SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 7, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Acosta, Mazzarelli, Andrias, Moskowitz, JJ.

2422 Tawna Hill, Index 17083/06
Plaintiff-Appellant,

-against-

New York City Health and Hospitals Corporation,
Defendant-Respondent.

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

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

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Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered August 6, 2015, which, in an action for medical malpractice, granted defendant's motion to dismiss the complaint, reversed, on the law, without costs, and the motion denied.

Plaintiff was an inpatient at Lincoln Medical and Mental Health Center (Lincoln Hospital) between August 26 and September 30, 2005. On September 17, 2005, after suffering complications from treatment of an incarcerated hernia, plaintiff underwent amputation of her left leg above the knee. Plaintiff ultimately

commenced this action, alleging that Lincoln Hospital's staff had committed medical malpractice and that defendant New York City Health and Hospitals Corporation (HHC), which owns Lincoln Hospital, was responsible for her injuries.

On January 25, 2006, plaintiff served a notice of claim on defendant HHC. At the 50-h hearing in June 2006, plaintiff testified that while her last actual medical treatment at Lincoln Hospital occurred on October 19, 2005, when hospital personnel removed the sutures from her leg, she received a follow-up appointment to return to Lincoln Hospital on October 24, 2005. Plaintiff stated that she arrived at Lincoln Hospital for treatment on that date, but was informed that the staff could not locate her medical records and that she should return to the Hospital in one week, on October 31, 2005. Plaintiff testified that she did, in fact, return on October 31, only to have the staff inform her that they did not accept her insurance and that she should seek treatment elsewhere.

On July 26, 2006, plaintiff moved for an order deeming the notice of claim timely served on the basis of the continuous treatment doctrine, or, in the alternative, for leave to serve a late notice of claim nunc pro tunc. Specifically, plaintiff argued, her last treatment date was October 31, 2005 and thus,

she had timely served her notice of claim on January 25, 2006.

By order dated September 14, 2006, the IAS court granted the application to deem timely the notice of claim "if it is eventually determined that the court had jurisdiction to entertain the application." In so doing, the IAS court directed plaintiff to serve on HHC a copy of the January 25, 2006 notice of claim "in the manner prescribed by law." On July 25, 2007, plaintiff did, in fact, serve the notice of claim on HHC.

HHC then moved to dismiss the complaint. On the motion, HHC asserted that in the September 14 order, the IAS court had held that plaintiff's motion would be granted only if her medical records showed that the continuous treatment doctrine applied. Thus, HHC concluded, plaintiff's original January 25, 2006 notice of claim was untimely because there was no continuous treatment after October 19, 2005.

The IAS court granted defendant's motion and dismissed the complaint. In so doing, the court found that plaintiff's last date of medical treatment occurred on October 19, 2005, and therefore, plaintiff was required to file the notice of claim no later than January 17, 2007, one year and 90 days past the accrual date, the date by which the action had to be filed. Therefore, the court found that the notice of claim was untimely

and a nullity. We now reverse.

As noted above, plaintiff's 50-h hearing testimony and her affidavit in support of the motion to deem the notice of claim timely served each state that plaintiff was still in a relationship of care or treatment with Lincoln Hospital until October 31, 2005 because both she and the Hospital expected the Hospital healthcare providers to continue to care for plaintiff's residual limb (*see Richardson v Orentreich*, 64 NY2d 896, 899 [1985] ["where the physician and patient reasonably intend the patient's uninterrupted reliance upon the physician's observation . . . and responsibility for overseeing the patient's progress, the requirement for continuous care and treatment for the purpose of the (s)tatute of (l)imitations is certainly satisfied"]; *cf. Allende v New York City Health & Hosps. Corp.*, 90 NY2d 333, 339 [1997] [continuous treatment rule did not apply where plaintiff had no intention of returning to defendant hospital for treatment]). If plaintiff was, in fact, considered to be under treatment until that date, that treatment would render timely the notice of claim that she served on January 25, 2006. Although through no fault of her own, plaintiff apparently was not examined at the October 24 or October 31 appointments, we can reasonably conclude that the doctor-patient relationship

continued past October 19, 2005. Specifically, the record suggests that plaintiff and her doctors explicitly anticipated that she would receive further treatment for her leg, thus giving her until one year and 90 days from October 31, 2005 – the last day that plaintiff returned for an appointment at the Hospital – to serve a notice of claim (*see Harris v Dizon*, 60 AD3d 495 [1st Dept 2009]).

HHC failed to come forward with any evidence to support its motion to dismiss. On the motion, HHC, offered a printout of a so-called "MPI inquiry," which, according to the supporting affirmation of defendant's counsel, is "a printout of information maintained by [the Hospital's] Patient Accounts." According to counsel's affirmation, the printout purportedly represents the dates of plaintiff's visits to the Hospital.

But the MPI inquiry does not support HHC's motion. First of all, the MPI inquiry is neither certified nor authenticated. Rather, the document is accompanied only by counsel's affirmation, and thus lacks probative value (*see Verette v Zia*, 44 AD3d 747, 748 [2d Dept 2007]). Additionally, because no one with knowledge has authenticated or explained the document, it is not altogether clear from the face of the MPI inquiry what

information that document contains.[1] What is clear, however, is that the MPI inquiry does not constitute a medical record and does not give any accessible information about patient treatment.

At any rate, even assuming that the MPI inquiry does purport to show the dates of plaintiff's treatment at Lincoln Hospital, it still would not be relevant, as plaintiff does not claim that she was actually treated on those dates. On the contrary, plaintiff states that she arrived at the Hospital for scheduled treatment on those dates and was turned away, and no one from HHC with knowledge of plaintiff's patient history disputes her assertion. Given plaintiff's account of her visits to the Hospital on October 24 and October 31, it is perfectly plausible that the MPI inquiry would not show that she appeared for

[1] According to Wikipedia (https://en.wikipedia.org/wiki/Enterprise_master_patient_index, accessed on December 14, 2016), an "enterprise master patient index" (which is often used synonymously with "master patient index," or MPI), is a "database that is used across a healthcare organization to maintain consistent, accurate and current demographic and essential medical data on the patients seen and managed within its various departments." Further, the essential patient data includes name, gender, date of birth, race and ethnicity, social security number, current address and contact information, insurance information, current diagnoses, most recent date of hospital admission and discharge (if applicable), etc." It is not altogether clear, then, that the MPI would have an entry for a date that plaintiff was not actually treated; certainly, that is not a determination any court can make on the record as it currently stands.

treatment, as she was not actually treated on those days even though she arrived there with the expectation that she would be. The MPI inquiry – which, as noted above, was uncertified and unauthenticated – therefore fails to support HHC's assertion that plaintiff was not scheduled for any treatment on those days. Indeed, in the affirmation in support of the motion to dismiss, HHC's counsel concedes that the Hospital's plan was for plaintiff to return to the surgery clinic on October 24, 2005 to have a test performed on that day. Notably, in light of the assertions in the affirmation, this concession is apparently based on medical records that HHC did not produce on its motion.

All concur except Friedman, J.P. and Andrias, J. who concur in a separate memorandum by Andrias, J. as follows:

ANDRIAS J. (concurring)

In this medical malpractice action, plaintiff alleges that the failure of Lincoln Hospital's staff to diagnose and treat blood clots caused her right leg to be amputated above the knee. In the order on appeal, the motion court granted defendant's motion to dismiss the complaint, finding that plaintiff's notice of claim served on January 25, 2006 was untimely under the 90-day statutory deadline of General Municipal Law § 50-e(1) because the last date of treatment was October 19, 2005 and there "is no objective evidence to establish that plaintiff received any medical treatment [thereafter] to permit the application of the continuous treatment doctrine." The court also found that plaintiff's late notice of claim, served July 25, 2007, was not served in a "manner prescribed by law," as directed in the court's prior order dated September 14, 2006, because the one year and 90-day statute of limitations of General Municipal Law § 50-i for commencement of this action lapsed on January 17, 2007 and could not be extended.

I agree with the majority that the motion court erred when it granted defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(7) on the ground that the notice of claim served by plaintiff on January 25, 2006 was untimely. However, I do not

agree with the majority's analysis insofar as it finds that plaintiff established that the continuous treatment doctrine applies as a matter of law. Rather, the record presents issues of fact as to whether plaintiff received continuous treatment from Lincoln Hospital until October 31, 2005, which would render the notice of claim served on January 25, 2006, timely, which cannot be resolved at this procedural stage.

Where there is a continuous course of treatment for the conditions giving rise to a malpractice action, the running of the applicable statutory period is tolled during the period of continuous treatment (*see Young v New York City Health & Hosps. Corp.*, 91 NY2d 291 [1998]; *Langsam v Terraciano*, 22 AD3d 414 [1st Dept 2005]). Continuous treatment will also toll the 90-day period within which a notice of claim must be filed under General Municipal Law § 50-e(1) (*see Plummer v New York City Health and Hosps. Corp.*, 98 NY2d 263, 267 [2002]).

In moving to dismiss the complaint, defendant argued that the notice of claim served by plaintiff on January 25, 2006 is untimely because the surgery took place on September 17, 2005 and the objective evidence demonstrates that the last treatment at the hospital was on October 19, 2005, when the sutures were removed. In support, defendant submitted its counsel's

affirmation, which, among other things, annexed plaintiff's 50-h testimony, bill of particulars and an "MPI Index Inquiry," which defendant's counsel characterized as a printout of information maintained by the hospital's Patients Accounts unit, which showed that plaintiff did not receive any treatment after October 19, 2005. However, although it is undisputed that the last time plaintiff received treatment at Lincoln Hospital was on October 19, 2005, when the sutures were removed, a patient remains under the continuous treatment or care of a physician between the time of the last appointment and the next scheduled one where the latter's purpose is to administer ongoing treatment for the same or a related condition (*see Richardson v Orentreich*, 64 NY2d 896, 898-899 [1985]). Defendant's counsel stated in her affirmation that "[t]he plan was for the plaintiff to have a PT/PTT test performed that day [October 19] and to return to the Surgery clinic on October 24, 2005." Thus, it appears that both plaintiff and defendant anticipated further treatment related to plaintiff's leg beyond the October 19 visit (*see Hardison v New York City Health & Hosps. Corp.*, 18 AD3d 224 [1st Dept 2005]; *Oksman v City of New York*, 271 AD2d 213, 215 [1st Dept 2000]).

Defendant did not produce any medical records that would demonstrate whether or not plaintiff appeared on October 24, or

which would disprove plaintiff's contention that she was told on that date to return on October 31. Insofar as defendant relies on the MPI Index Inquiry to show that plaintiff did not receive any treatment after October 19, 2005, as the majority states, the document is unverified and unauthenticated (*see Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 997 [2d Dept 2010]), and does not definitively establish what happened on October 24 and thereafter. Thus, defendant did not demonstrate its prima facie entitlement to dismissal of the complaint.

Furthermore, even if defendant's submissions are deemed to satisfy its initial burden on the motion to dismiss, plaintiff's submissions raised an issue of fact as to the applicability of the continuous treatment doctrine. Plaintiff asserted in her 50-h testimony and an affidavit that the notice of claim served on January 25, 2006 is timely under the continuous treatment doctrine because (i) a follow-up appointment was scheduled for October 24, 2005, at which time she was not examined and was told to return on October 31, 2005 because the hospital could not find her medical records; and (ii) when she returned on October 31, she was not examined and was told to go to her own physician because the hospital did not accept her insurance. This testimony as to scheduled follow-ups related to plaintiff's leg,

which was not disproved by documentary evidence, must be deemed true for the purposes of the CPLR 3211(a)(7) motion to dismiss (*see Hurrell-Harring v State of New York*, 15 NY3d 8, 20 [2010]).

However, while plaintiff's testimony suffices to defeat the motion to dismiss, her credibility cannot be resolved at this procedural stage. Plaintiff did not produce any objective records that would establish that she in fact returned to the hospital for treatment on October 24 or 31, 2005, and her hearsay allegations about statements from unidentified hospital staffers do not suffice to establish as a matter of law the hospital's intent to continue treatment though October 31. Contrary to the majority's holding, it is not enough that the record "suggests" or that "we can reasonably conclude" that plaintiff and her doctors explicitly anticipated that she would receive further treatment at the hospital after October 19, 2005, and the resolution of whether the continuous treatment doctrine applies raises factual issues that cannot be resolved at this procedural stage in the litigation. While defendant's counsel confirmed that the parties anticipated further treatment on October 24, plaintiff would have to show that treatment was anticipated on October 31, in order to render the January 25, 2005 notice of claim timely.

Insofar as plaintiff re-served her notice of claim on July 25, 2007, pursuant to an order dated October 14, 2006 which directed her to serve defendant with a copy "in the manner prescribed by law," the motion court correctly held that it no longer had the authority to recognize that notice of claim because the one year and 90 day statute of limitations of General Municipal Law§ 50-i had lapsed before it was served (*see Argudo v New York City Health & Hosps. Corp.*, 81 AD3d 575, 576-577 [2d Dept 2011]).

Accordingly, I concur in the result only.

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

ENTERED: FEBRUARY 7, 2017

CLERK

Friedman, J.P., Sweeny, Richter, Manzanet-Daniels, Kapnick, JJ.

2600 Dina Fouad, Index 312366/15
Plaintiff-Appellant,

-against-

Mohamed Esmat Ezzat Mahmoud Magdy,
Defendant-Respondent.

_____

Awad & Khoury LLP, New York (Abed Awad of counsel), for appellant.

Law Office of Dalia Zaza, Glen Cove (Dalia Zaza of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Lori S. Sattler, J.), entered on or about August 18, 2016, to the extent appealed from, granting defendant husband's cross motion to dismiss the complaint, unanimously reversed, on the law, on the facts and in the exercise of discretion, without costs, the cross motion denied, and the complaint reinstated.

The parties were married in Egypt in 2006, after which they resided in Dubai. In August 2012, the parties moved to Massachusetts to enable the husband to pursue a degree at the Massachusetts Institute of Technology. In July 2014, the husband accepted a position as an investment associate with Deutsche Bank and, together with plaintiff wife and the parties' two children, moved to New York City. In July 2015, after the husband engaged

in an extramarital affair, the parties separated, with the wife and the two children moving to her parents' home in Egypt, while the husband remained in New York.

The wife commenced this divorce action in Supreme Court on October 5, 2015. On April 20, 2016, in response to the wife's motion for an order granting her temporary child support and maintenance, the husband cross-moved to dismiss the action on the ground that he had obtained an Egyptian divorce. In support of his cross motion, the husband submitted an Egyptian bill of divorce, dated October 27, 2015, stating that, on October 13, 2015, he had revocably divorced the wife. Supreme Court granted the husband's cross motion and dismissed the divorce action. Upon the wife's appeal, we reverse.

We reject the husband's contention that the doctrine of comity mandates dismissal of the wife's divorce action. Initially, New York's "first-in-time" rule provides that "the court which has first taken jurisdiction is the one in which the matter should be determined" (*Syncora Guar. Inc. v J.P. Morgan Sec. LLC*, 110 AD3d 87, 95 [1st Dept 2013] [internal quotation marks omitted]). Here, the wife commenced this action eight days prior to October 13, 2015, the date that the husband sought the revocable divorce under Egyptian law, according to the Egyptian

bill of divorce he submitted. We further note that, as the husband concedes, the divorce he sought on October 13, 2015, was revocable for a period of 90 days, and the wife avers that the husband did in fact revoke that divorce on December 5, 2015, before he allegedly instituted a second divorce in February 2016. In addition, the husband failed to submit certification of the purported Egyptian divorce in the form required by CPLR 4542(a).

To the extent the husband moved for dismissal on the ground of forum non conveniens (*see* CPLR 327), we are not persuaded that New York is an inappropriate forum, as the matter has a substantial nexus with this state (*see Jindal v Jindal*, 54 AD3d 605 [1st Dept 2008]). Although the wife, upon separating from the husband, moved with the two children to her parents' home in Egypt, the parties had lived in the United States for the final three years of their nine-year marriage, the last marital domicile was in New York, and the husband continues to reside and work in New York, the last factor having particular significance to financial issues in this matter.

Finally, contrary to the husband's argument, New York has jurisdiction to determine child custody issues because New York was the children's home state within six months of the commencement of the divorce action, and the husband continues to

reside here (Domestic Relations Law § 76[1][a]; *see Matter of Michael McC. v Manuela A.*, 48 AD3d 91, 95 [1st Dept 2007], *lv dismissed* 10 NY3d 836 [2008]). We need not determine at this juncture the extent to which Supreme Court, in view of the children's residence in Egypt, should defer determination of such issues to the Egyptian court in which the husband has initiated proceedings.

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

ENTERED: FEBRUARY 7, 2017

CLERK

Saxe, J.P., Moskowitz, Gische, Kahn, Gesmer, JJ.

2626 Kemper Independence Insurance Company, Index 156866/13
Plaintiff-Respondent,

-against-

Adelaida Physical Therapy, P.C., et al.,
Defendants-Appellants,

Avalon Radiology, P.C., et al.,
Defendants.

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The Rybak Firm, PLLC, Brooklyn (Maksim Leyvi of counsel), for appellants.

Rubin, Fiorella & Friedman LLP, New York (Harlan R. Schreiber of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Anil C. Singh, J.), entered February 19, 2015, to the extent appealed from, granting plaintiff's motion for summary judgment and declaring that plaintiff is not obligated to provide no-fault benefits to defendants Adelaida Physical Therapy, P.C., Charles Deng Acupuncture, P.C., Delta Diagnostic Radiology, P.C., Island Life Chiropractic Pain Care, PLLC, Maiga Products Corp., and TAM Medical Supply Corp. as a result of a motor vehicle accident, due to claimants' failure to appear for their scheduled examinations under oath (EUO), unanimously reversed, on the law, without costs, the judgment vacated and the motion denied.

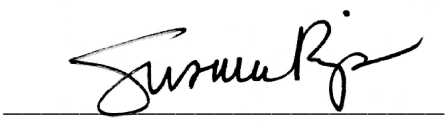
Although the failure of a person eligible for no-fault benefits to appear for a properly noticed EUO constitutes a breach of a condition precedent, vitiating coverage (*see* 11 NYCRR 65-1.1; *see also Hertz Corp. v Active Care Med. Supply Corp.*, 124 AD3d 411 [1st Dept 2015]; *Allstate Ins. Co. v Pierre*, 123 AD3d 618 [1st Dept 2014]), plaintiff failed to supply sufficient evidence to enable the court to determine whether the notices it had served on the injury claimants for EUOs were subject to the timeliness requirements of 11 NYCRR 65-3.5(b) and 11 NYCRR 65-3.6(b) (*see Mapfre Ins. Co. of N.Y. v Manoo*, 140 AD3d 468, 470 [1st Dept 2016]) and, if so, whether the notices had been served in conformity with those requirements (*see National Liab. & Fire Ins. Co. v Tam Med. Supply Corp.*, 131 AD3d 851 [1st Dept 2015]). Specifically, plaintiff failed to provide copies of any completed verification forms it may have received from any of the health service provider defendants or any other evidence reflective of the dates on which plaintiff had received any such verification forms, or otherwise assert that it never received such forms. Thus, plaintiff failed to meet its burden of establishing either that the EUOs were not subject to the procedures and time frames set forth in the no-fault implementing regulations or that it properly noticed the EUOs in conformity with their terms (*see*

Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC, 82 AD3d 559 [1st Dept 2011], *lv denied* 17 NY3d 705 [2011]; *Allstate Ins. Co. v Pierre*, 123 AD3d at 618).

In view of our disposition, we need not reach defendants' remaining contentions.

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

ENTERED: FEBRUARY 7, 2017



CLERK

Acosta, J.P., Mazzarelli, Andrias, Feinman, Webber, JJ.

2659 Shantay P., Infant, by her Father, and Natural Guardian, et al., Plaintiffs-Appellants, -against- The City of New York, Defendant-Respondent. Index 21187/11

Litman & Litman, P.C., Woodbury (Jeffrey E. Litman of counsel), for appellants.

Lester Schwab Katz & Dwyer, LLP, New York (Stewart G. Milch of counsel), for respondent.

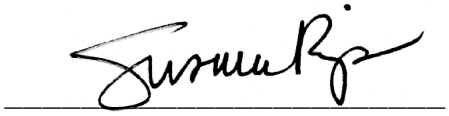
Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about July 8, 2015, which granted defendant City of New York's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The infant plaintiff, a high school student, was injured when her hand became caught in a metal cage that was covering lights in a school gymnasium. Dismissal of the complaint was warranted in this action, because defendant is not a proper party (*see Gonzalez v City of New York*, 94 AD3d 559 [1st Dept 2012], *lv denied* 20 NY3d 859 [2013]; *Corzino v City of New York*, 56 AD3d 370 [1st Dept 2008]). Plaintiffs' argument that the City created the alleged dangerous condition was not pleaded in the complaint,

and plaintiffs never moved to amend the complaint (*compare Fogan-Chew v Poughkeepsie Dept. of Pub. Works*, 135 AD3d 702 [2d Dept 2016]).

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

ENTERED: FEBRUARY 7, 2017



CLERK

Tom, J.P., Renwick, Saxe, Feinman, Gesmer, JJ.

2991 The People of the State of New York, Ind. 1427/14
Respondent,

-against-

James Rizzo,
Defendant-Appellant.

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

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

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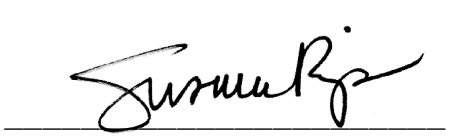
Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered January 20, 2015, convicting defendant, upon his plea of guilty, of attempted robbery in the third degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously modified, on the law, to remand for resentencing and for further proceedings on defendant's plea withdrawal motion in accordance with this decision.

The court and defense counsel were under the mistaken impression that defendant was proceeding pro se, with an attorney acting only as a legal advisor, at the time defendant's motion to withdraw his guilty plea was determined. Although defendant had represented himself at a suppression hearing, he had subsequently asked for the reinstatement of counsel, and he was represented by

counsel when he pleaded guilty. The record does not reflect any subsequent request by defendant to return to pro se status. We have considered and rejected the People's preservation argument regarding this right-to-counsel issue. Accordingly, we remand the matter for resentencing, with the assignment of counsel and resubmission of defendant's motion.

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

ENTERED: FEBRUARY 7, 2017



CLERK

Tom, J.P., Renwick, Saxe, Feinman, Gesmer, JJ.

2994-
2995 In re Karime R., and Others,

Children Under Eighteen Years
of Age, etc.,

Robin P.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

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Andrew J. Baer, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Eric Lee of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Amy C. Hausknecht of counsel), attorney for the children.

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Order of fact-finding and disposition (one paper), Family Court, Bronx County (Robert D. Hettleman, J.), entered on or about September 18, 2014,[1] to the extent it brings up for review an order of fact-finding, same court and Judge, entered on or about September 24, 2014, which, among other things, found that respondent-appellant had sexually abused the oldest subject child and had derivatively abused the two youngest subject children, unanimously affirmed, without costs. Appeal from the

[1]The September 24, 2014 order memorialized a decision described on the record on September 18, 2014.

fact-finding order, entered on or about September 24, 2014, unanimously dismissed, without costs, as subsumed in the appeal from the order of fact-finding and disposition (one paper).

The record supports Family Court's determination that respondent was a person legally responsible for the care of the two oldest children when the sexual abuse occurred, because the oldest child's undisputed testimony permitted "an inference of substantial familiarity" between herself, her siblings and respondent at the time of the abuse (Family Ct Act § 1012[g]; *Matter of Keoni Daquan A. [Brandon W.—April A.]*, 91 AD3d 414, 415 [1st Dept 2012] [internal quotation marks omitted]; *Matter of Joel O. [Yvonne O.]*, 93 AD3d 491, 492 [1st Dept 2012]).

A preponderance of the evidence supports Family Court's finding that respondent had sexually abused the oldest child and had derivatively abused the two youngest children (Family Ct Act §§ 1012[e][iii]; 1046[b][i]). Family Court properly credited the oldest child's testimony, and any inconsistencies with her prior statements were minor and peripheral to her claim that respondent had inappropriately touched her (*see Matter of Kylani R. [Kyreem B.]*, 93 AD3d 556, 557 [1st Dept 2012]). Although the child's testimony was competent evidence that respondent had sexually abused her and did not have to be corroborated, the record shows

that it was corroborated by the caseworker's testimony and by the child's records from the Children's Advocacy Center, which included the child's similar account of the sexual abuse (*see Matter of Marelyn Dalys C.-G. [Marcial C.]*, 113 AD3d 569, 569 [1st Dept 2014]). Respondent's intent to gain sexual gratification from touching the child's breasts and vagina was properly inferred from the acts themselves, especially given the lack of any other explanation (*Matter of Dorlis B. [Dorge B.]*, 132 AD3d 578, 579 [1st Dept 2015]). Respondent's out-of-court statement that the child had misunderstood what had happened because he only hugged the child and did not mean to do it, confirmed the child's testimony that respondent had touched her and failed to rebut the evidence of his culpability (*see Matter of Philip M.*, 82 NY2d 238, 244 [1993]; *see also Matter of Benjamin L.*, 9 AD3d 153, 155 [1st Dept 2004]).

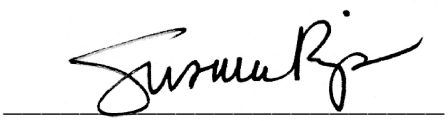
Family Court was entitled to draw the strongest negative inference from respondent's failure to testify at the fact-finding hearing, notwithstanding the existence of pending criminal charges against him (*see Matter of Nicole H.*, 12 AD3d 182, 183 [1st Dept 2004]).

The derivative abuse findings are not undermined by the fact that, at the time of the abuse, the youngest child had not yet

been born and the middle child was only an infant. Respondent's actions demonstrated that his parental judgment and impulse control were so defective as to create a substantial risk of harm to any child in his care (*see Matter of Nyjaiah M. [Herbert M.]*, 72 AD3d 567 [1st Dept 2010]).

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

ENTERED: FEBRUARY 7, 2017



CLERK

Tom, J.P., Renwick, Saxe, Feinman, Gesmer, JJ.

2996-
2997-
2998 Index 106791/08

Spyridon Livathinos,
Plaintiff-Appellant,

-against-

Roberta F. Vaughan, etc., et al.,
Defendants-Respondents.

_____

Goldberg & Lasson, Brooklyn (Donald Drew Goldberg of counsel), for appellant.

Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP, Uniondale (Jeffrey G. Stark of counsel), for Roberta F. Vaughan and 287 Realty Corp., respondents.

Ackerman, Levine, Cullen, Brickman & Limmer, LLP, Great Neck (John M. Brickman of counsel), for James S. Vaughan, respondent.

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Appeal from judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered October 26, 2015, awarding defendants costs and disbursements, and dismissing plaintiff's consolidated amended complaint with prejudice pursuant to an order, same court and Justice, entered September 9, 2015, which, among other things, sua sponte dismissed the consolidated amended complaint, unanimously dismissed, without costs, as taken from a nonappealable paper. Appeal from aforementioned order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment and as taken from a nonappealable order.

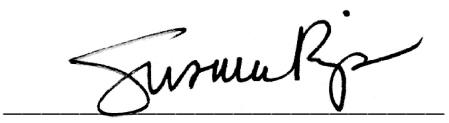
Appeal from order, same court and Justice, entered September 9, 2015, which granted defendants' motion to, among other things, release escrow funds to defendant Trinity Stewart Associates, Inc., unanimously dismissed, without costs, as moot.

There is no right to appeal from a judgment that is based upon a sua sponte order; nor is there a right to appeal from the sua sponte order itself (*see Hladun-Goldmann v Rentsch Assoc.*, 8 AD3d 73, 73 [1st Dept 2004]). We decline to treat plaintiff's notice of appeal as an application for leave to appeal (*see* CPLR 5701[c]).

Given the foregoing determination, plaintiff's appeal from the order granting defendants' motion to release the escrow funds is moot.

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

ENTERED: FEBRUARY 7, 2017



CLERK

Tom, J.P., Renwick, Saxe, Feinman, Gesmer, JJ.

2999 In re The Bronx-Lebanon Highbridge Woodycrest Center, Petitioner-Respondent-Appellant, Index 260253/10

-against-

Richard F. Daines, M.D., etc., et al., Respondents-Appellants-Respondents.

_____

Eric T. Schneiderman, Attorney General, New York (Eric Del Pozo of counsel), for appellants-respondents.

Garfunkel Wild, P.C., Great Neck (Jason Y. Hsi of counsel), for respondent-appellant.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered September 22, 2015, which, to the extent appealed from as limited by the briefs, declared that, for the period at issue, in the formula used to calculate Medicaid reimbursement rates, "patient days" shall not include "reserved bed patient days," and directed respondent Department of Health (DOH) to recalculate petitioner's Medicaid reimbursement rate accordingly, and dismissed the third, fourth, fifth, and sixth causes of action, unanimously modified, on the law, to reinstate the third, fifth, and sixth causes of action, to declare, upon the third cause of action, that petitioner is not entitled to an add-on under the federal Omnibus Budget Reconciliation Act of

1987 (OBRA) for the period at issue, and, upon the fifth and sixth causes of action, to annul DOH's proportional adjustment of Medicaid reimbursements to petitioner on reimbursements that did not derive from prior adjustments pursuant to Public Health Law § 2808(2-b)(b) and (g), and to declare that DOH erroneously imposed such proportional adjustments on petitioner, and otherwise affirmed, without costs.

Pursuant to the unambiguous language of chapter 58, part D, § 2 of the Laws of 2009, only adjustments to petitioner's Medicaid reimbursements received pursuant to Public Health Law § 2808(2-b)(b), as further adjusted by Public Health Law § 2808(2-b)(g), are subject to proportional readjustment. DOH's interpretation is contrary to the plain language of the law (*see Matter of Rosen v Public Empl. Relations Bd.*, 72 NY2d 42, 47 [1988]; *Kateri Residence v Novello*, 95 AD3d 619 [1st Dept 2012], *lv dismissed* 20 NY3d 1031 [2013]). We reject DOH's argument that it properly included "reserved bed patient days" among "patient days" for purposes of calculating petitioner's Medcaid reimbursement rate for the reasons stated in *Kateri Residence* (95

AD3d at 619-620). However, DOH's conclusion that petitioner was not entitled to an OBRA add-on, which was subsumed in the recalculating of operating costs under the 2006 rebasing, is not irrational.

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ENTERED: FEBRUARY 7, 2017

CLERK

Tom, J.P., Renwick, Saxe, Feinman, Gesmer, JJ.

3000 In re The People of the State of New York, ex rel. Carl Fraser, Petitioner-Appellant, Index 400537/12

-against-

Warden, G.M.D.C., New York City Department of Corrections, Respondent-Respondent.

_____

Carl Fraser, appellant pro se.

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

_____

Appeal from judgment (denominated an order), Supreme Court, New York County (Larry R.C. Stephen, J.), entered April 24, 2012, denying the petition for a writ of habeas corpus and dismissing the proceeding brought pursuant to CPLR article 70, unanimously dismissed, without costs, as moot.

This appeal challenging the legality of petitioner's preconviction detention is moot, since petitioner is currently incarcerated following his conviction and sentencing (*see People*

ex rel. Mason v Warden, 138 AD3d 501 [1st Dept 2016]). Petitioner has failed to demonstrate the applicability of an exception to the mootness doctrine (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

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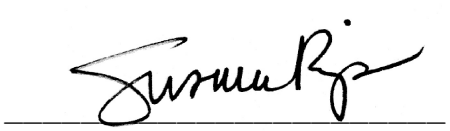


CLERK

Tom, J.P., Renwick, Saxe, Gesmer, JJ.

3001 Orly Genger, etc., Index 109749/09
Plaintiff-Respondent,

-against-

Dalia Genger, et al.,
Defendants,

Sagi Genger, et al.,
Defendants-Appellants.

_____

Kelley Drye & Warren LLP, New York (John Dellaportas of counsel), for Sagi Genger, appellant.

Ira Daniel Tokayer, New York, for D&K GP LLC, appellant.

Kasowitz Benson Torres & Friedman LLP, New York (Michael Paul Bowen of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered April 12, 2016, which granted plaintiff's motion for partial summary judgment, and denied defendants-appellants' cross motion for summary judgment, unanimously affirmed, with costs.

Plaintiff is entitled to summary judgment on the breach of fiduciary duty cause of action (*Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014]). The evidence demonstrates that the subject transaction, in which defendant Sagi Genger was on both sides, was not "entirely fair" under Delaware law (*Cambridge Capital Real Estate Invs., LLC v Archstone Enter. LP*, 137 AD3d 593, 595

[1st Dept 2016]; *R2 Invs., LDC v Icahn*, 117 AD3d 632, 633 [1st Dept 2014]).

Plaintiff made a prima facie showing that the UCC sale of the TPR shares was not commercially reasonable (UCC 9-610), and defendants failed to raise an issue of fact.

The motion court's grant of summary judgment to plaintiff on the replevin cause of action was appropriate, notwithstanding that the court directed that the value of the shares would be awarded rather than ordering the return of the shares (CPLR 7108[a]).

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

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

ENTERED: FEBRUARY 7, 2017

CLERK

Tom, J.P., Renwick, Saxe, Feinman, Gesmer, JJ.

3002 Carolyn Ghee, Index 100143/11
Plaintiff-Appellant,

-against-

Hudson Transit Lines, Inc.,
et al.,
Defendants-Respondents,

Majed Al Salaj, et al.,
Defendants.

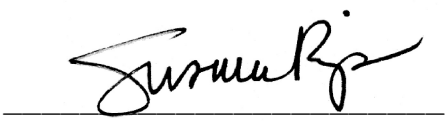
_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Arlene P. Bluth, J.), entered on or about March 19, 2015,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated January 17, 2017,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: FEBRUARY 7, 2017



CLERK

Tom, J.P., Renwick, Saxe, Feinman, Gesmer, JJ.

3003- Ind. 2090/10
3004-
3005 The People of the State of New York,
Respondent,

-against-

Christopher Montanez,
Defendant-Appellant.

- - - - -

The People of the State of New York,
Respondent,

-against-

Andrew McCray,
Defendant-Appellant.

- - - - -

The People of the State of New York,
Respondent,

-against-

Martrell Terrell,
Defendant-Appellant.

_____

Sheila Samuels, Mount Vernon, for Christopher Montanez, appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), and Freshfields Bruckhaus Deringer US LLP, New York (Shannon M. Leitner of counsel), for Andrew McCray, appellant.

Seymour W. James, Jr., The Legal Aid Society, New York (David Crow and Ursula Bentele of counsel), and Patterson Belknap Webb & Tyler LLP, New York (Zachary M. Vaughan of counsel), for Martrell Terrell, appellant.

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

Judgments, Supreme Court, New York County (Marcy L. Kahn, J.), rendered April 5, 2013, after a jury trial, convicting defendant Montanez of gang assault in the second degree and assault in the third degree, and sentencing him, as a second felony offender, to an aggregate term of eight years, convicting defendant McCray of gang assault in the second degree and assault in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 15 years, and convicting defendant Terrell of gang assault in the first degree and assault in the first degree, and sentencing him to an aggregate term of 15 years, unanimously affirmed.

Each verdict was based on legally sufficient evidence and was not against the weight of the evidence, and we find that defendants' various arguments to the contrary are unavailing (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence amply established that each defendant acted with the requisite intent and community of purpose with the other defendants as well as unapprehended assailants, regardless of which of the participants had any connection with each other before the incident. Therefore, each defendant was accessorially liable for

the acts of all the participants in the attack on the victim (*see* Penal Law § 20.00; *Matter of Tatiana N.*, 73 AD3d 186, 191 [1st Dept 2010]).

The court correctly declined defendant McCray's request for submission of assault in the third degree as a lesser included offense, because there was no reasonable view of the evidence, viewed most favorably to McCray, under which he took part in the attack but did not use or act in concert with anyone who used a dangerous instrument (*see People v Rivera*, 23 NY3d 112, 120-21 [2014]), particularly given a videotape of the the incident and McCray's own testimony.

We reject defendant Montanez's argument that the court should have granted an adjournment of opening statements after the prosecutor informed the court and counsel that additional medical records regarding the victim would be produced by the hospital, and we likewise reject Montanez's argument that the court should have granted a mistrial after the records had been produced (*see generally People v Ortiz*, 54 NY2d 288, 292 [1992]). The defense was already well aware that the prosecution's evidence would indicate that the victim suffered permanent hearing loss in his left ear, and Montanez has failed to demonstrate that he was prejudiced by the delay in disclosure.

Likewise, contrary to Montanez's contention, the court providently exercised its discretion in denying mistrial motions in connection with allegedly inflammatory publicity about the case that appeared during deliberations, or based on allegedly inflammatory and prejudicial comments made during the summation of counsel for McCray. In the first instance, the court engaged in an appropriate inquiry of the jurors, which elicited that they had not been exposed to the coverage at issue (*see People v Williams*, 78 AD3d 160, 167 [1st Dept 2010], *lv denied* 16 NY3d 838 [2011]). In the latter, the court gave a curative instruction that appropriately addressed any alleged danger of prejudice from the other lawyer's remarks (*see People v Santiago*, 52 NY2d 865 [1981]).

The court correctly declined to deliver a missing witness charge, because the People made a detailed showing of their reasonable but unsuccessful efforts to locate the witness, thereby demonstrating a "genuine inability to locate [the] witness" (*People v Savinon*, 100 NY2d 192, 198 [2003]).

Defendant Montanez did not preserve his argument that a supplemental instruction impermissibly directed the jury to draw a mandatory inference of intent, or his repugnant verdicts claim, and we decline to review either of them in the interest of

justice. As an alternative holding, we find both claims to be without merit. Montanez's ineffective assistance of counsel 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 Montanez has not made a CPL 440.10 motion, the merits of his ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that he 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]).

We perceive no basis for reducing any of the sentences.

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

ENTERED: FEBRUARY 7, 2017

CLERK

Tom, J.P., Renwick, Saxe, Feinman, Gesmer, JJ.

3006 In re Michael Angelo D., also known as Michael B.,

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

AbbyAnn D., also known as Abby Ann D.,
Respondent-Appellant,

Sheltering Arms Children and Family Services, Inc.,
Petitioner-Respondent.

_____

Dora M. Lassinger, East Rockaway, for appellant.

Michael F. Linardi, New York, for respondent.

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

_____

Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about November 19, 2015, which, upon a finding of abandonment, terminated respondent mother's parental rights to the subject child, and transferred custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of abandonment was supported by clear and convincing evidence. The record demonstrates that respondent failed to communicate or visit with the child or the agency

during the six months immediately preceding the filing of the petition (*see Matter of Amin Enrique M.*, 52 AD3d 316 [1st Dept 2008], *lv dismissed* 12 NY3d 792 [2009]).

The court providently exercised its discretion in denying respondent's request for a full dispositional hearing following its finding of abandonment, as such a hearing is not statutorily required (*see Matter of Keyevon Justice P. [Lativia Denice P.]*, 90 AD3d 477 [1st Dept 2011]).

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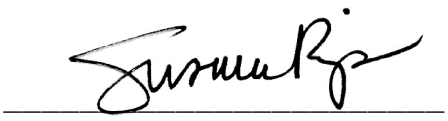

CLERK

Tom, J.P., Renwick, Saxe, Feinman, Gesmer, JJ.

3007 Charles Schwarz, Index 151686/15
Plaintiff-Appellant,

-against-

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

Serrins & Associates LLC, New York (Corey M. Stein of counsel), for appellant.

Paul Limmiatis, New York, for respondents.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered on or about August 4, 2015, which granted defendants' CPLR 3211(a)(7) motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff failed to allege facts sufficient to state an employment discrimination claim under either the New York State or New York City Human Rights Law (HRL) based on his "having been convicted of one or more criminal offenses" (Executive Law § 296[15]; Administrative Code of City of NY § 8-107[10]). The State and City HRLs incorporate article 23-A of the Correction Law, which prohibits denial of employment to an individual "by reason of the individual's having been previously convicted of one or more criminal offenses, or by reason of a finding of lack

of 'good moral character' when such finding is based upon the fact that the individual has previously been convicted of one or more criminal offenses" (Corr Law § 752; Executive Law § 296[15]; Administrative Code § 8-107[10]).

Plaintiff alleges that defendant Consolidated Edison, Inc. (Con Ed) denied him employment based on his 2002 perjury conviction, and prior assault-related convictions, which subsequently were vacated, in connection with the assault in 1997 of Abner Louima by New York City police officers who arrested and transported Louima to a police precinct, where he was beaten and sodomized in a bathroom. Plaintiff was convicted of participating in and conspiring with other officers to participate in the assault on Louima, but his convictions were vacated in 2002 on grounds of ineffective assistance of counsel (*see United States v Schwarz*, 283 F3d 76 [2d Cir 2002]). Upon retrial, he was tried on two of the original assault counts as well as two counts of perjury based on testimony given in the first trial. Plaintiff was convicted of one count of perjury; the jury deadlocked on the remaining three counts.

The complaint contains no allegations that show that plaintiff was terminated under circumstances giving rise to an inference of discrimination based on his perjury conviction (*see*

Melman v Montefiore Med. Ctr., 98 AD3d 107, 113 [1st Dept 2012]), rather than due to the disruption of Con Ed's workplace and its employee and customers relations stemming from his perceived involvement in the underlying assault. Con Ed hired plaintiff after he disclosed the conviction on his employment application. The allegations relevant to any discriminatory intent state only that shortly after he was hired, one Con Ed construction supervisor told plaintiff that people were "talking," that everyone "downstairs" knew who he was, and that his hiring "blew up the building." The complaint alleges, "Upon information and belief," without elaborating, that the supervisor was referring to plaintiff's perjury conviction (and vacated convictions), but the allegation is speculative and therefore insufficient (*see Board of Mgrs. of the Gansevoort Condominium v 325 W. 13th, LLC*, 121 AD3d 554 [1st Dept 2014]).

The complaint also alleges that Con Ed's director of employee and labor relations advised plaintiff that he was being terminated due to "potential disruption of business operations" and "damage to the Company's reputation" if he continued in its employ. There is no mention of his perjury conviction or any associated dishonesty, or any allegation that anyone mentioned the Louima case. When plaintiff himself commented that he was

being terminated due to his "convictions," the director allegedly did not deny it, but under these circumstances, his silence alone does not suffice to show that plaintiff was terminated on account of his perjury conviction (*see Van Houdnos v Evans*, 807 F2d 648, 655 [7th Cir 1986]; *see also Menard v First Sec. Servs. Corp.*, 848 F2d 281, 288 [1st Cir 1988]).

The assault-related convictions on which plaintiff was retried, and the jury deadlocked, are not covered by article 23-A, since the article applies only to individuals who "previously have been convicted," and the vacatur of plaintiff's prior assault convictions rendered those convictions nullities (*Poland v Arizona*, 476 US 147, 152 [1986]; *Matter of Barash*, 20 NY2d 154, 157-158 [1967]; *People v Dozier*, 163 AD2d 220 [1st Dept 1990], *affd* 78 NY2d 242 [1991]). Although plaintiff maintains that he remains "previously ... convicted," we reject this interpretation since it would permit an employer to deny employment based on a vacated conviction in reliance on the statutory exceptions (*see* Correction Law §§ 752; 753).

The legislative intent is to rehabilitate, and therefore avoid recidivism by, "ex-offenders," not those whose convictions have been vacated, who generally do not need rehabilitation and are not at risk of recidivism (*see Matter of Bonacorsa v Van*

Lindt, 71 NY2d 605, 611-612 [1988]). "Although ex-offenders were urged when released from prison to find employment as a part of their rehabilitation, they had great difficulty in doing so because of their criminal records.... Failure to find employment ... injured society as a whole by contributing to a high rate of recidivism ... Thus, [article 23-A] sets out a broad general rule that employers and public agencies cannot deny employment or a license to an applicant solely based on status as an ex-offender" (*id.* at 611; *see Matter of Meth v Manhattan & Bronx Surface Tr. Operating Auth.*, 134 AD2d 431 [2d Dept 1987]).

Plaintiff acknowledges that he cannot rely on sections of the State and City HRLs that render it unlawful to discriminate against an individual based on an arrest or criminal accusation that was terminated in the individual's favor (Executive Law § 296[16]; Administrative Code § 8-107[11]), because his convictions, upon vacatur, were remanded for a new trial, and the proceeding did not otherwise result in acquittal or dismissal of all charges against him (*see* CPL 160.50[3]).

Similarly, the complaint does not allege any facts from which it can reasonably be inferred that plaintiff was perceived to have been convicted of the assault of Louima, assuming "perceived" convictions are protected under article 23-A. In

fact, while his notoriety may well be from his perceived involvement in the assault, it is not necessarily from any perceived conviction. There are no allegations that suggest that Con Ed believed that plaintiff had been convicted of a crime against Louima.

Plaintiff does not challenge the dismissal of the complaint as against defendant Consolidated Edison Company of New York, Inc. (CEI), the parent company of Con Ed, on the additional ground that the complaint does not allege that CEI hired him or had any control over Con Ed's employment decisions so as to warrant holding it liable for Con Ed's acts. Accordingly, we affirm the dismissal of the complaint as against CEI on this additional ground (*see Esposito v Altria Group., Inc.*, 67 AD3d 499 [1st Dept 2009], *lv denied* 15 NY3d 701 [2010]).

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

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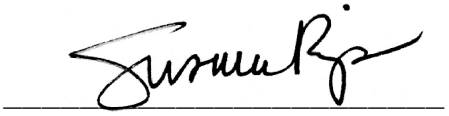

CLERK

Tom, J.P., Renwick, Feinman, Gesmer, JJ.

3008 P7 Owner LLC, Index 651981/12
Plaintiff-Appellant,

-against-

Arbor Realty Trust, Inc.,
et al.,
Defendants-Respondents.

_____

Ellenoff Grossman & Schole LLP, New York (Eric S. Weinstein of counsel), for appellant.

Morrison Cohen LLP, New York (Y. David Scharf of counsel), for respondents.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered March 8, 2016, which denied plaintiff's motion for summary judgment, and granted defendants' cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff owned the most subordinate of the participation interests in a $125 million mortgage loan. Defendant Arbor Realty Participation, LLC, an indirect wholly owned subsidiary of defendant Arbor Realty Trust, Inc., owned a more senior participation interest in the loan and acted as servicer of both its and plaintiff's interests. When $35 million of the loan was written down pursuant to a restructuring of the financing,

plaintiff's participation interest was eliminated. Plaintiff claims that defendants breached their obligations under the governing sub-participation agreement by inappropriately allocating the entire write-down to plaintiff's participation interest.

The elimination of plaintiff's participation interest was proper pursuant to §§ 3(a) and 4(e) of the Sub-Participation and Servicing Agreement, which provided that any reduction in the loan pursuant to a loan modification done "in accordance with" the terms of the governing agreements would be applied against plaintiff's participation interest first. Contrary to plaintiff's contention, the underlying loan modification complied with the terms of the governing agreements and with "Accepted Servicing Practices." The Initial Asset Status Report issued by the Special Servicer satisfied the Special Servicer's contractual obligation to provide certain specified information "to the extent reasonably determinable." In addition, the evidence reflects that the possibility of recovery under the "bad boy" guaranty and the net present value of a variety of recovery scenarios were properly considered.

Because our holding disposes of this matter, we need not reach the issue of the appropriateness of veil-piercing.

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

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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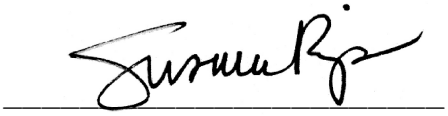

CLERK

Tom, J.P., Renwick, Saxe, Feinman, Gesmer, JJ.

3009 Zafar Salyamov, individually and as President and sole shareholder of FEA 23rd Inc., Plaintiff-Respondent, Index 152452/15

-against-

Ben Lyhovsky, etc., Defendant-Appellant.

_____

Steinberg & Cavaliere, LLP, White Plains (Steven A. Coploff of counsel), for appellant.

Leon I. Behar, P.C., New York (Mark Balken of counsel), for respondent.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered July 25, 2016, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff asserts a legal malpractice claim based on defendant's alleged failure to confirm that a sublessor of premises in which plaintiff wished to operate a business had the owner's consent to assign the sublease at issue. However, there was no assignment of the sublease; the subtenant was a corporation whose stock plaintiff purchased in the transaction at issue. Further, it is undisputed that the master lease allowed

the sublessor to sublet the premises without the owner's consent.

Plaintiff's additional theory of liability, that defendant failed to ascertain the status of the master lease, was improperly raised for the first time in opposition to defendant's motion for summary judgment (*see Atkins v Beth Abraham Health Servs.*, 133 AD3d 491 [1st Dept 2015]).

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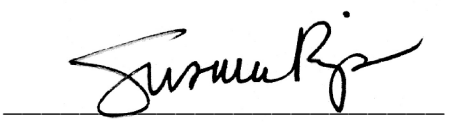


CLERK

Tom, J.P., Renwick, Saxe, Feinman, Gesmer, JJ.

3011 Alarmex Holdings, LLC, Index 152706/15
Plaintiff-Appellant,

-against-

JP Morgan Chase Bank, N.A.,
Defendant-Respondent.

_____

Feder Kaszovitz, LLP, New York (David Sack of counsel), for appellant.

Emmet, Marvin & Martin, LLP, New York (Tyler J. Kandel of counsel), for respondent.

_____

Order, Supreme Court, New York County (Robert Reed, J.), entered October 23, 2015, which granted defendant's motion to dismiss the complaint as time-barred, unanimously affirmed, without costs.

Plaintiff seeks to recover certain funds that allegedly were wrongfully transferred from an escrow account maintained at a branch of defendant by Marc Dreier, the principal of Dreier LLP, before Dreier LLP filed for bankruptcy. Plaintiff does not dispute that its causes of action are time-barred under the applicable statutes of limitations; it argues that defendant's active concealment of the illicit transfers equitably estops it from asserting a statute of limitations defense. However, the complaint fails to allege facts showing either that defendant had

actual knowledge of the diversion of funds or reason to suspect that the funds were being misappropriated or that a fiduciary relationship existed between the parties that would give rise to a duty to disclose (*see Gonik v Israel Discount Bank of N.Y.*, 80 AD3d 437, 438 [1st Dept 2011]; *Home Sav. of Am. v Amoros*, 233 AD2d 35, 38-39 [1st Dept 1997]). Indeed, the allegations show that Dreier LLP, as the escrow agent, was the fiduciary, and that defendant was merely the depositary bank at which Dreier LLP maintained the escrow account. Thus, defendant had no duty to monitor the subject escrow account "to safeguard the funds [therein] from fiduciary misappropriation" (*Amoros*, 233 AD2d at 38).

Plaintiff also failed to allege adequately that it was a third-party beneficiary of the agreement between defendant and Dreier LLP that gave rise to a contractual duty on defendant's part to notify it of the transfer (*see LaSalle Natl. Bank v Ernst & Young*, 285 AD2d 101, 108 [1st Dept 2001]). Its allegation that it was an intended beneficiary is conclusory. Its contention that the motion court should have permitted the matter to proceed to discovery for defendant to produce the agreement seeks nothing more than a fishing expedition (*see Orix Credit Alliance v Hable Co.*, 256 AD2d 114, 116 [1st Dept 1998]).

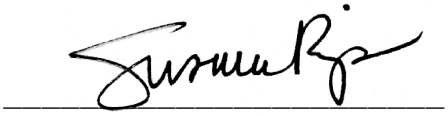
Plaintiff's argument that the statutes of limitations were tolled by the continuing breach doctrine falls with the failure of its argument that defendant owed it contractual and fiduciary duties.

Plaintiff waived any contention that its third cause of action states a timely claim for aiding and abetting fraud (*see* CPLR 213[8]). It denominated the claim as one for "aiding and abetting" without specifying the underlying theory, and never disputed defendant's characterization of the claim as a claim for aiding and abetting conversion. In any event, the complaint fails to allege facts showing that defendant had actual knowledge of Dreier's fraud (*see Oster v Kirschner*, 77 AD3d 51, 55 [1st Dept 2010]). Without actual knowledge, defendant's allowing of the transfer of funds was routine business service, and does not amount to substantial assistance of the fraud (*McBride v KPMG Intl.*, 135 AD3d 576, 579 [1st Dept 2016]).

The court properly denied leave to amend, since the proposed amendments would not have cured the deficiencies (*see CLP Leasing Co., LP v Nessen*, 27 AD3d 291 [1st Dept 2006]).

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

ENTERED: FEBRUARY 7, 2017



CLERK

Tom, J.P., Renwick, Saxe, Feinman, Gesmer, JJ.

3012 Jae Hee Chung, Index 150554/15
Plaintiff-Respondent,

-against-

Mary Manning Walsh Nursing Home Co., Inc., et al.,
Defendants-Appellants.

_____

Bond, Schoeneck & King, PLLC, Garden City (Richard S. Finkel of counsel), for appellants.

Gligoric C. Garupa, Brentwood, for respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered August 18, 2015, which, insofar as appealed from as limited by the briefs, denied defendants' CPLR 3211(a) motion to dismiss the complaint, unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

In September 2013, defendants, plaintiff, and plaintiff's union entered into a "Settlement Agreement" resolving a grievance proceeding brought by the union regarding her separation from employment in January 2012. Among other provisions, in the Settlement Agreement, the parties agreed that plaintiff would be deemed to have resigned on January 8, 2012. Since plaintiff makes no claim that the Settlement Agreement is invalid (*see*

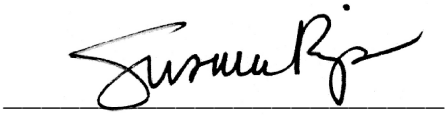
generally Hallock v State of New York, 64 NY2d 224, 230 [1984]; *34 Funding Assoc., Inc. v Pollak*, 26 AD3d 182, 182 [1st Dept 2006]), it thus fixes the date of her separation from employment at January 8, 2012 (*see Matter of Miller v New York State Dept. of Correctional Servs.*, 69 NY2d 970, 972 [1987], *affg for reasons stated at* 126 AD2d 831, 831-832 [3d Dept 1987]; *Gant v Brooklyn Dev. Ctr.*, 307 AD2d 307, 308 [2d Dept 2003]). Defendants' assertion of the Settlement Agreement's terms via motion in response to the complaint renders this a "proceeding to enforce [its] terms" as stipulated therein (*see Commissioners of State Ins. Fund v Fortune Interior Dismantling Corp.*, 7 AD3d 427, 328 [1st Dept 2004]; *Fishof v Grajower*, 262 AD2d 118, 120 [1st Dept 1999]).

Since plaintiff filed the complaint in this action on January 17, 2015, more than three years after the stipulated date of her resignation, her claims under the New York State and City Human Rights Laws are time-barred under the applicable three-year

limitations periods (*see* CPLR 214[2]; Administrative Code of City of NY § 8-502[d]; *Santiago-Mendez v City of New York*, 136 AD3d 428, 428 [1st Dept 2016]).

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

ENTERED: FEBRUARY 7, 2017



CLERK

Tom, J.P., Renwick, Saxe, Feinman, Gesmer, JJ.

3013 In re Jerome Razor, Index 101079/13
Petitioner-Respondent,

-against-

City of New York, et al.,
Respondents-Appellants.

_____

Zachary W. Carter, Corporation Counsel, New York (Emma Grunberg of counsel), for appellants.

Glass Krakower LLP, New York (John Hogrogian of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Doris Ling-Cohan, J.), entered April 9, 2015, to the extent appealed from as limited by the briefs, denying respondents' cross motion to dismiss the petition, granting the petition to the extent it annulled respondents' April 3, 2013 determination denying petitioner's appeal of his U-rating, and directing respondent Board of Education to expunge the rating and replace it with an "S" rating, unanimously reversed, on the law, without costs, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed.

Petitioner failed to preserve the issue of whether the U-rating should have been annulled based on an alleged procedural deficiency or deviation from the collective bargaining agreement

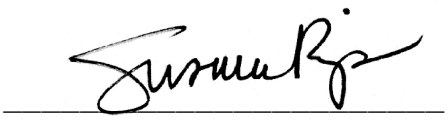
negotiated by his union regarding observation practices, since he never raised the issue at the administrative level (*see e.g. Matter of Bottom v Annucci*, 26 NY3d 983, 985 [2015]; *Green v New York City Police Dept.*, 34 AD3d 262, 263 [1st Dept 2006]).

Petitioner has failed to show that the U-rating was arbitrary and capricious, or made in bad faith.

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

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

ENTERED: FEBRUARY 7, 2017



CLERK

Tom, J.P., Renwick, Saxe, Feinman, Gesmer, JJ.

3014N In re Brenda Nazario, etc., Index 157732/14
Petitioner-Appellant,

-against-

New York City Health and Hospitals Corporation,
Respondent-Respondent.

_____

Charnas Law Firm, P.C., New York (John V. Decolator of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ingrid R. Gustafson of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (George J. Silver, J.), entered on or about February 4, 2015, which denied the petition for leave to serve and file a late notice of claim, unanimously affirmed, without costs.

The motion court providently exercised its discretion in denying the petition (*see* General Municipal Law § 50-e[5]; *Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 535 [2006]; *Webb v New York City Health & Hosps. Corp.*, 50 AD3d 265 [1st Dept 2008]). Bellevue Hospital's medical records show nothing that would alert respondent to a possible claim of malpractice (*Williams*, 6 NY3d at 537; *Webb*, 50 AD3d at 265). The records show that decedent was given a prophylactic course of antibiotics

and told to return if he observed any signs of infection. "Under these circumstances[, respondent] could well have concluded that when [petitioner's father] left the hospital there was nothing wrong with him" (*Williams*, 6 NY3d at 537). Petitioner fails to point to any specific act or omission in Bellevue's treatment of her father that could support a claim for malpractice (*Webb*, 50 AD3d at 265). Petitioner also failed to make a showing of lack of substantial prejudice to respondent or demonstrate a reasonable excuse for the delay in serving a notice of claim (*see* General Municipal Law § 50-e[5]; *Webb*, 50 AD3d at 265).

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

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

ENTERED: FEBRUARY 7, 2017

CLERK

Tom, J.P., Renwick, Saxe, Feinman, Gesmer, JJ.

3015N Eleanor John, Index 21726/11E
Plaintiff-Respondent,

-against-

Arin Bainbridge Realty Corp.,
Defendant-Appellant,

Samcity Inc.,
Defendant.

_____

Profeta & Eisenstein, New York (Fred R. Profeta, Jr. of counsel), for appellant.

Michael P. Bloomfield, Bronx, for respondent.

_____

Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered August 19, 2015, which, inter alia, denied defendant Arin Bainbridge Realty Corp.'s (Arin) motion to vacate the default judgment against it, pursuant to CPLR 317 and 5015(a)(1), unanimously affirmed, without costs.

"To obtain relief from a default judgment [under CPLR 5015(a)(1)], a party is required to demonstrate both a reasonable excuse for the default and a meritorious claim or defense to the action" (*Bobet v Rockefeller Ctr., N., Inc.*, 78 AD3d 475, 475 [1st Dept 2010]; CPLR 5015[a][1]). However, "[t]he failure of a corporate defendant to receive service of process due to breach of the obligation to keep a current address on file with the

Secretary of State (*see* Business Corporation Law § 306) does not constitute a reasonable excuse" (*Crespo v A.D.A. Mgt.*, 292 AD2d 5, 9-10 [1st Dept 2002]). Thus, the court properly denied Arin's motion to vacate the default judgment under CPLR 5015(a)(1).

CPLR 317 provides that "[a] person served with a summons other than by personal delivery to him or to his agent for service under [CPLR] 318 ... who does not appear may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment ... upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense." No showing of a reasonable excuse is necessary (*Eugene Di Lorenzo, Inc. v A. C. Dutton Lbr Co.*, 67 NY2d 138, 141 [1986]). Service upon a corporation through the Secretary of State, pursuant to Business Corporation Law § 306, is not "personal service" (*id.* at 142).

Viewing the totality of the record, we find that the court providently exercised its discretion to deny vacatur of the default judgment under CPLR 317. Numerous anomalies in the record support the court's inference that Arin sought to deliberately avoid service. For example, both the address given to the Secretary of State, 3161 Bainbridge Avenue, Bronx County (the Bainbridge address), and on the deed registration for the

subject property, 320 Nassau Blvd, Garden City, were purportedly incorrect due to errors by Arin's real estate counsel at the time Arin purchased the Bainbridge property, yet Arin never sought an affidavit from counsel to explain the error, and Arin explains it only as a "mystery." Moreover the summons and complaint, among many other notices, were sent to these addresses, which purportedly housed defendants Samcity and Arin's real estate attorney's office, and were not returned as undeliverable, but no affidavit was sought by Arin from anyone at either address to explain why these correspondences were not forwarded to Arin. Additionally, while Arin asserts that it used a P.O. box as its business address for a number of years, the P.O. box recited on the lease, while similar, is not the same as the P.O. box recited by plaintiff's vice president in his affidavit. Arin's secretary and shareholder, also averred that, since 2005, Arin has used the business address of 705 Rhinelander Avenue, Bronx County, however, in reply, its vice president avers that the address used is 705 Rylander Avenue.

While poor draftsmanship or typographical errors might explain some of these anomalies, it does not explain why Arin submitted a lease to show that it was Samcity's out-of-possession landlord, where the lease affirmatively refutes such an

assertion, or the lack of any affirmative evidence of why those notices sent to the Bainbridge Ave. and Nassau Blvd. addresses were never forwarded to Arin. Under these circumstances, there were sufficient facts in the record to support the court's inference of deliberate avoidance of process in this case, or at least, that Arin has not demonstrated that it did not receive notice in time to defend this action.

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

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

ENTERED: FEBRUARY 7, 2017

CLERK

Friedman, J.P., Andrias, Moskowitz, Kapnick, Kahn, JJ.

3017 The People of the State of New York, Ind. 2229/14
Respondent,

-against-

Baldemiro Lopez,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Ben A. Schatz of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Jeffrey A. Wojcik of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered April 28, 2015, convicting defendant, after a jury trial, of burglary in the second degree, criminal contempt in the first and second degrees, endangering the welfare of a child (two counts) and resisting arrest, and sentencing him to an aggregate term of eight years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence warranted an inference that, beyond his unlawful entry into the victim's apartment, defendant intended to violate another provision of the order of protection obtained by the victim against him, namely the provision requiring him to stay away from her and to not

communicate with her (*see People v Cajigas*, 82 AD3d 544, 545 [1st Dept 2011], *affd* 19 NY3d 697 [2012]). The evidence also demonstrated defendant's pattern of violent and hostile behavior toward the victim, permitting the inference that he intended to enter the apartment in order to assault or threaten her (*see People v Polanco*, 279 AD2d 307, 308 [1st Dept 2001], *lv denied* 96 NY2d 833 [2001]; *People v Melendez*, 206 AD2d 270, 271 [1st Dept 1994], *lv denied* 84 NY2d 870 [1994]).

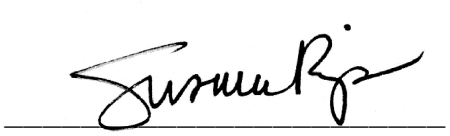
The court providently exercised its discretion when it denied defendant's request to introduce medical records relating to an injury he sustained about six months before the burglary. In the absence of any explanatory testimony, these records did not shed any light on defendant's physical condition at the time of the burglary, including his ability to enter the victim's apartment by climbing a fire escape (*see People v Ortiz*, 259 AD2d 271 [1st Dept 1999], *lv denied* 93 NY2d 901 [1999]). Moreover, the voluminous records would have been likely to confuse the jurors and encourage them to speculate and appoint themselves as medical experts regarding the time it would take particular injuries to heal. Since defendant never asserted that he was constitutionally entitled to introduce these records, he only raised a question of state evidentiary law (*see People v Lane*, 7

NY3d 888, 889 [2006]; *see also Smith v Duncan*, 411 F3d 340, 348-349 [2d Cir 2005]), and we decline to review his unpreserved constitutional claim in the interest of justice. As an alternative holding, we reject it on the merits (*see Crane v Kentucky*, 476 US 683, 689-690 [1986]).

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 7, 2017



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Friedman, J.P., Andrias, Moskowitz, Kapnick, Kahn, JJ.

3018-
3018A Index 805451/14

Leslie Venegas,
Plaintiff-Respondent,

-against-

Capric Clinic,
Defendant,

Oleg Antonov, M.D.,
Defendant-Appellant.

_____

Marshall Dennehey Warner Coleman & Goggin, New York (Tonya M. Lindsey of counsel), for appellant.

Ferro Kuba Mangano Sklyar P.C., Hauppauge (Kenneth E. Mangano of counsel), for respondent.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered February 24, 2016, which, upon granting reargument, adhered to an order, same court and Justice, entered October 26, 2015, denying defendant doctor's motion to dismiss the complaint for lack of personal jurisdiction and denying plaintiff's cross motion for leave to conduct jurisdictional discovery, unanimously modified, on the law, to deny the doctor's motion without prejudice to renewal following the completion of discovery concerning jurisdiction over the doctor, and otherwise affirmed, without costs. Appeal from order entered October 26, 2015, unanimously dismissed, without costs, as academic.

In opposition to the doctor's showing of the lack of personal jurisdiction over him (*see Minella v Restifo*, 124 AD3d 486 [1st Dept 2015]), plaintiff made a "sufficient start" to warrant discovery concerning whether the doctor has jurisdictional contacts with the State of New York sufficient to support the exercise of jurisdiction under CPLR 302(a)(1) (*Peterson v Spartan Indus.*, 33 NY2d 463, 467 [1974]; *American BankNote Corp. v Daniele*, 45 AD3d 338, 340 [1st Dept 2007]; CPLR 3211[d]). Although the website information submitted by plaintiff is, by itself, insufficient to meet his ultimate burden of establishing jurisdiction (*see Paterno v Laser Spine Inst.*, 24 NY3d 370, 377 [2014]; *Minella*, 124 AD3d at 486; *see generally Lamarr v Klein*, 35 AD2d 248, 250 [1st Dept 1970], *affd* 30 NY2d 757 [1972]), the statements on the website boasting that the doctor has provided medical treatment in New York for the last 14 years directly contradict the doctor's claims that he has never provided any medical treatment in New York.

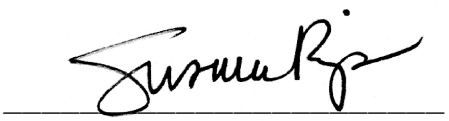
Because the doctor averred that he only treated plaintiff in Pennsylvania, and plaintiff submitted no evidence disputing that sworn statement, any injury suffered by plaintiff occurred in Pennsylvania, where the malpractice took place (*Paterno*, 24 NY3d at 381; *Minella*, 124 AD3d at 486-487). Therefore, to the extent

plaintiff alternatively relies on CPLR 302(a)(3)(i), he failed to make a sufficient start in showing jurisdiction under that provision (*id.*).

Supreme Court's reliance on cases concerning "conspiracy jurisdiction" (*see e.g. Lawati v Montague Morgan Slade Ltd.*, 102 AD3d 427 [1st Dept 2013]) is misplaced and does not support the exercise of jurisdiction over the doctor in this case.

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

ENTERED: FEBRUARY 7, 2017



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Friedman, J.P., Andrias, Moskowitz, Kapnick, Kahn, JJ.

3019 In re Priseten T.,

A Dependent Child under
Eighteen Years of Age, etc.,

Miatta T.,
Respondent-Appellant,

Catholic Guardian Services,
Petitioner-Respondent.

_____

Dora M. Lassinger, East Rockaway, for appellant.

Magovern & Sclafani, Mineola (Joanna M. Roberson of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Riti P. Singh of counsel), attorney for the child.

_____

Order, Family Court, New York County (Emily M. Olshansky, J.), entered on or about November 5, 2015, which, upon a fact-finding determination that respondent mother suffers from a mental illness within the meaning of the Social Services Law, terminated her parental rights to the subject child and committed custody and guardianship of the child to petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence, including the uncontroverted expert testimony of the court-appointed psychologist who

testified that respondent suffers from schizophrenia, supports the determination that she is presently and for the foreseeable future unable to provide proper and adequate care for the child and that the child would be in danger of becoming a neglected child if he were placed in the mother's care (Social Services Law § 384-b[4][c], [6][a]).

Petitioner submitted, among other things, the psychology expert's detailed report, which was prepared after an interview with the mother and a review of her mental health records (*see Matter of Isis S.C. [Doreen S.]*, 98 AD3d 905, 905-906 [1st Dept 2012]). The expert noted respondent's schizophrenia diagnosis, her limited insight into her condition, her recurrent hospitalizations, and her inconsistent treatment (*see Matter of Akiko Miami-Lyn A. [Ann Althea A.]*, 139 AD3d 617 [1st Dept 2016]). In addition, respondent's testimony demonstrated that she was unable to acknowledge the existence of her mental illness and did not believe that she needed medication (*see Matter of Mar De Luz R. [Luz R.]*, 95 AD3d 423 [1st Dept 2012]).

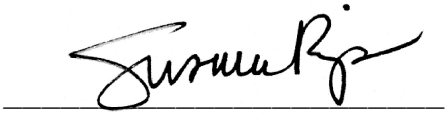
Contrary to respondent's contention, the court did not err in declining to conduct a dispositional hearing prior to finding that termination of parental rights is in the best interest of the child (*see Matter of Joyce T.*, 65 NY2d 39, 46 [1985]; *Matter*

of Ashanti A., 56 AD3d 373, 373-374 [1st Dept 2008]).

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

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

ENTERED: FEBRUARY 7, 2017



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Friedman, J.P., Andrias, Moskowitz, Kapnick, Kahn, JJ.

3020-
3021 Index 113181/11

Hilary Kolodin, also known as
Hilary Kole,
Plaintiff-Respondent,

-against-

John R. Valenti, also known as
Gianni Valenti, et al.,
Defendants,

Howard Weiss,
Defendant-Appellant.

- - - - -

Hilary Kolodin, also known as
Hilary Kole,
Plaintiff-Respondent,

-against-

John R. Valenti, also known as
Gianni Valenti,
Defendant-Appellant,

Jayarvee, Inc., etc., et al.,
Defendants.

_____

Landman Corsi Ballaine & Ford P.C., New York (Stephen Jacobs of counsel), for Howard Weiss, appellant.

Simmons Hanly Conroy LLC, New York (Andrea Bierstein of counsel), for John R. Valenti, appellant.

Lewis and Garbuz, P.C., New York (Michael A. Andrews of counsel), for respondent.

_____

Order, Supreme Court, New York County (Ellen Coin, J.),

entered October 28, 2015, which denied defendant Valenti's motion

for partial summary judgment dismissing the causes of action in the second amended complaint for constructive trust and an accounting, conversion and unjust enrichment with respect to an individual investment account held in said defendant's name, and which denied defendant Weiss's motion for summary judgment dismissing the malpractice claim against him, unanimously modified, on the law, to grant Valenti's motion only to the extent of dismissing the cause of action for conversion, and to grant defendant Weiss's motion, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint as against Weiss.

The motion court correctly found that, contrary to defendant Valenti's contention, plaintiff's affidavit did not contradict her earlier deposition testimony and that there were issues of fact as to whether plaintiff reasonably relied on the alleged promises of her former paramour, defendant Valenti, when she agreed to transfer her interest in their joint investment account into an account held solely in his name. However, because, giving full credence to the factual allegations of the complaint, defendant Valenti's disposition of the funds so transferred was an exercise of lawful dominion over them, plaintiff has failed to state a cause of action for conversion *(see National Ctr. For Crisis Mgt., Inc. V Lerner*, 91 AD3d 920 [1st Dept 2012]).

With respect to the malpractice claim against the defendant accountant, the record shows that plaintiff was clearly aware of the legal consequences of her action, and that she effected the transfer in at least partial reliance on defendant Valenti's promise that the money would still be hers, a moral obligation rather than a legal one, and out of concern that he could suffer adverse tax consequences if the funds remained in the joint investment account. Thus, the defendant accountant's advice could not have been the proximate cause of plaintiff's claimed loss (*see Herbert H. Post & Co. v Sidney Bitterman, Inc.*, 219 AD2d 214, 223 [1st Dept 1996]).

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

ENTERED: FEBRUARY 7, 2017

CLERK

Friedman, J.P., Andrias, Moskowitz, Kapnick, Kahn, JJ.

3022 The People of the State of New York, Ind. 4714/11
Respondent,

-against-

Tyshawn Brockington,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Marisa K. Cabrera of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Thomas A. Farber, J.), rendered June 26, 2013, convicting defendant, after a jury trial, of murder in the second degree, burglary in the first degree and two counts of criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 25 years to life, unanimously affirmed.

Defendant did not preserve his claim that the court should have submitted to the jury the issue of whether the prosecution's main witness was an accomplice in fact, whose testimony would thus require corroboration (*see* CPL 60.22), and we decline to review it in the interest of justice. The record does not support defendant's assertion that he joined in a codefendant's request for such a charge (*see People v Buckley*, 75 NY2d 843

[1990]). At most, defendant made a brief remark that appeared to support the codefendant's theory that because of the witness's participation in the purchase, months before the murder, of what ultimately proved to be the alleged murder weapon, she remained an accomplice to possession of the weapon at the time of the murder. Thus, any preservation would be limited to that theory, which we find to be meritless. As an alternative holding, we reject defendant's entire argument on the merits (*see People v Jones*, 73 NY2d 902, 903 [1989]). Although the witness heard her boyfriend, a codefendant, declare his intention to "smoke someone," she did not accompany him to the scene of the murder, she was not at or near that location before, during or after the crime, and there is no evidence suggesting that the witness had any homicidal intent or that she importuned or intentionally aided either defendant in committing the crime. All of defendant's theories under which the witness could be viewed as having participated in the charged crimes are unsupported and based on speculative inferences. In any event, any error in failing to deliver an accomplice corroboration charge was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

The court providently exercised its discretion in receiving evidence of defendant's Facebook post, made one hour after the

murder, which could be reasonably interpreted as at least indirectly boasting about the crime by announcing that defendant's group had scored a victory over a rival group (*see generally People v Scarola*, 71 NY2d 769, 777 [1988]). The jury was provided with sufficient context in which to make such a interpretation, and the possibility of innocent interpretations did not go to the admissibility of the evidence, but to the weight to be accorded it by the trier of fact.

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 7, 2017

CLERK

Friedman, J.P., Andrias, Moskowitz, Kapnick, Kahn, JJ.

3023 Sonia Bonilla, Index 22405/12E
Plaintiff-Respondent,

-against-

P.A. Vargas-Nunez,
Defendant-Respondent,

Jesus Bravo, et al.,
Defendants-Appellants.

_____

Richard T. Lau & Associates, Jericho (Christine A. Hilcken of counsel), for appellants.

Law Offices of Mark B. Rubin, Bronx (Mark B. Rubin of counsel), for Sonia Bonilla, respondent.

Marjorie E. Bornes, Brooklyn, for P.A. Vargas-Nunez, respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered August 18, 2015, which, among other things, denied the branch of defendants-appellants' cross motion for summary judgment dismissing plaintiff's claims of a "permanent consequential" or "significant" limitation to her left shoulder within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

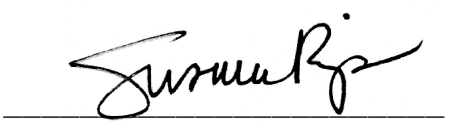
The motion court correctly determined that in opposition to defendants' prima facie showing of the lack of a serious injury, plaintiff raised a triable issue of fact as to whether she

sustained a permanent consequential or significant limitation to her left shoulder causally related to the parties' motor vehicle accident (*see Shinn v Catanzaro*, 1 AD3d 195, 197 [1st Dept 2003]). Plaintiff submitted evidence that she sought medical treatment for her shoulder shortly after the accident and that she received MRI testing on the shoulder approximately two months later, which is sufficient to show contemporaneous treatment (*see Perl v Meher*, 18 NY3d 208, 217-218 [2011]). The MRI revealed tears in the shoulder, and plaintiff's expert's examination revealed that, several years after the accident, plaintiff had limitations of motion in the shoulder, which the expert causally related to the accident (*see Kone v Rodriguez*, 107 AD3d 537, 538 [1st Dept 2013]).

If a trier of fact determines that plaintiff sustained a serious left shoulder injury, plaintiff is entitled to recover damages for all injuries causally related to the accident (*see Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549-550 [1st Dept 2010]).

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

ENTERED: FEBRUARY 7, 2017



CLERK

Friedman, J.P., Andrias, Moskowitz, Kapnick, Kahn, JJ.

3026 The People of the State of New York, Ind. 166/13
Respondent,

-against-

Evon Blackwood,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Rachel T. Goldberg of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Matthew B. White of counsel), for respondent.

_____

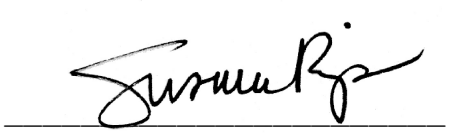
Judgment, Supreme Court, Bronx County (Peter J. Benitez, J.), rendered December 12, 2014, convicting defendant, after a jury trial, of assault in the first degree, and sentencing him to a term of eight years, unanimously reversed, as a matter of discretion in the interest of justice, and the matter remanded for a new trial.

As in *People v Velez* (131 AD3d 129 [1st Dept 2015]), the court's charge did not convey to the jury that an acquittal on the top count of attempted murder based on a finding of justification would preclude consideration of the other charges. We find that the error was not harmless, and that it warrants reversal in the interest of justice (*see e.g. People v Flores*, __ AD3d __, 41 NYS3d 890 [1st Dept 2016]; *People v Delin*, __ AD3d __, 43 NYS3d 47 [1st Dept 2016]).

In light of this determination, we find it unnecessary to reach any other issues.

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

ENTERED: FEBRUARY 7, 2017



CLERK

Friedman, J.P., Andrias, Moskowitz, Kapnick, Kahn, JJ.

3027 In re Diane T.,
Petitioner-Appellant,

-against-

Shawn N., et al.,
Respondents-Respondents.

_____

Larry S. Bachner, Jamaica, for appellant.

John R. Eyerman, New York, for respondents.

Carol L. Kahn, New York, attorney for the child.

_____

Order, Family Court, Bronx County (Robert D. Hettleman, J.), entered on or about March 4, 2016, which dismissed the petition for custody of the subject child, unanimously affirmed, without costs.

Petitioner, the subject child's grandmother, contends that she has standing to seek custody and/or visitation pursuant to Domestic Relations Law (DRL) § 72(1) (which addresses grandparents' standing to seek visitation). However, she failed to demonstrate "that conditions exist which equity would see fit to intervene" [sic] (*id.; see Matter of Emanuel S. v Joseph E.*, 78 NY2d 178, 182-183 [1991]). Petitioner visited the child so infrequently that she was unable to demonstrate an existing relationship with him.

We note that the record demonstrates no "extraordinary circumstances" pursuant to DRL § 72(2) (which addresses grandparents' standing to seek custody).

In any event, petitioner failed to show that awarding her custody would be in the child's best interests (*see Eschbach v Eschbach*, 56 NY2d 167, 170-171 [1982]; *Matter of Antoinette McK. v Administration for Children's Servs.-NYY*, 107 AD3d 493 [1st Dept 2013], *lv denied* 22 NY3d 851 [2013]). In addition to the absence of a meaningful relationship between petitioner and the child (*see Matter of Wilson v McGlinchey*, 2 NY3d 375, 380 [2004]), the child was well bonded, loved, and cared for in the foster home, the only home he has ever known.

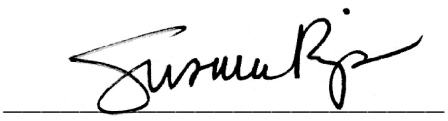
Contrary to petitioner's argument, kinship relatives of parents whose rights have been terminated do not have and are not afforded any greater standing or interest with respect to custody of the child than the child's foster parents (*see* Social Services Law § 383[3]). Moreover, on this record, respondent agency, which had custody and guardianship of the child, supported the child's foster parents as his adoptive resource and would not consent to adoption by petitioner (*see Matter of Yary [Carol W.]*, 100 AD3d 200 [1st Dept 2012], *lv denied* 20 NY3d 1006 [2013]).

Petitioner failed to establish the requisite extraordinary

circumstances to support her claim that her trial counsel and the attorney for the child rendered ineffective assistance of counsel (*see Salvatore v Salvatore*, 68 AD3d 966 [2d Dept 2009]). Notably, during the proceedings, the then two-year-old child was unable to articulate or exercise his own judgment. Thus, the attorney for the child properly substituted her judgment for her client's in advocating for his best interests (*see e.g. Matter of Alfredo J.T. v Jodi D.*, 120 AD3d 1138 [1st Dept 2014]).

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

ENTERED: FEBRUARY 7, 2017



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Friedman, J.P., Andrias, Moskowitz, Kapnick, Kahn, JJ.

3029- Index 3927/09C-G
3030- 3927/09H
3031- 3927/09J
3032-
3033-
3034-
3035 In re Pamela S. Wasserstein,
et al.,
Petitioners-Respondents,

-against-

Erin McCarthy,
Respondent-Appellant.

- - - - -

In re Ellis Jones,
Petitioner-Respondent,

-against-

Erin McCarthy,
Respondent-Appellant.

- - - - -

In re Pamela S. Wasserstein,
et al.,
Petitioners-Respondents,

-against-

Erin McCarthy,
Respondent-Appellant.

_____

Carroll McNulty & Kull, LLC, New York (Christopher R. Carroll of counsel), for appellant.

Milbank, Tweed, Handley & McCloy LLP, New York (Robert C. Hora of counsel), for Pamela S. Wasserstein, Ben C. Wasserstein and A.D. Scoop Wasserstein, respondents.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Andrew G. Gordon of counsel), for Anup Bagaria, Ellis B. Jones and George L. Majoros, Jr., respondents.

Solomon Blum Heymann LLP, New York (Charles F. Gibbs of counsel), for Dash P. Wasserstein and Jack D. Wasserstein, respondents.

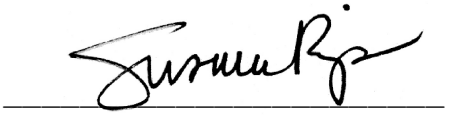
Farrell Fritz, Uniondale (Eric W. Penzer of counsel), for Sky W.E. Wasserstein, respondent.

Appeals from decrees, Surrogate's Court, New York County (Nora S. Anderson, S.), entered on or about May 22, 2015, which approved petitioner trustees' proposed distributions, unanimously dismissed, without costs, as taken from nonappealable decrees.

Respondent failed to file objections to petitioners' accounts, thereby defaulting in this proceeding (*see Matter of E. & H. Goldstein Family Trust*, 81 AD3d 728 [2d Dept 2011]). No appeal lies from an order entered upon default (CPLR 5511; *see e.g. Matter of Dietz*, 29 NY2d 915 [1972]; *Goldstein*, 81 Ad3d at 729).

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

ENTERED: FEBRUARY 7, 2017



CLERK

Friedman, J.P., Andrias, Moskowitz, Kapnick, Kahn, JJ.

3036 The People of the State of New York, Ind. 6284/08
Respondent,

-against-

Alo Ablakatov,
Defendant-Appellant.

_____

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

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

_____

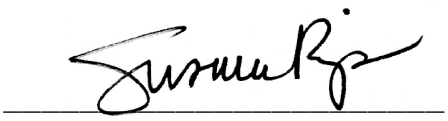
Appeal from judgment, Supreme Court, New York County (Gregory Carro, J.), rendered December 9, 2009, convicting defendant, upon his plea of guilty, of attempted robbery in the second degree, and sentencing him to a term of 2½ years, held in abeyance, and the matter remanded for further proceedings in accordance herewith.

As the People concede, because the court did not warn defendant of the deportation consequences of his guilty plea, he should be afforded the opportunity to move to vacate his plea

upon a showing that there is a reasonable probability that he would not have pleaded guilty had the court advised him of the possibility of deportation (*People v Peque*, 22 NY3d 168, 198 [2013], *cert denied* 574 US —, 135 S Ct 90 [2014]). Accordingly, we remit for the remedy set forth in Peque (22 NY3d at 200-201).

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

ENTERED: FEBRUARY 7, 2017



CLERK

Friedman, J.P., Andrias, Moskowitz, Kapnick, Kahn, JJ.

3037 Melissa Shillingford, Index 303660/12
Plaintiff-Respondent,

-against-

New York City Transit Authority, et al.,
Defendants-Appellants.

_____

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

Wingate, Russotti, Shapiro & Halperin, LLP, New York (Robert J. Bellinson of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered January 7, 2016, in favor of plaintiff and against defendants in the total amount of $3,003,704.02, unanimously reversed, on the law, without costs, and the matter remanded for a new trial on damages.

In opposition to plaintiff's motion to preclude defendants' biomechanical engineer from testifying, defendants failed to present any scientific literature to support the expert's theories that bulging discs without damage to adjacent bony structures do not result from a force to the spine in its normal range of motion, that daily activity acceleration data may be used as a proxy for injury risk, or that crash-test dummy testing may be used to establish injury thresholds. Accordingly, Supreme

Court properly precluded the expert's testimony regarding those theories (*see Fraser v 301-52 Townhouse Corp.*, 57 AD3d 416, 418 [1st Dept 2008], *appeal dismissed* 12 NY3d 847 [2009]). However, Supreme Court erred in precluding the expert's testimony insofar as he sought to opine on the maximum force that may have been applied to plaintiff and the likelihood of resulting injury, without relying on the aforementioned theories; plaintiff's expert merely disagreed with defendants' expert's methodology and conclusions, presenting a battle of the experts for the jury to resolve (*see Vargas v Sabri*, 115 AD3d 505, 505-506 [1st Dept 2014]). Further, Supreme Court erred in precluding photographs of the vehicles after the accident, which were "probative and admissible . . . [on] the question of damages" (*Homsey v Castellana*, 289 AD2d 201, 201 [2d Dept 2001] [internal quotation marks omitted]).

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

ENTERED: FEBRUARY 7, 2017

CLERK

Friedman, J.P., Andrias, Moskowitz, Kapnick, Kahn, JJ.

3038 The People of the State of New York, Ind. 1998/14
Respondent,

-against-

Otman Siad,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Lee M. Pollack of counsel), for respondent.

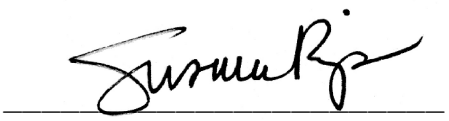
_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Maxwell Wiley, J.), rendered July 24, 2014,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: FEBRUARY 7, 2017



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

Friedman, J.P., Andrias, Moskowitz, Kapnick, Kahn, JJ.

3039 Jorge Galindo, also known as George Galindo,
Plaintiff-Appellant,

-against-

Efrain Uzhca Orellana Fausto, et al.,
Defendants-Respondents.

Index 23984/14E

Wingate, Russotti, Shapiro & Halperin, LLP, New York (Robert J. Bellinson of counsel), for appellant.

Burke Conway Loccisano & Dillon, White Plains (Chikodi E. Emerenini of counsel), for respondents.

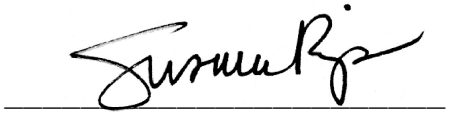
Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered on or about February 24, 2016, which, in this action for personal injuries sustained when plaintiff pedestrian was struck by defendants' vehicle, denied plaintiff's motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

Defendants' affidavit, in opposition to plaintiff's motion raised a triable issue of fact as to plaintiff's location at the

time of the accident, in connection with the crosswalk, and whether plaintiff failed to exercise due care in crossing the street (*see Thoma v Ronai*, 82 NY2d 736 [1993];).

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

ENTERED: FEBRUARY 7, 2017



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Friedman, J.P., Andrias, Moskowitz, Kapnick, Kahn, JJ.

3044 Violet Trapp-White, Index 150719/15
Plaintiff-Respondent,

-against-

Frank Fountain, et al.,
Defendants-Appellants.

_____

Rivkin Radler LLP, New York (Jonathan Bruno of counsel), for appellants.

Schwartz, Ponterio & Levenson, PLLC, New York (Matthew F. Schwartz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Donna M. Mills, J.), entered on or about October 1, 2015, which denied defendants' motion to dismiss the complaint, unanimously modified, on the law, to grant the motion to the extent the complaint seeks damages for emotional distress or mental anguish, and otherwise affirmed, without costs.

Plaintiff, who ultimately was granted a green card and permitted to return to the United States, *inter alia* alleges that defendants' failure to file a motion to reopen for over a year caused her to be deported and denied permission to return to the United States for almost two years, which caused her to lose her job. Accepting plaintiff's allegations as true on this motion to dismiss pursuant to CPLR 3211 they sufficiently state a legal

malpractice claim (*see Lapin v Greenberg*, 34 AD3d 277 [1st Dept 2006]).

However plaintiff failed to state a claim for emotional distress because the damages alleged are not pecuniary in nature (*see Dombrowski v Bulson*, 19 NY3d 347, 351, 352 [2012]), and the pleadings fail to allege the requisite extreme and outrageous conduct (*see Hyman v Schwartz*, 127 AD3d 1281, 1283-1284 [3d Dept 2015]; *see also Wolkstein v Morgenstern*, 275 AD2d 635, 636-637 [1st Dept 2000]).

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

ENTERED: FEBRUARY 7, 2017

CLERK

Friedman, J.P., Andrias, Moskowitz, Kapnick, Kahn, JJ.

3045N Juan Corcino, etc., Index 310162/11
Plaintiff-Appellant,

-against-

4303 Baychester LLC, etc., et al.,
Defendants-Respondents,

Frank Palazzolo, etc., et al.,
Defendants.

_____

David A. Kapelman, P.C., New York (David A. Kapelman of counsel), for appellant.

Rocco Vozza, Bronx, for respondents.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered December 7, 2015, which granted the motion of defendants 4303 Baychester LLC, 505 East 178 LLC, 983 East 181 LLC and 1064 Ward LLC (respondents) to vacate a default judgment entered as against them, unanimously affirmed, without costs.

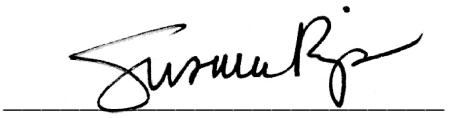
The court providently exercised its discretion in vacating the default judgment as against respondents, because the record supports the conclusion that their failure to appear was the result of law office failure by their attorney (*see Jackson v Pelletier*, 160 AD2d 604 [1st Dept 1990]). The fact that respondents may have delayed in seeking vacatur is not dispositive, because the court has the inherent power to consider

the application (*see Hunter v Enquirer/Star, Inc.*, 210 AD2d 32, 33 [1st Dept 1994]). Plaintiff has also failed to demonstrate any prejudice from vacatur of the default judgment (*see Mutual Mar. Off., Inc. v. Joy Constr. Corp.*, 39 AD3d 417, 419 [1st Dept 2007]).

Furthermore, respondents set forth a meritorious defense to the complaint's allegations that they engaged in fraudulent conveyances to shield defendant New Line Realty III Corp. from paying a judgment that plaintiff's decedent obtained against it in a personal injury action (*see e.g. Blakeslee v Rabinor*, 182 AD2d 390, 392 [1st Dept 1992], *lv denied* 82 NY2d 665 [1993]).

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

ENTERED: FEBRUARY 7, 2017



CLERK

Friedman, J.P., Andrias, Moskowitz, Kapnick, Kahn, JJ.

3046N David Turret, Index 312678/14
Plaintiff-Appellant,

-against-

Nancy Turret,
Defendant-Respondent.

_____

Law Office of Michael C. Marcus, New York (Michael C. Marcus of counsel), for appellant.

Cohen Rabin Stine Schumann LLP, New York (Bonnie E. Rabin of counsel), for respondent.

_____

Order, Supreme Court, New York County (Frank P. Nervo, J.), entered February 16, 2016, which, to the extent appealed from as limited by the briefs, granted defendant wife's application for interim monthly maintenance in the amount of $11,564.78, tax-free, and $175,000 in interim counsel fees from plaintiff husband, unanimously affirmed, without costs.

The motion court properly applied the formula set forth in Domestic Relations Law (DRL) § 236 (B)(5-a) in calculating the award of temporary spousal maintenance to the wife. In determining an upward departure from the presumptive amount was appropriate, the court relied upon two of the enumerated factors set forth in DRL § 236(5-a)(h)(1), the substantial differences in the incomes of the parties and the standard of living of the

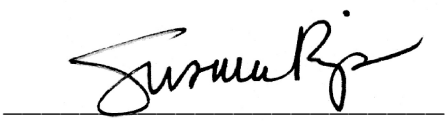
parties established during the marriage. The court also explained its deviation from the presumptive guidelines award in its decision (DRL § 236[5-a][d][3]). Under the circumstances "the amount awarded is a proper accommodation between the reasonable needs of [the wife] and the financial ability of [the husband], while taking into consideration the pre-separation standard of living" (*Brown v Brown*, 123 AD3d 596, 596 [1st Dept 2014]).

The court also providently exercised its discretion in awarding the wife $175,000 in counsel fees, pendente lite, upon its determination that the husband was in a better position to bear the cost of her legal fees at that time under DRL § 237 (*Bricker v Powers*, 208 AD2d 463 [1st Dept 1994]). Regardless, it is "well settled that a speedy trial is plaintiff's proper remedy in this situation" (*id.*).

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

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

ENTERED: FEBRUARY 7, 2017



CLERK

Friedman, J.P., Andrias, Moskowitz, Kapnick, Kahn, JJ.

3047N-
3048N Notte Restaurant Corp., et al.,
Plaintiffs-Respondents,

-against-

1626 Second Avenue, LLC,
Defendant-Appellant.

- - - - -

1626 Second Avenue, LLC,
Plaintiff-Appellant,

-against-

Steven Salsberg,
Defendant-Respondent,

Nick Camaj,
Defendant.

Index 600027/09
603492/09

_____

Kushnick Pallaci PLLC, Melville (Vincent T. Pallaci of counsel), for appellant.

James Glucksman, Rye Brook, for respondents.

_____

Orders, Supreme Court, New York County (Marcy S. Friedman, J.), entered August 5, 2015, which denied the motions of 1626 Second Avenue, LLC (the defendant in the first action and the plaintiff in the second action) to enforce a default against plaintiffs in the first action and defendant Steven Salsberg in the second action, and vacated the defaults, unanimously affirmed, without costs.

The motion court providently exercised its discretion in vacating the defaults (*Matter of Rivera v New York City Dept. of Sanitation*, 142 AD3d 463, 465 [1st Dept 2016]), given that public policy favors the resolution of cases on the merits (*id.*), that Salsberg provided a reasonable excuse for the defaults (*id.* at 464), that it has already been determined that issues of fact exist concerning the lease and guaranty at issue in the two actions (*see 1626 2nd Ave. LLC v Salsberg*, 105 AD3d 432, 432-433 [1st Dept 2013]), and that 1626 failed to follow the court's directions for entering default judgments.

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

ENTERED: FEBRUARY 7, 2017

CLERK

Friedman, J.P., Andrias, Moskowitz, Kapnick, Kahn, JJ.

3049 In re Kaseem Williams, Ind. 66/13
[M-6186] Petitioner,

-against-

Hon. A. Yearwood, etc., et al.,
Respondents.

_____

Kaseem Williams, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Michelle R. Lambert of counsel), for Hon. Alvin Yearwood, respondent.

_____

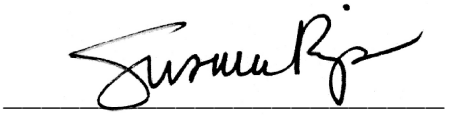
The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

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

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

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

ENTERED: FEBRUARY 7, 2017



CLERK

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

2787 Collateral Loanbrokers Association of New York, Inc., et al., Plaintiffs-Respondents, Index 303901/14

-against-

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

- - - - -

CTIA--The Wireless Association, Amicus Curiae.

_____

Zachary W. Carter, Corporation Counsel, New York (Max O. McCann of counsel), for appellants.

Kriss, Kriss & Brignola, LLP, Albany (Mark C. Kriss of counsel), for respondents.

Schlam Stone & Dolan LLP, New York (Richard H. Dolan of counsel), for amicus curiae.

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered June 8, 2015, reversed, on the law, without costs, and the motion denied.

Opinion by Saxe, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David B. Saxe
Paul G. Feinman
Judith J. Gische
Marcy L. Kahn, JJ.

2787
Index 303901/14

_____x

Collateral Loanbrokers Association
of New York, Inc., et al.,
Plaintiffs-Respondents,

-against-

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

- - - - -

CTIA--The Wireless Association,
Amicus Curiae.

_____x

Defendants appeal from an order of the Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered June 8, 2015, which, insofar as appealed from as limited by the briefs, granted plaintiffs' motion for a preliminary injunction enjoining defendants from enforcing General Business Law § 45, New York City Charter §§ 435 and 436, Local Law No. 149 of 2013 and its amendments to Administrative Code §§ 20-267, 20-273, and 20-277, Rules of City of New York Department of Consumer Affairs (6 RCNY) § 1-16 and Police Department (38 RCNY) §§ 21-03(a) and (b), 21-04(a) and (c), 21-07(a)-(f), and 21-08, and the procedures outlined in a 1998 memorandum by then NYPD Deputy Commissioner of Legal Matters George A. Grasso, and in NYPD Patrol Guide Procedure No. 214-38.

Zachary W. Carter, Corporation Counsel, New York (Max O. McCann, Richard Dearing and Susan Greenberg of counsel), for appellants.

Kriss, Kriss & Brignola, LLP, Albany (Mark C. Kriss of counsel), for respondents.

Schlam Stone & Dolan LLP, New York (Richard H. Dolan of counsel), for amicus curiae.

SAXE, J.

This appeal concerns a statutory and regulatory scheme comprised of provisions of the General Business Law, the New York City Charter, the Administrative Code of the City of New York, the Rules of the City of New York, and New York Police Department (NYPD) procedures, which together form a framework of reporting and inspection requirements applicable to pawnbrokers and other secondhand dealers. Plaintiffs, a statewide association of pawnbrokers, along with various individual pawnbrokers, secondhand dealers, and customers of pawnbrokers and/or secondhand dealers, brought this declaratory judgment action challenging the constitutionality of that statutory and regulatory framework. Relying substantially on *People v Keta* (*sub nom. People v Scott*)[1] (79 NY2d 474 [1992]), they contend that the entire statutory and regulatory scheme violates the unreasonable search and seizure prohibition under New York Constitution article I, § 12. The motion court agreed, and granted plaintiffs' motion for preliminary injunctive relief prohibiting enforcement of the statutes, regulations and procedures. Defendants appeal, arguing that the challenged reporting requirements and inspection programs satisfy the

[1] Since it is the Court of Appeals' separate discussion regarding *People v Keta* that is relevant to these facts, I will cite that case name.

constitutional requirements applicable to closely regulated industries and do not implicate constitutional prohibitions against unreasonable searches and seizures. We now reverse the motion court's order, and conclude that the challenged statutory and regulatory scheme does not violate the New York State Constitution's proscription against unreasonable searches and seizures. While plaintiffs are correct that article I, § 12 of the New York Constitution affords greater protection than the corresponding provision in the Fourth Amendment to the US Constitution (*see People v Keta*, 79 NY2d 474, 497-498), those greater protections do not implicate the statutes, regulations and procedures at issue here.

To obtain a preliminary injunction prohibiting enforcement of these laws, regulations and procedures, plaintiffs were required to demonstrate a likelihood of success on the merits, irreparable injury, and a balancing of the equities in their favor (*see* CPLR 6301; *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]).

To establish a likelihood of success, plaintiffs rely primarily on *People v Keta*. *Keta* held that former Vehicle and Traffic Law § 415-a(5)(a), which authorized police to conduct random warrantless administrative searches of vehicle dismantling businesses, violated the New York State Constitution's proscription against unreasonable searches and seizures (79 NY2d

at 497). Although the United States Supreme Court had previously reversed the New York Court of Appeals in order to hold that section 415-a(5) did *not* violate the Fourth Amendment's proscription against unreasonable searches and seizures (*see New York v Burger*, 482 US 691 [1987], *revg People v Burger*, 67 NY2d 338 [1986]), the Court of Appeals in *Keta* held that our State Constitution's proscription against unreasonable searches and seizures affords greater protection than the corresponding provision in the United States Constitution. In reliance on those greater protections, the *Keta* Court concluded that the statute violated the privacy rights encompassed within article I, § 12 of the New York State Constitution (*see People v Keta*, 79 NY2d at 497).

However, *People v Keta* does not justify invalidating the challenged statutory and regulatory framework at issue here.

That framework begins with the relevant provisions of General Business Law article 5, now entitled "Collateral Loan Brokers." The antecedents of that article were first enacted in 1909 (*see* L 1909, ch 25, as amended), and some were derived from laws going back to 1883 (*see* L 1883, ch 339, § 1). General Business Law section 40 requires pawnbrokers in New York City to be licensed by the City's Commissioner of Consumer Affairs. Section 43 requires pawnbrokers to maintain a book containing a

"description of the goods ... pawned or pledged, the amount of money loaned thereon, ... the rate of interest to be paid ..., the name and residence of the person pawning ... said goods." Section 45 requires that the books kept by collateral loan brokers "*at all reasonable times be open to the inspection* of ... the mayor or local licensing authority, ... [and] *police* inspectors" (emphasis added).

Prior to the 2013 enactment of Local Law 149, Administrative Code § 20-273 required dealers in secondhand goods to keep a book in which they recorded information such as a description of every article purchased or sold and the name, address, and a general description of the person buying or selling the item. It is uncontested that pawnbrokers and secondhand dealers have historically reported transactions on a Second-Hand Article Store Log provided by the NYPD, which requires the store owner to provide the date and time of the transaction, a description of the article, and the name, address, gender, date of birth, and race of the seller. Administrative Code § 20-267 provides that all dealers in secondhand articles, "upon being served with a written notice to do so by a member of the police department, shall report to the police commissioner ..., a copy of any of the records required to be kept under section 20-273."

In 2013 New York City adopted Local Law 149, which amended several provisions of the Administrative Code so as to require

certain dealers to also create records and make them available in electronic form. Local Law 149 amended Administrative Code § 20-273 by adding an electronic record requirement for transactions involving articles comprised of gold, silver, platinum, or other precious metals, electrical appliances, excluding kitchen equipment, and electrical equipment, computer, or component parts of electrical equipment or computers (Administrative Code § 20-273[b], [c][2]). The provisions state that such electronic records "may include real-time sharing or accessing of such records in an electronic format and/or through use of an internet website designated by the police commissioner" (*id.*). Depending on the type of dealer, the electronic record shall or "may include ... digital photographs ... in accordance with specifications as provided by rule of the police commissioner" (*id.*).

Prior to the enactment of Local Law 149, Administrative Code § 20-277 authorized the police commissioner to require pawnbrokers "to report to such commissioner, upon blank forms to be furnished by the police department, a description of all goods, articles or things ... pawned or pledged," as well as "a general description as to sex, color and apparent age of every person depositing such pledges." Local Law 149 amended Administrative Code § 20-277 so as to add an electronic record component. As amended, the provision now permits the use of an

Internet website designated by the police commissioner, and allows the police commissioner to require that the forms recording the transactions include "identifying information regarding any pledgors or persons redeeming any articles pledged or pawned, including name, address, phone number, date of birth, sex and race or ethnicity" (Administrative Code § 20-277[a], [b]). The amended § 20-277 further provides that "[r]ecords required to be kept by pawnbrokers pursuant to this section shall be open to the inspection of ... any police officer ... or any other governmental officer or employee authorized by the state or local law" (Administrative Code § 20-277[d]).

The related regulations promulgated in the Rules of the City of New York authorize the Commissioner of the New York City Department of Consumer Affairs (DCA) to enter a licensee's premises in order to verify statutory and regulatory compliance and to inspect the required records (6 RCNY 1-16[b]). Such inspections are to "be conducted at least once in every two-year period," with "additional inspections [to] be conducted if an inspection reveals alleged violations" and "whenever the [DCA] receives information alleging violation of said chapters or regulations" (6 RCNY 1-16[c]).

The Rules of the City of New York promulgated to implement Local Law 149 of 2013 are found in 38 RCNY 21-02 to 21-09. In addition, new procedures were adopted by the NYPD, outlined in a

1998 memorandum from George A. Grasso, then Deputy Commissioner of Legal Matters with the NYPD (the Grasso Memo), and in the NYPD's Patrol Guide Procedure No. 214-38.

The analysis employed by the Court of Appeals in *Keta*, in addressing the Vehicle and Traffic Law's statutory authorization of random warrantless searches of vehicle dismantling businesses, does not warrant the injunctive relief sought by plaintiffs here. The Court's analysis in *Keta* focused on "the so-called 'administrative search' exception to the Fourth Amendment's probable cause and warrant requirements" (79 NY2d at 498). Here, the statutory and regulatory framework at issue consists of two distinct components: not merely inspection requirements involving targeted, on-premises administrative inspections by government officials, but also substantial reporting requirements, involving submission of transactional information to the government.

To the extent the statutory and regulatory framework involves transactional reporting requirements, it does not involve either physical inspections or administrative searches of a business or its records; instead, it merely requires the submission of information in which the businesses have little, if any, expectation of privacy. Transactional reporting requirements imposed in a regulated industry that sufficiently describe and limit the information to be provided and are reasonably related to the regulatory authority of the agency to

which the information is provided do not trigger constitutional protections against unreasonable searches and seizures (*see California Bankers Assn. v Shultz*, 416 US 21, 67 [1974]). The reported information, whether in traditional paper form or electronic format, is part of a "document[] prepared in compliance with regulatory requirements," in which there is "little or no expectation of privacy" (*Matter of Glenwood TV v Ratner*, 103 AD2d 322, 328 [2d Dept 1984] [internal quotation marks omitted], *affd* 65 NY2d 642 [1985], *appeal dismissed* 474 US 916 [1985]; *see also People v Guerra*, 65 NY2d 60, 64 [1985]).

Even if we focus on those provisions that authorize inspections, and characterize them as administrative searches, plaintiffs failed to demonstrate a likelihood that they will prevail. The Court of Appeals in *Keta* acknowledged the continued viability of an "administrative search" exception to the constitutional requirements of probable cause and warrants. While that exception "cannot be invoked where ... the [administrative] search is 'undertaken solely to uncover evidence of criminality' and the underlying regulatory scheme is 'in reality, designed simply to give the police an expedient means of enforcing penal sanctions'" (79 NY2d at 498, quoting *People v Burger*, 67 NY2d 338, 344 [1986]), a regulatory administrative search scheme can pass muster under New York's Constitution where

it is "pervasive and include[s] detailed standards in such matters as, for example, the operation of the business and the condition of the premises" (*Keta*, 79 NY2d at 499).

Subsequent to its *Keta* decision, the Court also explained that warrantless administrative searches of closely regulated businesses are permissible where "the regulatory statute authorizing the search prescribes specific rules to govern the manner in which the search is conducted" (*People v Quackenbush*, 88 NY2d 534, 541 [1996]), as long as these rules are "designed to guarantee the certainty and regularity of application" so as "to provide either a meaningful limitation on the otherwise unlimited discretion the statute affords or a satisfactory means to minimize the risk of arbitrary and/or abusive enforcement" (*id.* at 542 [internal quotation marks and ellipsis omitted]).

Unlike the Vehicle and Traffic Law provision considered in *Keta*, the statutory and regulatory scheme challenged here was not created "solely to uncover evidence of criminality" or "designed simply to give the police an expedient means of enforcing penal sanctions" (79 NY2d at 498 [internal quotation marks omitted]). Rather, its impact is primarily to ensure that proper protections are in place to *avoid* criminality and the need for penal sanctions. The supervision and regulation of pawnbrokers and secondhand dealers serves to protect customers who pledge goods as collateral for short-term loans, by ensuring that they are

charged lawful interest rates and that goods are held for the statutory period (*see* National Pawnbrokers Association, Frequently Asked Questions, https://www.nationalpawnbrokers.org/faq/ [accessed Jan. 27, 2017]; General Business Law §§ 44[1], [2]; 46, 48). Supervision and regulation also promote confidence in the buying public that the goods are not stolen, and deter theft crimes by making it more difficult for thieves to monetize stolen property.

Furthermore, the challenged statutory and regulatory scheme qualifies as "pervasive" and "includ[es] detailed standards in such matters as, for example, the operation of the business" (79 NY2d at 499). The business of pawnbrokers has been subject to thorough regulation for over a century, under which they have been required to create, maintain, and make available for inspection, records of their transactions. The regulation of this industry serves several purposes, including deterring theft crimes by making it more difficult for stolen property to be monetized and protecting customers who pledge goods as collateral for short-term loans by ensuring that they are charged lawful interest rates and that the goods are held for the statutory period.

The rules promulgated by the NYPD to implement Local Law 149 of 2013 (38 RCNY 21-01) and the DCA's "Inspection Checklist: Pawnbrokers," are properly "designed to guarantee the certainty

and regularity of application" so as "to provide either a meaningful limitation on the otherwise unlimited discretion the statute affords or a satisfactory means to minimize the risk of arbitrary and/or abusive enforcement" (*People v Quackenbush*, 88 NY2d at 541-542 [internal quotation marks and ellipsis omitted]).

Finding that plaintiffs failed to establish a likelihood of success on the merits, we reverse the order granting them injunctive relief.

Accordingly, the order of the Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered June 8, 2015, which, insofar as appealed from as limited by the briefs, granted plaintiffs' motion for a preliminary injunction enjoining defendants from enforcing General Business Law § 45, New York City Charter §§ 435 and 436, Local Law No. 149 of 2013 and its amendments to Administrative Code §§ 20-267, 20-273, and 20-277, Rules of City of New York Department of Consumer Affairs (6 RCNY) § 1-16 and Police Department (38 RCNY) §§ 21-03(a) and (b), 21-04(a) and (c), 21-07(a)-(f), and 21-08, and the procedures outlined in a 1998 memorandum by then NYPD Deputy Commissioner of Legal Matters

George A. Grasso, and in NYPD Patrol Guide Procedure No. 214-38, should be reversed, on the law, without costs, and the motion denied.

All concur.

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

ENTERED: FEBRUARY 7, 2017

CLERK