

the law, without costs, and the motion to dismiss granted. The Clerk is directed to enter judgment dismissing the proceeding as against First Hotels & Resorts Investment, Inc.

In 1991, Société de Banque Occidentale (SDBO), the predecessor-in-interest to petitioner CDR Créances S.A.S. (CDR), loaned nonparty Euro-American Lodging Corp. (EALC) more than \$82 million to acquire a Manhattan property and turn it into a hotel. Judgment debtor Maurice Cohen controlled EALC. EALC later defaulted on the loan, and SDBO sued EALC in France to accelerate repayment of the loan debt. In February 2003, the French court directed EALC to repay the loan, and in 2005, the New York courts recognized the French judgment against EALC and entered judgments against it (2005 judgments).

As part of its efforts to recover payment of the loan agreement, CDR commenced two actions in the New York Supreme Court in 2003 and 2006, based on what CDR alleged was an extensive conspiracy orchestrated to conceal stock transfers and other transfers by Maurice Cohen and his son, judgment debtor Leon Cohen. The 2003 complaint named as defendants Maurice Cohen, EALC, and several corporate entities that Maurice Cohen controlled and that served as alter egos of one another, including Blue Ocean Finance, Ltd. The 2006 action alleged that Maurice Cohen and Leon Cohen conspired with others to strip EALC

of its operating income, which was the collateral for the loan agreement. Further, the 2006 action alleged that Maurice Cohen and Leon Cohen sold the New York hotel for \$33 million, in violation of the loan agreement, and diverted the proceeds to Blue Ocean without making payments to CDR on the 2005 judgments. CDR named as defendants, among others, Robert Maraboef, the former chief executive officer of EALC and a judgment debtor in this proceeding; Allegría Achour Aich, an officer of Blue Ocean and also a judgment debtor in this proceeding; and several corporate entities that Maurice Cohen controlled, including Blue Ocean. The 2003 and 2006 actions were eventually consolidated.

Shortly after August 2010, CDR moved to strike defendants' pleadings and for a default judgment in the consolidated 2003 and 2006 actions, basing the motion on allegations that defendants had perpetrated a fraud on the court. The IAS court granted the motion, and judgment was entered against Maurice Cohen, among others, in September 2011. This Court affirmed, and the Court of Appeals affirmed this Court's decision in part (*CDR Créances S.A.S. v Cohen*, 23 NY3d 307, 324 [2014]).¹

Meanwhile, in 2004, Maurice Cohen had created respondent

¹ The Court of Appeals found that the evidence was insufficient to justify the default against Maurice Cohen's wife, who is not a party in this action (23 NY3d at 324).

First Hotels, a Quebec corporation, to buy a condominium unit at 845 United Nations Plaza in Manhattan. Maurice Cohen, his wife, and Leon Cohen owned First Hotels, and Maurice Cohen controlled it. First Hotels obtained a mortgage from nonparty HSBC Bank USA, where it had a bank account from December 2003 through December 2008.

In February 2009, CDR sued First Hotels and HSBC, among others, seeking the sale of the condominium unit to satisfy CDR's 2008 judgments against Blue Ocean, Maraboeuf and Aich, among others (the 2009 action). According to the complaint, First Hotels had no apparent source of income and received its funding from Cohen entities, apparently without any compensation to those entities. Further, the complaint alleged, the Cohens used the loan proceeds they diverted from CDR to set up First Hotels and to use it as a shell corporation for the purpose of hiding their fraudulently acquired assets. The Cohens then allegedly took the proceeds that Blue Ocean owed to CDR and transferred those proceeds to First Hotels in order to acquire the condominium unit. CDR alleged that the Cohens then personally used the condominium unit as a New York City pied-à-terre without any compensation to Blue Ocean.

In connection with the 2009 action, petitioner filed a notice of pendency against the condominium unit. First Hotels

found a buyer for the unit, but the buyer would close only if the notice of pendency was cancelled. By order entered June 26, 2009, the court in the 2009 action granted First Hotels' motion to vacate and cancel the notice of pendency on condition that First Hotels place the net proceeds of the sale of the unit in an interest-bearing escrow account. Accordingly, on July 20, 2009, First Hotels deposited \$2,995,120.71 in escrow with respondent Stewart Title Insurance Company.

In the first half of 2012, based on documents that HSBC had produced in response to a federal subpoena, CDR moved for leave to amend its complaint in the 2009 action. The IAS court denied the motion, and this Court affirmed, noting that the proposed allegations of fraud and conspiracy to defraud against First Hotels were supported by the same allegedly newly discovered evidence as underlay the proposed amendment against HSBC, and that the new evidence did not warrant amendment of the complaint (see *CDR Créances S.A.S. v First Hotels & Resorts Inv., Inc.*, 101 AD3d 485, 486-487 [1st Dept 2012] [the 2012 *CDR Créances* decision]). Moreover, this Court found, to the extent First Hotels could be deemed liable for amounts owed under the judgments that CDR had obtained, CDR's appropriate course was to seek amendment of the judgments, not to seek relief by way of an unrelated action (*id.* at 487). Indeed, this Court noted, CDR's

counsel "stated at oral argument that if the court denied amendment, [CDR] would bring a special proceeding pursuant to CPLR 5225" (*id.*). In addition, this Court held that "no allegation in the proposed amended complaint suffices to connect First Hotels, an entity that did not even exist until 2004, . . . with a fraud by the Cohens that occurred decades ago, regardless of any use the Cohens may ultimately have made of it" (*id.*).

In January 2014, CDR commenced this turnover proceeding under CPLR 5225(b). In an amended petition, CDR sought a judgment and order that First Hotels was jointly and severally liable for satisfaction of the outstanding balance of CDR's September 2011 judgment against Maurice Cohen, Leon Cohen, Maraboeuf, and Aich in the amount of \$186,325,301.01. The amended petition, noting that First Hotels had been Maurice Cohen's alter ego since its inception, sought to pierce the corporate veil on the basis that the judgment debtors, particularly Maurice Cohen, exercised complete dominion and control of First Hotels and used First Hotels to conceal the proceeds of their fraud. CDR also requested that the court order Stewart Title Insurance Company to turn over to CDR all sums that it was holding as the net proceeds from the sale of the condominium unit.

In support of its motion to dismiss for lack of personal

jurisdiction, First Hotels noted that it had no assets in New York, owned no real property in New York, had no offices or employees in New York, and had no bank accounts in New York. First Hotels also noted that, in fact, it had sold its New York condominium unit in 2009.

The IAS court denied First Hotels' motion. In so doing, the court found that it had long-arm jurisdiction over First Hotels under CPLR 302 because First Hotels owned property in New York and had sold that property only so that it could put the funds into an escrow account. The IAS court also noted that the proceeding underlying this appeal "was entirely contemplated by the First Department in its [2012 *CDR Créances*] decision."

We now reverse. To begin, on this appeal, CDR claims that in the 2012 *CDR Créances* decision, this Court stated that the proper procedure to assert First Hotels' liability for the September 2011 judgment against the individual judgment debtors was in a proceeding to enforce the judgment under CPLR 5225. Thus, CDR argues, in essence, that this Court directed it to file this proceeding. But contrary to CDR's assertion, this Court did not, in the 2012 *CDR Créances* decision, so direct CDR. Rather, this Court's reference to CPLR 5225 was simply to show that CDR recognized that it could not enforce an existing judgment by commencing a new action against a party that was not already one

of the judgment debtors. At any rate, the jurisdictional hurdles to a CPLR 5225 proceeding, discussed *infra*, were not before the Court in the earlier appeal.

CDR seeks to assert jurisdiction over First Hotels based on CPLR 302(a)(1) and (4). However, under the circumstances presented here, that section of the CPLR does not confer personal jurisdiction over First Hotels.

CPLR 302 will confer personal jurisdiction “so long as the defendant’s activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted” (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]; see also *Parke-Bernet Galleries v Franklyn*, 26 NY2d 13, 16 [1970]). Further, “[t]he party asserting long arm jurisdiction must demonstrate that his or her claim arises out of, or has a specific nexus with, the performance of a purposeful statutory act or acts” (Weinstein-Korn-Miller, NY Civ Prac ¶ 302.00 [2nd ed 2015]).

When CDR commenced the 2009 action, First Hotels still owned real property within the state - namely, the Manhattan condominium unit. Moreover, the 2009 action arose from First Hotels’ ownership of real property, in that CDR sought to force a sale of the unit. In contrast, by the time CDR commenced this proceeding, First Hotels had sold its condominium unit and closed

its bank account with HSBC.

Thus, with respect to this proceeding, First Hotels' only contacts with New York were the purchase and sale of the condominium unit. But this turnover proceeding does not arise out of that purchase and sale. At most, CDR could premise jurisdiction on the escrowed funds in the 2009 action, or on ownership of the condominium unit. However, as to the escrowed funds, the mere retention of those funds in New York pending a resolution of the 2009 action is not "transact[ing]. . . . business" in New York for purposes of jurisdiction under CPLR 302(a)(1) (see *Pramer S.C.A. v Abaplus Intl. Corp.*, 76 AD3d 89, 96-97 [1st Dept 2010]; see also *DirectTV Latin Am., LLC v Pratola*, 94 AD3d 628, 629 [1st Dept 2012], *lv denied* 19 NY3d 812 [2012]). Indeed, CDR argues that the funds in escrow do not even properly belong to First Hotels; CDR cannot be heard to argue at the same time that the mere presence of those funds is sufficient to confer personal jurisdiction.

Likewise, ownership of the condominium unit does not, in this case, confer jurisdiction under CPLR 302(a)(4), as the ownership is not relevant to the claims asserted in this proceeding. First of all, First Hotels sold the unit in 2009, approximately two years before the 2011 judgment was entered and approximately five years before this proceeding was commenced.

What is more, First Hotels was created in 2004 to buy the condominium unit, and by the time First Hotels sold that unit, Maurice Cohen's wrongdoing had long since occurred. As we have already held in the 2012 *CDR Créances* decision, ownership of the condominium unit is unrelated to the 2011 judgment or to the wrongdoing that resulted in that judgment.

In light of our decision, we need not consider the parties' remaining arguments.

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

ENTERED: JUNE 21, 2016


CLERK

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

16717-

Index 160459/13

16718-

16719 Eric Hood,
Plaintiff-Respondent-Appellant,

-against-

Peter Koziej, et al.,
Defendants-Appellants-Respondents.

Wuersch & Gering LLP, New York (Craig M. Flanders of counsel),
for appellants-respondents.

Charles H. Small, New York, for respondent-appellant.

Judgment, Supreme Court, New York County (Joan M. Kenney, J.), entered February 26, 2015, awarding plaintiff the total sum of \$53,534.98, and bringing up for review an order, same court and Justice, entered July 15, 2014, which, inter alia, denied defendants' motion for summary judgment dismissing the complaint, and granted plaintiff's cross motion for partial summary judgment as to liability, and an order, same court and Justice, entered on or about February 20, 2015, which confirmed the recommendation of the Judicial Hearing Officer, dated December 22, 2014, and awarded plaintiff damages of \$6,700.00, plus interest, and attorneys' fees of \$44,714.00, denied plaintiff's motion for supplemental attorneys' fees and treble damages, and denied defendants' cross motion to vacate the grant of partial summary

judgment to plaintiff, unanimously modified, on the law and the facts, to award plaintiff attorneys' fees and expenses of \$32,870.55 for the period subsequent to December 10, 2014, and to grant plaintiff treble damages on the sum of \$6,700 only, and otherwise affirmed, without costs. Defendants' appeals from aforementioned orders unanimously dismissed, without costs, as subsumed in the appeal from the judgment. Plaintiff's appeal from the order entered February 20, 2015 deemed an appeal from the judgment.

The court properly concluded that there was personal jurisdiction over defendants based on the process server's affidavits and defendant Robert Koziej's admission that multiple sets of pleadings were affixed to different locations in defendants' building and place of business. Robert Koziej's affidavit was conclusory and insufficient to overcome the presumption raised by the other evidence (*see Grinshpun v Borokhovich*, 100 AD3d 551, 552 [1st Dept 2012], *lv denied* 21 NY3d 857 [2013]).

The court correctly denied defendants' motion to vacate the court's order granting plaintiff partial summary judgment on liability based on defendants' failure to contest the merits of plaintiff's claims, including his request for attorneys' fees. Although not technically a default because defendant appeared in

opposition to plaintiff's cross motion, they failed to demonstrate a reasonable excuse or a meritorious defense, and failed to explain why it took more than six months to seek this relief (see *Benson Park Assoc., LLC v Herman*, 73 AD3d 464, 465 [1st Dept 2010]).

However, plaintiff is entitled to an award of supplemental attorneys' fees and expenses for the period subsequent to December 10, 2014, pursuant to Real Property Law § 234, in that the proceedings after that date were necessary for plaintiff to obtain complete relief, and, in any event, defendants never contested the amount of the fees and expenses or the reasonableness of counsel's hourly rate. In fact, defendants only argue that the award of attorneys' fees and expenses under Real Property Law § 234 was improper because the lease and lease extension were not signed by them. However, it is not disputed that plaintiff, as the party to be charged, signed the lease and lease extension, and defendants accepted payment from plaintiff and provided him with the keys to the premises. By so doing, defendants ratified the lease and lease extension, and thus cannot avoid their obligations now, including their reciprocal obligation for attorneys' fees under Real Property Law § 234, simply because they never delivered a signed copy of the leases to plaintiff (see *One Ten W. Fortieth Assoc. v Isabel Ardee*,

Inc., 124 AD3d 500 [1st Dept 2015]).

As to whether plaintiff is entitled to treble damages under Real Property Actions and Proceedings Law § 853, the statute provides:

“If a person is disseized, ejected, or put out of real property in a forcible or unlawful manner, or, after he has been put out, is held and kept out by force or by putting him in fear of personal violence or by unlawful means, he is entitled to recover treble damages in an action therefor against the wrong-doer.”

“RPAPL § 853 and its predecessor . . . were enacted to discourage undue intimidation and violence in the ejection of persons from real property by providing for treble damages under certain circumstances” (Rudolph de Winter and Larry M. Loeb, *Practice Commentaries*, McKinney’s Cons Laws of NY, Book 49½, RPAPL 853). The statute was amended in 1981 to include the references to “unlawful manner” and “unlawful means” (*see Lyke v Anderson*, 147 AD2d 18, 24 [2d Dept 1989]; *see also Mannion v Bayfield Dev. Co.*, 134 Misc 2d 1060 [Sup Ct, NY County 1987]) and was “intended to remedy such actions as ‘removing the tenant’s possessions while he or she is out, or by . . . changing the door lock – actions

beyond the narrow legal definition of force'” (*Mayes v UVI Holdings*, 280 AD2d 153, 160 [1st Dept 2001], quoting 1981 NY Legis Ann at 256).

In *Mayes*, this Court, without ultimately reaching the issue, acknowledged that “[t]he [1981] amendment to the statute has resulted in some variation in the criteria applied in assessing treble damages against a wrongdoer” (280 AD2d at 160). Since 1981, courts have framed the issue as whether, under RPAPL 853, an award of treble damages is discretionary or mandatory in cases where the record establishes forcible or unlawful entry into real property. Although this Court has not decided the issue, the Appellate Division, Second Department, and the Supreme Court, New York County, have determined that the legislature intended to leave the question of whether treble damages should be awarded, pursuant to RPAPL 853, to the discretion of the court (*Lyke*, 147 AD2d at 28; *Mannion*, 134 Misc 2d at 1064).¹ In fact, plaintiff here does not advocate that he is automatically entitled to recovery under RPAPL 853, simply because he prevailed on his wrongful eviction claim, but rather takes the position that the

¹ As this Court observed in *Mayes*, the Second Department’s reasoning in *Lyke* is at least in part based on the concept that there could be scenarios where an unlawful eviction was unintentional, in which case treble damages would not be appropriate.

decision to award treble damages is a matter left to the Court's discretion. Therefore, the issue of whether the statute mandates treble damages is not specifically before us and we need not reach it.² In any event, plaintiff should prevail here under either interpretation of the statute.

Plaintiff cites to this Court's decision in *Rocke v 1041 Bushwick Ave. Assoc.* (169 AD2d 525 [1st Dept 1991]), affirming the trial court's award of treble damages pursuant to RPAPL 853 where the record showed that while the plaintiff was out of her apartment, the building superintendent moved her belongings to the basement and changed her apartment door lock. The record there also contained evidence sufficient to allow a jury to conclude that the building superintendent did this on instructions from the building's manager, who was a friend of the plaintiff's ex-husband, with whom the plaintiff had recently had an argument. Here, defendants did not dispute plaintiff's allegations that after executing a lease extension, which defendants wanted to rescind, he returned home and found defendants in the process of changing the dead bolt lock on his front door, despite the fact that they had not commenced legal proceedings to evict him and did not have permission to enter the

² We note that the trial court summarily denied plaintiff's request for treble damages without any reasoning or discussion.

apartment. Plaintiff also alleged, and provided an affidavit supporting his claim, that all of his personal effects, clothing, valuable jewelry, electronics and other possessions were removed from the apartment, and his demands for the location and return of his property were refused by defendants for at least a month.

Defendants do not oppose plaintiff's request for treble damages on the merits. Instead, defendants argue that it is premature to reach the issue because there are conflicting facts and a trial is needed. Since we have already found, *infra*, that plaintiff was properly awarded summary judgment on liability and there has been a hearing on actual damages, the record is sufficiently developed to determine treble damages (*cf. Mayes*, 280 AD2d at 161 [declining to reach the issue of treble damages where "no damages have been assessed, and the propriety of the imposition of treble damages against any defendant remains to be evaluated upon a full record after trial"])). Accordingly, under the circumstances presented here, we find that the trial court's denial of treble damages under RPAPL 853 was improvident and

plaintiff is entitled to treble damages on his damages award of \$6,700 (*Rocke*, 169 AD2d at 525; see also *Clinkscale v Sampson*, 48 AD3d 730, 731 [2d Dept 2008]; *Moran v Orth*, 36 AD3d 771, 773 [2d Dept 2007]).

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

ENTERED: JUNE 21, 2016



CLERK

Tom, J.P., Sweeny, Manzanet-Daniels, Gische, Gesmer, JJ.

679 Orlando Nieves, Index 18807/07
Plaintiff-Respondent,

-against-

Citizens Advice Bureau Jackson Avenue
Family Residence,
Defendant-Appellant,

Joseph Farro, et al.,
Defendants.

Callan, Koster, Brady & Brennan, LLP, New York (Janine L. Peress
of counsel), for appellant.

Dinkes & Schwitzer, P.C., New York (Andrea M. Arrigo of counsel),
for respondent.

Order, Supreme Court, Bronx County (Laura G. Douglas, J.),
entered October 25, 2013, which denied defendant Citizens Advice
Bureau Jackson Avenue Family Residence's (CAB) motion for summary
judgment dismissing the complaint, and granted plaintiff's cross
motion to vacate a prior conditional preclusion order,
unanimously modified, on the law and the facts, to grant the
cross motion on condition that plaintiff's lawyer, within 30 days
of the date hereof, pay to defendant CAB the sum of \$3,000 to
compensate it for costs in opposing the cross motion, and as so
modified, affirmed, without costs. If these conditions are not
complied with within 30 days, the cross motion is denied.

The conditional preclusion order of the Supreme Court, dated

January 31, 2013, which required plaintiff to produce certain discovery within 30 days of entry of the order or be precluded from testifying, was self-executing and became absolute when plaintiff failed to produce the discovery or an explanatory affidavit within the stated time frame (see *Casas v Consolidated Edison Co. of N.Y., Inc.*, 116 AD3d 648, 648 [1st Dept 2014]). In order to be entitled to vacatur of the order, plaintiff was required to show a reasonable excuse for his failure to comply with the order and a meritorious claim (see *Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 80 [2010]). Plaintiff met this burden by showing that it was law office failure that caused the default (CPLR 2005; *Tewari v Tsoutsouras*, 75 NY2d 1, 12-13 [1989]), that defendant was not significantly prejudiced, since plaintiff provided the authorizations called for in the order one and a half months past the deadline, and that plaintiff's deposition testimony demonstrates a meritorious claim which raised a triable issue of fact sufficient to defeat summary judgment. The short default was not willful or contumacious. While we are concerned with plaintiff's failure to comply with prior discovery orders, given the strong preference in our law that actions be decided on

their merits (*Banner v New York City Hous. Auth.*, 73 AD3d 502, 503 [1st Dept 2010]), rather than precluding plaintiff from testifying at trial, a monetary sanction imposed upon plaintiff's lawyer is appropriate, and we condition the grant of relief accordingly.

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

ENTERED: JUNE 21, 2016


CLERK

the award for past pain and suffering in the amount of \$400,000, to award 0 on account of past and future lost earnings, and to order a new trial as to damages for future pain and suffering unless plaintiff stipulates, within 30 days after service of a copy of this order with notice of entry, to a reduction of the jury award for future pain and suffering to \$370,000, for a total award of \$500,500 after allocation of fault, and otherwise affirmed, without costs.

The forty-one-year-old plaintiff was injured on August 3, 2011 when he stepped on a piece of electrical conduit debris on defendants Structure Tone and Cowtan & Tout's work site. The jury found defendants liable for plaintiff's injury under Labor Law § 241(6), premised on a violation of Industrial Code (12 NYCRR) § 23-1.7(e)(2) (tripping and other hazards in work areas), allocating 65% fault to defendants and 35% to plaintiff. Plaintiff was awarded damages totaling \$1,361,000, consisting of \$400,000 for past pain and suffering, \$400,000 for past lost earnings, \$425,000 for future pain and suffering (covering a period of 8.5 years), and \$136,000 for future lost earnings (covering a period of 2 years).

The court correctly determined that there was no basis for setting aside the verdict as to liability. The verdict was based on legally sufficient evidence (*see Cohen v Hallmark Cards*, 45

NY2d 493 [1978]), and not against the weight of the evidence (*Lolik v Big V Supermarkets*, 86 NY2d 744 [1995]).

The jury's awards for past and future pain and suffering, as modified herein, do not deviate materially from reasonable compensation. Plaintiff sustained a evulsion fracture of the fifth metatarsal (i.e., with tendon involvement), for which he underwent an open reduction internal fixation procedure shortly after the accident. He had to undergo a second operation to remove the hardware. The evidence at trial established that plaintiff's Type 1 diabetes was a substantial aggravating factor impeding and prolonging his ability to heal. Plaintiff underwent skin debridements and approximately 20 treatments in a hyperbaric chamber. An MRI in February 2012 revealed "tendinosis of the peroneal brevis," a chronic problem resulting from healing of the initial injury with scar tissue. The instability of plaintiff's right foot prevents him from working in construction, where the risk of falling is always present. He continues to exhibit long-term instability and weakness. Under the circumstances, the award of \$400,000 for past pain and suffering and a reduced award of \$370,000 for future pain and suffering do not deviate from what would be considered reasonable compensation (see *Vasquez v Chase Manhattan Bank*, 266 AD2d 3 [1st Dept 1999] [upholding \$1.55 million for future pain and suffering where the plaintiff was

operated on twice for a fractured heel and ruptured disc resulting from a scaffold injury]; *McGilloway v Block 1289 Assoc.*, 266 AD2d 35 [1st Dept 1999], *lv dismissed* 94 NY2d 915 [2000], *lv denied* 95 NY2d 755 [2000] [award of \$880,000 for future pain and suffering where the plaintiff sustained a severe and disabling heel injury]).

There is no basis for the awards for past and future lost earnings inasmuch as the evidence showed that plaintiff has been working and advertising for work in a self-employed capacity.

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

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

ENTERED: JUNE 21, 2016



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

CLERK

Mazzarelli, J.P., Andrias, Saxe, Gische, Kahn, JJ.

1503-

Ind. 3779/10

1503A The People of the State of New York,
Respondent,

5388/09

-against-

Harold Jones,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Kelly L. Smith
of counsel), for respondent.

Judgments, Supreme Court, New York County (Richard D.
Carruthers, J.), rendered October 1, 2014, convicting defendant,
upon his pleas of guilty, of criminal possession of a weapon in
the second degree and criminal possession of a controlled
substance in the third degree, and sentencing him to an aggregate
term of 3½ years, unanimously affirmed.

The court properly denied defendant's suppression motion. A
warrant to search defendant's apartment, identified by address
and apartment number, was sufficiently specific to authorize a
search of the apartment's bathroom, notwithstanding that it was
located across the hall from the apartment's main door.
Defendant had a key to the bathroom at issue, to the exclusion of
others, and his apartment had no other bathroom. Thus, the

bathroom was part of the apartment for all relevant purposes, or was at least appurtenant to it (see *People v Brito*, 11 AD3d 933, 935 [4th 2004], *appeal dismissed* 5 NY3d 825 [2005]; see also *United States v Fagan*, 577 F3d 10 [1st Cir 2009], *cert denied* 559 US 958 [2010]). Accordingly, the search of the bathroom did not exceed the scope of the warrant.

We perceive no basis for reducing the three-year term of postrelease supervision.

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

ENTERED: JUNE 21, 2016


CLERK

Mazzarelli, J.P., Andrias, Saxe, Gische, Kahn, JJ.

1504 Amtrust-NP SFR Venture, LLC, Index 810148/12
Plaintiff-Respondent,

-against-

James Vazquez, also known as James Vasquez,
Defendant-Appellant,

City of New York Environmental Control Board,
et al.,
Defendants.

Steven W. Stutman, Melville (Douglas M. Jones of counsel), for
appellant.

Houser & Allison, APC, New York (Jacqueline Muratore of counsel),
for respondent.

Order, Supreme Court, New York County (Joan M. Kenny, J.),
entered May 15, 2015, which, insofar as appealable, denied
defendant's motion for renewal of a prior order, same court and
Justice, entered February 10, 2015, granting plaintiff's motion
for summary judgment, striking defendant's answer and
counterclaims and appointing a referee to compute the sums due
and owing to plaintiff under the subject note and mortgage,
unanimously affirmed, without costs.

The court properly denied defendant's motion to renew. The
affidavit of Stephen Dibert, and the additional documents
attached, particularly the new purported copy of the note, were
properly rejected by the court in that they were submitted for

the first time in defendant's reply papers on the motion to renew and reargue, and plaintiff had no opportunity to respond to them (see *All State Flooring Distribs., L.P. v MD Floors, LLC*, 131 AD3d 834, 835-836 [1st Dept 2015]; *Dannasch v Bifulco*, 184 AD2d 415, 416-417 [1st Dept 1992]). The court also properly denied defendant's motion on the ground that he offered no justification whatsoever as to why he did not obtain the new evidence in time to submit it in opposition to plaintiff's original motion, and did not assert that he made any effort, let alone a diligent effort, to obtain this new evidence, which was readily available (see *Altschuler v Jobman 478/480, LLC.*, 135 AD3d 439, 441 [1st Dept 2016]; *Queens Unit Venture, LLC v Tyson Ct. Owners Corp.*, 111 AD3d 552 [1st Dept 2013]; compare *Tishman Constr. Corp. of N.Y. v City of New York*, 280 AD2d 374 [1st Dept 2001]).

This Court previously dismissed so much of this appeal as was based on the motion court's denial of defendant's motion to

reargue (see order M-4360, entered November 24, 2015), which is not appealable. In light of the dismissal of the appeal, we reject defendant's remaining arguments.

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

ENTERED: JUNE 21, 2016


CLERK

Mazzarelli, J.P., Andrias, Saxe, Gische, Kahn, JJ.

1505 & In re Jayding S., and Another,
M-2582 Children Under Eighteen Years of Age,
etc.,

Vanessa S.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

O'Melveny & Myers LLP, New York (Daniel L. Cantor of counsel),
for appellant.

Zachary W. Carter, Corporation Counsel, New York (Kathy Park of
counsel), for respondent.

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

Appeal from order, Family Court, Bronx County (Carol R.
Sherman, J.), entered on or about October 8, 2015, which granted
petitioner agency's petition seeking a modification of an order
of disposition, to the extent of directing that an expedited
hearing be held to determine whether good cause exists for
modification under Family Court Act § 1061, unanimously
dismissed, without costs.

The appeal is moot, because the modification petition was
dismissed in April 2016 due to the agency's withdrawal of the
petition. The issues respondent mother seeks to raise concerning
Family Court's jurisdiction are not substantial and novel

questions that should be addressed by this Court, and are unlikely to recur in light of the recent amendments to Family Court Act § 1055-b (see *Duane Reade Inc. v Local 338, Retail, Wholesale, Dept. Store Union, UFCW, AFL-CIO*, 11 AD3d 406 [1st Dept 2004]). Nor has the mother shown that she will suffer ascertainable and legally significant consequences if the order appealed from is not vacated (see e.g. *Matter of Javier R. [Robert R.]*, 43 AD3d 1, 3-5 [1st Dept 2007], *appeal dismissed* 10 NY3d 754 [2008]).

M-2582 - In the Matter of Jayding S. and Another

Motion to dismiss the appeal as moot denied
as academic.

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

ENTERED: JUNE 21, 2016


CLERK

Mazzarelli, J.P., Andrias, Saxe, Gische, Kahn, JJ.

1506 Alexander Reus, Index 115995/10
Plaintiff-Appellant-Respondent,

-against-

Andreas W. Tilp,
Defendant-Respondent-Appellant.

Winne, Banta, Basralian & Kahn, P.C., New York (Gary S. Redish of
counsel), for appellant-respondent.

Smith, Gambrell & Russell, LLP, New York (John G. McCarthy of
counsel), for respondent-appellant.

Order and judgment (one paper), Supreme Court, New York
County (Saliann Scarpulla, J.), entered December 16, 2015, which,
to the extent appealed from, denied plaintiff's motion for
summary judgment on his first cause of action, and granted
defendant's motion for summary judgment on that cause of action
to the extent of declaring that defendant's ownership interest in
the parties' former Florida law firm and his fee-sharing
arrangement with plaintiff under the parties' settlement
agreement are valid; granted defendant's motion for summary
judgment dismissing plaintiff's fourteenth affirmative defense;
granted plaintiff's motion for summary judgment declaring in its
favor on the second cause of action with respect to a Foundation
matter and denied defendant's motion for summary judgment
dismissing the Foundation matter claim, and declared that all

fees that plaintiff received from Grant & Eisenhofer, P.A. in connection with the Foundation matter belong solely to him and are not subject to any fee-splitting with defendant under the settlement agreement; and granted plaintiff's motion for summary judgment dismissing defendant's second counterclaim, for legal fees from the Foundation matter, unanimously affirmed, with costs.

Under Florida law, even if the parties' fee-sharing agreement and ownership agreement violated Florida's attorney disciplinary rules, the violation does not provide a basis for invalidating those agreements (*Mark Jay Kaufman v Davis & Meadows, P.A.*, 600 So2d 1208, 1211 [Fla 1st Dist Ct App 1992]; *Lee v Florida Dept. of Ins. and Treasurer*, 586 So2d 1185, 1188 [Fla 1st Dist Ct App 1991]).

Plaintiff made a prima facie showing that the fees paid to him in the Foundation matter are not governed by the parties' settlement agreement and that he is therefore entitled to keep

all of those fees. In opposition, defendant failed to raise a triable issue of fact.

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

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to which plaintiff sold the Painting to SOG in an exchange of artwork and cash. Plaintiff then entered into a series of transactions with SOG, culminating in a May 2006 agreement pursuant to which plaintiff transferred \$1,465,000, to SOG, "plus full title, free and clear," to four enumerated artworks, including the Painting, in exchange for \$300,000 and 40 enumerated artworks from SOG.

The conversion and replevin claims were correctly dismissed since, as the motion court found, plaintiff's own pleadings concede that plaintiff sold the Painting in 2006 and has no current possessory interest in it (see *Pappas v Tzolis*, 20 NY3d 228, 234 [2012]; *Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]; *Pivar v Graduate School of Figurative Art of N.Y. Academy of Art*, 290 AD2d 212 [1st Dept 2002]). In addition to the evidence of the sale in the April 2006 and May 2006 agreements, a letter dated August 3, 2011 from plaintiff's counsel to defendant in connection with SOG's then pending bankruptcy proceeding states that "on or about April 14, 2006, [plaintiff] sold [the Painting] . . . to [SOG]."

Plaintiff's failure to plead any prior relationship with defendant, let alone one that would cause inducement or reliance, precludes its unjust enrichment claim (see *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]).

The declaratory judgment claim is duplicative of the other claims and is thus "unnecessary and inappropriate" (*Spitzer v Schussel*, 48 AD3d 233, 234 [1st Dept 2008]).

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

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robbery does not warrant a different conclusion (see *People v Abraham*, 22 NY3d 140, 146-147 [2013]; *People v Rayam*, 94 NY2d 557 [2000]).

Defendant was properly adjudicated a persistent violent felony offender. The court correctly ruled that defendant was foreclosed from contesting the constitutionality of his 2000 conviction, which had already been relied upon, in 2005, in adjudicating him a second violent felony offender (see CPL 400.15[7][b],[8]; *People v Odom*, 63 AD3d 408 [1st Dept 2009], *lv denied* 13 NY3d 798 [2009]). Although the minutes of the 2005 plea have been irretrievably lost, defendant has not established a sufficient basis for a reconstruction hearing (see *People v Parris*, 4 NY3d 41, 49-50 [2004]).

An isolated portion of the prosecutor's summation that went beyond the evidence did not deprive defendant of a fair trial. Defendant's claims regarding evidentiary matters are unpreserved, and we decline to review them in the interest of justice. As an

alternative holding, we find that the court properly exercised its discretion in denying defendant's belated mistrial motion raising some of these issues and that any errors were harmless (see *People v Crimmins*, 36 NY2d 230 [1975]).

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Mazzarelli, J.P., Andrias, Saxe, Gische, Kahn, JJ.

1511 Tayquine Green, Index 302492/12
Plaintiff-Appellant,

-against-

Domino's Pizza, LLC, et al.,
Defendants-Respondents.

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Brian J. Isaac of counsel), for appellant.

Kendric Law Group P.C., Garden City (Christopher Kendric of counsel), for Domino's Pizza LLC, respondent.

Cheven, Keely & Hatzis, New York (William B. Stock of counsel), for Miguel Sanchez-Matos, respondent.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about January 29, 2015, which granted defendants' motions for summary judgment dismissing the complaint on the threshold issue of serious injury under Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants made a prima facie showing that plaintiff did not sustain a permanent consequential or significant limitation of use of his right knee, left shoulder, or left ankle by submitting the report of their orthopedic expert, who found no significant limitations and negative clinical results, and opined that plaintiff had a resolved shoulder strain, a resolved ankle sprain, and that any injury to his right knee had resolved

(see *Rivera v Fernandez & Ulloa Auto Group*, 123 AD3d 509, 509 [1st Dept 2014], *affd* 25 NY3d 1222 [2015]). In addition, defendant submitted a radiologist's report finding that the MRI of plaintiff's right knee was normal and showed no evidence of traumatic or acute injury causally related to the accident (see *Perdomo v City of New York*, 129 AD3d 585, 585 [1st Dept 2015]; *Kang v Almanzar*, 116 AD3d 540 [1st Dept 2014]).

In opposition, plaintiff failed to raise an issue of fact as to whether he suffered any serious injury to his left shoulder or left ankle, since his orthopedic surgeon's affirmation concerning a recent examination did not address those injuries (see *Kang* at 541), and his uncertified and unaffirmed medical records were inadmissible (see *Malupa v Oppong*, 106 AD3d 538, 539 [1st Dept 2013]; *Luetto v Abreu*, 105 AD3d 558, 558-559 [1st Dept 2013]).

As for the right knee, the affirmation of plaintiff's orthopedic surgeon stated only that he had performed arthroscopic surgery two years earlier, but provided no opinion as to causation and no findings of permanent or significant limitation of use. His unaffirmed reports, if considered, show that tears in the meniscus were found during surgery, but do not provide any opinion as to causal relationship or any findings of quantitative or qualitative limitation of use. A "tear of the meniscus, standing alone, without any evidence of limitations caused by the

tear, is not sufficient to raise a triable issue of fact” (*Mulligan v City of New York*, 120 AD3d 1155, 1156 [1st Dept 2014]; see *Acosta v Zulu Servs., Inc.*, 129 AD3d 640, 640 [1st Dept 2015]). Further, plaintiff failed to explain his cessation of treatment about nine months after the accident, until the examination by his surgeon two years later, since he acknowledged that Medicaid would have covered additional physical therapy after his no-fault benefits ended (see *Windham v New York City Tr. Auth.*, 115 AD3d 597, 599 [1st Dept 2014]; *Merrick v Lopez-Garcia*, 100 AD3d 456 [1st Dept 2012]). Nor did plaintiff offer any medical evidence to explain why the hospital records he submitted show that he had full range of motion and no swelling in the right knee when examined after the accident (see *Thomas v City of New York*, 99 AD3d 580, 581 [1st Dept 2012], *lv denied* 22 NY3d 857 [2013]; see also *Acosta v Vidal*, 119 AD3d 408 [1st Dept 2014]).

Plaintiff’s testimony that he did not miss any days of work and walked one-half mile each way to physical therapy, after the

accident, defeats his 90/180-day claim (see *Streeter v Stanley*, 128 AD3d 477, 478 [1st Dept 2015]; *Frias v Son Tien Liu*, 107 AD3d 589, 590 [1st Dept 2013]).

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officer's testimony that he observed a drug transaction.

Defendant did not preserve his challenge to expert testimony concerning the practices of drug traffickers, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. The testimony had a sufficient factual predicate, was helpful to the jury in understanding the evidence presented and in resolving issues raised at trial, and was not prejudicial (see *People v Brown*, 97 NY2d 500, 505-507 [2002]).

Defendant claims that his counsel rendered ineffective assistance by failing to object to the expert testimony. 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]). The testimony was clearly admissible and objecting to it would have been futile; in any event, the lack of objection did not cause any prejudice.

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: JUNE 21, 2016


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Mazzarelli, J.P., Andrias, Saxe, Gische, Kahn, JJ.

1513 Vicki Lynn Turbeville, Index 306447/12
Plaintiff-Respondent-Appellant,

-against-

Wallace Turbeville,
Defendant-Appellant-Respondent.

Joelson & Rochkind, New York (Kenneth Joelson of counsel), for
appellant-respondent.

Peter Morris Law, New York (Elsie Echevarria of counsel), for
respondent-appellant.

Judgment, Supreme Court, New York County (Lancelot B.
Hewitt, Special Referee), entered September 11, 2014, dissolving
the parties' marriage, pursuant to an amended order, same court
and Special Referee, entered on or about March 3, 2014, which,
among other things, awarded plaintiff wife \$3500 per month in
maintenance until she turns 68 years old, denied plaintiff
attorneys' fees and costs, awarded defendant husband marital debt
in the amount of \$150,710.50, and awarded plaintiff marital debt
in the amount of \$27,111, a portrait, and her jewelry business,
unanimously modified, on the law and the facts, to the extent of
directing that plaintiff pay defendant the amount of \$123,599.50
within 90 days of this decision, and that if full payment is not
made, defendant is allowed to enter judgment for the unpaid
amount in the Supreme Court, and otherwise affirmed, without

costs.

The Special Referee had authority to determine the issues of equitable distribution, maintenance, marital debt and counsel fees, since the order of reference and the parties' stipulation allowed him to do so (CPLR 4311, 4317[a]; see *Batista v Delbaum, Inc.*, 234 AD2d 45, 46 [1st Dept 1996]). Moreover, the parties participated in the trial without disputing the Special Referee's authority to determine the referred issues (see *Matter of Carlos G. [Bernadette M.]*, 96 AD3d 632, 633 [1st Dept 2012]). The Special Referee did not exceed his authority by considering and determining the issue of capital gains tax on the sale of the marital property, since that issue was relevant to the referred issues of equitable distribution and martial debt (see e.g. *Schorr v Schorr*, 96 AD3d 583, 584 [1st Dept 2012]; *Anonymous v Anonymous*, 222 AD2d 305, 305-306 [1st Dept 1995]).

The Special Referee considered the relevant factors in awarding maintenance, and his award was appropriate (see former Domestic Relations Law § 236B[6][a]; *Cohen v Cohen*, 120 AD3d 1060, 1064 [1st Dept 2014], *lv denied* 24 NY3d 909 [2014]). The Special Referee properly considered and rejected defendant's assertion that he could not obtain meaningful employment because of health reasons. The Special Referee properly concluded, crediting the vocational expert evidence, that defendant had not

been diligent in finding a job within his earning capacity of \$150,000 to \$180,000, and properly relied on that earning capacity in calculating maintenance. The Special Referee considered the overall decline in the parties' finances over time, and did not rely on any lavish predivorce standard of living in awarding maintenance.

Lifetime maintenance of \$10,000 per month for plaintiff is not warranted, as the evidence shows that she is capable of future self-support and was gainfully employed during the parties' marriage (see *Michelle S. v Charles S.*, 257 AD2d 405, 407 [1st Dept 1999]). Although plaintiff left her position in the publishing industry to raise the parties' two children, she later started and ran a jewelry business during the marriage.

Based upon the parties' arguments, the Special Referee correctly determined that plaintiff owed defendant 50% of the mortgage and maintenance payments defendant paid to maintain the marital residence, the parties' most significant marital asset, even after plaintiff moved out in July 2009 (*Crowley v Ruderman*, 60 AD3d 556, 556 [1st Dept 2009]; see *Le v Le*, 82 AD3d 845, 846 [2d Dept 2011]). While plaintiff claims that these expenses were attributable in part or whole to defendant's ongoing living expenses, she failed to submit proof of comparable living expenses to prove any allocation of these expenses in such a

manner. The Referee also correctly concluded that plaintiff was not responsible for any capital gains tax on the home, as the evidence shows that plaintiff transferred her interest in the marital residence to defendant on April 15, 2011 in exchange for \$750,000, and received no sale proceeds when the marital residence was sold in November 2011, before the commencement of the divorce action (see 26 USC § 1041[a][1]).

Given the equitable distribution of assets and the award of marital debt for the mortgage and maintenance payments, the Special Referee properly declined to award defendant credit for additional marital debt for relatively minor costs he incurred in storing the parties' property (see *Savage v Savage*, 155 AD2d 336, 337 [1st Dept 1989]).

The Special Referee correctly awarded defendant \$41,000 for plaintiff's share of college tuition costs, and did not overlook an additional \$38,000 loan defendant had taken out to pay for tuition. The evidence shows that defendant acknowledged that the loan was paid, as agreed upon, from sale proceeds of the parties' second home. The Special Referee also correctly awarded plaintiff \$27,111 in marital debt for household expenses she incurred, which defendant expressly agreed to pay.

The Special Referee properly determined that the relevant statutory factors warranted awarding plaintiff a portrait of the

couple, which they jointly obtained as a wedding gift (Domestic Relations Law § 236B[5][c], [d]; *Holterman v Holterman*, 3 NY3d 1, 7-8 [2004]; *Del Villar v Del Villar*, 73 AD3d 651, 652 [1st Dept 2010])). While the parties claim the portrait has value because the artist is prominent, they failed to provide the court with an actual value. In the absence of proof of value, the Referee's in kind distribution of personal property will not be disturbed. Although the jewelry business was clearly a marital asset, there was no expert testimony as to its value. While there was some financial data about the business, it did not serve as a proxy on which the Referee could have reliably valued the asset. The Special Referee's decision not to equitably distribute the asset was, therefore, appropriate (see *Kurtz v Kurtz* 1 AD3D 214 [1st Dept 2003]).

We recognize that upon affirming the Referee's allocation of debt, plaintiff owes defendant \$123,599.50. The Referee did not provide a mechanism for recoupment, payment or offset of that debt. We therefore modify the Referee's award solely to permit plaintiff a period of 90 days to pay such amount.

The Special Referee considered the parties' financial circumstances and the other circumstances of the case, and providently exercised his discretion in declining to award plaintiff counsel fees and other litigation costs (Domestic

Relations Law § 237; *DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881 [1987]).

We have considered the parties' other contentions and find them unavailing.

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CPLR 213[1], [2]; *Maya NY, LLC v Hagler*, 106 AD3d 583, 585 [1st Dept 2013]).

Plaintiff argues that, because the agreement did not specify a time for performance, defendant's reimbursement payment was due, and the statute of limitations began to run, not when the settlement payment was made but within a reasonable time thereafter (see e.g. *Savasta v 470 Newport Assoc.*, 82 NY2d 763 [1993]). However, the law does not imply a reasonable time for performance where the sole contractual obligation is to make a monetary payment (see *Pine v Okoniewski*, 256 AD 519, 521 [4th Dept 1939]; *Schmidt v McKay*, 555 F2d 30, 35 [2d Cir 1977]). Defendant's monetary reimbursement obligation became due as soon as plaintiff's settlement payment was made (see *Bradford, Eldred & Cuba R.R. Co. v New York, Lake Erie & W. R.R. Co.*, 123 NY 316, 326 [1890]; *Vitale v Giaimo*, 103 AD3d 835, 838 [2d Dept 2013]).

Plaintiff's alternative argument that defendant was not

obligated to repay it until after he resigned in 2010 is inconsistent with the allegations in the complaint concerning the terms of the oral agreement.

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product of "confusion" (see *People v Johnson*, 23 NY3d 973, 976 [2014]) about the definition of the crime to which defendant pleaded guilty. On the contrary, in a dismissal motion, counsel claimed that the burglarized commercial premises did not qualify as a dwelling because there was a question of its accessibility to the residential part of the building (see *People v McCray*, 23 NY3d 621 [2014]). After reviewing the grand jury minutes, the court rejected that claim, and defendant chose to plead guilty, thereby forfeiting any review of that issue (see *People v Taylor*, 65 NY2d 1 [1985]; *People v Mendez*, 25 AD3d 346 [1st Dept 2006]).

Defendant made a valid waiver of his right to appeal (see *People v Sanders*, 25 NY3d 337, 341 [2015]; *People v Lopez*, 6 NY3d 248, 256-257 [2006]), which forecloses review of his excessive sentence claim. Regardless of whether defendant validly waived his right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: JUNE 21, 2016


CLERK

Mazzarelli, J.P., Andrias, Saxe, Gische, Kahn, JJ.

1516 Steven Pianoforte, Index 305876/13
Plaintiff-Appellant,

-against-

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

Dr. Scott Albin,
Defendant.

Steven A. Hoffner, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jason Anton of
counsel), for respondents.

Order, Supreme Court, Bronx County (Stanley Green, J.),
entered on or about June 5, 2015, which granted the City
defendants' motion for summary judgment dismissing the complaint,
unanimously affirmed, without costs.

Plaintiff commenced this action for medical malpractice
against the City and the doctors who treated him for their
failure to prevent a grand mal seizure he suffered while he was
incarcerated. Defendants established their entitlement to
judgment as a matter of law by submitting evidence showing that
plaintiff's seizure was caused by an underlying, undetected
seizure disorder that defendant doctors had no reason to expect
plaintiff suffered from, and that the treatment provided to
plaintiff was appropriate and within accepted medical practice

(see e.g. *Curry v Dr. Elena Vezza Physician, P.C.*, 106 AD3d 413 [1st Dept 2013]).

In opposition, plaintiff failed to raise a triable issue of fact. Contrary to plaintiff's contention, defendants demonstrated that plaintiff's seizure could not have been the result of benzodiazepine withdrawal.

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

ENTERED: JUNE 21, 2016

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

CLERK

Mazzarelli, J.P., Andrias, Saxe, Gische, Kahn, JJ.

1517-

Index 653823/13

1517A Citibank, N.A.,
Plaintiff-Respondent,

-against-

Roxann Villano,
Defendant-Appellant.

Hogan & Cassell, LLP, Jericho (Michael D. Cassell of counsel),
for appellant.

Zeichner Ellman & Krause LLP, New York (Nathan Schwed of
counsel), for respondent.

Judgment, Supreme Court, New York County (Eileen A. Rakower,
J.), entered May 1, 2015, awarding plaintiff the total sum of
\$305,416.40, and bringing up for review an order, same court and
Justice, entered January 23, 2015, which granted plaintiff's
motion for summary judgment against defendant guarantor,
unanimously modified, on the law, the judgment vacated, the
matter remanded for further proceedings to determine the amount
of indebtedness, if any, for which defendant is liable under the
guaranties, and otherwise affirmed, without costs. Order, same
court and Justice, entered January 22, 2016, brought up for
review by the appeal from the judgment, pursuant to CPLR 5517(b),
which denied defendant's motion for renewal, unanimously
affirmed, without costs.

Defendant's failure, both in opposition and on renewal, to deny that she executed the personal guaranty and other loan documents under which she was sued, mandated the grant of summary judgment as to liability in favor of plaintiff. While she had a handwriting expert's report in support of her motion for renewal, it was proffered solely on renewal. Moreover, defendant's repeated failure to expressly and unequivocally deny signing the documents made her opposition futile (*cf. All State Flooring Distribs., L.P. v MD Floors, LLC*, 131 AD3d 834, 836 [1st Dept 2015]). Nor was the motion premature. While it was made pre-discovery, defendant obviously knew whether or not she signed the documents without needing access to plaintiff's records.

However, defendant is correct that plaintiff never established its prima facie entitlement to judgment as to the amount of the debt. Plaintiff submitted no records with its moving papers supporting its calculation of the debt amount. It revealed on reply that half the debt was based on older loan documents that it never submitted, either in reply or in moving papers. The "records" upon which it relied for the calculation of this previous indebtedness were cryptic and bore the header, "Eh hem . . . does this belong to you?" Plaintiff's affiant never explained these documents or produced or even identified the specific documents upon which she relied in calculating the

total alleged indebtedness.

For these reasons, the judgment must be vacated, and further proceedings held to determine the amount of the indebtedness for which defendant is liable under the guaranties.

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

ENTERED: JUNE 21, 2016


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Mazzarelli, J.P., Andrias, Saxe, Gische, Kahn, JJ.

1518 James Cruz, Index 23922/14E
Plaintiff-Respondent,

-against-

Renwick B. Skeritt, et al.,
Defendants-Appellants.

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

Orin R. Kitzes, Flushing, for respondent.

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered June 23, 2015, which granted plaintiff's motion for summary judgment on the issues of liability and compliance with the threshold "serious injury" requirement of Insurance Law § 5102(d) and ordered a trial on damages, unanimously modified, on the law, to deny plaintiff's motion as premature with respect to the serious injury issue, and vacate the order regarding a damages trial, and otherwise affirmed, without costs.

Plaintiff made a prima facie showing of his entitlement to judgment as a matter of law on the issue of liability. He submitted evidence showing that defendant driver made an illegal U-turn, in violation of Vehicle and Traffic Law § 1163(a), and collided with plaintiff's car within seconds and before plaintiff had any opportunity to avoid the collision (see *Estate of Mirjani*

v DeVito, 135 AD3d 616, 617-618 [1st Dept 2016]; *Williams v Simpson*, 36 AD3d 507, 508 [1st Dept 2007])). Defendant driver's admission in the police accident report that he had made an illegal U-turn and had collided with plaintiff's car is admissible, since defendants also relied upon the report and waived any hearsay or authentication objection (see *Matter of Government Empls. Ins. Co. v Boohit*, 122 AD3d 525, 525 [1st Dept 2014])).

Defendant driver's affidavit, to the extent he claimed that plaintiff struck his car after the turn was complete, was insufficient to defeat plaintiff's motion as to liability, because defendant does not articulate any way in which plaintiff was at fault.

The grant of summary judgment on the serious injury issue was premature, since defendants had not had an opportunity to conduct any discovery concerning the extent or causation of the injuries (CPLR 3212[f]; *Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 103 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007])).

Since plaintiff placed his physical condition in issue, defendants have the right to examine him (see *Cynthia B. v New Rochelle Hosp. Med. Ctr.*, 60 NY2d 452, 456-457 [1983]; CPLR 3101, 3121).

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

ENTERED: JUNE 21, 2016



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Mazzarelli, J.P., Andrias, Saxe, Gische, Kahn, JJ.

1519-

Index 651781/15

1520 EidosMedia Inc.,
Plaintiff-Appellant,

-against-

Citigroup Technology, Inc., also known
as Citi Technology Inc.,
Defendant-Respondent.

Allegaert Berger & Vogel LLP, New York (Richard L. Crisona of
counsel), for appellant.

James S. Goddard, New York, for respondent.

Order, Supreme Court, New York County (Charles E. Ramos,
J.), entered January 28, 2016, which granted defendant's motion
for summary judgment dismissing the complaint, unanimously
reversed, on the law, with costs, and the motion denied. Appeal
from decision, same court and Justice, entered November 10, 2015,
unanimously dismissed, without costs, as taken from a
nonappealable paper.

Defendant argues that plaintiff failed to comply with a
notice requirement in the parties' agreements for the licensing
of plaintiff's software that amounted to a condition precedent to
the triggering of defendant's obligation under the agreements.

We find, contrary to the motion court, that the provisions
on which defendant relies do not establish a condition precedent.

One provision requires notice, given by plaintiff, upon the completion of installation of the software, but only if it is designated as the "[p]arty responsible for installing the Software." The other states that defendant can begin testing the software after it has been successfully installed, regardless of who installs it, and makes no reference to any required notice. These provisions, which concern different events, and lack any referential or clear conditional language, cannot be read together to create a condition precedent that results in a forfeiture (see *Oppenheimer & Co., v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690 [1995]).

In any event, the record presents issues of fact as to whether plaintiff provided the required notice and whether defendant waived any complaint as to the time or form of the notice by proceeding with testing (see e.g. *Morrisania Towers Hous. Co. LP v Lexington Ins. Co.*, 104 AD3d 591 [1st Dept 2013]; *Matter of DeMartino v New York City Dept. of Transp.*, 67 AD3d 479 [1st Dept 2009]).

Issues of fact also preclude the summary dismissal of the second cause of action, which alleges that defendant breached a contract separate from the above-mentioned agreements by refusing to pay an amount due for work performed.

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

ENTERED: JUNE 21, 2016


CLERK

Mazzarelli, J.P., Andrias, Saxe, Gische, Kahn, JJ.

1521- Kevin Pludeman, et al., Index 101059/04
1522N Plaintiffs-Appellants,

-against-

Northern Leasing Systems, Inc., et al.
Defendants-Respondents.

Chittur & Associates, P.C., Ossining (Krishnan S. Chittur of counsel), for appellants.

Cahill Gordon & Reindel LLP, New York (Thomas J. Kavalier of counsel), for respondents.

Order, Supreme Court, New York County (Martin Shulman, J.), entered August 4, 2014, which, insofar as appealed from as limited by the briefs, denied plaintiffs' motion to sanction defendants for discovery violations without prejudice to renewal at the fact-finding hearing, unanimously affirmed, without costs. Order, same court and Justice, entered January 7, 2015, which granted defendants' motion to decertify the class and/or remove plaintiffs as class representatives, unanimously modified, on the law and the facts, to deny the motion to decertify with respect to the issue of the reasonableness of the Loss and Destruction Waiver (LDW) fee for those lessees whose leases provided for an LDW fee of "price in effect" and who were charged a LDW fee of \$4.95, and to remove plaintiff Chris Hanzsek as a class representative, and otherwise affirmed, without costs.

In accordance with orders of this Court in prior appeals, a fact-finding hearing was held to determine (1) whether plaintiffs were provided with only one page of a lease; (2) whether, even if provided with a four-page booklet, a reasonable person would have believed that the first page comprised the entire lease; and (3) if the LDW provision on the third page of the leases was found to be part of the leases, whether the LDW fee charged under leases setting a LDW fee of "price in effect" was reasonable (see *Pludeman v Northern Leasing Sys., Inc.*, 106 AD3d 612 [1st Dept 2013]; *Pludeman v Northern Leasing Sys., Inc.*, 87 AD3d 881 [1st Dept 2011]; *Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420 [1st Dept 2010]). As a result of the hearing, class certification is no longer warranted with respect to the first two issues (see *DeFilippo v Mutual Life Ins. Co. of N.Y.*, 13 AD3d 178 [1st Dept 2004], *lv dismissed* 5 NY3d 746 [2005]). Two of four plaintiffs testified that they were not rushed to sign the leases; three testified that they had an opportunity to read the leases with which they were presented but simply failed to do so; two testified that they either made a copy of the leases or declined to do so; and one testified that he was apprised of additional lease pages and the LDW charge. This testimony contradicts the allegations made in the complaint and amplified in affidavits previously provided by plaintiffs describing a

routine practice by sales people for defendant Northern Leasing Systems, Inc. of obscuring all but the first page of the lease.

However, this action may be maintained as a class action with respect to the third issue (CPLR 906[1]; see *Stellema v Vantage Press*, 109 AD2d 423 [1st Dept 1985]). If the LDW charge was not reasonable, then Northern Leasing's overcharges were a breach of the leases, regardless of whether the individual lessees reasonably believed that the first page alone comprised the entire lease.

Since plaintiff Chris Hanzsek's lease set the LDW fee at \$2.95, he does not represent the class as we have limited it.

The motion court providently exercised its discretion in denying plaintiffs' motion for sanctions, without prejudice to renew as issues arose at the hearing.

Because plaintiffs did not appeal from the order holding in abeyance their cross motion for judgment as a matter of law, that

ruling is not properly before us (*Stratakis v Ryjov*, 66 AD3d 411
[1st Dept 2009]).

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

ENTERED: JUNE 21, 2016


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Mazzarelli, J.P., Andrias, Saxe, Gische, Kahn, JJ.

1523N Laurie Cochin, et al., Index 159331/13
Plaintiffs-Respondents,

-against-

Metropolitan Transit Authority, et al.,
Defendants-Appellants,

City of New York,
Defendant.

Lawrence Heisler, Brooklyn (Timothy J. O'Shaughnessy of counsel),
for appellants.

Simonson Hess Leibowitz & Goodman, P.C., New York (Alan B.
Leibowitz of counsel), for respondents.

Order, Supreme Court, New York County (Michael D. Stallman,
J.), entered on or about October 16, 2015, which, inter alia, in
this personal injury action arising from allegedly malfunctioning
bus doors, granted plaintiffs' motion to compel production of
defendants-appellants' post-accident records pertaining to the
service, maintenance, and repair of the doors, unanimously

affirmed, without costs, for the reasons stated by Stallman, J.

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defendants. Moreover, certain documents at issue, namely, those letters sent out to adjunct professors in the Art Department to inform them as to whether they would be reappointed for the upcoming academic year, were all exchanged, as was an export chart of the letters' metadata. Plaintiff's assertion that additional metadata existed, but was not exchanged, is unsupported.

Plaintiff also failed to make a showing of entitlement to all of the social media sites and private email accounts of certain individual defendants. The mere fact that a Facebook "friend" of defendant Barton, who also worked at defendant New York University, wrote "Hi" on Barton's "wall" does not establish that Barton used her Facebook account for NYU business in general, so as to warrant production of the discovery requested (see *Tapp v New York State Urban Dev. Corp.*, 102 AD3d 620 [1st Dept 2013]).

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

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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Angela M. Mazzaelli
Richard T. Andrias
Sallie Manzanet-Daniels
Ellen Gesmer, JJ.

1290
Ind. 2530/12

x

The People of the State of New York,
Respondent,

-against-

Lino Rios,
Defendant-Appellant.

x

Defendant appeals from a judgment of the Supreme Court, New York County (Marcy L. Kahn, J.), rendered August 12, 2013, convicting him, after a jury trial, of robbery in the second degree, and imposing sentence.

Robert S. Dean, Center for Appellate Litigation, New York (Claudia B. Flores of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Christine DiDomenico and Hilary Hassler of counsel), for respondent.

MANZANET-DANIELS, J.

"Physical injury," as defined in the Penal Law, means "impairment of physical condition or substantial pain" (Penal Law § 10.00[9]). Although the issue is generally one for the trier of fact, "there is an objective level . . . below which the question is one of law" (*Matter of Philip A.*, 49 NY2d 198, 200 [1980] [twice slapping complainant, and causing red marks and pain, insufficient to establish "physical injury"]; *People v Rolando*, 168 AD2d 578 [2d Dept 1990] [complainant's testimony as to pain caused by bruised shoulder and scratches insufficient to establish "physical injury" in the absence of medical records or treatment], *lv denied* 77 NY2d 910 [1991]).

The evidence convicting defendant of robbery in the second degree (Penal Law § 160.10[2][a] [causes physical injury]) was legally insufficient to establish the element of "physical injury." The photographs in evidence depict only slight redness on the complainant's neck and hands. They do not show cuts, abrasions, lacerations, or anything of the kind. The victim did not seek medical treatment. There are no medical records. Further, inasmuch as the victim in this case did not testify, there is no evidence concerning even his subjective experience of pain. Without any testimony from the complainant or medical records substantiating same, it is impossible to know if he was

in significant pain, or whether the pain to his jaw was slight or trivial (see e.g. *Matter of Jose B.*, 47 AD3d 461 [1st Dept 2008] [repeated punches, together with victim's testimony that he suffered pain, insufficient to demonstrate physical injury in the absence of bruising or a reduction in range of motion]; *People v Galletta*, 171 AD2d 178 [1st Dept 1991] [bruises that healed within a week, together with victim's description of pain, insufficient to establish physical injury], *lv denied* 79 NY2d 947 [1992]; *People v Ingram*, 143 AD2d 448 [3d Dept 1988] [red marks on victim who was struck in the face and arm and pushed to the ground and who testified that she suffered pain insufficient to establish physical injury])). The testimony of a police officer after the fact as to the victim's state of shock and nervousness is not a sufficient substitute for the testimony of the victim as to his injuries, medical corroboration, or even photos that objectively demonstrate more than seemingly insubstantial injuries.

Matter of Dominick V. (223 AD2d 453, 453 [1st Dept 1996]), which the dissent relies on for the proposition that "the absence of medical treatment is not dispositive," involved a complainant who testified as to his injuries. *People v Deas* (102 AD3d 464 [1st Dept 2013], *lv denied* 20 NY3d 1097 [2013]) involved a victim who testified at length as to the injuries to his shin and elbow.

Similarly, the victims testified in *People v Mullings* (105 AD3d 407 [1st Dept 2013], *lv denied* 21 NY3d 945 [2013] [victim had facial bruising or swelling which made it difficult for him to eat or to sleep]) and *People v James* (2 AD3d 291 [1st Dept 2003], *lv denied* 2 NY3d 741 [2004] [victim was punched in the face, causing pain, swelling, and headaches for a week]). In contradistinction, this case involves minor injuries (as the photographs attest), a victim who did not testify as to his pain or injuries, and an utter lack of medical proof.

Although defendant made only a general motion for a trial order of dismissal at the close of the People's case, the issue was clearly raised. The People in opposing the motion argued that the jury could infer "substantial pain and physical impairment based on the markings on [complainant's] face." While denying the motion, the court noted that there was a reasonable view of the evidence that defendant committed third-degree robbery (which does not have a physical injury element) as opposed to second-degree robbery - a factor that influenced the court's decision to grant the People's motion to charge the lesser included offense of robbery in the third degree. In reviewing the photos the court noted that there was "redness" to the complainant, stating, "Whether that's physical injury or not, I don't know." The issue was revisited when the court ruled on

defendant's posttrial 330.30 motion.

In light of our holding, it is unnecessary to address defendant's further argument that his sentence was excessive.

Accordingly, the judgment of the Supreme Court, New York County (Marcy L. Kahn, J.), rendered August 12, 2013, convicting defendant, after a jury trial, of robbery in the second degree and sentencing him, as a second violent felony offender, to a term of 11 years, should be modified, on the law, to reduce defendant's conviction to the crime of robbery in the third degree, and to remand the matter for resentencing.

All concur except Tom, J.P. and Andrias, J.
who dissent in an Opinion by Andrias, J.

ANDRIAS, J. (dissenting)

Defendant's challenge to the legal sufficiency of the evidence is unpreserved, and does not warrant review in the interests of justice. Even if the claim is considered, the verdict is based on legally sufficient evidence and is not against the weight of the evidence. Accordingly, I respectfully dissent.

Defendant's general motion to dismiss at the close of the People's case failed to specify any grounds for dismissal (see CPL 470.05[2]; *People v Hawkins*, 11 NY3d 484, 492 [2008]) and he did not make a specific challenge to the sufficiency of the evidence supporting the physical injury element of second-degree robbery until his postverdict CPL 330.30 motion, which lacked any preservation effect (see *People v Hines*, 97 NY2d 56 [2001]). The court "did not expressly decide, in response to protest, the issues now raised on appeal" (*People v Miranda*, 27 NY3d 931, 932 [2016]) at a charge conference dealing only with the distinct issue of submission of a lesser offense, or elsewhere during the trial.

In any event, the element of "physical injury," requires proof that a victim's injuries were more than mere "petty slaps, shoves, kicks and the like" (*Matter of Philip A.*, 49 NY2d 198, 200 [1980] [internal quotation marks omitted]), and that they

caused “more than slight or trivial pain” (*People v Chiddick*, 8 NY3d 445, 447 [2007]; see also *People v Rosario*, 121 AD3d 424, 425 [1st Dept 2014], *lv denied* 25 NY3d 1170 [2015]). “Relatively minor injuries, including injuries not requiring medical treatment, may meet the statutory threshold” (*People v Deas*, 102 AD3d 464 [1st Dept 2013], *lv denied* 20 NY3d 1097 [2013] [internal citations omitted]; *Matter of Dominick V.*, 223 AD2d 453 [1st Dept 1996] [the fact that a victim does not seek or receive medical treatment is not dispositive with respect to whether the victim suffered physical injury]). Whether the evidence proved a physical injury is a question for the factfinder, who may consider the nature of the injury, any corroboration of it, the offender’s motive, and the victim’s subjective expression of pain (*Chiddick*, 8 NY3d at 447-448). Applying these principles, the testimony that defendant placed the significantly older and smaller victim in a chokehold and kept punching him in or about the head to facilitate the robbery, together with the testimony concerning the victim’s physical and mental condition after the robbery and the photographs showing that marks remained on his face hours after the attack, is legally sufficient to satisfy the element of physical injury.

Although the victim did not testify, an eyewitness testified that he saw defendant place the victim in a chokehold and punch

him repeatedly as he removed cash from the victim's pocket. The eyewitness also testified that after the beating, the victim "was holding his face," which was red and swollen.

A police officer testified that the victim was in a state of shock, shaking and sweating profusely, and that his face and neck were pink and that he had urinated on himself. A detective testified that when he saw the victim at the precinct about 2½ hours after the attack, the victim was still very nervous and upset, and complained of pain, including that his jaw was still hurting. The detective observed redness in the victim's face and took several photographs which showed red marks on his left cheek and chin and bruising and red marks behind his right ear.

From this evidence, viewed as a whole, the jury could have reasonably inferred that the victim suffered injuries which caused substantial pain, even though the victim did not seek medical attention and did not testify at trial (*see People v Davis*, 136 AD3d 559, 561 [1st Dept 2016]; *People v Mullings*, 105 AD3d 407 [1st Dept 2013], *lv denied* 21 NY3d 945 [2013]). In order to rob the victim, defendant repeatedly punched him with enough force to leave him in such a state of shock and fear that he urinated on himself. Witnesses testified that the victim was holding his face and complained of pain, and the impact of the blows remained visible 2½ hours later (*see People v James*, 2 AD3d

291, 291 [1st Dept 2003] ["The element of physical injury was established by evidence that the defendant punched the victim twice in the face during the robbery, causing pain, swelling and headaches"], *lv denied* 2 NY3d 741 [2004]; *People v Campbell*, 228 AD2d 227 [1st Dept 1996] [finding sufficient evidence of physical injury where the defendant held victim in a chokehold, beat him, and threatened to kill him in order to take money from the victim's pockets], *lv denied* 88 NY2d 981 [1996]). Furthermore, the jury could have reasonably concluded that photographic evidence tended to corroborate rather than contradict the eyewitness accounts.

There is no basis for reducing the sentence.

Accordingly, I would affirm the judgment convicting defendant, after a jury trial, of robbery in the second degree and sentencing him, as a second violent felony offender, to a term of 11 years.

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

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