



2015]) and directed a reconstruction hearing to establish the circumstances surrounding a jury note that appeared in the court file but that, on the trial transcript then before us, did not appear to have led to any discussion with counsel or response to the jury. After the reconstruction hearing, the court reporter was contacted, and she discovered that she had not transcribed two pages of trial minutes, which related to the note in question. The newly transcribed pages revealed that the court complied with the procedures required by *People v O'Rama* (78 NY2d 270 [1991]), including informing the parties of the note and the court's intended response, and giving that response to the jury. As the two pages were certified by the court reporter to be "a true and accurate transcript of the stenographic minutes taken within," the trial court properly declined to reopen the reconstruction hearing to permit defense counsel to question the court reporter regarding those pages. Once the reporter located, transcribed and certified the minutes, there was no longer anything to reconstruct or resettle, and no need to take any further testimony. We have considered and rejected defendant's remaining arguments concerning the reconstruction proceedings and this Court's consideration of these pages of the transcript.

The transcript reveals that defendant did not object to the

court's response to the jury note. Accordingly, her challenge to that response is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. The court responded meaningfully (*see generally People v Malloy*, 55 NY2d 296, 302 [1982]) to the note, which stated "that we have come to a verdict on some charges but are hung on a few other charges." The court's simple request that the jury continue deliberations to try to reach a verdict was not unbalanced or coercive (*see People v Ford*, 78 NY2d 878 [1991]; *People v Pagan*, 45 NY2d 725 [1978]).

Turning to the remaining issues raised on the initial appeal, we likewise find no basis for reversal. The court properly admitted evidence of uncharged crimes as probative of defendant's intent (*see People v Alvino*, 71 NY2d 233, 242 [1987]), and the probative value of this evidence exceeded its potential for prejudice, which was minimized by the court's limiting instructions. Defendant's failure to fulfill her past promises to two prior victims of her scam, most notably promises to return money, was highly probative of her larcenous intent, including whether defendant intended to fulfill her promises to the victims of the charged crimes. Evidence that her past victims had told defendant that her predictions had not come

true, and that she had reneged on her promises to return money was also relevant to refute any defense that defendant believed herself to be a true psychic who intended to, and did, provide the victims with the psychic services for which they had paid. Further, given how gullible the victims appeared, the testimony about defendant's past crimes helped to place the events in a believable context (*see e.g. People v Feliciano*, 301 AD2d 480 [1st Dept 2003], *lv denied* 100 NY2d 538 [2003]), by showing how other vulnerable victims had been deceived by defendant's implausible scam. Defendant's constitutional argument regarding the uncharged crimes evidence is both unpreserved and without merit (*see People v Pettaway*, 30 AD3d 257 [1st Dept 2006], *lv denied* 7 NY3d 816 [2006]). In any event, any error in this regard was harmless.

Of the evidentiary issues raised on appeal, the only ones that are arguably preserved are those relating to evidence of a witness's thought processes and discovery of defendant's name on the Internet, and evidence of another witness's conversation with a person at defendant's shop. The court properly exercised its discretion in receiving all of this evidence, which was admissible to establish the state of mind of the respective witnesses in relevant contexts. Defendant's remaining

evidentiary claims, and her arguments relating to the statute of limitations, the right to a speedy trial, the prosecutor's summation and the court's charge are all unpreserved and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits.

Defendant claims that her trial counsel rendered ineffective assistance by failing to raise the issues that defendant now raises for the first time on appeal. These ineffective assistance claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record (see *People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (see *People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that any of counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed

individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case (see *People v Cass*, 18 NY3d 553, 564 [2012]).

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 2, 2016

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CLERK

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

16347 Walnut Housing Associates 2003 Index 653945/13  
L.P., et al.,  
Plaintiffs-Respondents,

-against-

MCAP Walnut Housing LLC, et al.,  
Defendants-Appellants,

American Foundation for Affordable  
Housing, Inc.,  
Defendant.

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Dechert LLP, New York (Joseph F. Donley of counsel), for  
appellants.

Holland & Knight LLP, New York (Michael T. Maroney of counsel),  
for respondents.

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Order, Supreme Court, New York County (Shirley Werner  
Kornreich, J.), entered November 28, 2014, which, to the extent  
appealed from as limited by the briefs, denied the motion of  
defendants MCAP Walnut Housing LLC (MCAP GP), Municipal Capital  
Appreciation Partners II, L.P. (MCAP II), and Richard G. Corey  
(Corey) to dismiss counts II, III, IV, VI, VII and VIII; and  
count V as against MCAP II and Corey, unanimously modified, on  
the law, to dismiss counts II and IV as against MCAP GP; dismiss  
count V as against MCAP II and Corey; dismiss count III as  
against MCAP II; dismiss count VI as against Corey and dismiss

count VIII, and otherwise affirmed, without costs.

Count V, asserting breach of the partnership agreement, should be dismissed as against MCAP II and Corey, nonsignatories to the agreement. Neither MCAP II nor Corey can be held liable as a "Designated Affiliate" of MCAP GP under section 6.7(B) of the agreement (see *MMA Meadows at Green Tree, LLC v Millrun Apts., LLC*, 130 AD3d 529, 530 [1st Dept 2015]). Nor is there a valid veil-piercing claim against them. To state a veil-piercing claim under Delaware law a plaintiff must plead facts supporting an inference that a corporation, through its alter ego, has created a sham entity designed to defraud investors and creditors (*Cross v BCBSD, Inc.*, 836 A2d 492 [Sup Ct Del 2003]). The Delaware courts apply the alter ego theory rather strictly and, in determining the sufficiency of the claim, will often consider a combination of factors including whether a company was adequately capitalized or solvent, whether corporate formalities were observed, whether the dominant shareholder siphoned company funds and whether, in general the company simply functioned as a facade for the dominant shareholder (*EBG Holdings LLC v Vredeszicht's Gravenhage*, 2008 WL 4057745 \*12, 2008 Del Ch LEXIS 127, \*48 [Del Ct of Chancery, Sept. 2, 2008, CA No. 3184-VCP]). A claim for veil-piercing will be dismissed at the pleading

stage, however, if the allegations are merely conclusory (see *Doberstein v G-P Indus. Inc.*, 2015 WL 6606468, \*4-5, 2015 Del Ch LEXIS 275, \*12-14, [Del Ct of Chancery, Oct. 30, 2015, CA No. 9995-VCP]; *Micro strategy, Inc v Acacia Research Corp.*, 2010 WL 5550455, \*11-12, 2010 Del Ch LEXIS 254, \*45-48 [Del Ct of Chancery, Dec. 30, 2010, CA No. 5735-VCP])). We do not believe that there were sufficient non-conclusory facts alleged in the complaint for plaintiffs to proceed on their veil-piercing claim at this time.

Count VI, asserting breach of the guaranty agreement, should be dismissed against Corey, as he is not a signatory to the agreement. MCAP II is a signatory to the agreement. At this stage of the proceedings, we cannot conclude that damages are, as a matter of law, speculative, requiring dismissal of the claim against it (*Fielding v Kupferman*, 65 AD3d 437, 442 [1st Dept 2009], *lv denied* 21 NY3d 859 [2013])).

Because the contract claims against MCAP II and Corey are not viable, the tort claims against them cannot be dismissed as duplicative (*MMA Meadows*, 130 AD3d at 531).

Count II, the breach of fiduciary duty claim, should be dismissed against MCAP GP, because the claim arises from the same allegations underlying the claim for breach of the partnership

agreement (*id.*). However, the amended complaint adequately alleges a breach of fiduciary duty claim against MCAP II (the sole member of MCAP GP) and Corey (who allegedly controls MCAP II and MCAP GP) (*id.*).

The amended complaint sufficiently states an aiding and abetting breach of fiduciary duty claim (count III) against Corey, but not against MCAP II (*id.*).

Count IV, the gross negligence claim, should be dismissed against MCAP GP, as the claim does not allege a violation of a duty independent of MCAP GP's contractual obligations (see *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389-390 [1987]; *McKenna v Terminex Intl. Co.*, 2006 WL 1229674, \*3, 2006 Del Super LEXIS 551, \*9 [Del Super, Mar. 13, 2006, C.A. No. 04C-02-022 (RBY)]). Insofar as the claim is asserted against MCAP II and Corey, they argue only that it should be dismissed against them as duplicative of the breach of contract claims – an argument that, as noted, is unavailing.

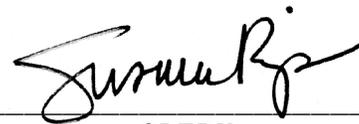
The amended complaint sufficiently states a constructive fraud claim (count VII) against MCAP GP, MCAP II, and Corey (see *Levin v Kitsis*, 82 AD3d 1051, 1054 [2d Dept 2011]; *In re Wayport, Inc. Litig.*, 76 A3d 296, 327 [Del Ch 2013]). The claim is not duplicative of the breach of contract or breach of fiduciary

claims, as the latter claims are based on different allegations. In particular, the claims for breach of contract and breach of fiduciary duty are based on allegations that defendants mismanaged funds by causing the partnership to default on a mortgage loan and to fail to pay for construction expenses, resulting in a mechanic's lien. The constructive fraud claim is based on allegations that defendants misrepresented the intended use of certain loans in order to induce the limited partners to consent and approve the obtaining of such loans, which defendants allegedly used to pay themselves.

Count VIII, the unjust enrichment claim, is barred by "[t]he existence of express contracts" (*MMA Meadows*, 130 AD3d at 532).

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

ENTERED: FEBRUARY 2, 2016

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wanted to be represented by an 'agent' instead of simply buying his own drugs" (*People v Vaughan*, 300 AD2d 104, 104 [2002], *lv denied* 99 NY2d 633 [2003]).

The court properly denied defendant's motion to dismiss the indictment, made on the ground that he was deprived of his right to testify before the grand jury when, against defendant's wishes, his counsel withdrew defendant's notice of intent to testify. We decline to revisit our prior holdings (see *People v Brown*, 116 AD3d 568 [1st Dept 2014], *lv denied* 24 NY3d 1001 [2014]; *People v Santiago*, 72 AD3d 492 [1st Dept 2010], *lv denied* 15 NY2d 757 [2010]) that the right to testify before the grand jury is not among the rights reserved to a defendant, but is among the rights whose exercise is a strategic decision requiring "the expert judgment of counsel" (*People v Colville*, 20 NY3d 20, 32 [2012]).

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

ENTERED: FEBRUARY 2, 2016



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

74 Dawn Marie D'Emidio, et al., Index 24097/13  
Plaintiffs-Respondents,

-against-

Williamsbridge Restaurant Inc.  
doing business as New Hawaii  
Sea Restaurant,  
Defendant-Appellant.

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Law Offices of Michael E. Pressman, New York (Stuart B. Cholewa  
of counsel), for appellant.

Law Office of Stephen B. Kaufman, P.C., Bronx (Stephen B. Kaufman  
of counsel), for respondents.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti-  
Hughes, J.), entered July 16, 2014, which denied defendant's  
motion to dismiss the class action complaint pursuant to CPLR  
3211(a)(7), unanimously affirmed, without costs.

The motion was properly denied. The allegations in the  
complaint sufficiently set forth factual allegations to arguably  
establish the class action prerequisites set forth in CPLR 901

and 902, at least to survive this dismissal motion (see *Bernstein v Kelso & Co.*, 231 AD2d 314, 323-324 [1st Dept 1997]; *Ackerman v New York Hosp. Med. Ctr. of Queens*, 127 AD3d 794, 796 [2d Dept 2015]).

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

ENTERED: FEBRUARY 2, 2016

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

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In re Chastity O.C.,

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

Angie O.C.,  
Respondent-Appellant,

Administration for Children's Services,  
Petitioner-Respondent.

- - - - -

In re Angie O.,

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

Maria C.,  
Respondent-Appellant,

Administration for Children's Services,  
Petitioner-Respondent.

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Tamara A. Steckler, The Legal Aid Society, New York (Jess Rao of  
counsel), for Angie O.C., appellant and the child.

Law Offices Of Thomas R. Villecco, P.C., Jericho (Thomas R.  
Villecco of counsel), for Maria C., appellant.

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

Loeb & Loeb LLP, New York (C. Linna Chen of counsel), attorney  
for the child Chastity O.C.

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Order of fact-finding and disposition, Family Court, New  
York County (Stewart H. Weinstein, J.), entered on or about July

24, 2014, which, insofar as appealed from as limited by the briefs, determined, after a hearing, that respondent mother Maria C. had neglected the subject child, Angie O., unanimously reversed, on the law and the facts, without costs, the neglect finding vacated and the petition dismissed. Appeal from order of dismissal, same court and Judge, entered on or about July 24, 2014, unanimously dismissed, without costs, as abandoned. Order of fact-finding and disposition, same court and Judge, entered on or about July 24, 2014, which, insofar as appealed from as limited by the briefs, determined, after a hearing, that respondent mother Angie O.C. had neglected the subject child, Chastity O.C., unanimously affirmed, without costs.

Petitioner Administration for Children's Services (ACS) failed to demonstrate by a preponderance of the evidence that respondent Maria educationally or medically neglected her teenage daughter, Angie (*see Matter of Alyanna C. [Rene B.]*, 110 AD3d 458, 459 [1st Dept 2013]). The record shows that Maria faced formidable obstacles, including a language barrier and Angie's violent and destructive behavior, that made it exceedingly difficult for her to get Angie to attend school (*see Matter of Alexander D.*, 45 AD3d 264, 266 [1st Dept 2007]). Further, the evidence shows that, at the time the petition was filed, Angie

was not in imminent danger as a result of any failure by Maria to attend to Angie's medical needs (*see id.*). Although Maria did not succeed in getting Angie into a drug treatment program, she believed that Angie had stopped using drugs and alcohol during her pregnancy, and she attended therapy with Angie to address those and other issues. Moreover, when Maria and Angie were engaged in services, ACS closed the case.

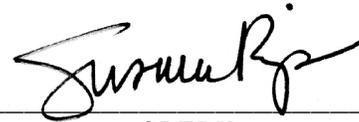
The evidence of Angie's admitted drug use during pregnancy, including testing positive for marijuana at the time of her daughter Chastity's birth, was sufficient to sustain a neglect finding against her (*see Matter of Omarion T. [Isha M.]*, 128 AD3d 583, 583 [1st Dept 2015]). In addition, a presumption of neglect was triggered by the evidence of Angie's substantial history of drug and alcohol abuse, including at least one occasion when she overdosed and blacked out, for which she never engaged in treatment (*see Family Ct Act § 1046[a][iii]; Matter of Arthur S. [Rose S.]*, 68 AD3d 1123 [2d Dept 2009]). Angie failed to rebut this presumption; her participation in therapy with Maria was not a substitute for a drug treatment program, and the lack of actual harm to Chastity is irrelevant (*see Arthur S.* at 1124).

The record does not show that Family Court relied on Angie's postpetition behavior in making its neglect finding against her

(see *Matter of Virginia C. [Sharri A.]*, 88 AD3d 514, 514 [1st Dept 2011]). Further, Family Court properly denied her motion to sever the fact-finding hearings regarding her and Maria, given that the two actions are related, arise from a common set of facts and involve the same witnesses, and Angie has failed to show any prejudice (*Williams v Property Servs.*, 6 AD3d 255 [1st Dept 2004]).

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

ENTERED: FEBRUARY 2, 2016

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requirements of the Mental Hygiene Law.

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ENTERED: FEBRUARY 2, 2016

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calendar year by a covered person . . . before benefits are payable under this policy. The deductible amount is the greater of the basic deductible [the basic deductible is \$3,000] shown on page 3 or the amount of benefits provided for covered charges by other medical expense coverage."

Thus, the deductible amount is either \$3,000 or the greater amount paid by other medical expense coverage. "Other medical expense coverage" under the policy includes Medicare. Plaintiff asserts in his complaint that for each of the years 2009, 2010, 2011 and 2012, Medicare paid in excess of \$3,000.

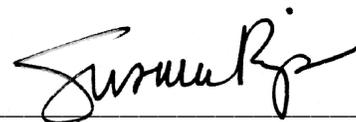
Contrary to the interpretation of the court below and defendant AXA, the deductible amount does not include both the \$3,000 basic deductible and the greater amount paid by Medicare. Even assuming there was an ambiguity in the policy definition of "Deductible Amount," such ambiguity "must be construed in favor of the insured and against the insurer" (*White v Continental Cas. Co.* 9 NY3d 264, 267 [2007], citing *United States Fid. & Guar. Co. v Annunziata*, 67 NY2d 229, 232 [1986]). Thus, to the extent that plaintiff paid any or all of the basic deductible in a year in which Medicare paid in excess of \$3,000 for covered expenses, plaintiff would be entitled to reimbursement of that amount. This is so because the payments made by Medicare, once they passed the \$3,000 mark, would become the "deductible amount," and

plaintiff's payments under the basic deductible would no longer be for a deductible amount. Neither the court nor AXA points to any provision in the policy under which AXA could retain this money when it is no longer part of the deductible amount.

To the extent, however, that Medicare or any other medical expense coverage paid or contributed to the basic deductible, plaintiff would not be entitled to any recovery, as that amount would then fall under the greater "amount of benefits provided for covered charges by other medical expense coverage," and would remain a deductible amount. Plaintiff is also not entitled to reimbursement for payments he made to the basic deductible in the relevant years to the extent that AXA's voluntary "Variable Deductible Payback Benefits" program has already reimbursed him in whole or in part.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 2, 2016



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site assaulted him without provocation. Although the assailant was an employee of a nonparty security company retained to secure the premises, he was assuming the non-security-related duties of a "flagman" at the time of the accident. Plaintiff commenced this action against, inter alia, landowners Amsterdam and construction manager Monadnock asserting claims sounding in premises liability, respondeat superior, negligent hiring, and negligent supervision, but on appeal, argues only that triable issues of fact exist as to whether Monadnock may be held vicariously liable as a special employer of the assailant.

The court properly dismissed the claim, as the evidence shows that Monadnock did not have sufficient control over the assailant's flagman duties so as to give rise to a special relationship between the parties (see *Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557-558 [1991]). Monadnock's construction supervisor testified that nonparty subcontractor was responsible for supplying flagmen to redirect pedestrian traffic at the time of the incident, and that while he would direct subcontractors to ensure that flagmen were supplied, he would not direct how many flagmen were to be provided, where to post them, or who were to be delegated the duties. Under these circumstances, any control by Monadnock over the flagmen's

responsibilities were only general supervisory powers, as opposed to control over the means and method of the work, which is insufficient to form the basis for liability against Monadnock (see *Lazo v Mak's Trading Co.*, 84 NY2d 896 [1994]; *Goodwin v Comcast Corp.*, 42 AD3d 322 [1st Dept 2007]).

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ENTERED: FEBRUARY 2, 2016

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defense (see *People v Jamison*, 8 AD3d 189 [1st Dept 2004], lv denied 3 NY3d 707 [2004]). Defendant's actions were those of a drug seller, and there is no evidence that he was doing a "favor" for a stranger (see *People v Lam Lek Chong*, 45 NY2d 64, 74-75 [1978], cert denied 439 US 935 [1978]). To the extent that defendant is arguing that the court should have given an agency charge based on testimony that defendant *could* have given, but did not, or that the court dissuaded defendant from testifying, those arguments are without merit.

The court properly received evidence that before bringing the undercover officer to defendant, another participant in the transaction offered to take her to "someone who had drugs." This evidence was admissible for the nonhearsay purpose of completing the narrative and explaining the sequence of events (see generally *People v Tosca*, 98 NY2d 660 [2002]). In any event, any error in this regard was harmless. Defendant's argument that the court should have delivered a limiting instruction is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that the lack of a limiting instruction does not warrant reversal.

Since the possession conviction is based on defendant's possession of the same bag of drugs that he sold to the

undercover officer, we exercise our discretion to dismiss the noninclusory concurrent possession count (see e.g. *People v Gortspujuls*, 44 AD3d 368, 369 [1st Dept 2007], lv denied 9 NY3d 1006 [2007])).

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 2, 2016

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

81 Susan S. Lee, Index 156350/12  
Plaintiff-Appellant,

-against-

Craig M. Lippman,  
Defendant-Respondent.

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Andrew Park, P.C., New York (Ji-Hyong Lee of counsel), for  
appellant.

Martin, Fallon & Mullé, Huntington (Richard C. Mullé of counsel),  
for respondent.

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Order, Supreme Court, New York County (Arlene P. Bluth, J.),  
entered November 7, 2014, which granted defendant's motion for  
summary judgment dismissing the complaint based on plaintiff's  
failure to establish that she suffered a serious injury within  
the meaning of Insurance Law § 5102(d), unanimously affirmed,  
without costs.

Defendant made a prima facie showing that plaintiff did not  
suffer a permanent or significant limitation in use of her  
cervical spine, lumbar spine, or right shoulder as a result of  
the motor vehicle accident. Defendant submitted an orthopedic  
surgeon's report finding normal range of motion in each part, and  
the report of a radiologist who opined that the MRIs of  
plaintiff's spine and right shoulder showed degenerative changes

unrelated to the accident (see *Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043, 1044 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]). The orthopedist was not required to address causation, and the radiologist's opinion was not arbitrary.

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff's experts provided only a conclusory opinion that plaintiff's injuries were caused by the accident, without addressing the preexisting degenerative conditions documented in plaintiff's own medical records, or explaining why her current reported symptoms were not related to the preexisting conditions (see *Rivera v Fernandez & Ulloa Auto Group*, 123 AD3d 509, 510 [1st Dept 2014], *affd* 25 NY3d 1222 [2015]; *Alvarez*, 120 AD3d at 1044). Further, plaintiff's doctor found only minor limitations in the range of motion of her spine upon a recent examination, and he diagnosed only minor changes in the shoulder, which is insufficient to demonstrate a serious injury involving significant or permanent limitations in use (see *Haniff v Khan*, 101 AD3d 643, 644 [1st Dept 2012]).

Plaintiff's allegations in her bill of particulars that she was confined to bed and home for no more than three days, and her testimony that she was able to resume doing household chores

within three months, refute her 90/180-day claim (see *Frias v Son Tien Liu*, 107 AD3d 589, 590 [1st Dept 2013]).

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

THIS CONSTITUTES THE DECISION AND ORDER  
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ENTERED: FEBRUARY 2, 2016

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

82                    Washington Ave. Property,                    Index 20531/13E  
                         Inc.,  
                         Plaintiff-Respondent-Appellant,

-against-

Bronx Pro Real Estate Management,  
Inc.,  
Defendant-Appellant-Respondent.

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Daniel J. McKenna, P.C., Eastchester (Daniel J. McKenna of  
counsel), for appellant-respondent.

Krinsky & Musumeci, PLLC, New York (Carmine V. Musumeci of  
counsel), for respondent-appellant.

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Order, Supreme Court, Bronx County (John A. Barone, J.),  
entered March 20, 2015, which denied plaintiff's motion and  
defendant's cross motion for summary judgment, with leave to  
renew at the close of discovery, unanimously affirmed, without  
costs.

Pursuant to the amendment to the original contract, the  
original contract remained in effect except to the extent that it  
conflicted with the amendment or with Contract A or B. Because  
the liquidated damages provision in the original contract does  
not conflict with the amendment or with Contract A or B, it  
remains in effect. However, an ambiguity exists as to the  
meaning of the liquidated damages provision. In particular, an

issue of fact exists as to whether the parties intended for plaintiff to retain the down payment in the event of defendant's default, given that the parties restructured the contract to use the down payment for another purpose. Accordingly, neither party is entitled to summary judgment (*see Ruttenberg v Davidge Data Sys. Corp.*, 215 AD2d 191, 193 [1st Dept 1995]).

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

ENTERED: FEBRUARY 2, 2016

  
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was no requirement that, in addition to that verification, each corporate defendant verify the answer (CPLR 3020[d]). In any event, plaintiff's motion for a default judgment was defective, as there was no proof that the amended complaint had ever been served.

Summary judgment was properly granted to all corporate defendants except Stack's LLC, because there was no evidence that any of those corporations owned, managed, or was in any way involved in the auction run by Stack's LLC in 2008. Plaintiff's invocation of CPLR 3212(f) is unavailing, because that provision may not be used as a means to embark upon a "fishing expedition" to explore the possibility of fashioning a viable cause of action against the corporate defendants (*see Citibank, N.A. v Furlong*, 81 AD2d 803, 804 [1st Dept 1981][internal quotations marks omitted]).

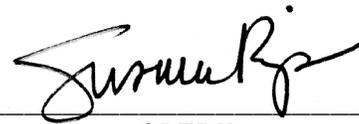
The motion court correctly dismissed plaintiff's claim for conversion, because plaintiff failed to point to a specific sum of money that was subject to a future obligation (*see Manufacturers Hanover Trust Co. v Chemical Bank*, 160 AD2d 113, 124-125 [1st Dept 1990], *lv denied* 77 NY2d 803 [1991]). Instead, the conversion claim was predicated on a mere breach of contract, which is insufficient (*Kopel v Bandwidth Tech. Corp.*, 56 AD3d

320, 320 [1st Dept 2008]).

Plaintiff failed to state any viable cause of action against defendants Karstedt and Yegparian, who were mere employees of Stack's LLC. Under the circumstances, the motion court providently exercised its discretion in awarding sanctions to those defendants (see 22 NYCRR 130-1.1[c][1]; see also *Levy v Carol Mgt. Corp.*, 260 AD2d 27, 33-34 [1st Dept 1999]).

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ENTERED: FEBRUARY 2, 2016

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responses to allegedly discriminatory conduct by coworkers and superiors and retaliation for discrimination complaints which he filed, are unavailing. The hearing officer credited the agency's witnesses' testimony, including their testimony that their conduct was not discriminatory or retaliatory.

The Commissioner did not abuse his discretion in imposing the penalty, which is not shockingly disproportionate to the offense (see *Matter of Berenhaus v Ward*, 70 NY2d 436, 445 [1987]; *Matter of Bal v Murphy*, 43 NY2d 762, 763 [1977]).

We have considered petitioner's remaining contentions and find them to be without merit.

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

ENTERED: FEBRUARY 2, 2016

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immediately after defendant announced that "we" were about to "pull something." To the extent defendant is also claiming that the court erred in failing to deliver a circumstantial evidence charge, that claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits.

Since defendant expressed complete satisfaction with the court's curative instruction and requested no further remedy, he failed to preserve his challenge to the prosecutor's summation (see *People v Heide*, 84 NY2d 943, 944 [1994]), and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal, because the curative instruction was sufficient to prevent any possible prejudice.

We perceive no basis for reducing the sentence.

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district courts of Tarrant County, Texas, and that Texas law would apply. Plaintiff failed to demonstrate that the enforcement of the forum-selection clause “would be unreasonable and unjust or that the clause is invalid because of fraud or overreaching, such that a trial in the contractual forum would be so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court” (*Sterling Natl. Bank v Eastern Shipping Worldwide, Inc.*, 35 AD3d 222, 222 [1st Dept 2006]; *Brooke Group v JCH Syndicate* 488, 87 NY2d 530, 534 [1996]).

With respect to plaintiff’s causes of action as set forth in his amended complaint, plaintiff failed to plead his causes of action for fraud and intentional misrepresentation with sufficient specificity, and they are duplicative of his claim for breach of contract (CPLR 3016(b); *Small v Lorillard Tobacco Co.*, 94 NY2d 43, 57 [1999]; *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]; *Trusthouse Forte [Garden City] Mgt. v Garden City Hotel*, 106 AD2d 271, 272 [1st Dept 1984]). Plaintiff failed to allege specific facts establishing a “special relationship” sufficient to state a claim for negligent misrepresentation (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180 [2011]). Plaintiff’s conclusory allegations regarding

the effect on consumers at large are insufficient to sustain the cause of action under General Business Law § 349 because this is essentially a private contract dispute relating to the specific facts at hand (*Golub v Tanenbaum-Harber Co., Inc.*, 88 AD3d 622, 623 [1st Dept 2011], *lv denied* 19 NY3d 806 [2012]; *Northwestern Mut. Life Ins. Co. v Wender*, 940 F Supp 62, 65 [SD NY 1996]). Finally, given that there is a written contract covering the dispute at issue, plaintiff's claim for unjust enrichment is duplicative of his cause of action for breach of contract (see *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388-389 [1987]).

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

90 Suffolk P.E.T. Management, Index 113141/08  
LLC, et al.,  
Plaintiffs-Respondents,

-against-

Azad K. Anand, M.D., et al.,  
Defendants-Appellants.

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Hodgson Russ LLP, Buffalo (Joshua Feinstein of counsel), for appellants.

Storch Amini & Munves, PC, New York (Avery Samet of counsel), for respondents.

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Judgment, Supreme Court, New York County (Marcy S. Friedman, J.), entered November 25, 2014, awarding plaintiffs damages, and bringing up for review an order, same court and Justice, entered November 7, 2014, which confirmed in part and modified in part the special referee's report and recommendation following an inquest on damages, unanimously modified, on the law, to reduce the principal sum by the amounts of \$44,724 awarded as damages for breach of a facility lease (\$33,500 for leasehold improvements and \$11,224 for the lost security deposit), and \$53,834.84 awarded as damages for conversion of property, and remand the matter for recalculation of the interest, and otherwise affirmed, without costs.

On a prior appeal, we affirmed an order striking defendants' answer for noncompliance with discovery and directing that a default judgment be entered against them on liability (105 AD3d 462 [1st Dept 2013]). As defaulting parties, defendants are deemed to have admitted all traversable allegations in the complaint, but not plaintiffs' conclusion as to damages (see *Rokina Opt. Co. v Camera King*, 63 NY2d 728, 730 [1984]).

Defendants contend that plaintiffs are not entitled to damages for accounts receivable, because the parties' "Turnkey License and Services Agreement" limits recovery of "Practice Revenues" to revenues received. However, in view of defendants' failure to explain why these amounts were not adjusted or written off, as was defendants' usual practice with unpaid bills, the referee's inference that these receivables were collected was reasonable (see generally *Kardanis v Velis*, 90 AD2d 727 [1st Dept 1982]). The absence of proof of payment is not dispositive, given defendants' discovery abuses (see *Reynolds Sec. v Underwriters Bank & Trust Co.*, 44 NY2d 568, 574 [1978]).

There is no basis for disturbing the motion court's upward modification of the referee's award of certain attorneys' fees. As the court found, "Plaintiffs achieved substantial success on the damages claim they initially pleaded," and defendants do not

ascribe additional fees to plaintiffs' subsequent inflation of their damages claim. Moreover, as the court observed, "[P]laintiffs also expended significant legal fees in connection with defendants' discovery defaults and in establishing liability based on such defaults as well as in connection with the appeal[] regarding the liability determination." In addition, we find that the use of block billing by lead trial counsel did not warrant so deep an across-the-board reduction as the referee imposed (see *Community Counseling & Mediation Servs. v Chera*, 115 AD3d 589, 590 [1st Dept 2014]).

Plaintiffs failed to establish that plaintiff Sagemark Companies, Ltd. sustained any damages as a result of defendant AKA Holdings Limited Partnership's breach of a facility lease, for which a total of \$44,724 in damages was awarded. Pursuant to the lease, the leasehold improvements, for which \$33,500 was awarded, were either fixtures that would become the landlord's property or the personal property of the tenant, which, if not removed, would be deemed abandoned. Further, in determining whether plaintiffs established their entitlement to \$11,224 in damages for the lost security deposit, the court should have considered evidence of Sagemark's default under the lease, since Sagemark's default was "intrinsic to the transactions at issue"

and was "determinative of . . . plaintiff[s'] real damages, which [could not] be established by the mere fact of . . . defendant[s'] default" (*Rokina Opt. Co.*, 63 NY2d at 730-731).

Sagemark's former chief financial officer's directions to his staff that "[w]e are taking what needs to be taken and nothing else," that Dr. Azad Anand return rental equipment not at issue, and that "[e]verything else is staying put" reflects a clear intent to abandon those items now claimed to have been improperly converted, for which \$53,834.34 in damages was awarded. In any event, as indicated, pursuant to the terms of the facility lease, personal items not removed were to be deemed abandoned.

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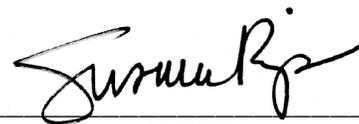
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MABSTOA demonstrated that, while defendants City of New York and/or Metro North Railroad may be responsible for maintaining that area of the sidewalk, MTA and MABSTOA were not responsible because they did not own the sidewalk or the abutting property (see Administrative Code of City of NY § 7-210; *Cabrera v City of New York*, 45 AD3d 455 [1st Dept 2007]). Plaintiff, who has not submitted a response to the appeal, offered no evidence sufficient to raise an issue of fact, and did not move to amend her notice of claim to assert any other theory of liability against MTA and MABSTOA (see *Scott v City of New York*, 40 AD3d 408, 409-410 [1st Dept 2007]; General Municipal Law § 50-e[2], [5], [6]). Nor did she set forth any basis for believing that discovery would lead to relevant evidence against them (see *Weiters v City of New York*, 103 AD3d 509 [1st Dept 2013]).

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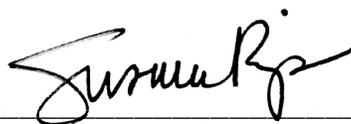


otherwise affirmed.

We find the sentence excessive to the extent indicated. The record does not establish a valid waiver of the right to appeal.

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

93N Elizabeth S. Straus, Index 304189/13  
Plaintiff-Appellant,

-against-

Daniel Strauss,  
Defendant-Respondent.

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Cohen Clair Lans Greifer & Thorpe LLP, New York (Robert Stephan Cohen of counsel), for appellant.

William S. Beslow, New York, for respondent.

Parmet & Greenblatt, LLC, New York (Wendy J. Parmet of counsel), attorney for the child.

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Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered June 25, 2015, which, to the extent appealed from as limited by the briefs, denied plaintiff wife's motion to exclude a forensic custody evaluation and appoint a new forensic mental health expert, and granted defendant husband's cross motion to modify the interim parental access schedule, unanimously affirmed, without costs.

The motion court properly denied plaintiff's motion to exclude the forensic report. *Frye v United States* (293 F 1013 [DC Cir 1923]) does not require that a forensic report cite specific professional literature in support of the report's analyses and opinions. As the motion court noted, plaintiff

could cross-examine the forensic evaluator regarding the lack of citations, and such an omission is relevant to the weight to be accorded to the evaluator's opinion, not to its admissibility (*Zito v Zabarsky*, 28 AD3d 42, 46 [2d Dept 2006]).

The forensic report does not rely to a significant extent on hearsay statements. A review of the report reveals that the primary source of the report's conclusions are the forensic evaluator's firsthand interviews with the parties. In any event, defendant intends to call as witnesses at any future custody hearing anyone to whom the forensic evaluator spoke; thus, the declarants will be subject to cross-examination, rendering admissible any opinion evidence based on their statements (see *Wagman v Bradshaw*, 292 AD2d 84, 86-87 [2d Dept 2002]). To the extent that any hearsay declarants are not cross-examined, the motion court acknowledged that those portions of the report containing inadmissible hearsay should be stricken or not relied upon (see *Lubit v Lubit*, 65 AD3d 954, 956 [1st Dept 2009], *lv denied* 13 NY3d 716 [2010], *cert denied* 560 US 940 [2010]).

Although the forensic report briefly refers to the parties' initial negotiations regarding custody, those negotiations do not form the basis for any conclusions regarding parental fitness or custody. Nor did the forensic evaluator contravene a prior order

of the motion court, which directed him to refrain from making an ultimate recommendation regarding custody. The report states that preschool-age children "usually tolerate well" a 65/35 custody split, and older children a range between 65/35 and 50/50, but it made no specific recommendation in this case. Nor did the report's findings that defendant was an adequate parent, despite plaintiff's safety concerns, usurp the motion court's fact-findings in prior orders. In a prior order, the motion court cited certain safety concerns for the child while in defendant's care, but the court noted that those concerns dissipated after it issued its order. The motion court also noted that it was free to reject opinions in the report (*Zelnik v Zelnik*, 196 AD2d 700, 700 [1st Dept 1993]).

There is a sound and substantial evidentiary basis for the motion court's modification of the visitation order (see *Matter of Frank M. v Donna W.*, 44 AD3d 495, 495-496 [1st Dept 2007]; see also *Eschbach v Eschbach*, 56 NY2d 167, 173 [1982]). Among other things, defendant sufficiently explained, without contradiction, why he missed certain visits with the child, and his failure to explain all of the missed visits did not warrant denial of his cross motion, particularly where the attorney for the child

supported the motion and noted that the child enjoyed spending time with his father. Plaintiff never requested a hearing before the motion court, and, in any event, a hearing was not necessary (see *Skidelsky v Skidelsky*, 279 AD2d 356, 356 [1st Dept 2001]).

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