React Industries, Inc., Third Party Defendant- Respondent-Appellant,	
	FL Mechanical LLC, Third-Party Defendant- Appellant-Respondent,	
	Schindler Elevator, Third-Party Defendant- Respondent-Appellant. - - - - -	
	Structure Tone, Inc., et al., Second Third-Party Plaintiffs- Respondents-Appellants,  -against-	
	FRP Sheet Metal Contracting Corp., Second Third-Party Defendant- Respondent-Appellant.	
	[And Another Third-Party Action]	

---

Barry, McTiernan & Moore, LLC, New York (Laurel A. Wedinger of counsel), for SL Green Realty Corp and Structure Tone, Inc., appellants.

Baxter Smith & Shapiro, P.C., White Plains (Sim R. Shapiro of counsel), for 1515 Broadway Fee Owner LLC, appellant.

Wade Clark Mulcahy, New York (Georgia Coats of counsel), for FL Mechanical LLC, appellant-respondent.

Gallo Vitucci & Klar LLP, New York (Daniel P. Mevorach of counsel), for React Industries, Inc., respondent-appellant.

McElroy, Deutsch, Mulvaney & Carpenter, LLP, New York (Michael B. Devins of counsel), for Schindler Elevator, respondent-appellant.

Fabiani Cohen & Hall, LLP, New York (Kevin B. Pollak of counsel), for FRP Sheet Metal Contracting Corp., respondent-appellant.

Sacks and Sacks, LLP, New York (Scott Singer of counsel), for respondents.

---

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered January 24, 2014, which, to the extent appealed from, granted plaintiffs partial summary judgment on their Labor Law § 240(1) claim; denied defendant 1515 Broadway Fee Owners' (1515 Broadway) summary judgment dismissal on plaintiffs' Labor Law § 200 and common-law negligence claims, denied it summary judgment on its third-party contractual indemnification claims against FL Mechanical LLC (FL Mechanical), React Industries, Inc. (React) and FRP Sheet Metal Contracting Corp. (FRP), and granted FL Mechanical summary judgment dismissal of the contractual

indemnification claim against them, and denied it summary judgment on its purported cross claims against defendant Structure Tone, Inc.; denied defendants Structure Tone and SL Green Realty (SL Green) summary judgment dismissal of plaintiffs' Labor Law § 200 and common-law negligence claims, denied them summary judgment on their third-party claims against FRP for contractual and common-law indemnification and contribution, denied them summary judgment on their third-party claims against FL Mechanical and React for contractual indemnification for failure to procure insurance, and granted FRP summary judgment dismissal of the claims for common-law indemnification and failure to procure insurance, granted FL Mechanical summary judgment dismissal of the claims for contractual indemnification and failure to procure insurance, and granted React summary judgment dismissal of the claims for common-law indemnification and contribution; denied FRP summary judgment dismissal of SL Green and Structure Tone's claims for contractual indemnification; denied FL Mechanical summary judgment dismissal of React's cross claim for contractual indemnification; denied React summary judgment dismissal of all claims against it for contractual indemnification and failure to procure insurance; and denied Schindler summary judgment dismissal of all third-party

and cross claims against it; unanimously modified, on the law, to dismiss the Labor Law § 200 and common-law negligence claims against 1515 Broadway, to dismiss all claims by and against SL Green, to reinstate Structure Tone's claims for contractual indemnification and failure to procure insurance against FL Mechanical, to reinstate Structure Tone's claim for failure to procure insurance against FRP, to dismiss all claims against Schindler Elevator, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing all claims by and against defendant SL Green Realty Corp. and all claims and cross claims against Schindler Elevator Corp.

Plaintiff Zoran Scekcic was an employee of third party FL Mechanical, working on the HVAC for an Aeropostale retail store located at 1515 Broadway in Manhattan. Defendant 1515 Broadway is the owner of the building, defendant Structure Tone was the general contractor for the build-out. Structure Tone had hired defendant FRP for the HVAC. However, FRP typically only did the "dry side" of an HVAC installation, the duct work, contracting out the "wet side," or steamfitters' mechanical work, to third-party defendant React. Structure Tone was willing to contract with React, going so far as to prepare and partially execute documents hiring it, before learning that React had a mechanic's

lien on the building, and could not enter into a contract for the job. A "gentleman's agreement" was reached whereby FRP would be the conduit for dealing with and paying React, which would still do the work. After this agreement was reached, React contracted with FL Mechanical to actually do the work.

On the morning of the accident, plaintiff was in the basement of Aeropostale reviewing the blueprints for his day's work when Michael Sansone, Structure Tone's project superintendent, asked him to move a pipe that was hanging too low on the first floor and blocking installation of the dry wall ceiling. Plaintiff and Sansone went to the first floor, where plaintiff observed that the pipe was hanging from a twenty foot ceiling, about eighteen feet in the air. Plaintiff told Sansone that FL Mechanical had sent its ladders and scaffolds back to its shop, and had nothing available to reach the pipe. Sansone allegedly (he denied it) told plaintiff to use an extension ladder located near the elevator, which turned out to be the property of Schindler Elevator. Plaintiff took the ladder and proceeded to work on moving the pipe when the ladder broke, causing plaintiff to plummet fifteen feet to the concrete floor and sustain injury.

On these facts, the motion court correctly granted summary judgment on plaintiff's Labor Law 240(1) claim. Proof that a ladder was defective or that it slipped, tipped, was placed improperly or otherwise failed to provide support gives rise to 240(1) liability (see *Felker v Corning, Inc.*, 90 NY2d 219, 224-225 [1997]; *Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 191 [1st Dept 2011]).

Plaintiff, in his submissions to this Court, has abandoned his Labor Law 200 claims as against 1515 Broadway, the owner of the building, and SL Green, also an alleged owner of the building. The motion court correctly denied Structure Tone's motion for summary judgment dismissing plaintiff's Labor Law 200 claims; there is a question of fact concerning whether Sansone, for Structure Tone, instructed plaintiff to use Schindler's ladder in express contravention of the project's work rules, and whether that potential negligence was a proximate cause of plaintiff's accident.

We dismiss plaintiff's Labor Law 200 and Labor Law 240(1) claims against SL Green. There is simply no evidence in the record that SL Green was the owner of the premises - 1515 Broadway is. We note that in his submission to this Court, plaintiff stated that he would not object to a denial of his

motion for partial summary judgment on 240(1) liability as against SL Green.

The record clearly shows that Schindler Elevator had no knowledge that its ladder was being used by plaintiff, who was not its employee, in contravention of the worksite's rules and construction site best practices. Schindler has made clear that it would not have consented to the use of its ladder if asked, and kept its equipment segregated from the other contractors' equipment. Moreover, there is no basis for any contractual indemnification claims against Schindler, as it did not contract with Structure Tone, but directly with Aeropostale for installation of the elevator. Imposing common-law indemnification or contribution liability on Schindler for plaintiff's improper use of its ladder or Structure Tone's improper direction to plaintiff to use it stretches the concepts of duty and foreseeability too far, regardless of whether Schindler's ladder was defective (see *e.g. Frank v Beck Wainwright Holding Corp.*, 279 AD2d 606 [2d Dept 2001]).

Here, plaintiff's recovery properly lies with the remaining defendants, owner, 1515 Broadway, and Structure Tone, the owner's contractor. In its submission on appeal, 1515 Broadway seeks summary judgment against Structure Tone for common-law

indemnification and contribution; however, 1515 Broadway does not appear to have asserted these cross claims against Structure Tone, giving the Court no basis to grant this relief.

The motion court correctly determined that questions of fact exist concerning the contractual indemnification claims. If there is anything that the record makes clear, it is that the precise roles and relationships between Structure Tone, FRP, React and FL Mechanical, and precisely what each subcontractor agreed to are unclear and need to be resolved by the trier of fact. To that end, we further modify the motion court's decision to deny FL Mechanical's motion for summary judgment dismissing Structure Tone's contractual indemnification claims and dismissing the breach of contract for failure to procure insurance claims. There is, at least, an issue of fact concerning whether FL Mechanical, through its contract with React, agreed to indemnify, defend and provide insurance for Structure Tone, the general contractor. Moreover, we modify to the extent the motion court concluded that React was a subcontractor of FRP; that too is an issue of fact to be decided at trial, once all the contractual relationships are established.

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: OCTOBER 22, 2015

  
\_\_\_\_\_  
CLERK



whether she was home and whether he might run into her and their son (Family Court Act § 821[1]; Penal Law §§ 120.14[2], 120.50[3], 240.26[3]; *Matter of Drita F. v Joseph I.R.*, 88 AD3d 619 [1st Dept 2011]; *Matter of Amber JJ. v Michael KK.*, 82 AD3d 1558 [3d Dept 2011]). To the extent he denied that he had any intent to harass, annoy, alarm or that he otherwise threatened petitioner or her boyfriend, we find no basis for disturbing the court's determination crediting petitioner's version of events over his (see *Matter of Peter G. v Karleen K.*, 51 AD3d 541 [1st Dept 2008]).

Petitioner's testimony that respondent called her numerous times to find out who she was with and where she was going, made uninvited and unannounced visits to her home largely to ascertain whether she was with her boyfriend in their son's presence, and shouted at and threatened her, often in the son's presence, further supports Family Court's determination.

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

ENTERED: OCTOBER 22, 2015



CLERK

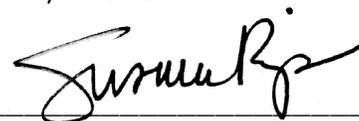


246 AD2d 224, 228 [1st Dept 1998]). Contrary to HSBC's argument, the plain language of section 3(d)(1) of the purchase agreement does not "conclusively" refute Sherman's claim (see *Thirty One Dev., LLC v Cohen*, 104 AD3d 1195, 1196 [4th Dept 2013]).

According to the complaint, the parties had estimated that Sherman would recover its \$16.5 million investment, along with a contractually calculated "Excess Distribution" amount, by sometime in 2009. It would therefore not appear to be economically feasible for Sherman to agree to HSBC's unilateral cessation of its cross-collection activities within two years of Sherman's purchase of the defaulted business. "It is a longstanding principle of New York law that a construction of a contract that would give one party an unfair and unreasonable advantage over the other, or that would place one party at the mercy of the other, should, if at all possible, be avoided" (*ERC 16W Ltd. Partnership v Xanadu Mezz Holdings LLC*, 95 AD3d 498, 503 [1st Dept 2012]), and discovery was properly allowed to move forward.

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

ENTERED: OCTOBER 22, 2015



CLERK

Sweeny, J.P., Renwick, Saxe, Gische, JJ.

15951 In re Robert Zohlman,  
Petitioner-Respondent,

Index 603619/07

-against-

Barbara Zoldan,  
Respondent-Appellant,

Alex Zoldan,  
Judgment-Debtor.

---

Schuchman Schwarz & Zoldan-Leite, LLP, New York (Roy Schuchman of counsel), for appellant.

Brickman Leonard & Bamberger, P.C., New York (David E. Bamberger of counsel), for respondent.

---

Judgment, Supreme Court, New York County (Joan A. Madden, J.), entered May 4, 2011, after a nonjury trial, awarding petitioner damages against respondent, unanimously affirmed, with costs.

In this turnover proceeding brought pursuant to CPLR 5225(b), petitioner judgment creditor seeks to collect from respondent, the judgment debtor's wife, distributions that she received in connection with a real estate development venture. A fair interpretation of the evidence adduced at trial supports the court's conclusion that 75% of those distributions were attributable to the work on the venture performed by the judgment debtor but were distributed to respondent as part of a

contrivance to shelter the judgment debtor's income from creditors like petitioner (see *Matter of Federal Deposit Ins. Corp. v Conte*, 204 AD2d 845 [3d Dept 1994]). As the judgment debtor had an equitable interest in that share of the distributions paid to respondent, the award to petitioner to be applied to the remaining unpaid balance of the judgment owed him by the judgment debtor is appropriate.

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

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

ENTERED: OCTOBER 22, 2015

  
\_\_\_\_\_  
CLERK

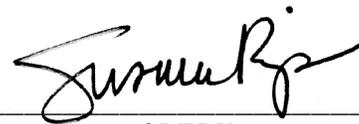


by a hat (see e.g. *People v Bouchereau*, 255 AD2d 389 [2d Dept 1998], *lv denied* 93 NY2d 966 [1999]; *Matter of Jason V.*, 171 AD2d 447, 447 [1st Dept 1991]). She also gave a detailed and accurate description of defendant.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (see *People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning identification and credibility. In addition to the victim's identification testimony, there was circumstantial evidence that not only undermined defendant's alibi defense, but tended to place him in the vicinity of the robbery around the time it was committed.

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

ENTERED: OCTOBER 22, 2015

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

CLERK



Sweeny, J.P., Renwick, Saxe, Gische, JJ.

15955 NYCTL 2011-A Trust, et al.,  
Plaintiffs,

Index 304621/12

-against-

Da'Jue Properties Inc.,  
Defendant-Respondent,

New York City Transit Authority Transit  
Adjudication Bureau, et al.,  
Defendants,

Fay Capital Corp.,  
Non-Party-Appellant.

---

Michael T. Sucher, Brooklyn, for appellant.

Kathleen R. Bradshaw, Bronx, for respondent.

---

Order, Supreme Court, Bronx County (John A. Barone, J.),  
entered January 21, 2015, which, to the extent appealed from as  
limited by the briefs, granted defendant Da'Jue Properties Inc.'s  
motion insofar as it sought to vacate the judgment of foreclosure  
and sale entered upon its default, and effectively granted  
defendant's motion insofar as it sought to vacate the auction  
sale of the property at issue, unanimously reversed, on the law,  
without costs, and the motion denied.

Defendant's right to redeem the property extinguished upon  
the property's sale (*NYCTL 2005-A Trust v Rosenberger Boat  
Livery, Inc.*, 96 AD3d 425, 426 [1st Dept 2012]), and defendant

failed to show an equitable basis for vacatur of the sale, "such as fraud, mistake or exploitive overreaching" (*id.*; see also *Otto Gerdau Co. v Anasae Realty Corp.*, 251 AD2d 174, 174 [1st Dept 1998]).

We reject defendant's argument that the tax lien was defective because it had received a tax exemption. There is no evidence that defendant received a tax exemption before the sale of the property. Nor is vacatur of the sale required based on the Referee's failure to file an oath before the sale. The filing is a ministerial act and, if omitted, it may be done nunc pro tunc, as occurred here (*Matter of Doyle [O'Connor]*, 195 AD 733, 735 [2d Dept 1921]; see also *Travelers Ins. Co. v Broadway W. St. Assocs.*, 164 FRD 154, 163 [SD NY 1995]).

The record does not support defendant's argument that it attempted to redeem the property before its sale. The Referee averred that during the auction of the property defendant stated that it "may be able to pay the taxes" and requested an adjournment, but did not provide the funds for such payment. Because defendant "did not redeem the property by unconditionally tendering the total amount owed," the property was properly sold at the auction (*NYCTL 1999-1 Trust v 573 Jackson Ave. Realty Corp.*, 13 NY3d 573, 579 [2009], *cert denied* 561 US 1006, 130 S Ct

3466 [2010]).

We have considered defendant's remaining contentions, including that this appeal is moot and that appellant lacks standing, and find them unavailing.

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

ENTERED: OCTOBER 22, 2015

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

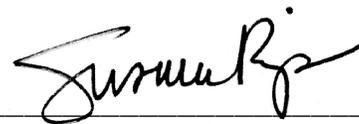
CLERK



The verdict was not against the weight of the evidence (see *People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations, including its evaluation of alleged inconsistencies in testimony.

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

ENTERED: OCTOBER 22, 2015

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", written over a horizontal line.

CLERK

Sweeny, J.P., Renwick, Saxe, Gische, JJ.

15957      In re Starlayjha S., etc.,  
  
            A Dependent Child Under  
            Eighteen Years of Age., etc.,

            Kumica F.,  
                    Respondent-Appellant,

                    -against-

            New York Foundling Hospital,  
                    Petitioner-Respondent.

---

Dora M. Lassinger, East Rockaway, for appellant.

Daniel Gartenstein, Long Island City, for respondent.

Larry S. Bachner, Jamaica, attorney for the child.

---

            Order, Family Court, Bronx County (Valerie Pels, J.),  
entered on or about June 17, 2014, which, upon a fact-finding  
determination that the mother is unable, by reason of mental  
retardation, to provide proper and adequate care for the subject  
child, terminated her parental rights to the subject child, and  
transferred the custody and guardianship of the child to the care  
of New York Foundling Hospital (the Agency), unanimously  
affirmed, without costs.

            The Agency proved the mother's mental retardation by clear  
and convincing evidence through expert testimony, that was  
consistent with and supported by the expert's detailed report,

which was the result of interviews and analyses that constitute the type of material relied upon in mental health evaluations (see e.g. *Matter of Abigail Bridget W. [Janice Antoinette W.]*, 112 AD3d 468 [1st Dept 2013]); *Matter of Michele Amanda N. [Elizabeth N.]*, 93 AD3d 610 [1st Dept 2012]; *Matter of Julius H. [Beatrice P.]*, 120 AD3d 1347 [2d Dept 2014]). The mother had an opportunity to cross-examine the Agency's expert on this point, or present other expert testimony, and failed to do so (see *Matter of Logan Q. [Michael R.]*, 119 AD3d 1010 [3d Dept 2014]).

Moreover, the court properly drew an adverse inference after the mother declined to testify, and it was appropriate for the court to conclude that, if the mother had testified, her testimony would have corroborated the Agency's expert's conclusions (*Matter of Thalia L.*, 303 AD2d 162 [1st Dept 2003]).

Finally, it is well-established that a dispositional hearing is not required after a finding of mental illness (*Matter of Joyce T.*, 65 NY2d 39, 49 [1985]; *Matter of Kasey D. [Richard D.]*, 100 AD3d 417, 418 [1st Dept 2012]).

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

ENTERED: OCTOBER 22, 2015



CLERK



discretion (see *People v Lane*, 7 NY3d 888, 889 [2006]) and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits (see *Ungar v Sarafite*, 376 US 575, 589 [1964]).

Since the heart of defendant's defense was that the People failed to prove that his touching of a young girl was intended to obtain sexual gratification, the court properly exercised its discretion in permitting the prosecution to elicit limited evidence regarding defendant's prior conviction, which involved the intentional sexual touching of two young girls. (see *People v Alvino*, 71 NY2d 233 [1987]). We reject defendant's arguments that the evidence was cumulative or unduly prejudicial.

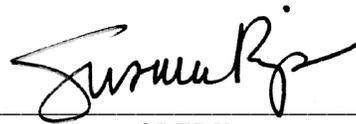
Defendant's ineffective assistance of counsel claims are generally unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record, including matters of strategy (see *People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]), and we reject defendant's argument that there were remarks by counsel that explain these matters. Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal

standards (see *People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that any of counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 22, 2015

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", written over a horizontal line.

CLERK

Sweeny, J.P., Renwick, Saxe, Gische, JJ.

15959 Jennifer Cangro,  
Plaintiff-Appellant,

Index 100278/13

-against-

John Z. Marangos,  
Defendant-Respondent.

---

Jennifer Cangro, appellant pro se.

---

Order, Supreme Court, New York County (Richard F. Braun, J.), entered July 10, 2013, which denied plaintiff's motion to compel the production of discovery and dismissed the action, unanimously affirmed, with costs.

Supreme Court properly dismissed the action which, as with previous similar actions commenced by plaintiff, arises out of her divorce judgment (see 90 AD3d 470 [1st Dept 2011], *appeal dismissed* 18 NY3d 985 [2012]; 61 AD3d 430 [1st Dept 2009]). Furthermore, plaintiff failed to comply with prior orders requiring her to obtain written approval from the administrative judge before commencing the action (see *e.g. Cangro v Cangro*, 288 AD2d 417 [2d Dept 2001]).

In any event, in addition to the fact that the complaint amounts to an impermissible collateral attack on the aforementioned divorce judgment, it fails to state a viable claim

(see CPLR 3211[a][7]). The fraud allegations are not sufficiently detailed (see CPLR 3016[b]), and the remainder of the complaint consists of bare legal conclusions (see *Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233 [1994]).

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

ENTERED: OCTOBER 22, 2015

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", written over a horizontal line.

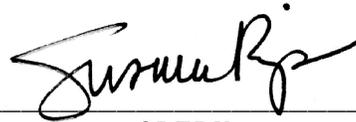
CLERK



the charge. The prosecutor's opening statement was not inflammatory or unduly prejudicial. Evidence that defendant was driving with a suspended license was properly admitted to complete the narrative and explain why the police arrested and searched defendant (see e.g. *People v Tosca*, 98 NY2d 660 [2002]).

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

ENTERED: OCTOBER 22, 2015

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", written over a horizontal line.

CLERK



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

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

ENTERED: OCTOBER 22, 2015

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

CLERK

Tom, J.P., Saxe, Manzanet-Daniels, Gische, JJ.

14266-

Index 651059/13

14266A Sonia Arroyo-Graulau,  
Plaintiff-Appellant,

-against-

Merrill Lynch Pierce, Fenner  
& Smith, Incorporated,  
Defendant-Respondent.

---

McLaughlin & Stern, New York (Steven Hyman of counsel), for  
appellant.

Bressler Amery & Ross, P.C., New York (David J. Libowsky of  
counsel), for respondent.

---

Judgment, Supreme Court, New York County (Eileen Bransten,  
J.), entered April 10, 2014, affirmed, with costs. Appeal from  
order, same court and Justice, entered December 12, 2013,  
dismissed, without costs, as subsumed in the appeal from the  
judgment.

Opinion by Gische, J. All concur except Tom, J.P. who  
concur in a separate Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.  
David B. Saxe  
Sallie Manzanet-Daniels  
Judith J. Gische, JJ.

14266-14266A  
Index 651059/13

x

---

Sonia Arroyo-Graulau,  
Plaintiff-Appellant,

-against-

Merrill Lynch Pierce, Fenner  
& Smith, Incorporated,  
Defendant-Respondent.

x

---

Plaintiff appeals from the judgment of the Supreme Court, New York County (Eileen Bransten, J.), entered April 10, 2014, dismissing the complaint in its entirety, with prejudice, and from the order, same court and Justice, entered December 12, 2013, which granted defendant's motion to dismiss the complaint.

McLaughlin & Stern, New York (Steven Hyman of counsel), for appellant.

Bressler Amery & Ross, P.C., New York (David J. Libowsky of counsel), for respondent.

GISCHE, J.

This action involves a dispute between plaintiff and defendant Merrill Lynch, Pierce, Fenner & Smith, Incorporated, (Merrill Lynch) regarding a securities account that had been held in the name of Alberto Arroyo, plaintiff's deceased father. Following Mr. Arroyo's death in 2010, Merrill Lynch delivered the account assets to the executors of Mr. Arroyo's estate, named in his August 22, 2008 last will and testament, which was admitted to probate in Surrogate's Court on October 25, 2011. Plaintiff's substantive claims in this action stem from her allegation that a 2003 letter sent by the decedent to Merrill Lynch makes plaintiff a direct beneficiary of the account, obviating the need for it to pass through the estate. Plaintiff asserts several causes of action against Merrill Lynch, the financial institution holding the account at the time of Mr. Arroyo's time of death, predicated on its failure to deliver the account assets directly to her in accordance with Mr. Arroyo's letter instructions.

Plaintiff previously petitioned the Surrogate's Court to vacate probate, claiming that the 2008 will was either the product of undue influence or that Mr. Arroyo lacked testamentary capacity to make it. Although the petition refers to the securities account and the 2003 letter, the ultimate relief requested by plaintiff does not concern distribution of the

account assets. The Surrogate's Court denied plaintiff's challenge to probate, and thus the earlier decree admitting the 2008 will to probate remained in force.

The motion court dismissed this action based upon principles of res judicata and collateral estoppel implicated by the prior Surrogate's Court proceedings. We now affirm, but solely on the basis that all of plaintiff's substantive claims, which are ultimately grounded upon alleged violations of New York's Transfer-on-Death Security Registration Act (TODSRA) (EPTL 13-4.1 *et seq.*), fail to state a cause of action.

Res judicata does not apply in this case because a linchpin of the doctrine, that there be an identity of parties litigating against each other in the two actions, is missing (*City of New York v Welsbach Elec. Corp*, 9 NY3d 124, 127 [2007]). The parties in the earlier Surrogate's Court action were plaintiff and the coexecutors of the estate of Alberto Arroyo. Although plaintiff served Merrill Lynch with her petition to vacate the decree admitting the 2008 will to probate, Merrill Lynch was not an interested party in that proceeding nor did it participate in it, having absolutely no right or interest whatsoever in decedent's estate. Collateral estoppel has no application here either, because the issues in the Surrogate's Court action are not identical to those raised here and were not "necessarily decided"

by the Surrogate's Court (*Welsbach Elec. Corp*, 9 NY3d at 128 [internal quotation marks omitted]). The only issue before the Surrogate to decide was whether the 2008 will should be admitted to probate. At no point did the Surrogate determine what assets actually constituted the probate estate, and she did not decide whether the securities owned by decedent at the time of his death were probate assets. By admitting the will to probate, the Surrogate did not assert authority over the account and did not implicitly or explicitly find that the securities account should be distributed as part of the estate. The will itself does not reference the securities account.

Admitting a will to probate involves the validity of the will and the designation of an estate representative (SCPA art. 14), who is then responsible for, among other things, marshaling probate assets (see *Matter of Schultz*, 104 AD3d 1146, 1148 [4th Dept 2013]; *Estate of Skelly*, 284 AD2d 336, 336 [2nd Dept 2001]). Disputes about particular assets are usually the subject of subsequently brought collateral proceedings, including discovery, turnover and accounting proceedings (SCPA art. 21, 22). No party claims that there is any collateral proceeding concerning the securities account currently pending in the Surrogate's Court.

We disagree with our concurring colleague that principles of comity control the outcome of this appeal. They are not argued

by the parties, nor do they apply. While there is no question that the Surrogate's Court could have exercised jurisdiction over the dispute under TODSRA if a proceeding or claim had been brought, there is no such proceeding or claim and the Court did not exercise such jurisdiction. Consequently, based upon the procedural context in which this dispute is before this Court, we only reach the merits of the claim asserted.

We hold that under TODSRA, the 2003 letter sent by the decedent to Merrill Lynch did not create an enforceable right in favor of plaintiff to have the securities pass directly to her upon Mr. Arroyo's death. New York State passed TODSRA during the 2005 legislative session as part of a national effort to create a method of owning securities in a manner that would allow them to automatically transfer to an owner's designee upon death (L 2005, ch 325). Before its enactment, joint ownership with the beneficiary during a decedent's lifetime was the only option for a non-probate disposition of securities (Margaret Valentine Turano, Practice Commentaries, McKinney's Cons. Laws of NY, Book 17B, EPTL art 13, part 4 at 696). Beginning in 1990 a majority of States enacted laws substantially similar to TODSRA, with New York being the 47th State to do so (McKinney's Cons. Laws of NY, Book 17B, 2015 Cum. Pocket Part, EPTL article 13, part 4 [Table of Jurisdictions Wherein Act Has Been Adopted] at 142-144). The

primary advantage of TODSRA is that securities need not pass through probate in order to be transferred upon the death of the owner (Margaret Valentine Turano, Practice Commentaries, McKinney's Cons. Laws of NY, Book 17B, EPTL art 13, part 4 at 695). The beneficiary designation is effective only upon the owner's death; before then an owner is free at any time to cancel or change the designation without consent of the beneficiary (EPTL 13-4.6).

In order to take advantage of New York's law, certain categories of owners may request that a security be registered in beneficiary form (EPTL 13-4.2). The institution holding the securities account, however, is not required to either offer or accept a request to register a security in beneficiary form (EPTL 13-4.8). It is only if the owner requests that a security be held in beneficiary form and the entity holding the security accepts the designation, that an enforceable contractual relationship is created between the owner and that registering entity, requiring the registering entity to act in accordance with the designation (EPTL 13-4.9). Under TODSRA, the registering entity has the sole right to establish the terms and conditions under which it will receive and implement requests to register securities in beneficiary form (EPTL 13-4.10), and TODSRA statutorily mandates that the registering entity have

certain protections in the process (EPTL 13-4.8).

A registering entity is not the owner of the security, but rather the person or entity that originates or transfers title to a security by registration, which includes a broker such as defendant (EPTL 13-4.1[i]). Thus, under the statute, it is perfectly clear that a unilateral action by an owner of a securities account to designate a beneficiary in the event of death is not by itself sufficient.

Against this statutory framework, the 2003 letter relied upon by plaintiff is not a legally enforceable beneficiary designation under TODSRA. At most, it is a unilateral request by the owner of the account to have Merrill Lynch register the securities in beneficiary form. In order to have an enforceable registered beneficiary form under TODSRA, plaintiff would need to have a certificate or designation on the account itself indicating transfer-on-death instructions (EPTL 13-4.1[h]; 13-4.5). Without that certificate or designation demonstrating the acceptance of the request, there are no rights under TODSRA. Without those rights (i.e. TODSRA), there are no independent contractual or common-law rights to compel distribution of securities outside of probate, unless the securities were jointly titled in decedent and the beneficiary's name before the decedent's death. Consequently, plaintiff has no direct

statutory or common law cause of action against Merrill Lynch for delivering the securities to decedent's coexecutors upon Mr. Arroyo's death.

Accordingly, the judgment of the Supreme Court, New York County (Eileen Bransten, J.), entered April 10, 2014, dismissing the complaint in its entirety, with prejudice, should be affirmed, with costs. The appeal from the order, same court and Justice, entered December 12, 2013, which granted defendant's motion to dismiss the complaint, should be dismissed, without costs, as subsumed in the appeal from the judgment.

All concur except Tom, J.P. who concurs in a separate Opinion.

TOM, J.P. (concurring)

This contract dispute was resolved by a Surrogate's decree dated October 25, 2011, and Supreme Court properly adhered to the principle of comity by dismissing the complaint with prejudice. Under the factual circumstances of this case, a court of coordinate jurisdiction can not issue an order concerning a probate issue that already has been decided by the Surrogate's Court. Because Supreme Court lacks the authority to decide the issue, the merits are not properly before us and I decline to join in the majority's advisory opinion that the complaint fails to state a cause of action (*e.g. T.D. v New York State Off. of Mental Health*, 91 NY2d 860 [1997] [having decided that an agency lacked power to promulgate regulations, declaring them invalid on various common-law, statutory and constitutional grounds was an inappropriate advisory opinion]; *see also Cuomo v Long Is. Light. Co.*, 71 NY2d 349, 354 [1988]).

Plaintiff's father, Alberto Arroyo (decedent), maintained a securities account at defendant brokerage valued at some \$1.2 million. In 2003, decedent sent a notarized letter to defendant directing that the account be made transferrable to plaintiff upon the event of either his death or disability. Although the complaint asserts that the instruction was accepted, it is apparent that defendant undertook no action to give it effect.

In 2008, decedent made a will leaving plaintiff 50% of his estate, but in no event less than \$500,000. The will made no mention of the securities account.

Upon Alberto Arroyo's death in 2010, defendant, over plaintiff's objection, turned over the proceeds of decedent's brokerage account to the executors of his estate. They commenced an action in Surrogate's Court to admit the will to probate, and plaintiff appeared by counsel in opposition. After the Surrogate rendered a decree admitting the 2008 will to probate, plaintiff brought a petition to vacate the decree and to direct, inter alia, that the executors return all assets received by the estate and immediately distribute no less than \$500,000 to plaintiff. She contended that by the time the will was made in 2008, decedent was incompetent and in any event was subject to the undue influence of her cobeneficiaries. Plaintiff further argued that the 2003 notarized letter reflected the true testamentary intent of decedent, and that it should be given full force and effect. In opposition, the executors argued that decedent's letter to defendant should be rejected by the Surrogate as contrary to his testamentary intent, as set forth in the will.

The Surrogate found that plaintiff had failed to demonstrate the likelihood that she would be able to establish decedent's incompetence, ruling that "there is not enough to open up this

probate.” The 2003 letter was never addressed, either at oral argument on the petition or in the court’s decree. The court’s order dated July 25, 2012 did provide, however, “for an advance distribution of her beneficial share under the will and directed the executor to pay her \$500,000 on account of her legacy.”

Plaintiff then commenced this action asserting breach of contract and various redundant claims, each seeking damages of not less than \$600,000 from defendant (*Rockefeller Univ. v Tishman Constr. Corp. of N.Y.*, 240 AD2d 341, 342 [1st Dept 1997], *lv denied* 91 NY2d 803 [1997] [causes of action seeking the same benefit-of-the-bargain damages merely duplicate a breach of contract claim]). The complaint alleges that the 2003 letter suffices as a registration of beneficiary pursuant to EPTL 13-4.1 *et seq.*, which provides for the contractual, nontestamentary transfer of the proceeds of an account to a designated beneficiary upon the death of the account holder (EPTL 13-4.9).

Without reaching the merits, Supreme Court dismissed the complaint with prejudice on the grounds of comity – not res judicata or collateral estoppel as the majority contends. The court stated as follows:

“You can’t come now and actually ask this [c]ourt to sit as an Appellate Court to [S]urrogate Glen.

“If you didn’t like the decision that

Surrogate Glen made, then the argument should have been made before the Appellate Division in the due course to appeal that decision."

Counsel interjected the same argument now advanced, asserting that "Surrogate Glen did not rule as to whether the Merrill Lynch assets were testamentary assets," which prompted the following reply:

"THE COURT: Sir, it was before her, and the fact that she did not, it was an appealable issue. The fact that you did not appeal, makes it now moot before this Court."

The order has since been reduced to a judgment entered April 10, 2014.

On appeal, plaintiff does not directly address the issue of coordinate jurisdiction. She merely argues that res judicata should not be applied to bar this action because the Surrogate did not explicitly rule that defendant is under no contractual duty to distribute the proceeds of decedent's brokerage account to plaintiff in accordance with his 2003 letter. In opposition, defendant argues that res judicata is applicable because this action involves the same claims and arises out of the same facts as those adjudicated in the course of the probate proceeding. Because Supreme Court based its order of dismissal on the principle of comity, holding that it lacked the authority of an appellate court to disturb the Surrogate's order, and because

plaintiff attacks the propriety of that ruling, the issue is squarely before us. That the parties have not expressly raised the issue of comity, or do not comprehend the issue, does not obviate its significance. Neither Supreme Court nor this Court has jurisdiction to vacate the Surrogate's ruling.

Analysis begins with the well-settled principle that an order or judgment of a court binds the parties subject to its mandate until such ruling is either vacated by the court that rendered it (CPLR 5015 [a]) or set aside on appeal (*Matter of Murray v Goord*, 298 AD2d 94, 97 [1st Dept 2002], *affd* 1 NY3d 29 [2003]). Alternatively, a party may collaterally attack a judgment on the ground that the issuing court lacked jurisdiction (see *Boorman v Deutsch*, 152 AD2d 48, 54 [1st Dept 1989], *appeal dismissed* 76 NY2d 889 [1990]). How the court arrived at its ruling and even the propriety of that ruling are immaterial until such time as a party pursues an available means of redress. Significantly, plaintiff's petition to vacate the Surrogate's decree argued that, based upon decedent's letter instructions to defendant, she became entitled to receive the proceeds of his brokerage account at the time he allegedly became incompetent due to a stroke in August 2008. When her petition to open up the probate proceedings was denied, however, plaintiff did not avail herself of an appeal from that ruling, the only other direct

means of obtaining relief from the court's decree. In the absence of an appeal or any contention that Surrogate's Court lacked jurisdiction to probate the will, the distribution of some \$500,000 in estate assets to plaintiff – which implicitly includes the funds defendant turned over to the executors – is governed by an order, by which plaintiff is bound.

The operative question is not, as plaintiff contends, whether the principle of res judicata bars the parties from challenging the Surrogate's decree admitting the will to probate; rather, the determinative issue is whether considerations of comity, not res judicata, deprive Supreme Court of the authority to hear this dispute. A court of coordinate jurisdiction is precluded from issuing any ruling at variance with an existing order or judgment that is binding upon the party seeking to vacate or modify its terms (*see Gee Tai Chong Realty Corp. v GA Ins. Co. of N.Y.*, 283 AD2d 295, 296 [1st Dept 2001]). The salutary purpose of this rule is to avoid potential conflicts that might result from disparate rulings on the same subject matter (*see State of New York v Thwaites Place Assoc.*, 155 AD2d 3, 7 [1st Dept 1990], citing *Pennsylvania v Williams*, 294 US 176 [1935]; *see also Pacesetter Sys., Inc. v Medtronic, Inc.*, 678 F2d 93, 96 n 3 [9th Cir 1982]; *Product Eng'g and Mfg. v Barnes*, 424 F2d 42, 44 [10th Cir 1970]). Observance of the doctrine requires

a court to avoid taking any action at variance with measures taken, or even under consideration, by another court of commensurate status, including a court located in a jurisdiction other than New York (see *White Light Prods. v On The Scene Prods.*, 231 AD2d 90, 93 [1st Dept 1997]). As stated by the Second Circuit in *Matter of Hines* (88 F2d 423, 425 [1937]):

“It is well established that a judge may not overrule the decision of another judge of co-ordinate jurisdiction . . . Such a rule is essential to an orderly and seemly administration of justice . . . It is equally applicable when an issue has been submitted to the first judge and has not yet been decided by him. To permit another judge to rush in and snatch [the] decision from his mouth is not to be tolerated; it is a breach of comity which, if sanctioned, could only lead to unseemly conflicts of decision and to protracting the litigation.”

(see also *George W. Collins, Inc. v Olsker-McLain Indus.*, 22 AD2d 485, 488-489 [4th Dept 1965]).

Plaintiff argues that despite being a party to the action before the Surrogate, she is not bound by the decree. The intimation is that because the contract arising from decedent's 2003 letter instruction to defendant was not specifically addressed in the probate proceedings, the issue of whether defendant properly turned over to the executors the funds held in the brokerage account, can still be adjudicated.

As stated by this Court, "A party to a lawsuit cannot sit by idly while a contract, to which he is also a party, is judicially construed without being precluded by the result" (*Buechel v Bain*, 275 AD2d 65, 74 [1st Dept 2000], *affd* 97 NY2d 295 [2001], *cert denied* 536 US 1096, 122 S Ct 2293 [2002]). By deciding that the account proceeds – the particular res at issue – should be distributed as part of the estate, the Surrogate necessarily decided that the distribution is testamentary, precluding the contrary adjudication, now proposed, that the funds should be passed as a nontestamentary distribution pursuant to a contract with defendant.

It is dispositive that the Surrogate has asserted authority over the disputed funds as assets of the estate, and no other court of equal status may purport to usurp that court's exercise of jurisdiction. As Supreme Court aptly noted, the issue of whether the disputed funds are testamentary assets was before the Surrogate and "the fact that she [ruled that they were testamentary], it was an appealable issue." Plaintiff never sought to relitigate this issue before the Surrogate or appeal from the court's ruling, there is absolutely no justification for permitting plaintiff to maintain a redundant action in a coordinate forum. Moreover, there is no question that the Surrogate has not only exercised jurisdiction over the disputed

funds but decided that they should be distributed under the will, having directed the executor to distribute \$500,000 to plaintiff "on account of her legacy."

To suggest that Supreme Court may entertain the same issue and make a contrary or inconsistent disposition based on the contract between the parties, which will adversely affect the Surrogate's ruling, invites chaos in judicial proceedings. The majority invites a party that is unhappy with a ruling obtained in one forum to commence a different action in a different forum regarding the same subject matter – forum shopping after the fact. This Court has consistently held that a party may not resort to a second forum to obtain relief explicitly or implicitly denied in the forum originally designated to hear the matter (see e.g. *All Terrain Props. v Hoy*, 265 AD2d 87 [1st Dept 2000]; *Thwaites Place Assoc.*, 155 AD2d at 7), thereby attempting to achieve by indirection a result that is directly foreclosed (see *Blake Elec. Contr. Co. v Paschall*, 222 AD2d 264, 267 [1st Dept 1995]). It is enough that the Surrogate has decided that the funds sought in this action should be distributed as part of the estate. Were plaintiff permitted to pursue her contract claim before Supreme Court and were ultimately to prevail in this action, this Court would then be confronted with "the anomaly of an unimpeached final decree of the Surrogate's Court . . . and a

judgment of the Supreme Court nullifying the effect of that decree" (*Grossman v Kass*, 124 NYS2d 416, 418 [Sup Ct NY County 1953]), a situation the law regards as intolerable (see *George W. Collins, Inc.*, 22 AD2d at 488-489). Thus, Supreme Court properly declined to entertain this dispute beyond its "jurisdiction to decide whether it has jurisdiction in [this] particular matter" (*Matter of Baron & Vesel, P.C. v Gammerman*, 101 AD2d 763, 763 [1st Dept 1984], *appeal dismissed* 63 NY2d 671 [1984], 63 NY2d 677 [1984]; *but see Gitelson v Quinn*, 118 AD3d 403 [1st Dept 2014] [allowing a contract action to proceed where the relief sought would abrogate the distribution of an estate asset made by the Surrogate]).

Because disposition of this matter is governed by the principle of comity, it is of no moment that *defendant* is not a party to the probate proceedings; however, plaintiff, as a party, is constrained to litigate in that forum. If she is aggrieved by the decree admitting the will to probate, she must seek vacatur from the court that issued it (CPLR 5015), given that she failed to pursue the alternative of taking an appeal from the Surrogate's ruling.

In the present procedural context, this Court is in no better position to afford the relief plaintiff seeks. While we may entertain the appeal from Supreme Court's judgment, our

jurisdiction to vacate or modify a judgment or order is limited to an appeal taken from such judgment or order by an aggrieved party (CPLR 5511). Since this appeal is taken from the judgment entered in Supreme Court, the Surrogate's ruling is not before us, and we are without jurisdiction to assess the propriety of the decree or otherwise disturb any order entered in connection therewith in the course of appellate review.

Accordingly, the judgment should be affirmed.

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

ENTERED: OCTOBER 22, 2015

  
\_\_\_\_\_  
CLERK