FIRST DEPARTMENT

APRIL 14, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Sweeny, Richter, Manzanet-Daniels, JJ.

16651 Sara Hunter Hudson, et al., Index 156706/13
Plaintiffs-Appellants,

Catherine Wharton,
Plaintiff,

-against-

Merrill Lynch & Co., Inc., et al.,
Defendants-Respondents.

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Vladeck, Raskin & Clark, P.C., New York (Anne L. Clark of counsel), for appellants.

Bressler, Amery & Ross, P.C., Birmingham, AL (Rima F. Hartman of the bar of the State of Alabama and the State of Washington, admitted pro hac vice, of counsel), for respondents.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered April 23, 2014, which granted defendants' motion for summary judgment dismissing the complaint asserting gender discrimination under the New York City Human Rights Law, unanimously affirmed, without costs.

In 2008 and early 2009, plaintiffs Sara Hunter Hudson and Julia Kuo were enrolled in a financial advisor training program

at the Fifth Avenue branch of defendant Merrill Lynch, Pierce, Fenner & Smith, Inc. The training program consisted of three phases of development. The first was the Trainee Period, which lasted up to 17 weeks. During this phase, the trainees were required to pass licensing exams and an initial developmental assessment. Upon completion of the Trainee Period, the trainees received a production number, which allowed them to bring in business, and entered the next phase, known as Stage I.

In Stage I, the trainees were required to complete a financial planning course and pass a second developmental assessment. After three months in Stage I, successful trainees moved on to Stage II, the core production phase, where they had to complete further course work and pass additional developmental assessments. In both Stages I and II, the trainees were expected to satisfy various objective performance hurdles measured by the business the trainees brought in. After 36 months in Stage II, successful trainees were deemed to have completed the training program.

In late 2008, the U.S. financial sector suffered a severe collapse. In mid-January 2009, Merrill Lynch senior management notified its branch offices that there would be a reduction in force in the trainee program, and directed the Fifth Avenue

branch to lay off half of its approximately 29 trainees. Merrill Lynch management provided the Fifth Avenue branch with two lists. The first was denominated the "termination list" with "no exceptions." It was a computer-generated list of Stage II trainees (and trainees in a similar training program) having at least three performance months who were off-target as of December 2008, and who were also off-target for more than 50% of that year. The second list consisted of all trainees in the Trainee Period and Stage I, and recommended that those not meeting performance targets be "strongly considered for termination." Hudson and Kuo were not on either list.

The Fifth Avenue branch was notified of the reduction in force on Friday, January 16, 2009, and was required to submit its proposed termination list by Tuesday, January 20. Working over the Martin Luther King Day weekend, Joel Meshel and Anna Roccanova, the principal Merrill Lynch decision makers, prepared the termination list. Meshel and Roccanova used the following methodology in making their decisions. They started with the first list, which contained seven men and two women. After consultation with Traci Kamil, Merrill Lynch's regional human resources director, and Sabina McCarthy, the regional managing director, Meshel and Roccanova removed three men from that list

due to extenuating circumstances.[1] The four remaining trainees on the list were chosen for termination: two men and two women, plaintiff Catherine Wharton, and Jennifer Vuona.

Branch management was given discretion in selecting the other trainees who would be laid off. In deciding whom next to include for termination, Meshel and Roccanova turned to the other Stage II trainees. In order to compare trainees with similar experience, Meshel and Roccanova divided them into two groups based on their time in the program. The first group consisted of five trainees, four men and Kuo, who had six or more months length of service in Stage II. Kuo, who had the worst record in the group based upon the objective performance standards, was chosen for termination. The second group of Stage II trainees consisted of two men, Hudson, and another woman, each with one to three months length of service in Stage II. From this group, Hudson, who objectively was the weakest performer, was laid off.

The remaining trainees who were laid off came from the second list provided to branch management, which included the 12 trainees in the Trainee Period and Stage I. Of this group, seven

[1] Although two other male trainees were also removed from the list, plaintiffs concede that the circumstances surrounding these men are not probative.

were chosen for termination, four men and three women. Two of these trainees were specifically identified on the list as having not met performance targets. Because of limited performance data, the remaining five layoff decisions were based on which trainees, in Meshel's and Roccanova's estimation, would be most likely to succeed. At the end of the process, Meshel and Roccanova presented their layoff recommendations to Linda Houston, the branch director. After reviewing the methodology, and the business reasons behind the recommendations, Houston approved the termination list, and those trainees were subsequently let go.

In September 2010, the three plaintiffs in this action (Hudson, Kuo, and Wharton), along with Vuona, filed a complaint against Merrill Lynch and related entities in the U.S. District Court for the Southern District of New York. In the federal complaint, the plaintiffs alleged, inter alia, that Merrill Lynch unlawfully terminated their employment on the basis of gender, in violation of Title VII of the Civil Rights Act of 1964 (42 USC § 2000e *et seq.*), and New York State and New York City Human Rights Laws (Executive Law § 290 *et seq.*; Administrative Code of City of NY § 8-107 *et seq.*). Following extensive discovery, the defendants in the federal action moved for summary judgment

dismissing the complaint. In a decision dated January 24, 2013, the federal court granted the motion with respect to the plaintiffs' federal and state law claims. The court declined to exercise supplemental jurisdiction over the plaintiffs' City Human Rights Law claims, and dismissed them without prejudice.

In July 2013, Hudson, Kuo, and Wharton commenced the instant action against Merrill Lynch and the related entities asserting a single cause of action for gender discrimination in violation of the City Human Rights Law.[2] Defendants moved for summary judgment dismissing the complaint, and in a decision entered April 23, 2014, the motion court granted the motion. Plaintiffs Hudson and Kuo (hereinafter plaintiffs) appeal, and we now affirm.[3]

Even though the federal court dismissed plaintiffs' federal and state gender discrimination claims, the viability of plaintiffs' City Human Rights Law claim must be independently assessed under more liberal standards (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 [1st Dept 2009], *lv denied* 13 NY3d 702 [2009] [the City Human Rights Law "explicitly requires an

[2] Vuona is not a party to this action.

[3] Wharton is not a party to this appeal.

independent liberal construction analysis in all circumstances, even where state and federal civil rights laws have comparable language"]). A motion for summary judgment dismissing a City Human Rights Law claim can be granted "only if the defendant demonstrates that it is entitled to summary judgment under both [the *McDonnell Douglas* burden-shifting framework and the 'mixed-motive' framework]" (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 113 [1st Dept 2012]).

Under the *McDonnell Douglas* framework, a plaintiff asserting a claim of employment discrimination bears the initial burden of establishing a prima facie case, by showing that she is a member of a protected class, she was qualified to hold the position, and that she suffered adverse employment action under circumstances giving rise to an inference of discrimination (*id.* at 113). If the plaintiff makes such a showing, the burden shifts to the employer to show a legitimate, nondiscriminatory reason for the employment decision (*id.* at 113-114). If the employer succeeds in doing so, the burden then shifts back to the plaintiff to prove that the reason proffered by the employer was merely a pretext for discrimination (*id.* at 114). Under the "mixed-motive" framework, "the question on summary judgment is whether there exist triable issues of fact that discrimination was one of

the motivating factors for the defendant's conduct" (*Williams*, 61 AD3d at 78 n 27). Thus, under this analysis, "the employer's production of evidence of a legitimate reason for the challenged action shifts to the plaintiff the lesser burden of raising an issue as to whether the [adverse employment] action was motivated at least in part by . . . discrimination" (*Melman*, 98 AD3d at 127 [internal quotation marks omitted]).

Applying these principles, we find that the motion court properly dismissed plaintiffs' claims of gender discrimination under the City Human Rights Law. At the outset, the federal court's decision collaterally estops plaintiffs from relitigating many discrete factual issues that were decided against them in the federal action. The doctrine of collateral estoppel precludes a party "from relitigating in a subsequent action an issue clearly raised and decided against that party in a prior action" (see *Ji Sun Jennifer Kim v Goldberg, Weprin, Finkel, Goldstein, LLP*, 120 AD3d 18, 23 [1st Dept 2014]). To successfully invoke this doctrine, "the issue in the second action must be identical to an issue which was raised, necessarily decided and material in the first action," and "the party to be precluded must have had a full and fair opportunity to litigate the issue in the earlier action" (*id.*).

In *Simmons-Grant v Quinn Emanuel Urquhart & Sullivan, LLP* (116 AD3d 134 [1st Dept 2014]), this Court applied the doctrine of collateral estoppel in the context of a state court litigation of a City Human Rights Law claim following a federal court's dismissal of a similar claim brought under federal law. In that case, we concluded that collateral estoppel can apply to "strictly factual question[s] not involving application of law to facts or the expression of an ultimate legal conclusion" (*id.* at 140). As explained further herein, plaintiffs are precluded from relitigating many "strictly factual" issues underlying their City Human Rights Law claims.

Viewing the evidence in the light most favorable to plaintiffs, no reasonable jury could find defendants liable under either the *McDonnell Douglas* or "mixed-motive" frameworks. Defendants do not dispute, for purposes of this appeal, that plaintiffs have made out a prima facie case of gender discrimination. Likewise, plaintiffs do not challenge on appeal the motion court's finding that defendants articulated legitimate nondiscriminatory reasons for including them in the layoffs. There is no question that a reduction in force undertaken for economic reasons is a nondiscriminatory basis for employment

terminations (*see Matter of Laverack & Haines v New York State Div. of Human Rights*, 88 NY2d 734, 738-739 [1996]; *Sheikh v Habib Bank*, 270 AD2d 107, 108 [1st Dept 2000]).

Further, defendants have proffered evidence showing that plaintiffs were included in the layoffs due to their poor work performance (*see Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 45-46 [1st Dept 2011] [unsatisfactory work performance is a nondiscriminatory motivation]). Specifically, defendants point to evidence showing that, based on objective standards, Hudson's performance was the weakest compared to the other Stage II trainees with one to three months length of service. Likewise, defendants put forth evidence showing that, based on similar objective standards, Kuo was the weakest performer in her group of Stage II trainees having six or more months length of service.

Even when analyzed under the more liberal City Human Rights Law, no reasonable jury could conclude that defendants' nondiscriminatory reasons for laying off plaintiffs were pretextual, or that gender discrimination played any role in those decisions. Plaintiffs argue that gender played a factor in the layoff decisions because they performed better than similarly situated male trainees who were not laid off. Collateral estoppel precludes this claim. The federal court specifically

found that there was "no evidence of male comparators to Hudson being treated differently," that "[n]o other . . . trainees [within the same length of service group] had nearly as poor performance data as Hudson," and that "[Hudson's] performance metrics were a far cry from those of any trainee who ultimately survived the [layoffs]". Likewise, with respect to Kuo, the federal court found that "[w]ithin her [length of service] group, Kuo had the weakest performance record, having met her hurdles" only 50% of the time.

Plaintiffs complain that the methodology used by Meshel and Roccanova to decide who would be let go shows pretext because it did not precisely follow corporate management's directives. Regardless of whether a different termination sequence might have made better business sense, there is no basis to conclude that gender played any role in the methodology employed. Nor can gender bias be inferred by the decision not to terminate three male trainees who were on the "no exceptions" list. These trainees were spared, after consultation with Human Resources personnel, due to extenuating circumstances. One of the men, JBC, was on medical leave for serious emotional problems; another, Joshua Young, had recently landed a multi-million dollar 401(k) account which would take him above the performance hurdles

once it was finalized; the third man, Shahe Galstian, had a sponsorship agreement with a female financial advisor whereby credit for business she brought in could be transferred to him to make up for his shortfalls. Neither Hudson nor Kuo had circumstances even remotely comparable to these, and no reasonable jury could conclude that these men were spared, and plaintiffs were terminated, on the basis of gender.

Plaintiffs contend that Meshel and Roccanova failed to credit Kuo with certain business not reflected in her performance figures, but considered similar unreflected business for Joshua Young, who was not laid off. Any claim that Meshel and Roccanova had actual knowledge of Kuo's alleged business is precluded by collateral estoppel. The federal court found that Kuo had not presented "any evidence that Meshel and Roccanova *knew* that the data reflected in the reports for Kuo, on which the decision to terminate her was made, were inaccurate." In contrast, the federal court found that Roccanova had actual knowledge of Young's unreflected business, a finding that also is entitled to preclusive effect. The absence of actual knowledge renders baseless plaintiffs' claim that Meshel and Roccanova ignored Kuo's additional business.

There is insufficient support for plaintiffs' contention

that the layoff decisions were infected by a purported office-wide culture of gender bias. Collateral estoppel precludes plaintiffs from arguing that male trainees were provided better mentoring and teaming opportunities than women. The federal court specifically found that plaintiffs had adduced no evidence to support this claim. Even if some managers made inappropriate gender-based comments, under the circumstances, they constitute at most stray remarks which, "even if made by a decision maker, do not, without more, constitute evidence of discrimination" (*Melman*, 98 AD3d at 125; *see Godbolt v Verizon N.Y. Inc.*, 115 AD3d 493, 494-495 [1st Dept 2014], *lv denied* 24 NY3d 901 [2014]). Although the subject matter of a book promoted at a firm event could be viewed as inappropriate, the event took place eight months prior to the layoffs, negating any causal nexus between the two (*see id.*).

Finally, plaintiffs' reliance on statistics as evidence of pretext or bias is unavailing, because the sample sizes are "too small to support an inference of discrimination" (*Armstrong v Sensormatic/ADT*, 100 AD3d 492, 493 [1st Dept 2012]). In any event, in the absence of other evidence of gender discrimination, the statistics alone are insufficient to defeat summary judgment. We also note that roughly half of those terminated were men.

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

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

ENTERED: APRIL 14, 2016

CLERK

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

595 In re Steven Banks, etc., Index 500033/15
Petitioner-Respondent,

Gwendolyn R.,

A Person Alleged to Be Incapacitated,
Respondent-Appellant.

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Marvin Bernstein, Mental Hygiene Legal Service, New York (Margo Flug of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Laura Visitación-Lewis, J.), entered June 23, 2015, which, to the extent appealed from as limited by the briefs, appointed a guardian over the person and property of the alleged incapacitated person, Gwendolyn R. (the AIP), pursuant to article 81 of the Mental Hygiene Law (the MHL), unanimously reversed, on the law and the facts and in the exercise of discretion, without costs, the matter remanded for the immediate appointment of a temporary guardian and a new hearing at which the AIP is afforded an opportunity to be present.

After multiple failed attempts to personally serve the AIP, the AIP was properly served with process by alternate means pursuant to court order (MHL § 81.07[e][2][i]). The order to

show cause seeking the appointment of a guardian over the AIP and setting a hearing date was also served upon the AIP's court-appointed counsel.

At the hearing, which was on for the first time on March 12, 2015, the AIP was not present. Although she had indicated to the court evaluator that she intended to appear at the hearing, she advised her counsel at the last minute that she was not feeling well. Supreme Court conducted the hearing in the AIP's absence, finding that the AIP had notice of the hearing and that she had "waived" her attendance at the hearing.

MHL § 81.11(c) provides that a hearing to determine whether the appointment of a guardian is necessary for an AIP "must be conducted in the presence of the person alleged to be incapacitated," including at the AIP's place of residence if necessary. There is an "overarching value in a court having the opportunity to observe, firsthand, the allegedly incapacitated

person" (*Matter of Levy v Davis*, 302 Ad2d 309, 312 [1st Dept 2003]; *see also Matter of Lillian U.*, 66 AD3d 1219 [3rd Dept 2009]). Accordingly, we remand the matter for a hearing at which the AIP should be afforded an opportunity to be present.

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

ENTERED: APRIL 14, 2016

CLERK

Sweeny, J.P., Richter, Manzanet-Daniels, Gische, JJ.

501 Donna Jean Weston, Index 305174/12
Plaintiff-Respondent,

-against-

Fidel R. Castro,
Defendant-Appellant.

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Brand Glick & Brand, P.C., Garden City (Kenneth Finkelstein of counsel), for appellant.

The Altman Law Firm PLLC, New York (Michael T. Altman of counsel), for respondent.

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Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered October 2, 2014, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff injured her ankle when, while riding as a passenger in the back seat of defendant's livery cab, she claims the vehicle came to an abrupt stop. Plaintiff further claims the stop propelled her body forward, causing her right leg to jam under the front passenger seat. At her deposition, plaintiff admitted that she could not provide an account of the sequence of events culminating in the accident because she was not paying attention. Defendant moved for summary judgment, relying on the emergency doctrine, claiming that another car unexpectedly cut in

front of him from the right, which required him to immediately apply his brakes to avoid a collision. We agree with the motion court that, notwithstanding defendant's present account of the accident, there are issues of fact regarding whether the stop was necessitated by an emergency that was not of defendant's own making.

The emergency doctrine will prevent a finding of negligence against a driver confronted by a sudden and unexpected situation that leaves little time for thought, deliberation or consideration, provided, however, that the driver's actions were reasonably prudent under emergent circumstances, and s/he did not create or contribute to the emergency (*Caristo v Sanzone*, 96 NY2d 172, 174 [2001], *Dattilo v Best Transp. Inc.*, 79 AD3d 432 [1st Dept 2010]). The existence of an emergency and reasonableness of a party's response to the situation ordinarily present questions of fact (Green v Metropolitan Transp. Auth. Bus Co., 26 NY3d 1061 [2015] *revg* 127 AD3d 421 [1st Dept 2015]; *Cahoon v Frechette*, 86 AD3d 774 [3rd Dept 2011]; *Bello v Transit Auth. of N.Y.*, 12 AD3d 58, 60 [2nd Dept 2004]).

Defendant claims on this motion that being cut off by a car while he was traveling in the left lane of the Major Deegan Expressway constituted an emergency necessitating him to suddenly

and forcefully apply his brakes. Over time, however, defendant gave varying accounts, under oath, about this accident. During an examination under oath he testified that he was driving in the left lane on the Expressway at a rate of 40-45 miles per hour in light traffic when he was cut off by car from the center lane, which forced him to apply the brakes and bring the car to a complete stop to avoid striking the offending vehicle. At his deposition, however, defendant stated that "nothing out of the ordinary happened" on the day in question and that there had been no incident. He testified that after being cut off by a vehicle that entered his lane of travel from the right, he reacted by decelerating from about 35 to 40 miles an hour to 20 miles an hour, but that he never stopped. He explained that he only exerted moderate force on the brakes. Defendant also gave contradictory accounts about whether the force of the stop propelled plaintiff forward. In view of the discrepancies in defendant's own testimony with respect to the details of the accident, the court cannot conclude as a matter of law that there was an emergency that absolves a finding of liability against defendant at this point in the litigation *(Green*, 26 NY3d at 1062).

In addition, the parties gave conflicting accounts of the

force of the stop, even disputing whether it was a stop at all, creating an issue of fact regarding whether the rapid change in speed was unusual or violent, as opposed to the commonplace "jerks and jolts" of city travel (*Fonseca v Manhattan & Bronx Surface Tr. Operating Auth*, 14 AD3d 397, 398 [1st Dept 2005]; *Phillipps v New York City Tr. Auth.*, 83 AD3d 473 [1st Dept 2011]).

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

ENTERED: APRIL 14, 2016

CLERK

Mazzarelli, J.P., Renwick, Manzanet-Daniels, Kapnick, JJ.

87 Vista Food Exchange, Inc., Index 652572/13
Plaintiff-Appellant,

-against-

BenefitMall also known as Centerstone Insurance and Financial Services, et al.,
Defendants-Respondents.

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Jonathan C. Scott, P.C., Bronx (Jonathan C. Scott of counsel), for appellant.

Vedder Price P.C., New York (Marc B. Schlesinger of counsel), for BenefitMall, Michael Brachlow and Erin Brachlow, respondents.

Gana LLP, New York (Daniel Gwertzman of counsel), for Dinesmore/Steele and Rodney Steele, respondents.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about June 10, 2014, which granted defendants' motions to dismiss the complaint, with leave to file an amended complaint as to the breach of contract claim against the corporate defendants only, and order, same court and Justice, entered on or about November 10, 2014, which granted defendants' motions to dismiss plaintiff's amended complaint, unanimously affirmed, without costs.

Plaintiff alleges that it relied on defendants' advice in outsourcing its human resources and benefits functions to a third

party recommended by defendants. The third party allegedly accepted funds from plaintiff for the payment of its payroll taxes, but failed to make such payments to the taxing authorities before becoming insolvent.

First, the court correctly dismissed the breach of contract claims asserted in the amended complaint, because the amended complaint does not sufficiently allege that there was consideration to support the alleged oral contract. Consideration sufficient to create a contract "consists of either a benefit to the promisor or a detriment to the promisee" (*Weiner v McGraw-Hill, Inc.*, 57 NY2d 458, 464 [1982]). Here, plaintiff, or the alleged promisee, claims that on the advice of defendants, it decided not to hire a different third-party company to perform its human resources and payroll services, and instead hired the company that defendants recommended. However, it is not alleged that this purported detriment was required by defendants as a condition of their promising to give advice, or was otherwise necessary to consummate the transaction, and, therefore, cannot serve as the requisite consideration needed to form a contract (22 NY Jur 2d, Contracts § 76). Similarly, there are no allegations that defendants, the alleged promisors, received a direct benefit, monetary or otherwise, in exchange for their

promise to provide advice. To the extent defendants received payments from the recommended third party rather than from plaintiff directly, such payments provide a benefit that is too remote or indirect to constitute consideration (*Trans Intl. Corp. v Clear View Tech.*, 278 AD2d 1, 1 [1st Dept 2000]).

Even if an enforceable contract had been formed between the parties here, plaintiff's breach of contract claim would still fail because plaintiff has failed to properly plead general or special damages. Plaintiff's alleged damages (namely, its potential incurment of tax penalties and other liabilities due to the third party's failure to pay plaintiff's taxes) do not directly flow from and are not the "natural and probable consequence" of defendants' alleged breach, and, therefore, do not qualify as general damages (*Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y.*, 10 NY3d 187, 192 [2008] [internal quotation marks omitted], *rearg denied* 10 NY3d 890 [2008]). Moreover, the allegations in the amended complaint fail to allege special damages because there are no allegations that defendants foresaw, or should have foreseen, the alleged damages, prior to or at the time the alleged contract was made (*id.* at 192-193).

The motion court correctly dismissed plaintiff's claim for breach of the implied covenant of good faith and fair dealing,

because it cannot be used as a substitute for plaintiff's nonviable breach of contract claim (*Smile Train, Inc. v Ferris Consulting Corp.*, 117 AD3d 629, 630 [1st Dept 2014]).

Because plaintiff did not allege defendants' violation of a legal duty independent of a contract, the motion court correctly dismissed the promissory estoppel claim in the amended complaint and the negligence/negligent misrepresentation claim in the original complaint (*MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 842-843 [1st Dept 2011][promissory estoppel], *lv denied* 21 NY3d 853 [2013]; *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987][negligence]). Further, plaintiff failed to support its negligent misrepresentation claim with sufficient allegations of "a special or privity-like relationship imposing a duty on the defendant[s] to impart correct information to the plaintiff," or that the information imparted by defendants was incorrect (*J.P. Morgan Sec. Inc. v Ader*, 127 AD3d 506, 506 [1st Dept 2015][internal quotation marks omitted]).

To the extent plaintiff has not abandoned the issue on appeal, it failed to state a claim for professional malpractice because, under New York law, defendants are not professionals (*see Chase Scientific Research v NIA Group*, 96 NY2d 20, 29-30

[2001]). Further, plaintiff failed to state a claim for breach of fiduciary duty, since there are no allegations in the complaint that defendants misled plaintiff by making false misrepresentations (*see Roni LLC v Arfa*, 74 AD3d 442, 444 [1st Dept 2010], *affd* 18 NY3d 846 [2011]).

The allegations in the complaint and the amended complaint are insufficient to support any claim against the individual defendants (*Chestnut Hills Partners, LLC v Van Raalte*, 45 AD3d 434, 435 [1st Dept 2007]). We have considered plaintiff's remaining contentions and find them unavailing.

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

ENTERED: APRIL 14, 2016

CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Gische, Webber, JJ.

822 The People of the State of New York, Ind. 571/13
Respondent,

-against-

Lamont Simmons,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered June 24, 2014, convicting defendant, upon his plea of guilty, of criminal facilitation in the fourth degree, and sentencing him to a conditional discharge, unanimously affirmed.

Defendant's challenges to the court's discussion of his rights under *Boykin v Alabama* (395 US 238 [1969]) do not fall within the narrow exception to the preservation requirement (*see People v Conceicao*, 26 NY3d 375, 382 [2015]), and we decline to review these unpreserved claims in the interest of justice. As an alternative holding, we find no basis for reversal. The plea was knowing, intelligent and voluntary (*see People v Tyrell*, 22 NY3d 359, 365 [2013]; *People v Harris*, 61 NY2d 9, 16-19 [1983]),

despite the absence of a full enumeration of the *Boykin* rights (*see People v Sougou*, 26 NY3d 1052 [2015]).

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

ENTERED: APRIL 14, 2016

CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Gische, Webber, JJ.

823 Diane Ortalano, et al., Index 23278/14
Plaintiffs-Appellants,

-against-

Yu He, et al.,
Defendants-Respondents.

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Raneri, Light, Sarro & O'Dell, PLLC, White Plains (Kevin D. O'Dell of counsel), for appellants.

Law Offices of John Trop, Yonkers (David Holmes of counsel), for respondents.

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Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered December 22, 2014, which conditionally granted defendants' motion to dismiss the complaint pursuant to CPLR 327(a), unanimously affirmed, without costs.

Plaintiffs, Pennsylvania residents, commenced this action in Bronx County against defendants, New Jersey residents, for alleged injuries arising out of a motor vehicle accident in Orange County, New York. Supreme Court providently exercised its discretion in dismissing the complaint based upon the doctrine of forum non conveniens (*see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], *cert denied* 469 US 1108 [1985]). Defendants established that the only link between plaintiffs' lawsuit and New York State was the accident's occurrence here.

This "adventitious circumstance" (*Martin v Mieth*, 35 NY2d 414, 418 [1974]), does not suffice to provide the substantial nexus required to warrant the retention of jurisdiction in New York State (*see Fajardo v Alejandro*, 126 AD3d 644 [1st Dept 2015]; *Economos v Zizikas*, 18 AD3d 392, 394 [1st Dept 2005]).

It is noted that defendants consented to the conditions imposed by Supreme Court of accepting service of process in the alternative forum of New Jersey and tolling the statute of limitations in that state.

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

ENTERED: APRIL 14, 2016

CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Gische, Webber, JJ.

824 In re Isabel T.,
Petitioner-Appellant,

-against-

Lucien W.,
Respondent-Respondent.

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Tennille M. Tatum-Evans, New York, for appellant.

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Order, Family Court, New York County (Mary E. Bednar, J.), entered on or about March 17, 2015, which, after a fact-finding hearing, dismissed petitioner's family offense petition against respondent, unanimously affirmed, without costs.

Petitioner failed to establish, by a fair preponderance of the evidence, that respondent had committed the family offenses of harassment in the second degree and disorderly conduct (*Matter of Tamara A. v Anthony Wayne S.*, 110 AD3d 560, 560 [1st Dept 2013]). Family Court found neither party to be credible, and its finding is supported by the record and entitled to deference (*see*

Matter of Buskey v Buskey, 133 AD3d 655, 656 [2d Dept 2015]).

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

ENTERED: APRIL 14, 2016

CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Gische, Webber, JJ.

826 In re Chaundra Peterson, Index 100995/14
Petitioner-Appellant,

-against-

Shola Olatoye, etc.,
Respondent-Respondent.

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Joan L. Beranbaum, New York, for petitioner.

David I. Farber, New York (Seth E. Kramer of counsel), for respondent.

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Determination of New York City Housing Authority (NYCHA), dated July 31, 2014, which, after a hearing, denied petitioner's grievance for succession rights as a remaining family member to the tenancy of her deceased grandmother, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Michael D. Stallman, J.], entered December 19, 2014), dismissed, without costs.

NYCHA's determination is supported by substantial evidence (see 300 Gramatan Ave. Assoc. v State Div. of Human Rights, 45, NY2d 176, 181-182 [1978]). The record shows that petitioner's grandmother, the tenant of record, never obtained NYCHA's written consent for petitioner's permanent occupancy (*see Matter of*

Lieder v New York City Hous. Auth., 129 AD3d 644, 644 [1st Dept 2015]). Even if NYCHA had granted the tenant's request to add petitioner as a permanent household member in 2005, petitioner would not be entitled to succession rights, because she vacated the apartment in 2007 to live with her new husband, and did not receive written permission to rejoin the apartment after she purportedly returned in 2008 (*see Matter of Vereen v New York City Hous. Auth.*, 123 AD3d 478, 479 [1st Dept 2014]). Petitioner's claim that she would not have vacated the apartment had the 2005 request been granted is speculative. Further, even if NYCHA had granted written consent in 2012, petitioner could not satisfy the one-year residency requirement because her grandmother died less than a year later (*id.*).

Petitioner may not invoke the doctrine of estoppel against NYCHA (*see id.*), and her mitigating factors do not provide a basis for annulling NYCHA's determination (*see id.*).

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

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

ENTERED: APRIL 14, 2016

CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Gische, Webber, JJ.

827 The People of the State of New York, Ind. 399/13
Respondent,

-against-

Reginald Claverie,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered May 28, 2013 convicting defendant, upon his plea of guilty, of burglary in the third degree and sentencing him to a term of nine months, unanimously affirmed.

The court providently exercised its discretion in denying defendant's motion to withdraw his guilty plea. Defendant received the precise sentence that had been promised by the court. Moreover, during the plea colloquy, defendant had acknowledged that no other promises had been made. Defendant's misunderstanding of the number of additional days he would have to serve after pleading guilty was based on alleged off-the-

record discussions and does not warrant vacatur of the plea (*see People v Ramos*, 63 NY2d 640, 642-643 [1984]).

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

ENTERED: APRIL 14, 2016

CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Gische, Webber, JJ.

830 The People of the State of New York, Ind. 667/12
Respondent,

-against-

Irving Ayala,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Jahaan Shaheed of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered March 20, 2014, 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: APRIL 14, 2016

CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Gische, Webber, JJ.

831 Bank of America, N.A., successor by merger to Bac Home Loan Servicing LP,
Plaintiff-Respondent,

-against-

Binu Thomas, et al.,
Defendants-Appellants,

MERS as nominee for
Countrywide Bank, FSB, et al.,
Defendants.

Index 35039/12

_____

Charles Wallshein, Melville, for appellants.

Bryan Cave LLP, New York (Elizabeth J. Goldberg of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered November 24, 2014, which, to the extent appealed from as limited by the briefs, granted plaintiff bank's motion for summary judgment of foreclosure, unanimously reversed, on the law, without costs, and the motion denied.

As a preliminary matter, we can consider defendants' legal arguments attacking plaintiff's prima facie showing raised for the first time on appeal (*see Chateau D'If Corp. v City of New York*, 219 AD2d 205, 209-210 [1st Dept 1996], *lv denied* 88 NY2d 811 [1996]). Defendants are correct that, generally, an assignment of a mortgage by MERS does not convey the note (*see*

Bank of N.Y. v Silverberg, 86 AD3d 274, 283 [2nd Dept 2011]). While physical delivery of the note can serve as a separate basis to establish standing in a foreclosure action (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355 [2015]), plaintiff has not satisfied its burden of proving that the note is in its possession or that it was delivered prior to the commencement of this action.

Even if plaintiff's employee's affidavit sufficiently laid the foundation for the admission of the note as business record (*see* CPLR 4518[a]), the note itself was not made part of the record (despite being referred to as an exhibit). In addition, although plaintiff's employee swears that based upon this review of business records, he knows that the note was delivered prior to the commencement of this action, the records relied upon for this conclusion are neither provided nor otherwise identified. Moreover, the absence of the note and nonconclusory information about its delivery makes it impossible to determine whether it was delivered from a holder, or plaintiff's standing (*see US Bank N.A. v Madero*, 125 AD3d 757, 757-758 [2d Dept 2015]); *JP Morgan*

Chase Bank, N.A. v Hill, 133 AD3d 1057, 1058-1059 [3rd Dept 2015]); *cf. Aurora Loan Servs. at* 360 [note and allonge attached to affidavit]).

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

ENTERED: APRIL 14, 2016

CLERK

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

832-
833 Index 100675/12

Rebecca S. Serdans,
Plaintiff-Respondent-Appellant,

-against-

The New York and Presbyterian Hospital,
Defendant-Appellant-Respondent.

_____

Epstein Becker & Green, P.C., New York (Frank C. Morris, Jr. of the bar of District of Columbia and the State of Pennsylvania, admitted pro hac vice, of counsel), for appellant-respondent.

Derek Smith Law Group, PLLC, New York (Derek T. Smith of counsel), for respondent-appellant.

_____

Judgment, Supreme Court, New York County (Donna M. Mills, J.), entered September 11, 2015, upon a jury verdict awarding plaintiff the principal sum of $4,050,000 in compensatory and punitive damages, unanimously modified, on the law and the facts, to vacate the award of punitive damages, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered July 8, 2015, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The liability verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see Cohen v Hallmark Cards*, 45 NY2d 493, 498-499 [1978]). Evidence of continued attempts by her supervisors to assign plaintiff to

areas outside the cardio-thoracic intensive care unit (CTICU), combined with evidence that defendant cancelled her requests for shifts with increased frequency after granting her the accommodation allowing her to work exclusively in the CTICU, supports the jury's conclusion that defendant failed to implement the agreed-upon accommodation.

The award for compensatory damages does not deviate materially from what would constitute reasonable compensation to the extent indicated (CPLR 5501[c]; *see e.g. Albunio v City of New York*, 67 AD3d 407 [1st Dept 2009], *affd on other grounds* 16 NY3d 472 [2011]).

Defendant's contention that plaintiff's claims for disability discrimination pursuant to the New York State Human Rights Law (Executive Law § 296) and New York City Human Rights Law (Administrative Code of the City of New York § 8-107) are barred by the exclusivity provisions of the Workers' Compensation Law is an improper attempt at reargument (*see Serdans v New York & Presbyt. Hosp.*, 112 AD3d 449, 451 [1st Dept 2013]) and in any event without merit (*Belanoff v Grayson*, 98 AD2d 353, 357-358 [1st Dept 1984]; *Matter of Grand Union Co. v Mercado*, 263 AD2d 923, 925 [3d Dept 1999]).

The trial court correctly refused to charge the jury on

assumption of risk. Meaningful review of defendant's argument that the court erred in admitting certain videos into evidence is precluded by the apparent absence of the videos from the record.

We see no basis for punitive damages. While it may be reasonably concluded from the evidence that defendant's employees did not fully appreciate the nature of plaintiff's condition or adequately communicate the accommodation in an effective or efficient manner, the evidence does not support the conclusion that defendant engaged in intentional conduct with malice or a reckless indifference to plaintiff's rights (*see Jordan v Bates Adv. Holdings, Inc.*, 11 Misc 3d 764, 776-777 [Sup Ct, NY County 2006], citing *Kolstad v American Dental Assn.*, 527 US 526, 529-530 [1999]).

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

ENTERED: APRIL 14, 2016

CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Gische, Webber, JJ.

834 The People of the State of New York, Ind. 5446/10
Respondent,

-against-

David Solano,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Stephen S. Mar of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Beth F. Cohen of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J. at suppression hearing and expert witness application; Cassandra M. Mullen, J. at jury trial and sentencing), rendered November 29, 2010, as amended December 14, 2012, convicting defendant of two counts of robbery in the first degree, two counts of robbery in the second degree, three counts of burglary in the second degree and three counts of grand larceny in the fourth degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 25 years to life, unanimously affirmed.

The court properly denied defendant's suppression motion. The police searched defendant's phone by means of a valid warrant based on probable cause that was independent of a prior unlawful search of the phone for contact information, made when a

detective mistook it for the phone of a codefendant, who had consented to such a search (*see People v Arnau*, 58 NY2d 27 [1982]). The decision to obtain a warrant was not prompted by what was discovered in the initial search, and the circumstances were far removed from the type of exploitation of illegality discussed in *People v Marinez* (121 AD3d 423 [1st Dept 2014]). In any event, any error in this regard was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). Evidence obtained from defendant's phone added little to the People's overwhelming case, which included the victim's testimony that he recognized the voice of his masked assailant as that of defendant, with whom he had worked closely for approximately two months, and which also included a chain of compelling circumstantial evidence.

The motion court properly exercised its discretion in denying defendant's application to present an expert witness on voice identification. The case did not turn on the accuracy of the voice identification, because there was extensive, competent corroborating evidence (*see People v Santiago*, 17 NY3d 661, 669-671 [2011]). Defendant's efforts to downplay the strong circumstantial evidence are unavailing.

The trial court, which gave an expanded instruction on identification that it adapted for voice identifications,

properly exercised its discretion in declining to add language relating to cross-racial identification. Defendant has not shown how a difference in race would affect an identification of a masked suspect, made entirely by voice, and by a witness who was very familiar with the voice.

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 14, 2016

CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Gische, Webber, JJ.

835-
836-
837 In re Nadia S.,

A Child Under Eighteen Years
of Age, etc.,

Ron S., et al.,
Respondents-Appellants,

-against-

Administration for Children's Services,
Petitioner-Respondent.

_____

Bruce A. Young, New York, for Ron S., appellant.

Andrew J. Baer, New York, for Melanie H., appellant.

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

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

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Order, Family Court, New York County (Susan K. Knipps, J.), entered on or about February 13, 2015, which, upon a fact-finding determination that respondent parents neglected the subject child, transferred custody and guardianship of the child to petitioner until the next permanency hearing, and directed the parents to comply with various services, consistently visit the child, and keep ACS apprised of their whereabouts, unanimously

affirmed, without costs.

Parents have an affirmative nondelegable duty to provide their children with adequate medical care. The level of care required is the "degree of care exercised by ordinarily prudent loving parents who are anxious for the well-being of their child" (*Matter of Faridah W.*, 180 AD2d 451, 452 [1st Dept 1992], *lv denied* 80 NY2d 751 [1992]).

The court properly found that the parents medically neglected the child, who was excessively underweight, by failing to comply with the recommendations of the child's doctor or seek other medical advice, and by not returning the child for diagnosis and treatment for almost six months *see Matter of Ronald Anthony G. [Samantha J.]*, 83 AD3d 608 [1st Dept 2011]). The child's doctor testified to the possible long-term consequences of their neglect to treat the child's failure to gain weight.

The court also properly concluded that the child was neglected by the parents by reason of the father's untreated mental illness, which was documented by the records of the hospital where he was involuntarily committed for almost two weeks and which diagnosed that he suffered from psychosis. The mother admitted to a caseworker and hospital staff that she was

aware that he was acting strangely, that she did not want him to kiss the child because she was afraid that he might bite the child, and that he engaged in a monologue with himself for two hours, displayed mood instability, and had angry outbursts. Despite this knowledge, she left the child in the father's care while she worked. The court properly drew a negative inference from her failure to testify (*see Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 79 [1995]).

The court correctly determined that the child was also neglected by the father's admitted use of marijuana almost every day and his refusal to seek treatment (*see Matter of Elijah J. [Yvonda M.]*, 105 AD3d 449 [1st Dept 2013]).

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

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

ENTERED: APRIL 14, 2016

CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Gische, Webber, JJ.

838 Paul Krebaum, Index 304087/12
Plaintiff-Appellant,

-against-

Capital One, N.A., et al.,
Defendants-Respondents.

_____

McQuade & McQuade, New York (Michael McQuade of counsel), for appellant.

Jackson Lewis P.C., New York (Lori D. Bauer and Ravindra K. Shaw of counsel), for respondents.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered March 18, 2015, which granted defendants' motion for summary judgment dismissing plaintiff's complaint, unanimously modified, on the law, to deny the motion with respect to plaintiff's claims of age discrimination and retaliation under the New York State Human Rights Law (State HRL) and the New York City Human Rights Law (City HRL), and otherwise affirmed, without costs.

Upon review of the evidence in the light most favorable to plaintiff (*see Udoh v Inwood Gardens, Inc.*, 70 AD3d 563, 565 [1st Dept 2010]), we find that plaintiff made a prima facie showing of age discrimination under both the State HRL and the City HRL and that he raised issues of fact as to whether defendants' purported

reason for terminating his employment was false or pretextual (*Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 43-44 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]; *Ferrante v American Lung Assn.*, 90 NY2d 623, 629-631 [1997]). Plaintiff asserted that for five months before the termination of his employment, he endured repeated negative comments about his age from his manager. His coworker's affidavit supported his position. Moreover, after his discharge, plaintiff, 58 years old at the time of his termination, was allegedly replaced by a 25 year old. Taken together, the evidence supports an inference of age discrimination (*see Viola v Philips Med. Sys. of N. Am.*, 42 F3d 712, 718 [2d Cir 1994]). Moreover, the evidence does not establish that plaintiff violated defendant Capital One's Code of Business Conduct and Ethics, and therefore issues of fact exist as to whether defendants' purported reason for terminating plaintiff's employment was false or pretextual. Accordingly, the motion court erred in granting defendants' motion for summary judgment dismissing plaintiff's age discrimination claims.

The motion court also erred in dismissing plaintiff's retaliation claim. The evidence showed that plaintiff engaged in a protected activity (namely, his complaint of age discrimination to human resources), that his employer was aware that he

participated in such an activity, that plaintiff suffered an adverse employment action (that is, the termination of his employment), and that there is a causal connection between the protected activity and the adverse action (*Bendeck v NYU Hosps. Ctr.*, 77 AD3d 552, 553 [1st Dept 2010]). The temporal proximity of plaintiff's complaint and the termination of his employment one month later indirectly shows the requisite causal connection (*Cifra v General Elec. Co.*, 252 F3d 205, 217 [2d Cir 2001]). Moreover, as noted, issues of fact exist as to whether defendants' proffered explanation for plaintiff's termination was merely pretextual (*id.* at 216).

Plaintiff has abandoned his hostile work environment claim (*see McHale v Anthony*, 41 AD3d 265, 266-267 [1st Dept 2007]).

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

ENTERED: APRIL 14, 2016

CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Gische, Webber, JJ.

839 Cruz Suarez, et al., Index 150374/14
Plaintiffs-Appellants-Respondents,

-against-

Axelrod Fingerhut & Dennis, et al.,
Defendants-Respondents-Appellants,

Turin Housing Development
Fund, Co., Inc., et al.,
Defendants-Respondents.

_____

Bierman & Associates, New York (Mark H. Bierman of counsel), for appellants-respondents.

L' Abbate, Balkan, Colavita & Contini, L.L.P., Garden City (Noah Nunberg of counsel), for respondents-appellants.

Lewis Brisbois Bisgaard & Smith LLP, New York (Jaime R. Wozman of counsel), for Turin Housing Development Fund, Co., Inc., Richard J. Thomas, Harvey Minsky, Ellen Durant, Martha Miller, Linda Burstion, Angela Faison-Strobe, Jacqueline Seidenberg, Evelyn Rivera and Veronica Jimenez, respondents.

Cantor, Epstein & Mazzola, LLP, New York (Gary Ehrlich of counsel), for Douglas Elliman Property Management, Deborah Hassell-Dobies and Patricia Pettway-Brown, respondents.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered January 30, 2015, which, insofar as appealed from as limited by the briefs, denied plaintiffs' motion for summary judgment as to liability on the cause of action for wrongful eviction in plaintiffs Alix and Brea's favor and the causes of action for breach of the covenant of quiet enjoyment, breach of

fiduciary duty, conversion, trespass to chattels, and breach of contract, and for treble damages under RPAPL 853, and, upon a search of the record, granted summary judgment dismissing the causes of action for breach of the covenant of quiet enjoyment, conversion, and trespass to chattels, and granted plaintiffs' motion for summary judgment dismissing defendant Axelrod Fingerhut & Dennis's (Axelrod) affirmative defenses of lack of standing, lack of fiduciary duty and lack of privity, unanimously modified, on the law, to grant plaintiffs summary judgment as to liability on the cause of action for wrongful eviction on behalf of Alix and Brea as against defendant Turin Housing Development Fund, Co., Inc. and its individual board members (the Turin defendants), to grant summary judgment, upon a search of the record, dismissing the cause of action for breach of fiduciary duty, and to deny plaintiffs' motion as to Axelrod's affirmative defenses of lack of standing and lack of privity, and otherwise affirmed, without costs.

The record demonstrates conclusively that the eviction of plaintiffs Alix and Brea by the Turin defendants was wrongful, inasmuch as they were unrefutedly known occupants of the apartment. Thus, Alix and Brea are entitled to summary judgment on the cause of action for wrongful eviction as against the Turin

defendants. However, issues of fact preclude summary judgment on that cause of action as against the remaining defendants, and with respect to plaintiffs' other causes of action, including the claim for breach of contract. The court also correctly denied plaintiffs summary judgment on their claim for treble damages under RPAPL 853 on the ground that the amount of the claim must be evaluated upon a full record (*see Mayes v UVI Holdings*, 280 AD2d 153 [1st Dept 2001]).

The court correctly dismissed the causes of action for breach of the covenant of quiet enjoyment, conversion, and trespass to chattels since in the specific context of a wrongful eviction action these claims "do not constitute cognizable causes of action but merely state demands for damages to be considered as elements of the statutory cause of action [wrongful eviction] upon which summary relief is sought" (*id.* at 161).

Upon a search of the record, we grant summary judgment dismissing the cause of action for breach of fiduciary duty. No such duty is owed to plaintiffs by any of the defendants (*see Peacock v Herald Sq. Loft Corp.*, 67 AD3d 442, 443 [1st Dept 2009]).

The court erred in dismissing Axelrod's affirmative defenses of lack of standing and lack of privity. These defenses are not

prima facie meritless with respect to the cause of action for negligence.

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

ENTERED: APRIL 14, 2016

CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Gische, Webber, JJ.

841 The People of the State of New York, Ind. 895N/09
Respondent,

-against-

Edward McLaughlin,
also known as Cookie Love,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered January 7, 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: APRIL 14, 2016

CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Gische, Webber, JJ.

842 Great American Insurance Company of New York, Plaintiff-Appellant, Index 157164/13

-against-

L. Knife & Son, Inc., et al., Defendants-Respondents.

Mound Cotton Wollan & Greengrass LLP, New York (Kevin F. Buckley of counsel), for appellant.

Mitchell Silberberg & Knupp, LLP, New York (Lauren J. Wachtler of counsel), for respondents.

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered April 20, 2015, which denied plaintiff's motion for summary judgment declaring the insurance policy it issued to defendants void ab initio and dismissing defendants' counterclaims, unanimously affirmed, with costs.

Plaintiff seeks to void ab initio the insurance policy it issued to defendants on the ground that defendants misrepresented the total insurable value (TIV) of the insured premises and its contents. The motion court correctly denied plaintiff's motion, since plaintiff failed to establish as a matter of law that defendants made any misrepresentation (*see generally 128 Hester LLC v New York Mar. & Gen. Ins.* Co., 126 AD3d 447, 447 [1st Dept

2015]). Although plaintiff's quotation for the policy contains the statement that it was basing the premium on the "$7 million TIV," defendants' broker did not provide any information on the insurance application regarding the TIV of the premises' contents. The broker submitted an affidavit stating that she recalled plaintiff's wholesale insurance broker asking her only to provide the amount of coverage desired and that "is precisely what [she] provided." Although the wholesale broker later sent plaintiff an email indicating the "contents value," an issue of fact exists as to whether the broker was acting on defendants' behalf. After plaintiff issued the policy, its own investigation of the property, which could have uncovered the TIV of the property and its contents, resulted in no underwriting activity, and other internal insurance company documents suggest that the decision to issue the policy and the premium charged were not tethered to the TIV.

There are also factual issues surrounding whether any purported misrepresentation would have been "material" such that it would have the effect of voiding the policy, which is "ordinarily a question of fact" (*Matter of Union Indem. Ins. Co.*

of N.Y., 200 AD2d 99, 107 [1st Dept 1994], *affd* 89 NY2d 94 [1996]). We have considered plaintiff's remaining contentions and find them unavailing.

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

ENTERED: APRIL 14, 2016

CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Gische, Webber, JJ.

843 In re Framboise Pastry Inc., et al., Petitioners, Index 101409/13

-against-

New York City Commission on Human Rights, et al., Respondents.

_____

Law Offices of Stewart Lee Karlin, P.C., New York (Stewart Lee Karlin of counsel), for petitioners.

Zachary W. Carter, Corporation Counsel, New York (Amy N. Okereke of counsel), for New York City Commission on Human Rights, respondent.

_____

Determination of respondent New York City Commission on Human Rights (the Commission), dated September 25, 2013, which, after a hearing, found that petitioners violated New York City Human Rights Law § 8-107(1)(a), and ordered them to pay $10,000 in compensatory damages to respondent Jamilah DaCosta, and $15,000 in civil penalties, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order, Supreme Court, New York County [Shlomo Hagler, J.], entered September 16, 2014), dismissed, without costs.

The untimely amendment of the complaints to name the

individual petitioners by their legal names, rather than nicknames followed by "Doe," was properly permitted in the absence of any prejudice.

The challenged determination is based on substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 179-182 [1978]). There is no basis to disturb the credibility determinations of the Administrative Law Judge (ALJ) (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]). The ALJ found that DaCosta credibly testified that petitioner Panagiota Meimetea, who co-owned petitioner Framboise Pastry Inc. (Framboise) with petitioner Ajith Saputhanthri, expressly declined to hire DaCosta for a counter position at a bakery because she was black. Petitioners' claim that DaCosta was rejected because she was unqualified was belied by petitioners' decision to interview her after she sent them her resume listing her extensive job experience, including as a waitress and bartender, without referring to any bakery experience.

The ALJ properly rejected the contention that there was no evidence that Framboise Pastry Inc. (Framboise) had at least four employees, as required to constitute an employer within the meaning of Human Rights Law § 8-102(5). Framboise failed to deny

its status as an employer, and the Commission's rules provide that "[a]ny allegation in the complaint not specifically denied or explained shall be deemed admitted unless good cause to the contrary is shown" (47 RCNY 1-14[b]). Even aside from that tacit admission, the evidence affirmatively showed that Framboise had at least four employees.

The compensatory damages and civil penalties are reasonable (*see Matter of New York City Tr. Auth. v State Div. of Human Rights*, 78 NY2d 207, 216 [1991]; *see e.g. Matter of Secor v City of New York*, 13 Misc 3d 1220[A] [Sup Ct, NY County 2006]). The $10,000 in compensatory damages for DaCosta's mental anguish was supported by her "own testimony, corroborated by reference to the circumstances of the alleged misconduct" (*Matter of New York City Tr. Auth.*, 78 NY2d at 216). Petitioners' gender discrimination in posting or causing to be posted an employment advertisement seeking a "counter girl," in the absence of any specific evidence

of male job-seekers being dissuaded from applying for the position, warranted the relatively small penalty of $5,000.

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

ENTERED: APRIL 14, 2016

CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Gische, Webber, JJ.

844 Country Wide Home Loans, Inc., Index 381771/09
Plaintiff-Appellant,

-against-

Gonzalo J. Dunia,
Defendant-Respondent,

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

_____

David M. Namm, P.C., Mineola (David M. Namm of counsel), for appellant.

Charles Wallshein, Melville, for respondent.

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger J.), entered September 25, 2014, which denied the motion of plaintiff Solo Group Series 9 LLC, as assignee to Country Wide Home Loans, Inc., to renew defendant's motion to dismiss the action, unanimously affirmed, with costs.

By order entered on or about April 2, 2014, the court granted defendant's motion to dismiss the action pursuant to CPLR 3215(c), based on plaintiff's failure to move for a default judgment within one year of defendant's failure to answer. The motion was granted on default, and without opposition. Plaintiff thereafter moved pursuant to CPLR 2221 for renewal of defendant's

prior motion to dismiss, and upon renewal, to deny the motion and have the action restored to the calender.

The court properly denied plaintiff's motion since the prior order was granted on default, and the proper remedy for plaintiff was to move to vacate the default pursuant to CPLR 5015, rather than by motion to renew (*see* CPLR § 5015[a][1]; *Vasquez v Koret, Inc.*, 151 AD2d 448, 448 [1st Dept 1989]; *Hurley v State of New York*, 200 AD2d 715, 715 [2nd Dept 1994]).

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

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

ENTERED: APRIL 14, 2016

CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Gische, Webber, JJ.

845 The People of the State of New York, Ind. 274/14
Respondent,

-against-

David Soto,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered March 13, 2014, convicting defendant, upon his plea of guilty, of assault in the second degree, criminal possession of a weapon in the third degree and attempted robbery in the third degree, and sentencing him, as a second violent felony offender, to an aggregate term of seven years, unanimously modified, on the law, to the extent of vacating the second violent felony offender adjudication and sentence and remanding for resentencing, including the filing by the People of a proper predicate felony statement, and otherwise affirmed.

By claiming that the predicate felony statement was facially insufficient because it failed to set forth the necessary tolling period for a predicate conviction over 10 years old, defendant is

raising the type of illegal-sentence claim that does not require preservation and is unaffected by defendant's valid waiver of his right to appeal (*see People v Santiago*, 22 NY3d 900, 903 [2013]; *People v Samms*, 95 NY2d 52, 57 [2000]). Because nothing in the record permits a determination of the relevant tolling period, the People's failure to include this information in the statement cannot be deemed harmless (*see People v Johnson*, 196 AD2d 408 [1st Dept 1993], *lv denied* 82 NY2d 806 [1997]; *see also People v Jiminez*, 132 AD3d 597 [1st Dept 2015]). "[T]he People's reliance on the NYSID sheet for the purpose of proving defendant's prior incarceration[] during which the statute was tolled is misplaced" (*People v Peterson*, 273 AD2d 88, 89 [1st Dept 2000]).

Accordingly, defendant is entitled to a new sentencing proceeding, including the filing of a proper predicate felony statement (*see e.g. People v Ortiz*, 19 AD3d 281 [1st Dept 2005],

lv denied 5 NY3d 809 [2005]). Therefore, we do not reach defendant's remaining contention regarding the sentence.

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

ENTERED: APRIL 14, 2016

CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Gische, Webber, JJ.

846N In re Richard Ronga, Index 653367/14
Petitioner-Appellant,

-against-

New York City Department
of Education,
Respondent-Respondent.

_____

Lichten & Bright, P.C., New York (Stuart Lichten of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Melanie T. West of counsel), for respondent.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered on or about August 7, 2015, which denied the CPLR article 75 petition seeking to vacate the Hearing Officer's award terminating petitioner's employment with respondent New York City Department of Education, and confirmed the award, unanimously affirmed, without costs.

After a full disciplinary hearing, the Hearing Officer found that petitioner, a probationary principal at a New York City public school, among other things, improperly directed subordinates to create fabricated teacher observation reports and professional development plans for which he himself was personally responsible, and submitted those reports and plans to

the superintendent. In a prior order, this Court upheld those specifications, but dismissed two other specifications on due process grounds, vacated the penalty of termination, and remanded the matter to the Hearing Officer for reconsideration of the appropriate penalty on the remaining specifications (*see Matter of Ronga v New York City Dept. of Educ.*, 114 AD3d 527 [1st Dept 2014]). On remand, the Hearing Officer reimposed the penalty of termination.

Despite petitioner's long-standing work history and lack of prior misconduct, given the fraudulent nature of his misconduct, the fact that he coerced subordinates into being complicit in his malfeasance, and the fact that his misconduct deprived teachers of important observations and evaluations, the penalty of

termination does not shock our sense of fairness (*see Matter of Montanez v Department of Educ. of the City of N.Y.*, 110 AD3d 487, 488 [1st Dept 2013]; *Matter of Chaplin v New York City Dept. of Educ.*, 48 AD3d 226, 227 [1st Dept 2008]).

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

ENTERED: APRIL 14, 2016

CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Gische, Webber, JJ.

847 In re John Walden, Ind. 3190/15
[M-883] Petitioner,

-against-

Hon. Jill Konviser, etc.,
Respondent.

_____

John Walden, petitoner pro se.

Eric T. Schneiderman, Attorney General, New York (Angel M. Guardiola II of counsel), for respondent.

_____

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: APRIL 14, 2016

CLERK

Mazzarelli, J.P., Renwick, Saxe, Moskowitz, JJ.

16095-
16096 American Economy Insurance Company, et al.,
Plaintiffs-Appellants,

-against-

The State of New York, et al.,
Defendants-Respondents.

- - - - -

Empire State Towing and Recovery Association, Inc., and Automotive Recyclers Association of New York,
Amici Curiae.

Index 156923/13

_____

Greenberg Traurig, LLP, Albany (Cynthia E. Neidl of counsel), for appellants.

Eric T. Schneiderman, Attorney General, New York (Claude S. Platton of counsel), for respondents.

Law Office of Peter O'Connell, Albany (Peter B. O'Connell of counsel), for Empire State Towing and Recovery Association, Inc., and Automotive Recyclers Association of New York, amici curiae.

_____

Judgment Supreme Court, New York County (Donna M. Mills, J.), entered September 29, 2014, reversed, on the law, without costs, the complaint reinstated, and a judgment entered in favor of plaintiffs declaring that Workers' Compensation Law § 25-a(1-a) as retroactively applied to policies issued before October 1, 2013 is unconstitutional. The Clerk is directed to enter an amended judgment accordingly. Appeal from order, same court and Justice, entered August 20, 2014, dismissed, without costs, as subsumed in the appeal from the judgment.

Opinion by Saxe, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Dianne T. Renwick
David B. Saxe
Karla Moskowitz, JJ.

16095-
16096
Index 456

_____x

American Economy Insurance Company,
et al.,
Plaintiffs-Appellants,

-against-

The State of New York, et al.,
Defendants-Respondents.

- - - - -

Empire State Towing and Recovery
Association, Inc., and Automotive Recyclers
Association of New York,
Amici Curiae.

_____x

Plaintiffs appeal from the judgment of the Supreme Court, New York County (Donna M. Mills, J.), entered September 29, 2014, dismissing the complaint, and from the order of the same court and Justice, entered August 20, 2014, which granted defendants' motion to dismiss the complaint, and denied plaintiffs' cross motion for summary judgment.

Greenberg Traurig, LLP, Albany (Cynthia Neidl of counsel), for appellants.

Eric T. Schneiderman, Attorney General, New York (Claude S. Platton and Steven C. Wu of counsel), for respondents.

Law Office of Peter O'Connell, Albany (Peter B. O'Connell of counsel), for Empire State Towing and Recovery Association, Inc., and Automotive Recyclers Association of New York, amici curiae.

SAXE, J.

Plaintiffs are private insurance companies that underwrite workers' compensation insurance policies in New York. In this action, they challenge the validity and constitutionality of a 2013 amendment to Workers' Compensation Law § 25-a to the extent it imposes liability on them with respect to policies issued before October 1, 2013. We hold that the challenged provision impermissibly imposes on plaintiffs significant additional liability retroactively with respect to those past contracts, and that they are entitled to judgment in their favor.

In 1933, the legislature added to the Workers' Compensation Law a provision establishing a special fund for the payment of workers' compensation benefits to employees whose cases were closed and later reopened (the reopened case fund, or the Fund) (*see* Workers' Compensation Law § 25-a, as added by L 1933, ch 384, § 2). The "statutory scheme contemplate[d] that the Special Fund [would] step into the shoes of the insurance carrier and succeed to its rights and responsibilities" (*Matter of De Mayo v Rensselaer Polytech Inst.*, 74 NY2d 459, 462-463 [1989]). The reopened case fund was initially financed by one-time charges imposed on employers or insurers for every case of injury or death, until in 1948 the Workers' Compensation Board was authorized to collect annual assessments from workers'

compensation insurers as needed to maintain the Fund at a prescribed minimum balance (Workers' Compensation Law § 25-a[3]).

Plaintiffs explain that the existence of the Fund meant that reopened workers' compensation claims were not included when insurers' premium rates were calculated by the New York Compensation Insurance Rating Board (CIRB) and approved by the New York State Department of Financial Services (DFS). They also assert that because reopened claims were handled and paid by the reopened case fund rather than by insurers, insurers did not maintain reserves to cover future reopened claim losses. Defendants do not disagree, except to the extent they assert that it was only once a reopened claim was actually transferred to the Fund that the claims were left off the calculation of rates chargeable to the insureds; they say that "prior to such transfer, the carrier is responsible for making payments on the claim, and the costs associated therewith are reported to CIRB for the purposes of allowing the costs to be factored into the rates which the carriers are permitted to charge their employer insureds."

On March 29, 2013, the legislature enacted a number of reforms to the Workers' Compensation Law as part of a "Business Relief Bill" contained in the 2013-2014 New York State Executive Budget. These reforms, presented as money-saving changes,

included the challenged amendment to the Workers' Compensation Law, which closed the reopened case fund to newly reopened claims as of January 1, 2014 (*see* Workers' Compensation Law § 25-a[1-a]; 2013 McKinney's Session Laws of NY, ch 57, S 2607-D, part GG, § 13). Any reopened claims that would have been transferred to the Fund under the former law would become the obligation of the carrier.

In a memorandum in support of the governor's 2013-2014 New York State Executive Budget, with regard to the portion of the "Business Relief Bill" that concerned the reopened case fund, it was suggested that the Fund was not needed "because the premiums [the insurers] have charged already covers this liability" (see Mem in Support of 2013-14 New York State Executive Budget, Public Protection and General Government Article VII Legislation, at 29, https://www.budget.ny.gov/pubs/archive/fy1314archive/eBudget1314/fy1314artVIIbills/PPGG_ArticleVII_MS.pdf, accessed March 28, 2016). The memorandum went on to characterize the Fund as creating a windfall for insurers.

In this declaratory judgment action, plaintiffs dispute the foregoing characterization of the Fund contained in that memorandum (i.e., that the premiums they charged already covered liability for reopened cases). Rather, they point out, with respect to those workers' compensation policies that were issued

before October 1, 2013, the premiums they charged to employers, as authorized by DFS, would not have been calculated to cover liability for future reopened claims, since at that time such claims were expected to be subject to transfer to the Fund for payment. In contrast, for policies written on or after October 1, 2013, DFS approved an increase in premiums to address the additional liability resulting from the closure of the Fund to future reopened cases; however, that premium increase would not cover policies issued before October 1, 2013. Yet, because these policies are occurrence-based, meaning that they provide coverage for accidents that occur during the policy term regardless of when the claim is made, a benefit payable on a reopened claim made after January 1, 2014 but arising out of an accident that occurred before October 1, 2013, will impose on the insurer a liability that was not contemplated when the premium for the pre-October 1, 2013 policy was calculated.

Thus, plaintiffs assert, Workers' Compensation Law § 25-a(1-a) improperly shifts liability to insurers for claims reopened after January 1, 2014 involving injuries that occurred before October 1, 2013, although such claims were not included in the calculations of either the premium rates they charged for those policies or the reserves they maintained in order to pay claims. They argue that the amendment imposes on them unfunded liability

for claims in reopened cases that arise from accidents or injuries that occurred before October 1, 2013, since premium rates are prospective in nature and the insurers cannot recoup the costs of this added liability, which they estimate at $62 million.

In moving to dismiss and for a declaration in their favor, defendants argue that the Fund's closure to new applications merely altered the handling of cases that reopen after January 1, 2014, and did not have any impermissible retroactive effect. Plaintiffs cross-moved for summary judgment and a declaration in their favor.

The motion court granted defendants' motion, holding that the statute does not have an improper retroactive effect; in response to plaintiffs' argument regarding the imposition of new liabilities not contemplated when their authorized premiums were calculated, the court reasoned that the statute only governs benefits awarded after its passage, and "[t]he fact that the benefits [for reopened claims relating to injuries occurring before October 1, 2013] may relate to an injury that occurred prior to the enactment of § 25-a(1-a) does not render it retroactive" (citing *Matter of Raynor v Landmark Chrysler*, 18 NY3d 48 [2011]).

Discussion

"It is a fundamental canon of statutory construction that retroactive operation is not favored by courts and statutes will not be given such construction unless the language expressly or by necessary implication requires it" (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 584 [1998], citing *Jacobus v Colgate*, 217 NY 235, 240 [1916, Cardozo, J.], *and Landgraf v USI Film Products*, 511 US 244, 265 [1994]). "[T]he date that legislation is to take effect is a separate question from whether the statute should apply to claims and rights then in existence" (*Majewski*, 91 NY2d at 583).

The question of whether the new statute would have a retroactive effect requires the court to consider "whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed" (*Landgraf v USI Film Products*, 511 US at 280). "[This] ban on retrospective legislation embrace[s] all statutes, which, though operating only from their passage, affect vested rights and past transactions," and thus "every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation . . . in respect to transactions or considerations already past, must be deemed retrospective" (*id.* at 268-269 [internal quotation

marks omitted]). "[T]he court must ask whether the new provision attaches new legal consequences to events completed before its enactment" (*id.* at 269-270).

Therefore, the central question here is whether closing the Fund to new applications and requiring the insurers to handle and pay on reopened claims arising out of accidents that occurred before October 1, 2013 impermissibly "attache[d] new legal consequences to events completed before its enactment" (*id.* at 270).

In concluding that the challenged statutory provision did not take away or impair vested rights, the motion court failed to treat the allegations in the complaint as true and afford plaintiffs all favorable inferences. It is essentially undisputed that the premiums charged for policies prior to October 1, 2013 took into account the transfer to the Fund of reopened claims under the former Workers' Compensation Law § 25-a, and thus, did not account for potential future liability relating to such claims, which were expected to qualify for a transfer to the Fund. The Fund's closure failed to provide for the unfunded liability it imposes on plaintiffs for reopened cases arising from accidents occurring before October 1, 2013 that would have otherwise qualified for transfer under Workers' Compensation Law §25-a, and they cannot make up this shortfall.

"Thus, even though the [statute] mandates only the payment of future . . . benefits, it nonetheless 'attaches new legal consequences to [a relationship] completed before its enactment'" (*Eastern Enterprises v Apfel*, 524 US 498, 532 [1998] quoting *Landgraf v USI Film Products*, 511 US at 270).

The motion court's reliance on *Matter of Raynor v Landmark Chrysler* (18 NY3d 48) was misplaced. There, the Court considered an insurance carrier's challenge to the requirement that, pursuant to a 2007 amendment to Workers' Compensation Law § 27(2) (*see* L 2007, ch 6, § 46), it deposit into the Aggregate Trust Fund the full present value of a lifetime permanent partial disability award for a 2004 injury (*id.* at 54-55). The Court rejected the carrier's argument that this application of the 2007 amendment was improperly retroactive (*id.* at 55). Observing that the carrier had always been liable for the full amount of the permanent partial disability award, and, moreover, that even before that amendment, the Workers' Compensation Board already had the discretion to require a carrier to deposit the present value of such an award into the ATF (*see id.* at 54, 57), the Court explained that this application of the 2007 amendment to Workers' Compensation Law § 27(2) "neither altered the carrier's preexisting liability nor imposed a wholly unexpected new procedure. It merely changed the time and manner of payments"

(*id.* at 57). Those circumstances fundamentally distinguish *Raynor* from the present case, where the challenged amendment to the statute, as applied to injuries occurring before October 1, 2013, actually "altered the carrier's preexisting liability" (*id.*), imposing on plaintiffs substantial new retroactive liability that have not and cannot be offset by premium increases.

Defendants characterize the challenged amendment as a mere "allocation of economic benefits and burdens [that] has always been subject to adjustment," as in *Becker v Huss Co.* (43 NY2d 527, 541 [1978]). *Becker* considered an amendment to Workers' Compensation Law § 29 applicable to workers' compensation carriers, which already had a lien on any recovery obtained in litigation brought by the compensation-claimant against a third party (*id.* at 538). The amendment imposed on carriers a requirement that they contribute to the expenses of that litigation from which they benefited (*id.* at 539). The State Insurance Fund (SIF), as a workers' compensation lienor, challenged the amendment insofar as it applied to litigation then pending, involving accidents before the effective date of the amendment; the SIF argued that such retroactive application would "creat[e] a new set of rights, . . . upset[ting] the cost-price balance on which it operated and impair[ing] its section 29

liens" (*id.*). The Court recognized that the amendment "saddl[ed] [the carriers] with financial obligations not contemplated when prior insurance premiums had been computed" (*id.* at 540), but rejected the SIF's claim that the amendment had an improper retroactive impact. It explained that "[t]he amendment at issue, presaged for some years, is just another adjustment in the allocation of the financial benefits and burdens," and, importantly, that it "neither created a new right *nor impaired an existing one*" (*id.* at 542 [emphasis added]). In particular, the Court observed that "[t]he carrier always benefited from the third-party action; the amendment simply requires it to bear the cost of that benefit" (*id.*).

Unlike the SIF in *Becker*, which retained the benefit of recouping its compensation payments by acting as a lienor in the compensation-claimant's third-party action, and was simply made to cover costs incurred in obtaining that benefit, the closure of the Fund here, by ending plaintiffs' right to transfer eligible cases to the Fund, retroactively deprived them of the entirety of the benefit of this right and created a new class of unfunded liability.

There have been circumstances in which a legislature has clearly indicated a considered determination to retroactively affect an entity's rights or liabilities by a new statutory

enactment, and in such circumstances even such incontrovertible retroactive impacts may be permissible. For that reason, defendants' reliance on *Matter of Hogan v Lawlor & Cavanaugh Co.* (286 App Div 600, 604 [3d Dept 1955]) is misplaced. There, in rejecting the argument of a workers' compensation carrier that the challenged statute impermissibly, retroactively "impose[d] liability upon the carrier [where] . . . the insurance premiums collected by it from its insured had been based upon liability of a less burdensome character," the Court explained that the legislature had clearly considered and intended to increase the carriers' burden in pending compensation cases such as the one at issue in *Hogan*.

Here, in contrast, the record fails to reflect that the legislature amended the statute with an understanding of the impact it would have on policies issued before October 1, 2013. Indeed, the memorandum in support of the Business Relief Bill reflects the incorrect belief that the increased costs to carriers for pre-October 1, 2013 claims were already taken into account in the calculation of those premiums.

Plaintiffs also established that the amendment, as applied retroactively, violates the Contract Clause of the US Constitution because it retroactively impairs an existing contractual obligation to provide insurance coverage "[w]here ***

the insurer does not have the right to terminate the policy or change the premium rate" (*Health Ins. Assn. of Am. v Harnett*, 44 NY2d 302, 313 [1978] [internal quotation marks omitted] [asterisks in original]; *see* US Const, art I, § 10, cl 1). Defendants failed to show that the impairment is "reasonable and necessary to serve" "a significant and legitimate public purpose *** such as the remedying of a broad and general social or economic problem" (*19th St. Assoc. v State of New York*, 79 NY2d 434, 443 [1992] [internal quotation marks omitted] [asterisks in original]). Indeed, the legislation's stated purpose of preventing a windfall to insurance carriers was based upon the erroneous premise that premiums already cover this new liability.

Retroactive application would also constitute a regulatory taking in violation of the Takings Clause (*see* US Const Amend V; NY Const, art I, § 7[a]; *Eastern Enterprises*, 524 US at 528-529 ["it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience"]).

Plaintiffs have therefore established that the amendment, as applied retroactively to policies issued before October 1, 2013, is unconstitutional.

As to defendants' assertion that should this Court find that

the complaint states a cause of action, summary judgment should be denied due to the existence of "[n]umerous issues of fact," defendants neither opposed the cross motion nor established the existence of triable issues of fact precluding summary judgment. The issues of fact they now allege to exist are purely speculative, unsupported by reference to the record, and improperly raised for the first time on appeal. Defendants did not submit any evidence to contradict plaintiffs' evidence as to the economic impact of the Fund's closure on plaintiffs, or to support their claim that issues exist as to "the extent to which [plaintiffs] benefitted from other changes in the 2013 legislation," or the nature and value of such benefit.

Accordingly, based on the record, plaintiffs established their entitlement to summary judgment on their claims for declaratory relief. However, plaintiffs' application for an injunction is denied, since "[w]hen [the] Court articulates the constitutional standards governing [S]tate action, we presume that the State will act accordingly" (*Matter of Maron v Silver*, 14 NY3d 230, 261 [2010]). The request in plaintiffs' briefs for an award of attorneys' fees is denied, since plaintiffs advance no supporting argument for such relief in the main body of their briefs, and no reason for such an award is apparent.

Accordingly, the judgment of the Supreme Court, New York

County (Donna M. Mills, J.), entered September 29, 2014, dismissing the complaint, should be reversed, on the law, without costs, the complaint reinstated, and a judgment entered in favor of plaintiffs declaring that Workers' Compensation Law § 25-a(1-a) as retroactively applied to policies issued before October 1, 2013 is unconstitutional. The Clerk is directed to enter an amended judgment accordingly. The appeal from the order of the same court and Justice, entered August 20, 2014, which granted defendants' motion to dismiss the complaint and denied plaintiffs' cross motion for summary judgment, should be dismissed, without costs, as subsumed in the appeal from the judgment.

All concur.

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

ENTERED: APRIL 14, 2016

CLERK