SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 28, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, J.P., Richter, Mazzarelli, Kapnick, Gesmer, JJ.

1960-
1961 In re Lisa T.,
Petitioner-Respondent,

-against-

King E. T.,
Respondent-Appellant.

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Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for respondent.

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Order, Family Court, Bronx County (John J. Kelley, J.), entered on or about June 30, 2015, which, inter alia, found that respondent willfully violated two temporary orders of protection, unanimously affirmed, without costs. Order, same court and Judge, entered on or about July 8, 2015, which issued a one-year order of protection against respondent, affirmed, without costs.

Respondent was on notice of the conduct prohibited under the October 3, 2013 order of protection, with which he was served in court. Despite his nonappearance in court on November 20, 2013, the prominent warning on the face of the October 3, 2013 order

put respondent on fair notice that the order would be extended (*see People v Hopkins*, 275 AD2d 667 [1st Dept 2000], *lv denied* 95 NY2d 935 [2000]).

Respondent's April 3, 2014 email contained statements clearly intended to harass petitioner, in violation of the order of protection that was entered that same day (*see Matter of Jaynie S. v Gaetano D.*, 134 AD3d 473, 474 [1st Dept 2015], *lv denied* 26 NY3d 917 [2016]; *Matter of Angela C. v Harris K.*, 102 AD3d 588, 589 [1st Dept 2013]).

Respondent's appeal from the July 8, 2015 order of protection has not been rendered moot solely by the expiration of that order. As the Court of Appeals held in *Matter of Veronica P. v Radcliff A.* (24 NY3d 668, 671 [2015]), the "expiration of the order of protection does not moot the appeal because the order still imposes significant enduring consequences upon respondent, who may receive relief from those consequences upon a favorable appellate decision."

Because the appeal has not been rendered moot, we must consider the merits of the order of protection, and we now find that it was properly issued. Family Court Act § 846-a, "Powers on failure to obey order," is "punitive [in] nature"; it prescribes the procedure and penalties for failing to obey a temporary order of protection (*see Matter of Walker v Walker*, 86

NY2d 624, 629 [1995]). Specifically, the court is permitted to issue a new order of protection if the respondent is "brought before the court for failure to obey [a] ... temporary order of protection issued pursuant to this act ... and if, after hearing, the court is satisfied by competent proof that the respondent has willfully failed to obey ... such order." Under Family Court Act § 846-a the new order of protection must be in accordance with Family Court Act § 842, which permits a court to issue such an order upon a finding "on the record that the conduct alleged in the petition is in violation of a valid order of protection."

Here, the Family Court found, on the record after a hearing, that respondent had willfully violated the temporary order of protection with his April 3, 2014 emails containing statements clearly intended to harass petitioner. As a result of this determination, the Family Court conducted a dispositional hearing on respondent's violation of the temporary order of protection, and thereafter issued a new order of protection. The Family Court adhered to the prescribed procedure and did not exceed its jurisdiction by issuing this final order of protection.[1]

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[1] The legislative history of Family Court Act § 842 makes plain that the primary goal of the statute is to prevent further abuse and additional violence and to provide victims of domestic violence with meaningful access to the protection of the law (*see* Mem of Assembly Judiciary Committee, Bill Jacket, L 2010, ch 325 at 5-6). Indeed, the statutory language specifically provides

Our dissenting colleague contends that Family Court Act § 846-a must be read to provide that a "final" order of protection can only be issued upon the Family Court's determination that: (1) the respondent willfully violated a final order of protection that itself was issued upon a finding that a family offense was committed; or (2) the respondent's violation of a temporary order of protection constituted a family offense; or (3) the respondent's violation of a final order of protection constituted a family offense. There is no support in the statute or in the case law for this proposition. The dissent's argument would require this Court to read language into the statute that is, simply, not there. Family Court Act § 846-a does not require a finding of the commission of a family offense.

The dissent's reliance on Family Court Act § 812 is misplaced, since that section addresses concurrent jurisdiction between the Family Court and Criminal Court. Family Court Act § 841 - "Orders of disposition" - also does not save the dissent's argument, as that section provides that the court may, upon a determination that no family offense has been committed, dismiss the petition. Moreover, as previously stated, we read Family

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that on a motion to extend an order of protection, the "fact that abuse has not occurred during the pendency of an order shall not, in itself, constitute sufficient ground for denying or failing to extend the order" (Family Court Act § 842).

Court Act § 846-a as prescribing the remedies available to the court when a respondent violates a temporary order of protection, which is what is at issue here.

The case of *Matter of V.C. v H.C.* (257 AD2d 27 [1st Dept 1999]), cited by our dissenting colleague, is inapposite and simply details the steps a court should take when a family offense is found to have been committed; it does not dictate that the finding of a family offense must exist before an order of protection can be issued. Moreover, the court in *Matter of V.C.* did not address Family Court Act § 846-a. *Matter of Mary C. v Anthony C.* (61 AD3d 682 [2nd Dept 2009]) and *Matter of Steinhilper v Decker* (35 AD3d 1101 [3rd Dept 2006]) also do not dictate that a finding that the respondent committed a family offense must exist in order for the court to issue an order of protection. Rather, in both cases, the courts focused on the allegations in the petitions and the fact that the alleged acts did not constitute acts specifically enumerated in Family Court Act § 812, and thus concluded that they lacked subject matter jurisdiction over the family offense proceedings and dismissed the petitions. Such is not the case here, where the petition before the court alleged acts that are specifically enumerated in Family Court Act § 812.

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

All concur except Gesmer, J. who dissents in part in a memorandum as follows:

GESMER, J. (dissenting in part)

I respectfully dissent in part.

I agree with the majority's decision except its affirmance of the final order of protection issued by the Family Court on July 8, 2015 (the 2015 OP). When the Family Court issued that order, it had not found that respondent (the father) had committed any family offense. Issuing an order of protection under these circumstances is inconsistent with article 8 of the Family Court Act, which gives the Family Court jurisdiction to issue a final order of protection only where it has concluded by a fair preponderance of the evidence that the respondent committed acts that constitute one of the enumerated family offenses (*see* Family Court Act §§ 812, 832).

This proceeding arises in the context of a contentious custody dispute. Petitioner (the mother) filed a family offense petition against the father on December 10, 2012, and the Family Court issued an ex parte temporary order of protection (TOP) that day. The Family Court repeatedly extended the TOP, with the result that the TOP remained in effect until July 8, 2015. The mother filed several petitions alleging that the father had violated the TOP.

The Family Court held a trial on the original family offense petition, combined with a hearing on the violation petitions, on

May 8, 12 and 27, 2015, more than 2½ years after the original petition was filed. In its order entered on or about June 30, 2015, the Family Court found that 1) the mother had failed to prove that the father had committed any family offenses based on the allegations in the original petition; 2) the father had violated the TOP by sending the mother two emails, on December 22, 2013 and April 3, 2014; and 3) neither the father's sending of the emails, nor any other conduct by the father, constituted any of the enumerated family offenses. The Family Court dismissed the mother's original family offense petition and scheduled a dispositional hearing on the father's violation of the TOP for July 8, 2015. On that day, the Family Court issued a one-year order of protection, the 2015 OP, as a remedy for the father's violations of the TOP. I conclude that the Family Court erred in doing so.

"Family Court is a court of limited jurisdiction [and] cannot exercise powers beyond those granted to it by statute" (*Matter of Johna M.S. v Russell E.S.*, 10 NY3d 364, 366 [2008]; *see* NY Const, art VI, § 13; Family Ct Act § 115). Section 812 of the Family Court Act provides that the Family Court has concurrent jurisdiction with Criminal Court "over any proceeding concerning acts which would constitute" any of the enumerated family offenses, each of which constitutes a crime pursuant to

the Penal Law, where those acts occur between members of the same family or household, or between persons who have had an intimate relationship with each other (Family Ct Act § 812).[1] Section 821 provides that a proceeding under article 8 must be commenced by a petition alleging that the respondent committed one or more of the enumerated family offenses (Family Ct Act § 821[1][a]).

Upon the filing of a family offense petition, the Family Court may issue a temporary order of protection "for good cause shown" (Family Ct Act § 828[1][a]). "A temporary order of protection is not a finding of wrongdoing" (Family Ct Act § 828[2]). There is no provision for a respondent to contest a temporary order of protection in the Family Court, and a temporary order of protection is not appealable as of right (Merril Sobie, Practice Commentaries, McKinney's Cons Laws of NY,

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[1]The majority takes the view that, because Family Ct Act § 846-a does not expressly require a finding of the commission of a family offense, no such finding was necessary in this case in order to issue a final order of protection as a remedy for a violation of the TOP. However, Family Ct Act § 812 already provides that Family Court only has subject matter jurisdiction over cases involving commission of one or more family offenses, and Family Ct Act § 841 provides for dismissal of the family offense petition where no family offense has been proven. Moreover, since the purpose of family offense proceedings is "to protect victims of domestic violence" (*Matter of V.C. v H.C.*, 257 AD2d 27, 31 [1st Dept 1999]; *see also* Mem of Assembly Judiciary Committee, Bill Jacket, L 2010, ch 325 at 5-6), that purpose is not served if a court issues an order of protection where it has not found that the complainant was in fact a victim of domestic violence.

Book 29A, Family Ct Act 828 at 287). Moreover, there is no limit on the number of times, or the length of time, a temporary order of protection may be extended, with the result that it can remain in effect for years. In this case, the TOP was repeatedly extended, with the result that it remained in effect for 2½ years, even though the allegations had not been proven at a hearing at which the father had an opportunity to be heard. This is six months longer than the maximum term of a final order of protection, absent proof of aggravating circumstances not present here (Family Ct Act § 842).

Section 841 sets forth the dispositional powers of the Family Court following a fact-finding hearing on a petition for a final order of protection. It provides, inter alia, for dismissal of the petition "if the allegations of the petition are not established" (subsection [a]) or "making an order of protection in accord with section eight hundred forty-two of this part" (subsection [d]). Section 842 lists the conditions that may be contained in an order of protection "under section eight hundred forty-one of this part."

Upon a finding of willful violation of a "lawful" order of protection, the Family Court may "make a new order of protection in accordance with section eight hundred forty-two" (Family Ct Act § 846-a). As the reference in this provision to section 842

suggests, since the Family Court only has jurisdiction to issue a final order of protection where a petition alleges that a family offense has been committed and the allegations in the petition are proved (Family Ct Act §§ 812; 841; 842; *see also Matter of V.C. v H.C.*, 257 AD2d 27, 31-32 [1st Dept 1999]; *Matter of Mary C. v Anthony C.*, 61 AD3d 682, 683 [2d Dept 2009]; *Matter of Steinhilper v Decker*, 35 AD3d 1101, 1102 [3d Dept 2006]),[2] section 846-a must be read to provide that the Family Court may only issue a final order of protection under this section upon a finding that the respondent willfully violated a final order of protection issued upon a finding that a family offense was committed, or a finding that the respondent's violation of a temporary order of protection or a final order of protection

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[2]The majority's attempt to distinguish these cases is unavailing. *Matter of V.C. v H.C.* does not merely establish a procedure; it affirmatively states that "[a]mong the purposes of a family offenses proceeding under article 8 of the Family Court Act is to protect victims of domestic violence by providing 'a civil, non-criminal alternative to a criminal prosecution' (Besharov, Practice Commentaries, McKinney's Cons Laws of NY, Book 29A, Family Ct Act § 812, at 181) *when family members commit certain designated criminal offenses*" (257 AD2d 27, 31-32 [footnote omitted] [emphasis added]). In *Matter of Mary C. v Anthony C.* and *Matter of Steinhilper v Decker*, our sister departments vacated orders of protection where the Family Court found that the respondents had not violated criminal acts that did not violate any of the enumerated family offenses. That is exactly the situation here, because the Family Court did not find that the father had ever violated any of the sections of the penal code enumerated in Family Ct Act § 812.

constituted a family offense. However, in this case, the Family Court did not find that the father committed a family offense either based on the allegations in the original petition or by his conduct, which the court found violated the TOP. Since the Family Court did not find that the father committed any family offense, I would hold that it did not have the authority to issue a final order of protection. It is a vast expansion of the Family Court's limited powers to permit it to issue an order of protection under these circumstances.

I am by no means suggesting that a person should never face a penalty for violating a temporary order of protection that is ultimately found to be based upon allegations of acts that do not constitute a family offense. The Family Court may direct other forms of relief upon finding a violation of a temporary order of protection, including forfeiture of bail, directing the respondent to pay the petitioner's counsel fees, and commitment of the respondent to jail for up to six months (Family Ct Act § 846-a). However, none of those alternative remedies is appropriate on this record, since there is no bail to forfeit, both parties are indigent and have assigned counsel, and the allegations in the violation petition were not proved beyond a reasonable doubt, as required in order to direct incarceration as a remedy for contempt (*People v Wood*, 95 NY2d 509, 513, n 3

[2000] [contempt under Family Court Act § 846-a is punitive in nature]; *Matter of Rubackin v Rubackin*, 62 AD3d 11, 21 [2d Dept 2009] [standard of proof required for incarceration under Family Court Act § 846-a is beyond a reasonable doubt]). Moreover, the father has already been effectively punished by the issuance of the 2015 OP and has been suffering its legal and reputational consequences in effect for a year. Accordingly, I would vacate the 2015 OP.

I disagree with the majority's contention that this result is inconsistent with the goal of Family Ct Act § 842: to prevent further abuse and additional violence and to provide victims of domestic violence with legal protection. Although the Family Court Act does not contain a definition of domestic violence, the Social Services Law provides:

> "'Victim of domestic violence' means any person over the age of sixteen, any married person or any parent accompanied by his or her minor child or children in situations in which such person or such person's child is a victim of an act which would constitute a violation of the penal law, including, but not limited to acts constituting disorderly conduct, harassment, aggravated harassment, sexual misconduct, forcible touching, sexual abuse, stalking, criminal mischief, menacing, reckless endangerment, kidnapping, assault, attempted assault, attempted murder, criminal obstruction of breathing or blood circulation, or strangulation; and
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> "(i) such act or acts have resulted in actual

> physical or emotional injury or have created a substantial risk of physical or emotional harm to such person or such person's child; and
>
> "(ii) such act or acts are or are alleged to have been committed by a family or household member"

(Social Services Law § 459-a; *see also* L 1994, ch 222, § 1 [amending Family Ct Act § 846-a to add forfeiture of bail and payment of petitioner's counsel fees as remedies, and finding that "domestic violence is criminal conduct occurring between members of the same family or household"]). This definition dovetails with the criteria that permit a court to issue an order of protection. Thus, in this case, since the Family Court did not find that the mother was a victim of any of the enumerated offenses in the penal code, the mother cannot be considered a victim of domestic violence. Accordingly, permitting the court to issue an order of protection in her favor does not advance the statutory purposes.

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

ENTERED: FEBRUARY 28, 2017

CLERK

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

2993 Capital One Taxi Medallion Finance, Index 651841/15
Plaintiff-Appellant,

-against-

Patton R. Corrigan, et al.,
Defendants-Respondents.

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Skadden, Arps, Slate, Meagher & Flom LLP, New York (Alexander C. Drylewski of counsel), for appellant.

Molo Lamken LLP, New York (Robert K. Kry of counsel), for respondents.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered July 21, 2016, which denied plaintiff's motion for summary judgment in lieu of complaint, unanimously reversed, on the law, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff established prima facie its entitlement to summary judgment on defendants' guaranties of nonparty Transit Funding Associates, LLC's (TFA) obligations under a loan agreement by submitting evidence of the loan agreement, promissory notes, individual guaranties, and TFA's and defendants' failure to pay (*see Bank of Am. v Tatham*, 305 AD2d 183 [1st Dept 2003]). Plaintiff established that it was owed $57,201,109.22 as of December 1, 2014.

In opposition, defendants failed to raise an issue of fact.

The guaranties include a provision limiting defendants' liability where there is "a final adjudication by a court of competent jurisdiction of a valid defense to Borrower's obligations under the Loan Documents to payment of its liabilities." In a separate action, TFA, its affiliates, and defendants herein allege, inter alia, that plaintiff herein breached the loan agreement by ceasing to approve any loan advances months before the expiration of the loan agreement. Defendants allege in this action that plaintiff's breach of contract and negligent interference with collateral are valid defenses to TFA's obligations and that a decision on plaintiff's summary judgment motion must await a decision in the other action.

However, the claims of breach of contract and negligent interference with collateral are not defenses to TFA's liability under the loan agreement; they are merely counterclaims. The adjudication of these claims will not affect TFA's liability for repayment of the amounts borrowed before the breach occurred, although it may entitle TFA to damages (*see generally Metropolitan Switch Bd. Mfg. Co., Inc. v B & G Elec. Contrs., Div. of B & G Indus., Inc.*, 96 AD3d 725 [2d Dept 2012]; *Color Mate v Chase Manhattan Bank*, 168 AD2d 534 [2d Dept 1990]). Because the breach of contract and negligent interference with collateral claims are separate from TFA's unequivocal and

unconditional obligation to repay the monies it was loaned, defendants are still liable under the guaranties and promissory notes.

We have considered defendants' other arguments and find them unavailing.

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

ENTERED: FEBRUARY 28, 2017

CLERK

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

3016N Karl Marston, Index 301370/09
Plaintiff-Appellant,

-against-

David Cole, et al.,
Defendants-Respondents,

Eric L. Brooks, et al.,
Defendants.

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Joseph A. Altman, P.C., Bronx (Joseph A. Altman of counsel), for appellant.

Goodman & Saltzman, Mont Vernon (Kenneth B. Saltzman of counsel), for David Cole, respondent.

Christina A. Marino, Floral Park, for Steven Berrins, respondent.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about June 12, 2015, which denied plaintiff Karl Marston's motion to vacate an order, entered on default, granting defendants Steven Berrin's motion and David Cole's cross motion to amend their respective answers to include the affirmative defenses of the statute of limitations and equitable estoppel, and to dismiss the complaint, affirmed, without costs.

The court may grant a motion to vacate a default on grounds of excusable default and a showing of a meritorious defense, if the motion is made within one year after service of the order entered on default, with written notice of its entry (*see* CPLR

5015[a][1]*; see also Caba v Rai*, 63 AD3d 578, 580 [1st Dept 2009]). Marston did not move to vacate the order entered on default until February 18, 2014, nearly 18 months after he was served with the order and requisite notice. Furthermore, in support of his motion, Marston sought to demonstrate a meritorious defense by making a statement directly contrary to a critical allegation in his complaint. Accordingly, the motion court providently exercised its discretion not to vacate the default (*see Greenwich Sav. Bank v JAJ Carpet Mart*, 126 AD2d 451, 452-453 [1st Dept 1987]).

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

TOM, J.P. (concurring)

While I agree with the result reached by the majority, I write separately because I would affirm the order on appeal because the motion court providently exercised its discretion in denying the vacatur motion on the ground that plaintiff did not move to vacate the order entered on default until nearly 18 months after he was served with the order and notice of its entry, and did not provide a reasonable excuse for the default (*see* CPLR 5015[a][1]; *Nash v Port Auth. of N.Y. & N.J.*, 22 NY3d 220, 225 [2013]).

Plaintiff commenced this action for money damages and cancellation of a deed in 2009. In March 2011, defendants-respondents (defendants) moved for leave to amend their answers to assert the affirmative defenses of the statute of limitations and equitable estoppel, and for dismissal of the complaint. The next month plaintiff's counsel moved to withdraw as attorney citing "[i]rreconcilable differences" and the fact that it had become "apparent" that plaintiff was not forthright in revealing all information related to the case.

By order entered December 28, 2011, the motion court granted counsel's motion to withdraw, adjourned defendants' motions for leave to amend and dismiss until February 6, 2012, to allow plaintiff time to find new counsel, and directed defendants to

serve plaintiff at his last known address with those pending motions. However, plaintiff never hired a new attorney until more than two years later and never responded to the motions.

Accordingly, by order dated August 12, 2012, the court granted defendants' motions for leave to amend their answers to assert the additional affirmative defenses of equitable estoppel and statute of limitations, and upon such leave, granted the accompanying motions to dismiss the complaint on default.

Although the order entered upon default with written notice of its entry was served upon plaintiff on September 7, 2012 at six different addresses that appeared on various loan documents and court filings by plaintiff, plaintiff failed to move to vacate the default until February 28, 2014, approximately 18 months later. Plaintiff claimed that due to his lack of funds and the complicated nature of the action he had not been able to find an attorney to represent him until that time. He also claimed he never received a copy of defendants' motions from defendants, insinuating he had no knowledge of the motions. However, he never refuted that his attorney sent him the December 2011 order granting counsel's motion to withdraw, or that he was served with the August 2012 order entered on default.

Initially, plaintiff's failure to comply with the deadline set forth in CPLR 5015(a)(1) was fatal to his motion. Unlike the

other grounds for vacatur provided in CPLR 5015, pursuant to which a motion must be made in a "reasonable time," a motion to vacate based on an excusable default must be made, in relevant part, within one year after service of the relevant judgment or order with written notice of its entry (*Nash*, 22 NY3d at 225; David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5015:3). This firm deadline has been consistently recognized and applied by this Department (*see e.g. Gottlieb v Northriver Trading Co. LLC*, 106 AD3d 580, 580 [1st Dept 2013] [referring to the "one-year deadline of CPLR 5015"]; *Carrillo v New York City Tr. Auth.*, 39 AD3d 296 [1st Dept 2007] [noting that the "[p]laintiff had one year from service of notice of entry of the order granting summary judgment on default to make the motion to vacate"]).

Regardless, plaintiff failed to proffer an excusable default. Plaintiff claims that he never received a copy of defendants' motions and thus was unaware of them. However, he never refuted that he was served with his prior counsel's motion to withdraw, and the record contains a letter from plaintiff's prior counsel indicating that he indeed served plaintiff with his withdrawal motion. Notably, attached to the withdrawal motion was counsel's affirmation stating that, in preparing a response to defendants' pending motions, plaintiff wanted him to make an

untrue statement in opposition to the motions. Notably, counsel's statements were made in an affirmation under the penalties of perjury and there is no basis to question counsel's credibility. In other words, counsel's motion to withdraw discloses that plaintiff was well aware of defendants' motions from their "inception," having discussed with counsel the response to the motions that led to counsel's decision to withdraw. Thus, plaintiff's bare claim that he was unaware of defendants' motions is belied by his own counsel's affirmation and he therefore cannot establish excusable default.

Plaintiff also never refuted that he was served with a copy of the order allowing his counsel to withdraw, which also put him on notice that he was required to obtain new counsel within 45 days in order to respond to defendants' motions. As noted, plaintiff never denied that he was served with the motion to withdraw and the fact that the motion court granted counsel's motion to withdraw is prima facie evidence that counsel's motion was properly served upon plaintiff. It is axiomatic that a court would not grant a party's motion, especially one that is unopposed, without an affidavit of service showing proper service (*see e.g.* CPLR 3215[g]).

Moreover, the court's stay of defendants' motions was only until the adjourn date of February 6, 2012, and even if plaintiff

did not receive copies of the pending motions at that time, he was unequivocally aware of them when he received service of the court's order entered on default, service of which plaintiff has failed to refute, which the majority fails to address. In this regard, an affidavit of service for the order entered on default is included within the record on appeal. Such affidavit constitutes prima facie evidence of proper service (*Reem Contr. v Altschul & Altschul*, 117 AD3d 583, 584 [1st Dept 2014]). Plaintiff's conclusory denial that he simply didn't receive the order is insufficient to raise an issue of fact to be resolved at a traverse hearing (*see Public Adm'r of County of N.Y. v Markowitz*, 163 AD2d 100, 101 [1st Dept 1990]). Notably, plaintiff failed to contest in a sworn statement that the addresses at which he was served the order were invalid or that he no longer resided there. Further, no mailed notices were returned by the post office.

Further, the determination as to whether to vacate an order on default lies within the discretion of the motion court, and thus our review of the court's decision is based on whether there was an abuse or improvident exercise of the court's discretion (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]). Given the fatal lateness of the motion to vacate and the lack of an excusable default, it cannot be said that the motion court

abused or improvidently exercised its discretion in denying the motion.

Finally, in light of the conclusion that plaintiff failed to proffer a reasonable excuse, it need not be determined whether he offered a potentially meritorious defense to the action (*see Caba v Rai*, 63 AD3d 578, 580 [1st Dept 2009]).

Accordingly, I would affirm the order on the ground that plaintiff's motion was not brought within one year after service of the default order and notice of its entry, and plaintiff failed to present a reasonable excuse for the default.

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

ENTERED: FEBRUARY 28, 2017

CLERK

Renwick, J.P., Mazzarelli, Moskowitz, Kapnick, Webber, JJ.

3220 The People of the State of New York, Respondent, Ind. 2389/10

-against-

Raphael Ospina, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes of counsel), for respondent.

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered June 12, 2012, as amended December 17, 2012, convicting defendant, after a jury trial, of aggravated vehicular assault, vehicular assault in the first degree, two counts of vehicular assault in the second degree, and two counts of operating a motor vehicle while intoxicated, and sentencing him to an aggregate term of six months, with five years' probation, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence supports the jury's determination that defendant, and not one of the two friends who accompanied him in his car, was driving the car when the collision occurred.

Defendant's claim of ineffective assistance of counsel is unreviewable on direct appeal because it involves matters outside the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). To the extent that the existing record permits review, we find that counsel's performance in failing to move to suppress evidence of defendant's refusal to take a chemical test was not deficient, and that, in any event, there is no reasonable probability that the outcome would have been different if the evidence had been suppressed (*see Strickland v Washington*, 466 US 668, 694 [1984]).

Defendant's argument that the trial judge excessively interfered in the questioning of witnesses is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we find that the court's participation, while sometimes extensive, did not deprive defendant of a fair trial (*see e.g. People v Melendez*, 31 AD3d 186, 197 [1st Dept 2006], *lv denied* 7 NY3d 927 [2006]).

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

ENTERED: FEBRUARY 28, 2017

CLERK

Renwick, J.P., Mazzarelli, Moskowitz, Kapnick, Webber, JJ.

3221-
321A Neo Universe Inc., et al.,
Plaintiffs-Appellants,

-against-

Takanobu Ito,
Defendant-Respondent,

Sanae Ito, et al.,
Defendants.

Index 602175/06

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McGovern Doherty & Kim, PLLC, New York (Kyu O. Kim of counsel), for appellants.

Paul F. Condzal, New York, for respondent.

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Judgment, Supreme Court, New York County (Barry R. Ostrager, J.), entered April 13, 2016, after a bench trial, dismissing the complaint as against defendant Takanobu Ito (defendant), pursuant to an order, same court, Justice, and date of entry, unanimously reversed, on the law, with costs, plaintiffs granted judgment as to liability in their favor as against defendant, and the matter remanded for a calculation of the amount owed to plaintiffs under the Loan Agreement and Promissory Note, and for other relief, such as interest and attorney's fees, if any. Appeal from the order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff Shinji Mitsunaga (plaintiff), principal of the

corporate plaintiff, demonstrated his entitlement to judgment by the introduction of the Loan Agreement, the Promissory Note (Note), and plaintiff's own testimony that defendant had not paid any portion of the debt owed under the Loan Agreement and Note. It was then defendant's burden to demonstrate a lack of consideration (*see Carlin v Jemal*, 68 AD3d 655, 656 [1st Dept 2009]), which he failed to do. Plaintiffs' alleged failure to provide any evidence of the loan disbursement to defendant does not demonstrate a lack of consideration, as plaintiffs were "not required to demonstrate that there was adequate consideration for the note" (*id.*). Defendant also incorrectly asserts that the "Basic Contract" does not contain any obligation on the part of defendant "to personally guarantee or repay these monies." In fact, the Basic Contract, pursuant to which plaintiff testified that he loaned the money to defendant through defendant's wife's company, unequivocally identifies defendant as "B" in the agreement, and states that the money which plaintiff "must" give to defendant company "shall be considered as a loan to B."

The trial court improperly found that plaintiff's admission that he never gave any money to defendant in 2004 warranted dismissal of the complaint for lack of consideration for the Loan Agreement and Note, both executed in 2004. The Loan Agreement expressly states that plaintiff "is owed" the amount expressed in

that agreement, clearly indicating that the debt owed was preexisting. This past consideration, the receipt and adequacy of which were both acknowledged by defendant in the Loan Agreement, is sufficient to enforce the debt instruments (*see Movado Group v Presberg*, 259 AD2d 371 [1st Dept 1999], *lv dismissed* 94 NY2d 794 [1999]; *Bellevue Bldrs. Supply v Audubon Quality Homes*, 213 AD2d 824, 825-826 [3d Dept 1995]). Moreover, plaintiff's own testimony with regard to the payments pursuant to the Basic Contract, executed in 2003, and the checks in evidence, executed between 2003 and 2004, support the existence of past consideration.

There is no evidence, testimonial or otherwise, that the money given to defendant was solely for investments in defendant company and/or in a nonparty company, Telecontinuity Inc. Nor is there any evidence that plaintiffs were seeking to recover monies already paid by defendant to plaintiffs under a Tokyo Court Final Decision. Plaintiff testified that the Tokyo decision involved

money defendant "also" owed plaintiff, and there was no evidence to rebut that testimony.

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

ENTERED: FEBRUARY 28, 2017

CLERK

Renwick, J.P., Mazzarelli, Moskowitz, Kapnick, Webber, JJ.

3222 In re Baby Girl L. also known as Faith Heaven L.,

A Child Under Eighteen Years of Age, etc.,

Mark Dunald B.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent,

Angel Mya L.,
Respondent.

_____

Larry S. Bachner, Jamaica, for appellant.

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

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

_____

Order of fact-finding and disposition (one paper), Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about February 25, 2016, to the extent it found, after a hearing, that respondent father had neglected the subject child, unanimously affirmed, without costs. Appeal from same order, insofar as it directed respondent to, among other things, complete a sex offender treatment program and comply with random drug and alcohol screening, unanimously dismissed, without costs.

Petitioner agency established by a preponderance of the

evidence that the subject child's physical, mental, or emotional condition had been impaired or was in imminent danger of becoming impaired as a result of respondent's transient lifestyle and inability to provide adequate shelter or make provisions for the child (*see* Family Ct Act § 1012[f][i][A]; *Matter of Rakeem M. [Marissa M.]*, 139 AD3d 622, 623 [1st Dept 2016]). Family Court properly relied on prior findings of neglect entered against respondent with respect to his other children, as the prior findings were sufficiently close in time to the instant petition and respondent had not ameliorated the conditions giving rise to the prior findings (*see Matter of Camarrie B. [Maria R.]*, 107 AD3d 409, 409 [1st Dept 2013]; *see generally Matter of Cruz*, 121 AD2d 901, 902 [1st Dept 1986]).

No appeal lies from the dispositional portion of Family Court's order, since the record reflects that respondent consented to the requirements set forth in the order, and he does

not argue otherwise (*see Matter of Shaniyah D.C. [Olivia C.]*, 143 AD3d 608, 608 [1st Dept 2016]).

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

ENTERED: FEBRUARY 28, 2017

CLERK

Renwick, J.P., Mazzarelli, Moskowitz, Kapnick, Webber, JJ.

3223 Rachel Tantaro, Index 152701/13
Plaintiff-Appellant,

-against-

Common Ground Community Housing Development Fund, Inc., et al.,
Defendants-Respondents.

_____

Sokolski & Zekaria, P.C., New York (Murray Shactman of counsel), for appellant.

Kellner Herlihy Getty & Friedman, LLP, New York (Jeanne Williams of counsel), for Common Ground Community Housing Development Fund Inc., respondent.

Shafer Glazer, LLP, New York (Mika Mooney of counsel), for Alliedbarton Security Services LLC, respondent.

_____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered July 27, 2015, which, upon reargument, adhered to the prior determination, which granted defendants' motions for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

As a visitor to premises leased by the tenant, plaintiff was a mere licensee and was not protected from eviction without legal process under RPAPL 853 or any of the statutes upon which she relies (*see P&A Bros. v City of N.Y. Dept. of Parks & Recreation*, 184 AD2d 267 [1st Dept 1992]; *Paulino v Wright*, 210 AD2d 171 [1st Dept 1994], *lv dismissed* 87 NY2d 918 [1996]). *Suarez v Axelrod*

Fingerhut & Dennis (142 AD3d 819, 820 [1st Dept 2016]), upon which plaintiff relies, is distinguishable, since the "known occupants" who were afforded protection from eviction in that case were listed in the tenant's required filings as household members; plaintiff, who was required to sign in on the visitor's log each time she sought access to the tenant's apartment, was not listed as a member of the tenant's household.

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

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

ENTERED: FEBRUARY 28, 2017

CLERK

Renwick, J.P., Mazzarelli, Moskowitz, Kapnick, Webber, JJ.

3224 Joseph Armato, Index 315700/11
Plaintiff-Appellant,

-against-

Josette Bullon,
Defendant-Respondent.

_____

Cohen Goldstein, LLP, New York (Glenn S. Goldstein of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Ellen Gesmer, J.), entered June 19, 2015, which, to the extent appealed from as limited by the briefs, directed plaintiff to pay defendant the sum of $768,962.28, and denied plaintiffs motion for attorneys' fees, unanimously affirmed, without costs.

Plaintiff is not entitled to separate property credits for contributions from Nationwide Contracting Consulting, Inc. to the parties' purchase of the apartment on East 74th Street or the commercial properties in Louisiana and Kansas. The parties' Post-Nuptial Agreement, dated June 28, 2005, plainly provides that any real estate purchased through the business entity Metropolitan Restoration Inc., now known as Nationwide Contracting Consulting, Inc., during the course of the parties' marriage shall be marital property (*see Kasowitz, Benson, Torres & Friedman, LLP v Duane Reade*, 98 AD3d 403, 406 [1st Dept 2012]

["Mere assertion by one" that "otherwise clear, unequivocal and understandable" contract language "means something to him" does not alone render a contract ambiguous] [internal quotation marks omitted], *affd* 20 NY3d 1082 [2013]; *see also generally 150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 6 [1st Dept 2004] ["a court should avoid an interpretation that would leave contractual clauses meaningless"] [internal quotation marks omitted]).

The court properly denied plaintiff's application for additional attorneys' fees (*see Silverman v Silverman*, 304 AD2d 41, 48 [1st Dept 2003]).

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

ENTERED: FEBRUARY 28, 2017

CLERK

Renwick, J.P., Mazzarelli, Moskowitz, Kapnick, Webber, JJ.

3225-
3226 Index 102882/02

Ruth Shomron, etc.,
Plaintiff-Respondent,

-against-

Darya Fuks, etc., et al.,
Defendants-Appellants.

_____

Levi Huebner & Associates, P.C., Brooklyn (Levi Huebner of counsel for) Darya Fuks and Gadi Hill, appellants.

The Appellate Law Office of Stephen Preziosi, New York (Stephen Neal Preziosi of counsel), for Mali Fuks, appellant.

The Halperin Law Firm, PLLC, New York (Guy S. Halperin of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered January 22, 2010, which denied defendants' motion, pursuant to CPLR 5015(a)(2) or (3), to vacate a decision and a judgment (same court, John E.H. Stackhouse, J.), entered September 27, 2006 and November 25, 2006, respectively, in favor of plaintiff, unanimously affirmed, with costs. Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered December 3, 2014, which denied defendants' motion for leave to renew the motion to vacate, unanimously affirmed, with costs.

This action stems from a dispute between two former partners in R&L Realty Associates, which owned a building in upper Manhattan. Plaintiff claimed that she would not have agreed to

sell four apartments in the building to the defendant entities had she known that Yoram Fuks, her partner's husband, was the sole beneficiary and owner of these entities. Defendants now seek to vacate a decision and interlocutory judgment entered in plaintiff's favor on the ground that one of plaintiff's trial witnesses was allegedly bribed.

The motion to vacate was properly denied. Vacatur was not appropriate pursuant to CPLR 5015(a)(2) (newly-discovered evidence) because defendants failed to meet the "heavy burden" of establishing the "genuineness" of the new evidence (*see H&Y Realty Co. v Baron*, 193 AD2d 429, 430 [1st Dept 1993]). Defendants also failed to establish the existence of fraud, thereby rendering vacatur pursuant to CPLR 5015(a)(3) likewise inappropriate (*see Thakur v Thakur*, 49 AD3d 861, 861 [2d Dept 2008]).

Defendants rely primarily on the affidavit of Rebecca Rottier. This affidavit, which was submitted three years after trial and which she later largely recanted, is wholly unreliable. Although plaintiff also admitted loaning the witness money after trial, she and the witness both insisted that the loans were in no way related to or affected his trial testimony. The evidence is thus insufficient even to raise an issue of fact for resolution at a fact-finding hearing (*cf. Matter of Travelers*

Ins. Co. v Rogers, 84 AD3d 469, 469 [1st Dept 2011]; *Pollio Dairy Prods. Corp. v Sorrento Cheese Co.*, 62 AD2d 1015, 1016 [2d Dept 1978]), especially in light of the "policy favoring the finality of judgments" (*Mark v Lenfest*, 80 AD3d 426, 426 [1st Dept 2011], quoting *Greenwich Sav. Bank v JAJ Carpet Mart.*, 126 AD2d 451, 453 [1st Dept 1987]).

The motion for leave to renew pursuant to CPLR 2221(e) was also properly denied. Although defendants submitted affidavits and other evidence not previously submitted, none of these materials were truly "new" when the motion was brought in April 2014. Two of the key affidavits had been in defendants' custody since 2011, and the remaining affidavits either restated information already submitted or else contained information that could and should have been submitted earlier. Nor have defendants provided any reasonable justification for their delay in bringing this evidence to the court's attention. Their retention of new counsel in May 2013 does not explain why prior counsel failed to raise this evidence during the two previous years.

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 28, 2017

CLERK

Renwick, J.P., Mazzarelli, Moskowitz, Kapnick, Webber, JJ.

3227 The People of the State of New York, Respondent, Ind. 3350N/13

-against-

Larick Micheaux, Defendant-Appellant.

_____

Feldman and Feldman, Uniondale (Steven A. Feldman of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered May 14, 2015, convicting defendant, upon his plea of guilty, of criminal sale of a firearm in the first degree and conspiracy in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of 13 years, unanimously affirmed.

Defendant made a valid waiver of his right to appeal. The court's oral colloquy with defendant concerning the waiver went beyond the minimum standards for such a colloquy (*see People v Bryant*, 28 NY3d 1094 [2016]). In addition, defendant acknowledged that he had discussed the waiver of his right to appeal with counsel, and he signed a written waiver.

To the extent defendant is claiming his plea was involuntary, that claim would survive an appeal waiver. However,

we find that the plea was knowing, intelligent and voluntary, and that defendant received the precise sentence promised by the court. Furthermore, the court providently exercised its discretion in denying defendant's meritless plea withdrawal motion (*see People v Frederick*, 45 NY2d 520 [1978]). Defendant's remaining claims are foreclosed by the waiver and are unavailing in any event.

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

ENTERED: FEBRUARY 28, 2017

CLERK

Renwick, J.P., Mazzarelli, Moskowitz, Kapnick, Webber, JJ.

3228 Frederick Munsey, Index 309788/10
Plaintiff-Respondent,

-against-

Antoinette Sindone,
Defendant-Appellant.

_____

Gorton & Gorton, LLP, Mineola (John Gorton of counsel), for appellant.

Bergman, Bergman, Goldberg, Fields & Lamonsoff, LLP, Hicksville (Allen Goldberg of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered April 8, 2016, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

There is an issue of fact as to whether the "as is" clause in the lease is applicable to plaintiff, whose signature does not appear on the lease, and who claims to have been a subtenant in the subject premises (*see e.g. McCarthy v Board of Mgrs. of Bromley Condominium*, 271 AD2d 247, 247 [1st Dept 2000]). In any event, as the motion court noted, a lease provision exempting defendant owner from liability for her own negligence is "void as

against public policy and wholly unenforceable" (General Obligations Law § 5-321).

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

ENTERED: FEBRUARY 28, 2017

CLERK

Renwick, J.P., Mazzarelli, Moskowitz, Kapnick, Webber, JJ.

3229 In re Barry Feuerstein, et al., Petitioners-Appellants, File 463A/13

For Reformation of Last Will and Testament of Shirley Feuerstein, Deceased.

_____

Charles E. Holster III, Mineola, for appellants.

_____

Decree, Surrogate's Court, Bronx County (Nelida Malave-Gonzalez, S.), entered on or about June 2, 2015, which, to the extent appealed from as limited by the brief, ordered a supplemental needs trust to be held and administered in accordance with the terms of a February 6, 2014 trust declaration and required petitioners to execute, file, and maintain a bond in the amount of $200,000, unanimously reversed, on the law, without costs, the bond requirement deleted, and Paragraph Fifth of the last will and testament of Shirley Feuerstein reformed so that it consists of the language in the petition, citation, and supplemental citation rather than the February 2014 trust declaration.

Surrogate's Court Procedure Act § 806 states, "Whenever a testamentary trustee is appointed by will or order of the court ..., he shall *unless the will provides otherwise,* execute and file a bond" (emphasis added). In the case at bar, the will

provides otherwise: it says that "no Executor or Trustee shall be required to file or furnish any bond." Therefore, the court should not have required petitioners to file a bond (*see Matter of Solomon,* 18 Misc 2d 1029 [Sur Ct, Kings County 1959]; *Matter of Ibelli,* 15 Misc 2d 499, 501 [Sur Ct, Kings County 1958]).

The February 2014 trust declaration was attached to a motion that was later withdrawn. "The effect of a withdrawal of a motion is to leave the record as it stood prior to its filing as though it had not been made" (*Matter of Stoute v City of New York,* 91 AD2d 1043, 1044 [2d Dept 1983] [emphasis deleted], *lv dismissed* 59 NY2d 762 [1983]). Thus, the record should not have included the trust declaration that the court required petitioners to attach to the decree being appealed.

In addition, "[t]here is no authority to justify impressing on a testamentary trust a greater obligation than the testator himself would have, if he were alive" (*Matter of Maul v Fitzgerald,* 78 AD2d 706, 708 [3d Dept 1980]). There is no indication in the will that the testatrix wanted annual accountings for the trust that she established for her son. Courts have recognized that "[t]here is no statutory requirement that annual accountings be filed with the Court" (*Matter of Chierchia,* NYLJ, Feb. 11, 2010, at 37, col 5 [Sur Ct, Kings County]; *Matter of Maria M.,* NYLJ, Sept. 18, 2009, at 35, col 2

[Sur Ct, Kings County]) and that "[i]t is 'unnecessary to mandate an annual accounting and burden the trust with the inherent costs'" (*Chierchia* [quoting *Matter of Kaidirmaoglou,* NYLJ, Nov. 5, 2004 [Sur Ct, Suffolk County]; *see also Matter of Stawarz,* NYLJ, Apr. 10, 2013, at 30 [Sur Ct, Suffolk County]).

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

ENTERED: FEBRUARY 28, 2017

CLERK

Renwick, J.P., Mazzarelli, Moskowitz, Kapnick, Webber, JJ.

3230-
3231-
3232 &
M-363

Index 651985/15

ABL Advisor LLC, et al.,
Plaintiffs-Respondents,

-against-

Ian S. Peck, et al.,
Defendants-Appellants.

_____

Peter M. Levine, New York, for appellants.

Berlandi Nussbaum & Reitzas LLP, New York (Peter W. Smith of counsel), for respondents.

_____

Order, Supreme Court, New York County (Geoffrey D.S. Wright, J.), entered July 5, 2016, which, to the extent appealed from as limited by the briefs, granted plaintiffs' motion to hold defendants in civil contempt to the extent of directing defendants to tender $1,176,840.00 to plaintiffs on or before July 11, 2016, unanimously reversed, on the law and the facts, without costs, and plaintiffs' motion denied. Order, same court Justice, and entry date, which denied defendants' motion to dismiss, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint as against defendants Ian S. Peck and Arts Capital Group LLC. Order, same court and Justice, entered on or about August 8, 2016, which, in effect, granted defendants'

motion for leave to reargue their motion to dismiss and plaintiffs' motion for civil contempt, and, upon reargument, adhered to its earlier determinations and effectively dismissed, sua sponte, defendants' claim for legal fees, unanimously reversed, on the law, without costs, to reinstate defendants' claim for legal fees, and the appeal from the order otherwise dismissed, without costs, as academic.

Supreme Court improvidently exercised its discretion when it found defendants to be in contempt of the court's order dated January 6, 2016 (*see Matter of Lipsig [Manus]*, 139 AD3d 600, 600-601 [1st Dept 2016]). The January 6, 2016 order clearly contemplated a potential settlement, and directed defendants to bring in a check and releases for a settlement conference on January 21, 2016. On January 20, 2016, plaintiffs unequivocally informed defendants that they would not sign any release of their claims, and would merely use the check as a set-off of the amounts allegedly owed to them. Defendants were, therefore, justified in not bringing in the check and releases, given plaintiffs' position and the fact that no settlement would occur.

Moreover, Supreme Court did not fashion a remedy contemplated by the Judiciary Law (*see* Judiciary Law § 753; *Pitterson v Watson*, 299 AD2d 467, 468 [2d Dept 2002]). Instead, the court improperly used the contempt motion to, sua sponte,

grant partial summary judgment to plaintiffs, without providing proper notice to the parties of its intent to do so (*see Wiesen v New York Univ.*, 304 AD2d 459, 459 [1st Dept 2003]; *see also Pitterson*, 299 AD2d at 468).

Supreme Court also erred in denying defendants' motion to dismiss. Plaintiffs' claim seeking removal of Patriot and Bluefin should have been dismissed, as the documentary evidence shows that plaintiffs failed to provide proper notice pursuant to section 7(d) of the Participation Agreements (*see U.S. Bank N.A. v DLJ Mtge. Capital, Inc.*, 141 AD3d 431, 432 [1st Dept 2016]). The notices plaintiffs rely upon are insufficient.

The breach of contract claim, as alleged against defendants Ian S. Peck and Art Capital Group, LLC (Art Capital), should have been dismissed, as these defendants were not parties to the Participation Agreements or the Settlement Agreement, and the amended complaint does not allege that either defendant intended to be bound by these agreements (*see Savoy Record Co. v Cardinal Export Corp.*, 15 NY2d 1, 4 [1964]; *Shugrue v Stahl*, 117 AD3d 527, 528 [1st Dept 2014]). Plaintiffs' request for attorneys' fees also should have been dismissed, since the Participation Agreements do not entitle plaintiffs to legal fees and the amended complaint provides no other basis for an award of fees (*see U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d

592, 597 [2004]).

The breach of fiduciary duty claim should have been dismissed as duplicative of the breach of contract claim (*NYAHSA Servs., Inc., Self-Ins. Trust v Recco Home Care Servs., Inc.*, 141 AD3d 792, 794 [3d Dept 2016]). Moreover, plaintiffs do not allege any factual basis for a finding that Ian S. Peck or Art Capital owe any fiduciary duty to plaintiffs.

Supreme Court should have dismissed the deceit claim and the "fraud and deceit" claim, because the claims rest solely on the alleged breach of the Participation Agreements (*see Hotel 71 Mezz Lender LLC v Mitchell*, 63 AD3d 447, 448 [1st Dept 2009]; *Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692-693 [1st Dept 1994]).

The gross negligence claim should have been dismissed as duplicative of the breach of contract claim (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 316 [1995]; *Pacnet Network Ltd. v KDDI Corp.*, 78 AD3d 478, 479 [1st Dept 2010]). Moreover, "claims based on negligence or grossly negligent performance of a contract are not cognizable" (*Pacnet*, 78 AD3d at 479 [internal quotation marks omitted]).

The conversion claim also should have been dismissed as duplicative of the breach of contract claim (*see M.D. Carlisle Realty Corp. v Owners & Tenants Elec. Co. Inc.*, 47 AD3d 408, 409 [1st Dept 2008]).

The existence of express contracts — the Participation Agreements and Loan Documents — bars the unjust enrichment claim (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]; *Allenby, LLC v Credit Suisse, AG*, 134 AD3d 577, 579 [1st Dept 2015]).

Because plaintiffs' allegation of a fiduciary relationship is directly refuted by the Participation Agreements, which were arm's length business transactions that did not create any fiduciary duty, and there are no special circumstances warranting an accounting in the interest of justice, the accounting claim should have been dismissed (*Grossman v Laurence Handprints-N.J.*, 90 AD2d 95, 104-105 [2d Dept 1982]).

Because Supreme Court addressed the merits of the reargument motion, the order on reargument is appealable as of right (*see Lipsky v Manhattan Plaza, Inc.*, 103 AD3d 418, 419 [1st Dept 2013]). To the extent the court dismissed defendants' claim for

legal fees in its reargument order, that determination was improper, since no party requested that relief on the motion to reargue.

M-363 ***ABL Advisor LLC, v Ian S. Peck***

Motion to take judicial notice or for permission to serve and file a supplemental record denied.

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

ENTERED: FEBRUARY 28, 2017

CLERK

Renwick, J.P., Mazzarelli, Moskowitz, Kapnick, Webber, JJ.

3233 James Couri, Index 113512/08
Plaintiff-Appellant,

-against-

John Seibert, et al.,
Defendants-Respondents.

_____

James Couri, appellant pro se.

Abrams Deemer PLLC, New York (Joseph M. Burke of counsel), for respondents.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered January 27, 2016, which, inter alia, denied plaintiff's motion seeking an order striking defendants' answer and disqualifying defense counsel, imposed sanctions against plaintiff for frivolous motion practice, and dismissed the complaint due to a failure to appear at a mandatory court conference, unanimously affirmed, with costs.

The court providently declined to grant pro se plaintiff's motion seeking to strike defendants' answer and disqualify defendants' defense counsel. As observed by the motion court, plaintiff filed a motion without the requisite prior permission, an edict twice imposed upon him, failed to comply with Rule 130, and failed to make a showing as to what, if any, discovery was outstanding. Plaintiff's motion seeking disqualification of

counsel was, at best, frivolous, and warranted the imposition of sanctions, particularly in light of plaintiff's course of conduct throughout litigation (*see Couri v Siebert*, 48 AD3d 370 [1st Dept 2008]).

The court also correctly dismissed the complaint for failure to appear at a status conference (202.27[b]). Although plaintiff argues on appeal that his health prevented him from appearing, this Court has already determined that his constant reliance upon his health as an excuse for noncompliance is unavailing (*see Couri, supra*).

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

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

ENTERED: FEBRUARY 28, 2017

CLERK

Renwick, J.P., Mazzarelli, Moskowitz, Kapnick, Webber, JJ.

3234 Convention Plaza III, LLC, Index 653766/14
Plaintiff-Respondent-Appellant,

-against-

Seneca Specialty Insurance Company,
Defendant-Appellant-Respondent.

_____

Rubin, Fiorella & Friedman LLP, New York (Paul Kovner of counsel), for appellant-respondent.

The Law Offices of Michael Swimmer, New York (Michael Swimmer of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered July 1, 2016, which denied the parties' respective motions for summary judgment, unanimously modified, on the law, to grant defendant's motion, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint.

Since this case does not involve a loss by fire or theft, the "Commercial Protective Safeguards" endorsement is inapplicable (*see* Insurance Law § 3106[b]; *Anjay Corp. v Those Certain Underwriters at Lloyd's of London Subscribing to Certificate No. HN01AAF4393*, 33 AD3d 323, 324 [1st Dept 2006]).

However, defendant established prima facie that the "Heat Condition" endorsement is applicable. That endorsement states that loss caused by leaks or flows of water or other liquids from

building systems or equipment caused by or resulting from freezing is excluded "unless ... [y]ou maintain heat *in the building or structure* at a minimum of 55 degrees Fahrenheit" (emphasis added). Defendant submitted two expert affidavits stating that the freezing water was caused by the fact that the HVAC rooftop units were turned off, and the baseboard heaters alone could not keep the internal temperature of the premises above freezing during the cold period before the January 17, 2014 loss, and indeed that the baseboard heaters could not have maintained a minimum internal temperature of 55 degrees Fahrenheit based on the premises' electrical consumption from December 23, 2013 to January 27, 2014.

In opposition, plaintiff submitted no expert affidavits, and, even considering the affidavit by the person hired to check on the premises, it failed to raise an issue of fact. That person's assertion that before the incident in question he "had never observed any significant change in temperature" contradicts the testimony he gave at his examination under oath (*see Telfeyan v City of New York*, 40 AD3d 372 [1st Dept 2007]).

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

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

ENTERED: FEBRUARY 28, 2017

CLERK

Renwick, J.P., Mazzarelli, Moskowitz, Kapnick, Webber, JJ.

3235 The People of the State of New York, Ind. 4316/13
Respondent,

-against-

Carlos Cabrera,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes 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 (Jill Konviser, J.), rendered October 14, 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 28, 2017

CLERK

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

Renwick, J.P., Mazzarelli, Moskowitz, Kapnick, Webber, JJ.

3236 Patsy Ann Harbison, Index 302529/10
Plaintiff-Respondent,

-against-

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

The City of New York,
Defendant.

_____

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

Leav & Steinberg, LLP, New York (Vincent F. Provenzano of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Barry Salman, J.), entered on or about January 25, 2016, which denied defendants-appellants' 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 testified that she slipped and fell as she was exiting a bus owned and operated by defendants because the step was covered with a slushy condition. She and the bus driver both stated that there was snow all over the ground from a storm that had ended earlier that day, and certified meteorological records submitted by defendants demonstrated that a snow storm that started the previous night and ended earlier in the day of the

accident had left about six inches of snow on the ground. The bus driver also testified that passengers tracked snow onto the bus on their shoes and boots as they boarded.

Common carriers are not obligated to provide a "constant remedy" for the tracking of water onto a bus during an ongoing storm or for a reasonable time thereafter (*Byrne v New York City Tr. Auth.*, 78 AD3d 525, 525 [1st Dept 2010]; *see Solazzo v New York City Tr. Auth.*, 21 AD3d 735 [1st Dept 2005], *affd* 6 NY3d 734 [2005]). Similarly, when the ground is covered with snow left by a recent storm, "it would be unreasonable to expect the [defendants] to constantly clean the front steps of the subject bus" (*Kelley-Taft v County of Westchester*, 119 AD3d 842, 843 [2d Dept 2014]; *see McKenzie v County of Westchester*, 38 AD3d 855 [2d Dept 2007]). Plaintiff's argument that defendants failed to show lack of notice of the slushy condition is irrelevant, since they did not breach any duty of care under the existing weather conditions. Moreover, plaintiff did not present evidence sufficient to raise a triable issue of fact since her meteorological expert agreed that the condition on the bus steps

resulted from the six inches of snow left on the ground by the storm that had ended several hours before the happening of the accident.

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

ENTERED: FEBRUARY 28, 2017

CLERK

Renwick, J.P., Mazzarelli, Moskowitz, Kapnick, Webber, JJ.

3237 The People of the State of New York, Ind. 1841/14
Respondent,

-against-

Antoine Pierre-Pierre,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Stephen J. Kress 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 (Edward J. McLaughlin, J.), rendered April 27, 2015,

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 28, 2017

CLERK

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

Renwick, J.P., Mazzarelli, Moskowitz, Kapnick, Webber, JJ.

3239 Mariana Huerta-Saucedo, et al., Index 23392/13E
Plaintiffs-Respondents,

-against-

City Bronx Leasing Inc., et al.,
Defendants-Appellants,

Orlando Garcia, et al,
Defendants-Respondents.

_____

Marjorie E. Bornes, Brooklyn, for appellants.

Ogen & Sedaghati, P.C., New York (Eitan A. Ogen of counsel), for Mariana Huerta-Saucedo, Yolanda Hernandez-Romero and Gabriela Cecilia Torres-Salas, respondents.

Richard T. Lau & Associates, Jericho (Christine A. Hilcken of counsel), for Orlando Garcia and Yasmine Garcia, respondents.

_____

Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered December 7, 2015, which, to the extent appealable, granted plaintiffs' motion for partial summary judgment on the issue of liability, unanimously modified, on the law, to deny the motion to the extent it sought partial summary judgment as to defendants' liability, and otherwise affirmed, without costs.

Plaintiffs met their prima facie burden of establishing both their own lack of culpability and the fault of both driver defendants. They submitted affidavits averring that they were backseat passengers in a cab driven by defendant Gonzalez, which was hit by a vehicle driven by defendant Yasmine Garcia, when

both vehicles entered an intersection with a red light against them. In opposition, City Bronx and Gonzalez did not dispute that plaintiffs were innocent passengers in their vehicle, but Gonzalez averred that he was proceeding lawfully through the intersection, with a green light in his favor, when the second car made a sudden left turn and hit him. Codefendants submitted the affidavit of Yasmine Garcia, who averred that she was making a lawful left turn, with a green arrow light in her favor, when she was struck by the other vehicle. These conflicting versions as to how the accident occurred raise triable issues of fact that preclude summary judgment on the issue of defendants' liability (*see Oluwatayo v Dulinayan*, 142 AD3d 113, 119-120 [1st Dept 2016]). Accordingly, plaintiffs were entitled only to an order

finding that their absence of liability was established (*id.*; CPLR 3212[g]).

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

ENTERED: FEBRUARY 28, 2017

CLERK

Renwick, J.P., Mazzarelli, Moskowitz, Kapnick, Webber, JJ.

3240 Nanto MK Corp., Index 650433/15
Plaintiff-Respondent,

-against-

J & E Realty, et al.,
Defendants-Appellants.

_____

The Schutzer Group, PLLC, New York (Eric Schutzer of counsel), for appellants.

Thomas J. Sullivan at Law, Bronx (Thomas J. Sullivan of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered December 11, 2015, which denied defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7), unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

The documentary evidence conclusively establishes a defense to plaintiff's claim for specific performance of a lease renewal option. Both the original commercial lease and the proposed renewal lease expressly provide that the parties will not be bound to negotiated lease terms until defendants deliver a fully executed copy of the lease; defendants never delivered a fully executed copy of the proposed renewal lease (*see Jordan Panel Sys. Corp. v Turner Constr. Co.*, 45 AD3d 165, 169 [1st Dept

2007]). Plaintiff does not deny that it was in breach of certain lease provisions and that not being in breach was a condition precedent to exercising its right of renewal under the original lease. It argues instead that defendants waived any claim of breach by continuing to accept its regular rent payments without complaint. This argument is conclusively refuted by the non-waiver provision of the original lease (*see Ahmed v C.D. Kobsons, Inc.*, 67 AD3d 467 [1st Dept 2009]; *Excel Graphics Tech. v CFG/AGSCB 75 Ninth Avenue*, 1 AD3d 65 [1st Dept 2003], *lv dismissed* 2 NY3d 794 [2004]).

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

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

ENTERED: FEBRUARY 28, 2017

CLERK

Renwick, J.P., Mazzarelli, Moskowitz, Kapnick, Webber, JJ.

3241N State Farm Mutual Automobile Insurance Company, et al., Plaintiffs-Appellants, -against- Dr. Ibrahim Fatiha Chiropractic, P.C., Defendant-Respondent. Index 20405/15E

Freiberg, Peck, & Kang, LLP, Armonk (Yilo J. Kang of counsel), for appellants.

Sobel Law Offices P.C., Syosset (Svetlana Sobel of counsel), for respondent.

Order, Supreme Court, Bronx County (Ruben Franco, J.), entered January 25, 2016, which denied plaintiffs' motion for a default judgment, and granted defendant's motion to compel plaintiffs to accept a late answer, unanimously reversed, on the law, without costs, plaintiffs' motion granted, and defendant's motion denied. The Clerk is directed to enter judgment declaring that, with respect to payments sought by defendant, there is no coverage for the claims identified in the complaint.

Contrary to the motion court, we find that defendant failed to demonstrate a reasonable excuse for its default in answering the complaint, service of which was complete when the Secretary of State was served (Business Corporation Law § 306; *Associated Imports v Amiel Publ.*, 168 AD2d 354 [1st Dept 1990], *appeal*

dismissed 77 NY2d 837 [1991]). Even were we to consider the document submitted by defendant's principal, it would not avail defendant. Neither the principal's bare denial that he ever received notice of the lawsuit before receiving the motion for a default judgment nor defendant's failure to keep current its address on file with the Secretary of State constitutes a reasonable excuse for defendant's failure to timely answer (*KPG Inc. v Salinas Group Ltd.*, 11 AD3d 338 [1st Dept 2004]; *Associated Imports*, 168 AD2d at 354).

Further, defendant acknowledges that the Bronx street address to which an additional copy of the summons and complaint was sent pursuant to CPLR 3215(g)(4)(i) was the actual address of its practice and does not deny that it received the motion for a default judgment at this address. Any failure by plaintiffs to send the additional copy of the summons and complaint by first class mail as the statute directs is not fatal to their motion for a default judgment (*Hamilton Pub. Relations v Scientivity, LLC*,

129 AD3d 1025, 1026 [2d Dept 2015]; *see also Crespo v A.D.A. Mgt.*, 292 AD2d 5, 10 [1st Dept 2002]).

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

ENTERED: FEBRUARY 28, 2017

CLERK

Renwick, J.P., Mazzarelli, Moskowitz, Kapnick, Webber, JJ.

3242N- Index 305816/13
3243N USA Recycling, Inc.,
Plaintiff-Appellant,

-against-

Baldwin Endico Realty
Associates, Inc.,
Defendant-Respondent.

_____

Rocco F. D'Agostino, White Plains, for appellant.

Lepatner & Associates, LLP, New York (Harry J. Petchesky of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered on or about July 15, 2015, which, to the extent appealed from as limited by the briefs, granted defendant's motion to disqualify plaintiff's counsel and to vacate the parties' stipulation of settlement, unanimously affirmed, without costs. Appeal from paper, same court and Justice, dated August 14, 2015, declining to sign an order to show cause, unanimously dismissed, without costs, as taken from a nonappealable paper.

Plaintiff's counsel employed as a paralegal a non-admitted law school graduate who had previously worked for the executor of the estate of defendant's former sole shareholder. These circumstances raise the question whether the paralegal possesses confidential information the disclosure of which could be

detrimental to defendant (*see* Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.6). Plaintiff argues that defendant failed to identify the confidential information that the paralegal obtained. However, the record demonstrates that, in his former position, the paralegal worked on matters directly related to this litigation, and gained considerable knowledge of defendant's affairs (*see Hernandez v Paoli*, 255 AD2d 130 [1st Dept 1998]), and that plaintiff's counsel did not properly "screen" him (NY St Bar Assn Comm on Prof Ethics Op 774 [2004]; *see Glover Bottled Gas Corp. v Circle M. Beverage Barn*, 129 AD2d 678 [2d Dept 1987]). The question whether there is a conflict of interest must be resolved in favor of disqualification (*Matter of Strasser*, 129 AD3d 457 [1st Dept 2015]; *Justinian Capital SPC v WestLB AG, N.Y. Branch*, 90 AD3d 585 [1st Dept 2011]).

No appeal lies from a writing declining to sign an order to show cause (*Kalyanaram v New York Inst. of Tech.*, 91 AD3d 532 [1st Dept 2012]).

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 28, 2017

CLERK

Andrias, J.P., Feinman, Gische, Gesmer, JJ.

3244 The People of the State of New York, Respondent, Ind. 1708/09

-against-

Kenneth Bazemore, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Diane N. Princ of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Lawrence K. Marks, J. at hearing; Renee A. White, J. at jury trial and sentencing), rendered February 7, 2012, convicting defendant of six counts of robbery in the first degree and three counts of robbery in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 12 years, unanimously affirmed.

The court properly denied defendant's motion to suppress a lineup identification. The lineup photograph reveals that the participants were all reasonably similar in appearance, so that there was no substantial likelihood that defendant would be singled out (*see People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]). Although defendant was the only person in the lineup not of Latino origin, this difference is not reflected in the actual appearances of the participants as shown

by the photo, which establishes that defendant and the fillers were sufficiently similar in skin tone and other features, as well as in apparent age, height and weight (*see People v Jackson*, 98 NY2d 555, 559 [2002]). Defendant's argument that the police could have recruited a more suitable set of fillers, without unreasonable delay, is speculative and unsupported by anything in the record.

The hearing court, which had reopened the hearing solely with regard to a photo identification not at issue on appeal, providently exercised its discretion when it declined to reopen the hearing with regard to the lineup as well. Defendant sought to inquire about a portion of the identifying witness's grand jury testimony in which the witness described his thought processes when he viewed the lineup. However, defendant failed to make a showing of "additional pertinent facts" (CPL 710.40[4]) that would have materially affected the determination on the *Wade* hearing (*see People v Clark*, 88 NY2d 552, 555-556 [1996).

After the identifying witness testified on cross-examination that he had not been involved in or charged with a particular assault, the trial court providently exercised its discretion in precluding further inquiry (*see e.g. People v Padilla*, 28 AD3d 365 [1st Dept 2006], *lv denied* 7 NY3d 792 [2006]). Initially, we note that although defendant raised this issue in an unsuccessful

CPL 440.10 motion that is not before this Court, our present review is limited to the trial record (*see People v Evans*, 16 NY3d 571, 575 [2011]). The prosecutor represented to the trial court that it was not the witness, but a person with the same name as the witness, who had been charged with the assault, and defendant did not establish a good faith basis for pursuing the matter any further. The court's ruling did not impair defendant's right to confront the witness (*see Delaware v Van Arsdall*, 475 US 673, 678-679 [1986]).

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

ENTERED: FEBRUARY 28, 2017

CLERK

Andrias, J.P., Feinman, Gische, Gesmer, JJ.

3247 In re Paul G. D. H.,

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

Yvonne H.,
Respondent-Appellant,

Graham Windham Services to Families and Children,
Petitioner-Respondent.

_____

Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for appellant.

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

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

_____

Order, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about December 4, 2015, denying respondent mother's motion to vacate an order of disposition, same court and Justice, entered on or about July 30, 2015, which, upon the mother's default, terminated her parental rights to the subject child and transferred custody and guardianship of the child to petitioner agency for the purpose of adoption, unanimously affirmed, without costs.

The mother failed to demonstrate both a reasonable excuse for the default and a meritorious defense to the permanent

neglect petition (*see Matter of Raymond C.M. [Marilyn M.]*, 132 AD3d 512, 512 [1st Dept 2015]). The mother's excuse that she was ill on the day of the fact-finding and dispositional hearings was unsupported by medical evidence (*id.*), and she failed to explain why it took her a month to contact her attorney to attempt to vacate her default. The medical note the mother provided was dated more than a month after her default and did not support her claim.

The mother also failed to demonstrate a meritorious defense, because she failed to support her assertion that she was compliant with mental health services and medication (*see Matter of Noah Martin Benjamin L. [Frajon B.]*, 139 AD3d 593, 593 [1st Dept 2016]).

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

ENTERED: FEBRUARY 28, 2017

CLERK

Andrias, J.P., Feinman, Gische, Gesmer, JJ.

3248 Patrick J. Thomas, Index 152318/15
Plaintiff-Respondent-Appellant,

-against-

G2 FMV, LLC, et al.,
Defendants-Appellants-Respondents.

_____

Olshan Frome Wolosky LLP, New York (Brian A. Katz of counsel), for appellants-respondents.

Meister Seelig & Fein LLP, New York (David E. Ross of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered February 10, 2016, which, to the extent appealed from as limited by the briefs, denied so much of defendants' motions as sought to dismiss the claims for malicious prosecution and defamation as against G2 FMV, LLC, Jonathan Todd Morley, and Dori Vicken Karjian and the indemnification claim in connection with the malicious prosecution claim, and granted so much of the motion as sought to dismiss the claims for punitive damages and indemnification in connection with the defamation claim, unanimously affirmed, with costs.

Plaintiff alleges that, for improper purposes, defendants brought an action for a declaration that he resigned from G2 Investment Group, LLC without "Good Reason" under G2 FMV, LLC's operating agreement.

The complaint states a cause of action for malicious prosecution (*see Facebook, Inc. v DLA Piper LLP [US]*, 134 AD3d 610, 613 [1st Dept 2015], *lv denied* 28 NY3d 903 [2016]). It pleads the absence of probable cause by alleging that no person of ordinary care and prudence would believe that plaintiff was not entitled to resign under the terms of the operating agreement (*see id.* at 613-614). It pleads malice by alleging that defendants brought the declaratory judgment action for the purpose of silencing plaintiff as a whistle blower, causing damage to his reputation, and wrongfully denying him fair market value for his shares in G2 FMV (*see Nardelli v Stamberg*, 44 NY2d 500, 502-503 [1978]). It pleads "special injury" by alleging with particularity that plaintiff had a consulting arrangement with Forbes Private Capital Group, LLC, and was terminated as a direct result of the allegations in the complaint in the declaratory judgment action (*see Dudick v Gulyas*, 277 AD2d 686, 688 [3d Dept 2000]; *Dermigny v Siebert*, 79 AD3d 460 [1st Dept 2010]).

The complaint states a cause of action for defamation (*see Dillon v City of New York*, 261 AD2d 34, 37-38 [1st Dept 1999]). Because the declaratory judgment action was "a sham action," defendants are not entitled to the protection of the absolute judicial privilege (*see Flomenhaft v Finkelstein*, 127 AD3d 634,

638 [1st Dept 2015]). Defendants' allegations that they had "Cause" under the operating agreement to terminate plaintiff, but decided not to do so, have no bearing on the issue of "Good Reason." Nor, contrary to defendants' contention, did plaintiff consent to publication of the defamatory statements by opposing defendants' motion to seal the complaint in the declaratory judgment action. However, defendants' conduct as alleged does not meet the standard for an award of punitive damages (*see Morsette v The "Final Call,"* 309 AD2d 249, 254 [1st Dept 2003], *lv dismissed* 5 NY3d 756 [2005]; *see also Prozeralik v Capital Cities Communications*, 82 NY2d 466, 479 [1993]).

The complaint states causes of action for malicious prosecution and defamation as against the individual defendants who served as corporate officers by alleging that those defendants participated in the commission of the torts (*see Board of Mgrs. of the S. Star v WSA Equities, LLC*, 140 AD3d 405 [1st Dept 2016]).

The indemnification claim was correctly sustained with respect to the malicious prosecution claim and dismissed with respect to the defamation claim. The indemnification provision in the operating agreement covers claims arising out of plaintiff's status as a member of G2 FMV; the declaratory judgment action was brought to preclude plaintiff from collecting

the fair market value of his units as a member of G2 FMV. However, the provision does not apply to claims arising out of plaintiff's status as an employee of G2 Investment Group, and the defamation claim is based upon plaintiff's actions as the chief operating officer of G2 Investment Group.

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

ENTERED: FEBRUARY 28, 2017

CLERK

Andrias, J.P., Feinman, Gische, Gesmer, JJ.

3249 The People of the State of New York, Respondent, Ind. 30231/13

-against-

Rodolfo Hoyos-Sanchez, Defendant-Appellant.

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

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

Order, Supreme Court, New York County (Juan M. Merchan, J.), entered on or about January 15, 2014, which adjudicated defendant a level one sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Pursuant to Correction Law § 168-a(2)(d)(ii), defendant, a New York resident, is required to register as a sex offender based upon his Connecticut conviction for a felony requiring such registration in that state, notwithstanding that the Connecticut felony is not equivalent to any New York felony. We reject defendant's equal protection argument, because he is being treated the same as a similarly situated Connecticut resident who was convicted of the same crime in that state and subsequently moved to New York (*see People v McGarghan*, 18 Misc 3d 811 {Sup Ct

New York County 2007], *affd* 83 AD3d 422 [1st Dept 2011]). Furthermore, the fact that defendant was physically in New York when he committed the underlying crime against a child, located in Connecticut, by electronic means, does not warrant a different conclusion. The underlying acts are deemed to have occurred in both jurisdictions (*see* CPL 20.60[1]; *People v Sposato*, 79 AD3d 420, 421 [1st Dept 2010]).

Defendant also argues that his Connecticut conviction was for a crime that is comparable to endangering the welfare of a child (Penal Law § 260.10), and that the legislature has not chosen to make that crime a registrable offense. However, the legislature has also chosen to make some out-of-state felonies registrable based solely on how they are treated in the foreign jurisdictions, with no equivalency requirement. Defendant has not shown that there is anything unconstitutional about this legislative choice.

We have considered and rejected defendant's remaining arguments.

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

ENTERED: FEBRUARY 28, 2017

CLERK

Andrias, J.P., Feinman, Gische, Gesmer, JJ.

3250 Underground Utilities Inc., Index 653124/14
Plaintiff-Appellant,

-against-

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

_____

Law Office of J.R. Stevenson, New York (John R. Stevenson of counsel), for appellant.

Satterlee Stephens LLP, New York (Alun W. Griffiths of counsel), for respondent.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered January 29, 2016, which, in this action alleging breach of fiduciary duty, granted defendant's motion to dismiss the complaint, unanimously affirmed, with costs.

The Custodial Service Agreement submitted with the motion to dismiss "flatly rejected" plaintiff's allegations, and thus dismissal was warranted (*Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 [1st Dept 2014]; *see also Leon v Martinez*, 84 NY2d 83, 88 [1994]; CPLR 3211[a][1]). The Custodial Service Agreement reflects that defendant owed no fiduciary or other obligation to plaintiff, who was a mere depositor and recipient of periodic bank statements on the accounts. The sole account holder and party with rights under the Custodial Service Agreement was nonparty City of New

York, which had the unfettered right to withdraw funds from the accounts on demand.

Plaintiff's various arguments that the Custodial Service Agreement did not apply to the accounts at issue are not persuasive, most notably because the Custodial Service Agreement expressly provides that it "supersedes all prior negotiations and [a]greements." The relevant withdrawals from the accounts were made in 2012, a time when the Custodial Service Agreement clearly governed. We also reject plaintiff's argument that the Custodial Service Agreement did not apply to the relevant accounts because plaintiff did not sign it or have notice of it. There is no requirement that a depositor or recipient of account statements must execute or have notice of an agreement that a bank has with the account's owner.

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 28, 2017

CLERK

Andrias, J.P., Feinman, Gische, Gesmer, JJ.

3251- Index 163083/15
3252 114 West 14 Realty LLC,
Plaintiff-Respondent,

-against-

Kenneth Brandman, et al.,
Defendants,

Western Development Group LLC, et al.,
Defendants-Appellants.

- - - - -

114 West 14 Realty LLC,
Plaintiff-Respondent,

-against-

Kenneth Brandman doing business as
United Realty Group Inc.,
Defendant-Appellant,

Western Development Group LLC, et al.,
Defendants.

_____

Ganfer & Shore, LLP, New York (Steven J. Shore of counsel), for Western Development Group, LLC, 53 Murray LLC, Jenny Haim, Joyce Reiss and Jackie Jengana, appellants.

Warshaw Burstein, LLP, New York (Bruce H. Weiner of counsel), for Kenneth Brandman, appellant.

Gallet Dreyer & Berkey LLP, New York (Morrell I. Berkowitz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered June 28, 2016, which denied the motion of defendants Western Development Group LLC, 53 Murray LLC, Jenny Jengana Haim a/k/a Jenny Haim, Individually and as a Managing Member of

Western Development Group LLC, Joyce Reiss, Individually and as a Member of 53 Murray LLC, and Jackie Jengana, s/h/a Jackie Langana Individually and as a Managing Member of 53 Murray LLC, to dismiss the complaint as against them, and order, same court and Justice, entered July 5, 2016, which denied the motion of defendant Kenneth Brandman d/b/a United Realty Group Inc. to dismiss the complaint, and granted plaintiff's cross motion for leave to amend the complaint and for Brandman to pay use and occupancy during the pendency of this action, unanimously reversed, on the law, with costs, and defendants' motions granted, and plaintiff's cross motion denied. The Clerk is directed to enter judgment accordingly.

Plaintiff's cause of action alleging fraud against all defendants is barred by the contract's specific disclaimer language and by the related "as is" and merger language contained in the contract (*see e.g. Mountain Cr. Acquisition LLC v Intrawest U.S. Holdings, Inc.*, 96 AD3d 633 [1st Dept 2012]). The rent-regulated status of an apartment in the building was not a matter peculiarly within the seller's knowledge, so as to permit a claim of justifiable reliance on defendants' alleged misrepresentations concerning that status despite the disclaimer language (*see Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128, 137 [1st Dept 2014]). Even assuming

that defendants' alleged misrepresentations about the rent-regulated status of an apartment were not discoverable by plaintiff, plaintiff's reliance upon those misrepresentations would not have been reasonable in light of the contract's language specifically warning plaintiff that defendants made no representations about the rent-regulated status of the building's units or defendants' compliance with the Loft Law (*see Rodas v Manitaras*, 159 AD2d 341 [1st Dept 1990]).

As the remaining causes of action against all moving defendants, concerning the same alleged misrepresentations, are duplicative of plaintiff's insufficient fraud claim, they are dismissed (*see e.g. Board of Mgrs. of the Chelsea 19 Condominium v Chelsea 19 Assoc.*, 73 AD3d 581 [1st Dept 2010]).

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

ENTERED: FEBRUARY 28, 2017

CLERK

Andrias, J.P., Feinman, Gische, Gesmer, JJ.

3253 Evelyn Oseguera, as Administratrix of the Estate of Edison Oseguera, Deceased,
Plaintiff-Respondent,

-against-

Lincoln Properties LLC, et al.,
Defendants-Respondents,

Azimuth Development Group, LLC,
Defendant-Appellant,

LMW Engineering Group, LLC, et al.,
Defendants.

Index 21242/14E

_____

Lester Schwab Katz & Dwyer, LLP, New York (Daniel S. Kotler of counsel), for appellant.

Kramer, Dillof, Livingston & Moore, New York (Matthew Gaier of counsel), for Evelyn Oseguera, respondent.

Ronald P. Berman, New York, for Lincoln Properties LLC, 383 Morris, LLC, Kevin Youghoubi and Abbas Youghoubi, respondents.

_____

Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered May 9, 2016, which, inter alia, denied defendant Azimuth Development Group, LLC's motion for summary judgment dismissing the complaint and all cross claims against it, unanimously affirmed, without costs.

Defendant Azimuth established prima facie that it could not be held liable for the decedent's injuries in common-law negligence or under Labor Law §§ 200, 240(1), or 241(6) by

submitting evidence that it did not own the subject premises, was not the general contractor on the project, was not the agent of the owner or general contractor, and did not supervise or control the decedent's work (*see Kosovrasti v Epic [217] LLC*, 96 AD3d 695 [1st Dept 2012]; *Huerta v Three Star Constr. Co., Inc.*, 56 AD3d 613, 613 [2d Dept 2008], *lv denied* 12 NY3d 702 [2009]).

In opposition, plaintiff and defendants-respondents submitted evidence that raises an issue of fact whether Azimuth played a much greater role than it claims in coordinating and arranging for the work that resulted in the accident (*see Kosovrasti*, 96 AD3d at 696; *see also Utica Mut. Ins. Co. v Style Mgt. Assoc. Corp.*, 28 NY3d 1018 [2016]). At the very least, this evidence – an affidavit by defendant Abbas Yaghoubi,[1] a member of defendants Lincoln Properties LLC and 383 Morris LLC, in

[1]The name is misspelled in the caption.

conjunction with certain documentary evidence – establishes that further discovery is warranted (*see* CPLR 3212[f]).

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

ENTERED: FEBRUARY 28, 2017

CLERK

Andrias, J.P., Feinman, Gische, Gesmer, JJ.

3254- Ind. 1268/13
3255 The People of the State of New York, 2945/13
Respondent,

-against-

Emmanuel Suzana,
Defendant-Appellant.

_____

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

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

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Judgments, Supreme Court, New York County (Michael J. Obus, J.), rendered December 12, 2013, convicting defendant, upon his pleas of guilty, of criminal possession of a weapon in the fourth degree and criminal mischief in the third degree, and sentencing him to concurrent terms of six months, unanimously affirmed.

Defendant made a valid waiver of his right to appeal (*see People v Bryant*, 28 NY3d 1094 [2016]). The court did not conflate the right to appeal with the rights automatically forfeited by pleading guilty. Instead, it separately explained to defendant that as part of his plea bargain, he was agreeing to waive his right to appeal. Defendant confirmed that he understood, and the oral colloquy was supplemented by a written waiver that was explained to defendant by his counsel with the

aid of an interpreter.

Regardless of whether defendant validly waived his right to appeal, his argument regarding the court's summary denial of a portion of his suppression motion is unpreserved and unavailing (*see People v Bayron*, 119 AD3d 444 [1st Dept 2014], *lv denied* 25 NY3d 987 [2015]).

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

ENTERED: FEBRUARY 28, 2017

CLERK

Andrias, J.P., Feinman, Gische, Gesmer, JJ.

3261 The People of the State of New York, Ind. 3058/12
Respondent,

-against-

Herminio Abreu,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Samuel L. Yellen of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Margaret L. Clancy, J.), rendered May 13, 2014 unanimously affirmed.

Although we do not find that defendant made a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 28, 2017

CLERK

Andrias, J.P., Feinman, Gische, Gesmer, JJ.

3262- Index 603431/08
3262A Sebastian Holdings, Inc.,
Plaintiff-Appellant,

-against-

Deutsche Bank, AG,
Defendant-Respondent.

_____

Zaroff & Zaroff LLP, Garden City (Richard M. Zaroff of counsel), for appellant.

Cahill Gordon & Reindel LLP, New York (David G. Januszewski of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Saliann Scarpulla, J.), entered January 27, 2016, which, insofar as appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the amended complaint, and denied plaintiff's motion for leave to serve and file a proposed second amended complaint, unanimously affirmed, with costs.

The claims in this action are the subject of a prior final judgment of an English court, which found in defendant's favor and denied plaintiff's counterclaims,[2] awarding defendant a sum of money.

The motion court properly accorded recognition to the judgment of the English court based on the doctrine of comity.

[2]Plaintiff was the defendant in the English action.

Having failed to show fraud in the procurement of the judgment or that recognition of the judgment would do violence to, or be fundamentally offensive and inimical to, some strong public policy of this State, plaintiff is precluded from attacking the validity of the judgment in this action (*Greschler v Greschler*, 51 NY2d 368, 376 [1980]; *Matter of Gotlib v Ratsutsky*, 83 NY2d 696, 699-700 [1994]).

To the extent the proposed claims are based upon different theories or seek a different remedy from the claims decided in the English action, they nevertheless are barred because they are predicated upon the same series of transactions and occurrences that formed the basis of that action (*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]), and they could have been raised in that action (*see Wietschner v Dimon*, 139 AD3d 461 [1st Dept 2016], *lv denied* 28 NY3d 901 [2016]; *Pahmer v Touche Ross & Co.*, 271 AD2d 371 [1st Dept [2000]).

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

ENTERED: FEBRUARY 28, 2017

CLERK

Andrias, J.P., Feinman, Gische, Gesmer, JJ.

3263 The People of the State of New York, Respondent, Ind. 2709/13

-against-

Ramon Henriquez, Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Brittany N. Francis of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered September 8, 2014, convicting defendant, after a jury trial, of attempted assault in the first degree, assault in the second degree, and criminal possession of a weapon in the third degree, and sentencing him, as a second violent felony offender, to an aggregate term of 13 years, unanimously affirmed.

The court providently exercised its discretion when it denied defendant's request for missing witness charges concerning three eyewitnesses to the stabbing. The People sufficiently established that the victim's half brother, who was present at the stabbing but whose contacts with the victim were very limited, was unavailable (*see People v Savinon*, 100 NY2d 192 [2003]). His whereabouts were unknown by the time of trial, and the People, despite diligent efforts, including attempts to serve

him with a subpoena at his last known address, could not locate him, and could not procure his attendance. Thus, the record establishes that the People did not "merely go through the motions of asking the witness to testify," with the "ulterior goal of keeping the witness off the stand" (*id*. at 200; *see People v Brooks*, 62 AD3d 511, 511 [1st Dept], *lv denied* 12 NY3d 923 [2009]). Regarding the two other eyewitnesses, defendant failed to establish that they were in the People's control for purposes of a missing witness charge, regardless of whether they were available. Even if they were friends of the victim's half brother, there was no evidence that they were friends of the victim; on the contrary, there was evidence that they were neighbors and friends of defendant.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters of strategy not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

Defendant has not shown that any of counsel's alleged deficiencies with regard to a prior consistent statement by the victim and related matters fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case (*see People v Gross*, 26 NY3d 689, 694 [2016]; *see also People v Ludwig*, 24 NY3d 221, 230 [2014]).

The court properly denied defendant's request for new counsel, made just before trial, and renewed just after trial was under way (*see People v Arroyave*, 49 NY2d 264, 270-72 [1980]). The court conducted an adequate inquiry into defendant's request (*see People v Sides*, 75 NY2d 822, 824 [1990]; *see also People v Linares*, 2 NY3d 507, 510 [2004]). The record does not demonstrate any serious dispute between defendant and his retained counsel, other than an issue about payment of fees, which was satisfactorily resolved (*see People v Kolon*, 37 AD3d

340, 341 [1st Dept], *lv denied* 8 NY3d 947 [2007]), and defendant's claim of a conflict is unavailing.

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 28, 2017

CLERK

Andrias, J.P., Feinman, Gische, Gesmer, JJ.

3264-
3264A Tonyia Watson,
Claimant-Appellant,

-against-

The State of New York,
Defendant-Respondent.

Claim 125779
126184

_____

Tonyia B. Watson, appellant pro se.

Eric T. Schneiderman, Attorney General, New York (David Lawrence III of counsel), for respondent.

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Orders, Court of Claims of the State of New York (Thomas H. Scuccimarra, J.), entered October 14, 2015 and (Faviola A. Soto, J.) entered October 22, 2015, which granted defendant's motions to dismiss the claims, unanimously affirmed, without costs.

The Court of Claims properly dismissed the first claim because claimant's service thereof was untimely (*see Miles v City Univ. of N.Y.*, 126 AD3d 609 [1st Dept 2015]; Court of Claims Act § 10[3]). The court also properly found that both claims at issue failed to comply with the pleading requirements of Court of Claims Act § 11(b) (*see Lepkowski v State of New York*, 1 NY3d 201, 209 [2003]). Notwithstanding claimant's pro se status, strict construction of and compliance with such statutory preconditions to suit under the Court of Claims Act is required (*see Kolnacki v State of New York*, 8 NY3d 277, 280-281 [2007]).

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

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

ENTERED: FEBRUARY 28, 2017

CLERK

Andrias, J.P., Feinman, Gische, Gesmer, JJ.

3266N- Index 155741/13
3267N-
3268N- Swiss Re Financial Services, Corp.,
Plaintiff-Respondent,

-against-

Michelle Lynn McGuirk,
Defendant-Appellant.

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Michelle Lynn McGuirk, appellant pro se.

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Appeals from orders, Supreme Court, New York County (Cynthia S. Kern, J.), entered December 3, 2013, September 19, 2013, and July 11, 2013, which, respectively, denied respondent's motion to renew petitioner's motion to quash a subpoena duces tecum, granted petitioner's motion to quash, and so-ordered a stipulation between the parties, unanimously dismissed, without costs.

Respondent's right to appeal from these discovery orders (issued in connection with a proceeding she commenced before the New York State Division of Human Rights [DHR]) terminated upon entry of the order of this Court confirming DHR's final order, denying the petition, and dismissing the proceeding (*Matter of*

McGuirk v New York State Div. of Human Rights, 139 AD3d 570 [1st Dept 2016]) (*see Matter of Aho*, 39 NY2d 241, 248 [1976]).

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

ENTERED: FEBRUARY 28, 2017

CLERK

Andrias, J.P., Feinman, Gische, Gesmer, JJ.

3269N- Index 151596/14
3270N Joseph Earl Jackson,
Plaintiff-Appellant,

-against-

OpenCommunications
Omnimedia, LLC, et al.,
Defendants-Respondents,

Sally O'Dowd,
Defendant.

_____

Akin Law Group PLLC, New York (Robert D. Salaman of counsel), for appellant.

Wiggin & Dana LLP, New York (Mary A. Gambardella of counsel), for respondents.

_____

Order, Supreme Court, New York County (Donna M. Mills, J.), entered December 15, 2015, which, insofar as appealed from, granted defendants-respondents' CPLR § 3126 motion to the extent of awarding them attorneys' fees and costs associated with a forensic examination of plaintiff's laptop computer, and order, same court (Michael L. Katz, J.), entered February 10, 2016, which awarded defendants a total of $40,994.80 in said fees and costs, unanimously affirmed, without costs.

The court's grant of relief under CPLR § 3126 was proper. Contrary to the court's conclusion, we find that plaintiff's pattern of noncompliance with discovery demands and a court-

ordered stipulation supports an inference of willful and contumacious conduct, which further justifies imposition of sanctions (*see e.g. Jones v Green*, 34 AD3d 260, 261 [1st Dept 2006]; *Pimental v City of New York*, 246 AD2d 467 [1st Dept 1998]). Here, a forensic examination of plaintiff's laptop, which was conducted pursuant to a court-ordered stipulation entered into after plaintiff's repeated refusals to produce all requested discovery, revealed numerous pages of documents that should have been turned over to defendants, as well as privileged attorney-client communications improperly accessed through defendant John Morris' email account (*see Suffolk P.E.T. Mgt., LLC v Anand*, 105 AD3d 462 [1st Dept 2013]). Further, plaintiff failed to produce a flash drive, which he himself admitted existed at the time of his deposition, now claiming that the transcript of his testimony was inaccurate.

We decline to reduce the amount of the award. Any challenge by plaintiff to the amount awarded has been waived, as he never objected to the proposed order and bill of costs submitted by defendants. His order to show cause sought only to reargue the order granting CPLR § 3126 relief, and did not dispute the specific amount of fees and costs sought by defendants. In any event, even if the order to show cause were deemed an objection, it was untimely, as plaintiff filed it less then two days prior

to the notice date of defendants' notice of settlement (see Uniform Rules for Trial Cts [22 NYCRR] § 202.48[c][2]).

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

ENTERED: FEBRUARY 28, 2017

CLERK

Tom, J.P., Saxe, Feinman, Kahn, JJ.

2457-
2458 In re New York City Asbestos Litigation — Index 190315/12

- - - - -

Mary Juni, etc.,
Plaintiff-Appellant,

-against-

A.O. Smith Water Products Co. et al.,
Defendants,

Ford Motor Company,
Defendant-Respondent.

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The Coalition for Litigation Justice, Inc., the Chamber of Commerce of the United States of America, the Business Council of New York State and the National Association of Manufacturers,
Amici Curiae.

_____

Weitz & Luxenberg, P.C., New York (Alani Golanski of counsel), for appellant.

McGuire Woods, LLP, New York (J. Tracy Walker, IV of the bar of the State of Virginia, admitted pro hac vice, of counsel), for respondent.

Malaby & Bradley LLC, New York (Robert C. Malaby of counsel), for amici curiae.

_____

Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered June 3, 2015, affirmed, without costs. Appeal from order, same court and Justice, entered April 13, 2015, dismissed, without costs.

Opinion by Saxe, J. All concur except Kahn, J. who concurs in the Opinion by Saxe, J. and in a separate Opinion, and Feinman, J. who dissents in an Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David B. Saxe
Paul G. Feinman
Marcy L. Kahn, JJ.

2457
2458
Index 190315/12

_____x

In re New York City Asbestos Litigation

- - - - -

Mary Juni, etc.,
Plaintiff-Appellant,

-against-

A.O. Smith Water Products Co. et al.,
Defendants,

Ford Motor Company,
Defendant-Respondent.

- - - - -

The Coalition for Litigation Justice, Inc., the Chamber of Commerce of the United States of America, the Business Council of New York State and the National Association of Manufacturers,
Amici Curiae.

_____x

Plaintiff appeals from the judgment of the Supreme Court, New York County (Barbara Jaffe, J.), entered June 3, 2015, in favor of defendant Ford Motor Company, and from the order of the same court and Justice, entered April 13, 2015.

Weitz & Luxenberg, P.C., New York (Alani Golanski of counsel), for appellant.

McGuire Woods LLP, New York (J. Tracy Walker, IV of the bar of the State of Virginia, admitted pro hac vice, and Tennille J. Checkovich of counsel), and Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Nancy L. Pennie and Oded Burger of counsel), for respondent.

Malaby & Bradley, LLC, New York (Robert C. Malaby and Maryellen Connor of counsel), for amici curiae.

Linda Popejoy, Washington, D.C., and William L. Anderson, Washington, D.C., for the Coalition for Litigation Justice, Inc., amicus curiae.

SAXE, J.

This appeal requires us to address whether a plaintiff who seeks damages for contracting mesothelioma based on exposure to a defendant's asbestos-containing products must satisfy the standards expressed in *Parker v Mobil Oil Corp.* (7 NY3d 434 [2006]) and *Cornell v 360 W. 51st St. Realty, LLC* (22 NY3d 762 [2014]) by offering evidence that, if it does not provide an exact mathematical quantification of that exposure, at least provides some "scientific expression" (*Parker* at 449) of the level of exposure to toxins in defendant's products that was sufficient to have caused the disease.

Plaintiff's decedent, Arthur Juni, commenced this personal injury action due to his mesothelioma allegedly caused by claimed exposure to asbestos-containing products while he worked as an auto mechanic. Juni died on March 16, 2014, after which his widow, Mary Juni, who also has a loss of consortium claim, was substituted as administratrix for Juni's estate. This appeal concerns only the trial of claims against defendant Ford Motor Company, based on Juni's exposure to asbestos over the years he worked on the brakes, clutches, and manifold gaskets of Ford vehicles, during which work, plaintiff says, asbestos dust was released.

After a trial in which a jury returned a verdict in

plaintiff's favor, the trial court granted defendant Ford Motor Company's motion to set aside the verdict (CPLR 4404[a]). We affirm that determination.

As the trial court recognized, under CPLR 4404(a) the court may set aside a verdict or judgment entered after trial, and direct that judgment be entered in favor of a party entitled to judgment as a matter of law, if the verdict was not supported by legally sufficient evidence, since under those circumstances there is "no valid line of reasoning and permissible inferences which could possibly lead rational [jurors] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]).

As the trial court pointed out, plaintiff was obliged to prove not only that Juni's mesothelioma was caused by exposure to asbestos, but that he was exposed to sufficient levels of the toxin from his work on brakes, clutches, or gaskets, sold or distributed by defendant, to have caused his illness. We agree with the trial court that the standards enunciated by *Parker* and *Cornell* are applicable here, that they are not altered by *Lustenring v AC&S, Inc.* (13 AD3d 69 [1st Dept 2004], *lv denied* 4 NY3d 708 [2005]) or other asbestos cases, and that plaintiff's evidence failed to satisfy that standard.

The Court of Appeals recently succinctly reiterated the

standard in *Sean R. v BMW of N. Am., LLC* (26 NY3d 801 [2016]):

> "In toxic tort cases, an expert opinion on causation must set forth (1) a plaintiff's exposure to a toxin, (2) that the toxin is capable of causing the particular injuries plaintiff suffered (general causation) and (3) that the plaintiff was exposed to sufficient levels of the toxin to cause such injuries (specific causation) (*see Parker v Mobil Oil Corp.*, 7 NY3d 434, 448 [2006]). Although it is 'not always necessary for a plaintiff to quantify exposure levels precisely' (*id.*), we have never '"dispensed with a plaintiff's burden to establish sufficient exposure to a substance to cause the claimed adverse health effect' (*Cornell v 360 W. 51st St. Realty, LLC*, 22 NY3d 762, 784 [2014]). 'At a minimum, . . . there must be evidence from which the factfinder can conclude that the plaintiff was exposed to levels of th[e] agent that are known to cause the kind of harm that the plaintiff claims to have suffered' (*id.*, quoting *Wright v Willamette Indus., Inc.*, 91 F3d 1105, 1107 [8th Cir 1996])" (26 NY3d at 808-809).

Therefore, the fact that asbestos, or chrysotile, has been linked to mesothelioma, is not enough for a determination of liability against a particular defendant; a causation expert must still establish that the plaintiff was exposed to sufficient levels of the toxin from the defendant's products to have caused his disease (*see Sean R.*, 26 NY2d at 809). Even if it is not possible to quantify a plaintiff's exposure, causation from exposure to toxins in a defendant's product must be established through some scientific method, such as mathematical modeling

based on a plaintiff's work history, or comparing the plaintiff's exposure with that of subjects of reported studies (*Parker* at 449).

The evidence presented by plaintiff here was insufficient because it failed to establish that the decedent's mesothelioma was a result of his exposure to a sufficient quantity of asbestos in friction products sold or distributed by defendant Ford Motor Company. Plaintiff's experts effectively testified only in terms of an increased risk and association between asbestos and mesothelioma (*see Cornell*, 22 NY3d at 783-784), but failed to either quantify the decedent's exposure levels or otherwise provide any scientific expression of his exposure level with respect to Ford's products (*see Sean R.*, 26 NY3d at 809; *Parker*, 7 NY3d at 449).

While both of plaintiff's experts asserted that the asbestos in Ford's friction products was a cause of Juni's mesothelioma, the concessions made by both of plaintiff's experts so undermined their assertions of causation as to render those assertions groundless or unsupported. Dr. Jacqueline Moline, plaintiff's expert in internal medicine and occupational and environmental science, asserted that Juni's "cumulative exposures to asbestos caused his mesothelioma," referring to "the sum total of [his] exposure to asbestos ... over [his] lifetime," but she admitted

that "there were no measurements of what Mr. Juni was exposed to," noting that "[h]e was exposed in different locations where historically there have been mixed exposures," and that "[a]ll of his occupational exposures were substantial factors" contributing to his disease. Further, Dr. Moline's testimony that the visibility of the dust itself indicates the magnitude of the exposure "at levels that are ... capable of causing disease" was undermined when on cross-examination she conceded that studies have shown that more than 99% of the debris from brake wear is not comprised of asbestos fibers. In addition, Dr. Moline acknowledged that most chrysotile fibers in brake pads undergo a transformation during the braking process, and she did not know whether the fibers from the brake debris to which Juni was exposed were still active.

Plaintiff's other expert witness, Dr. Steven Markowitz, an internist, occupational medicine specialist, and epidemiologist, provided opinions that, after cross-examination, were similarly lacking in support on the issue of causation by Ford products. While he asserted that "chrysotile in friction products, if it becomes airborne and inhaled, can cause malignant mesothelioma" he acknowledged that 21 of 22 epidemiological studies that addressed asbestos exposure to mechanics working on friction products found no increased risk of mesothelioma. He also

acknowledged that chrysotile has a curly and flexible structure, with shorter fibers, dissolves in the lungs, to an extent, and can clear the lungs through macrophages and translocation, and that when asbestos fibers in braking equipment are mixed with certain resins during manufacturing, "they would not be respirable." Further, Dr. Markowitz conceded that the high heat generated within the brake drums when the brakes are applied converts most of the asbestos in the brake lining to another mineral known as forsterite, and that studies have shown that only 1% of the dust blown out from brake drums is comprised of asbestos.

The trial court was at pains to point out that unlike here, in other litigation Dr. Markowitz has offered a scientific basis for claims that visible dust emanating from a particular defendant's asbestos-containing product contained enough asbestos dust to be hazardous, citing *Caruolo v John Crane, Inc.* (226 F3d 46 [2d Cir 2000]), in which Markowitz cited studies that measured the amount of asbestos fibers released by the products there at issue, and showed that the amount was hazardous. In contrast, no such supportive reports were offered at this trial. Rather, the reports or studies of mesothelioma in garage mechanics or those who work with friction products in a vehicle repair setting showed only an association between the work and mesothelioma.

Our dissenting colleague suggests that the proof in asbestos cases need not be analyzed using the same criteria as those we use to analyze exposure in other toxic tort cases, namely, the quantification or other "scientific expression of exposure" required by *Parker*. The dissent also suggests that applying the same criteria would set an insurmountable standard for asbestos claims. However, there is no valid distinction to be made between the difficulty of establishing exposure to, say, benzene in gasoline and exposure to asbestos. In each type of matter, a foundation must be made to support an expert's conclusion regarding causation.

Moreover, our decisions in *Lustenring v AC&S, Inc.* (13 AD3d 69 [2004], *lv denied* 4 NY3d 708 [2005], *supra*) and other asbestos cases (*see e.g. Penn v Amchem Prods.*, 85 AD3d 475, 476 [1st Dept 2011]; *Matter of New York Asbestos Litig.*, 28 AD3d 255, 256 [1st Dept 2006]) do not justify allowing a judgment in an asbestos case to stand based solely on a bare conclusion that because the plaintiff worked with the defendant's asbestos-containing products, those products were a contributing cause of the plaintiff's mesothelioma. The rulings in each of those cases are based on their discrete facts. Where the courts relied on evidence linking visible dust to the use of the particular defendant's product, expert testimony established that the extent

and quantity of the dust to which the plaintiffs had been exposed contained enough asbestos to cause the mesothelioma. In none of those case was the mere presence of visible dust considered sufficient alone to prove causation. For instance, in *Lustenring*, the evidence established that "both plaintiffs worked all day for long periods in clouds of dust," which the expert testimony stated "necessarily contained enough asbestos to cause mesothelioma" (13 AD3d at 70]). Here, in contrast to the expert testimony in *Penn v Amchem Prods.* (85 AD3d at 476), the testimony of plaintiff's expert as to the contents of the dust to which the decedent was exposed was equivocal at best, and was insufficient to prove that the dust to which Juni was exposed contained any asbestos, or enough to cause his mesothelioma.

The trial court also correctly declined to adopt plaintiffs' theory of cumulative exposure to support the verdict. Neither of plaintiff's experts stated a basis for their assertion that even a single exposure to asbestos can be treated as contributing to causing an asbestos-related disease. Moreover, reliance on the theory of cumulative exposure, at least in the manner proposed by plaintiffs, is irreconcilable with the rule requiring at least *some* quantification or means of assessing the amount, duration, and frequency of exposure to determine whether exposure was sufficient to be found a contributing cause of the disease (*see*

Parker, 7 NY3d at 449).

The dissent references a "consensus from the medical and scientific communities that even low doses of asbestos exposure, above that in the ambient environment, are sufficient to cause mesothelioma." We do not agree that the existence of any such consensus entitles a particular plaintiff to be awarded judgment against a particular defendant by merely establishing some exposure to a product containing any amount of asbestos. Rather, the standards set by *Parker* and *Cornell*, require that a plaintiff claiming that a defendant is liable for causing his or her mesothelioma must still establish some scientific basis for a finding of causation attributable to the particular defendant's product. Here, the experts' broad conclusions on causation lacked a sufficient foundation, and were therefore legally insufficient to establish that Juni's exposure to asbestos from brakes, clutches, or gaskets sold or distributed by defendant constituted a significant contributing factor in causing Juni's mesothelioma. There is therefore no valid line of reasoning or permissible inference which could have led the jury to reach its result.

Accordingly the judgment of the Supreme Court, New York County (Barbara Jaffe, J.), entered June 3, 2015, in favor of defendant Ford Motor Company, should be affirmed, without costs.

The appeal from the order of the same court and Justice, entered April 13, 2015, should be dismissed, without costs, as subsumed in the appeal from the judgment.

All concur except Kahn, J. who concurs in the Opinion by Saxe, J. and in a separate Opinion, and Feinman, J. who dissents in an Opinion.

KAHN, J. (concurring)

I join fully in the opinion of the majority, and write separately solely to address an important issue of our state's jurisprudence.

In contrast to the federal government and most of our sister states, New York does not base its law of evidence on statutorily codified rules. Instead, we rely principally upon the common law, as articulated by the Court of Appeals.

We additionally part ways with the majority of other jurisdictions in how our courts determine the admissibility of expert scientific testimony. Thus, we have not adopted any rules addressing the reliability of expert witness testimony comparable to those codified in Federal Rules of Evidence (FRE) 702.[1]

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[1] FRE 702 provides:

"A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

"(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

"(b) the testimony is based on sufficient facts or data;

"(c) the testimony is the product of reliable principles and methods; and

"(d) the expert has reliably applied the principles and methods to the facts of the case."

Further, we are among the small minority of states that have not adopted the rule of *Daubert v Merrell Dow Pharms., Inc.* (509 US 579 [1993]) requiring that all scientific testimony, whether novel or not, be based upon reliable scientific principles properly applied, and charging the trial judge to act as the gatekeeper to ensure that result. Under *Daubert*, the expert witness must explain the application of the particular scientific principle to the facts at hand, ruling out alternative hypotheses and arriving at logical conclusions. Neither speculation nor generalized conclusions will pass muster under *Daubert*.

New York has consistently resisted adopting the *Daubert* standard as a means of assuring the reliability of scientific evidence put before our juries (*see e.g. Giordano v Market Am., Inc.*, 15 NY3d 590, 601 [2010]; *People v LeGrand*, 8 NY3d 449 [2007]; *People v Lee*, 96 NY2d 157 [2001]; *People v Wesley*, 83 NY2d 417, 435-436 [1994] [Kaye, Ch. J., concurring]). With respect to the admissibility and sufficiency of evidence to prove causation in a long-latency toxic tort case, however, the New York Court of Appeals established its own standard a decade ago in *Parker v Mobil Oil Corp.* (7 NY3d 434 [2006]). There the Court acknowledged the tension present in cases involving long-latency personal injuries from exposure over time to toxic substances:

"As with any other type of expert evidence, we

> recognize the danger in allowing unreliable or speculative information (or 'junk science') to go before the jury with the weight of an impressively credentialed expert behind it. But, it is similarly inappropriate to set an insurmountable standard that would effectively deprive toxic tort plaintiffs of their day in court. It is necessary to find a balance between these two extremes" (*Parker*, 7 NY3d at 447).

To achieve this balance, the Court announced the following standard:

> "It is well-established that an opinion on causation should set forth a plaintiff's exposure to a toxin, that the toxin is capable of causing the particular illness (general causation) and that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation) . . . . [It] is not always necessary for a plaintiff to quantify exposure levels precisely or use the dose-response relationship, provided that whatever methods an expert uses to establish causation are generally accepted in the scientific community"(*Parker*, 7 NY3d at 448 [internal citations omitted]).

The *Parker* Court went on to suggest a nonexclusive list of alternative methods for proving causation in such cases that could satisfy its balancing test, including establishing the intensity of the plaintiff's exposure, estimations using mathematical modeling, or, in an appropriate case, qualitative comparison of the plaintiff's particular exposure level to the exposure levels of subjects in other studies (*Parker*, 7 NY3d at 449). Reviewing the case before it, however, the Court of Appeals, while acknowledging the plaintiff's exposure to the carcinogenic substance, rejected the plaintiff's expert evidence

as too "general, subjective and conclusory," and lacking in specific relation to the plaintiff's exposures, to satisfy its announced standard (*id.*).

In this case, the dissent urges that this Court create an exception to the settled rule of *Parker* as to proof of causation to permit a finding of liability in asbestos friction product use cases through a plaintiff's unquantified cumulative exposures to "visible dust" which contained an unknown amount of chrysotile asbestos fibers,[2] based principally on the scientifically settled general association between asbestos exposure and mesothelioma and without evidence of either general or specific causation. However, were we to carve such a gaping hole in the *Parker* standard of proof on causation, eviscerating its fundamental evidentiary requirements, we would effectively overrule the Court of Appeals' holding in *Cornell v 360 W. 51st St. Realty, LLC* (22 NY3d 762, 783 [2014]), which explained that references to risk, linkage and association are not sufficient in themselves to establish causation in long-latency toxic exposure cases.

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[2] Typically, chrysotile asbestos fibers are less than two microns in length and are, therefore, not visible to the naked eye (*see* BioMed Central, Environmental Health, *Quantification of Short and Long Asbestos Fibers to Assess Asbestos Exposure: A Review of Fiber Size Toxicity*, July 21, 2014, available at https://ehjournal.biomedcentral.com/articles/10.1186/1476-069X-13-59 [accessed Feb. 10, 2017]).

The approach urged by the dissent, regardless of its laudable goal in seeking compensation for injured workers, is not available to us. In view of the singular role of the Court of Appeals in advancing policy changes in the common law (*cf. People v Keta*, 165 AD2d 172, 177 [2d Dept 1991] [recognizing "the policy and rule-making function traditionally perceived as the exclusive domain of the Court of Appeals"], *revd on other grounds sub nom. People v Scott*, 79 NY2d 474 [1992]; Hopkins, *The Role of An Intermediate Appellate Court*, 41 Brooklyn L Rev 459, 460, 467 [1974-75]), and given the key role the *Parker* rule plays in our state's evidence jurisprudence on expert witness testimony, any change in this regard must be made by the Court of Appeals.

FEINMAN, J. (dissenting)

In this products liability action based on defendant Ford Motor Company's failure to warn decedent of the dangers of asbestos-containing products it sold or distributed, the jury returned a verdict in plaintiffs' favor after a trial lasting 20 days. Among its findings, the jury determined (1) that decedent Arthur Juni, Jr. was exposed to asbestos from products sold or distributed by Ford Motor Company, (2) that Ford failed to exercise reasonable care by not providing an adequate warning with respect to the hazards posed by such exposure, (3) that Ford's failure to warn was a substantial cause of his injury, and (4) that Ford acted with reckless disregard for the safety of others. While the jury found that decedent was also exposed to asbestos from products or equipment manufactured, sold, distributed or used by some other entities, except for nonparty Orange & Rockland Utilities (O&R), it found that those other companies did not fail to exercise reasonable care by not providing decedent with adequate warnings, or that those companies' failures to warn were not a substantial contributing factor in causing decedent's injuries. The jury allocated fault, 49% to Ford and 51% to O&R, and awarded money damages.

The trial court granted defendant Ford's postverdict motion to set aside the verdict, and dismissed the complaint, on the

ground that there was legally insufficient evidence to establish that the decedent developed mesothelioma as a result of his exposure to asbestos-containing friction products sold or distributed by Ford while he was working as an automobile mechanic. The majority now affirms. Because the trial court misapplied the standard of review for legal sufficiency, and misapplied the law concerning general and specific causation in asbestos cases, I would reverse and remand the matter to the trial court to determine the branches of Ford's postverdict motion it did not reach.[1] Simply put, affording the plaintiffs the benefit of every favorable inference, as we must when reviewing the legal sufficiency of the evidence, the jury's verdict was not "utterly irrational." Because the trial court and the majority have, in the guise of a legal sufficiency analysis, inappropriately substituted their assessment of the credibility of the witnesses for that of the jury, I dissent.

Trial Evidence

Decedent Arthur Juni, Jr. was diagnosed with mesothelioma in 2012 and died in early 2014. At trial, his deposition was read

[1] The remaining branches in Ford's motion seek a weight of the evidence review and a new trial (as opposed to dismissal), renewal of the court's prior order on the consolidation motion, remittitur, and offsets from settlements prior to entry of judgment.

to the jury. According to Juni, he worked from 1966 to 2009 as an auto mechanic in two garages owned by O&R, servicing predominantly Ford vehicles. For more than 25 years, he was exposed directly and indirectly to asbestos-laden dust released from new and used brakes, clutches and gaskets when they were cleaned with "compressed air," and from scraping off asbestos intake on manifold and engine gaskets. In 1988, he was issued a respirator, and plaintiffs made no claim of respirable asbestos exposure thereafter.

Juni had previous exposure to asbestos when he worked as a driver for O&R in the summers of 1961, 1962 and 1963, because his truck was housed in a machine shop accessed through a one-room power station described by Juni as having asbestos "all over the place," on the floor and "everywhere." In addition, he was exposed to asbestos in 1963 and 1964, when he worked as a courier for O&R, delivering packages to the many company offices, one of which was at the same power station with the asbestos on the floor.

The rest of Juni's long work life was as a mechanic in the two O&R-owned garages. He began as a third-grade mechanic in 1964 in O&R's Nyack garage working the night shift. His primary work was pumping gas, changing oil and other regular maintenance of vehicles, but he was exposed to the dust from the work of

other mechanics doing brake and clutch work on various types of mostly Ford vehicles. Juni's duties included sweeping up the asbestos-laden dust generated by the other mechanics.

In 1966, he was transferred to a much larger garage owned by O&R, and began as a second-class mechanic working at night where he helped service a fleet of up to 500 mostly Ford vehicles. On a weekly basis, he performed brake work, removing and dumping brake drums from Ford trucks to the floor, which raised asbestos-filled brake dust. He was promoted to first-class mechanic and became a foreman in 1970. Juni stated that he performed a lot of welding work for a couple of years, using an asbestos blanket for protection. He also installed new Ford brakes and removed old Ford brakes from a variety of Ford vehicles, and installed other brands of brakes in Ford vehicles and in other non-Ford trucks. The packaging of new brakes contained asbestos, and when Juni opened the packages, asbestos dust was released into the air. Sometimes he scuffed new brakes with sandpaper, which also released dust into the air, although he described this as a "quick process." Before 1979, Juni assisted with clutch work about once every three months, but thereafter he worked on a weekly basis with clutches, the bell housings of which contained asbestos, for Ford's 1979 C-8000 cab-over bucket trucks. The Ford clutches of the Ford trucks had to be replaced about once a

month, and on average, a clutch job took about four hours. About once a month, he replaced clutches made by various companies on non-Ford backhoes. He did clutch work for 10 years.

He replaced Ford manifold gaskets in the Ford C-8000 cab-over bucket trucks. This involved taking the engine apart and removing and cleaning the gaskets. To clean these parts, Juni and the other mechanics used a drill with a special brush that scraped off the dirt. Sometimes they used compressed air to clean the parts. Both processes spewed dust containing asbestos into the air.

In addition to Juni's deposition testimony and a video that showed his pain and suffering, the jury heard voluminous and sometimes quite technical scientific and statistical testimony over the course of 20 days from the parties' epidemiologists, toxicologists, medical doctors with specialization in occupational and environmental science, and others. They heard that mesothelioma is a rare and deadly disease, caused almost exclusively by respirable asbestos, and can take decades to manifest, but then killing within a year or two at the most. They heard that Ford's brakes, clutches, and gaskets (often referred to as friction products) were manufactured with asbestos, of a type called chrysotile, which is short-fibered and curly, and when inhaled can dissolve in the lungs or clear the

lungs. The parties disputed its toxicity. Plaintiffs' epidemiologist, Steven Markowitz, M.D., testified that chrysotile is less harmful than other forms of asbestos, but is nonetheless hazardous. Defendant's toxicologist, Brent Finley, Ph.D., opined that it is not hazardous, but conceded that scientific organizations, including the National Institute for Occupational Safety and Health and the Occupational Safety and Health Administration, classify it as a human carcinogen. Documents issued internally by Ford, in the 1970s in particular, discuss the growing understanding of the health hazard associated with brake linings to workers installing and cleaning brakes in automobile repair shops, as well as in the automotive industry.

Plaintiffs offered Dr. Markowitz to establish that chrysotile asbestos in friction products, if allowed to become airborne and inhaled, can cause mesothelioma (general causation). His opinions were based on the "firmly established" and accepted knowledge that chrysotile asbestos causes mesothelioma, industrial hygiene studies that measured chrysotile asbestos among workers using friction products, case series of mesothelioma occurring among mechanics who work with friction products,[2] evidence that persons who work with friction products

[2] Dr. Markowitz explained that a case series is a report published in the medical literature focusing on persons in the same industry with a particular disease and suggesting a causal

in vehicle repairs develop nonmalignant asbestos-related disease, peer-reviewed studies examining the pertinent literature, and materials from various health and safety agencies and organizations.

Dr. Markowitz testified that new friction products generally require beveling or shaving for proper placement in the vehicles. Mechanics are exposed to asbestos fibers in this process. They are also exposed when cleaning used products of dust and grime, including loosened asbestos, especially if cleaned with compressed air, but also with sandpaper, because asbestos-containing dust is released into the air. Asbestos dust is also shaken loose and becomes airborne when brake drums are dropped to the floor in the normal course of work.

Dr. Finley, defendant's toxicologist, testified that new brake linings are comprised of 50% asbestos by weight. Thus, if a truck brake lining weighed 12 pounds, 6 of those pounds would be asbestos, containing "billions" of fibers. He also testified that as to brakes and brake linings, although apparently *not* as to clutches or gaskets, chrysotile asbestos degrades with use due to the ongoing friction and heat from the braking process. It transforms into a non-toxic chemical called forsterite.

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relationship between the disease and the industry.

According to Finley, there remains little to no actual asbestos fibers in used brake liners.[3]

Dr. Markowitz testified that even with degradation in used brakes, from one to about three percent asbestos remains present, and even this small amount contains millions of active fibers. He agreed that if asbestos fibers were mixed with certain resins during the brake manufacturing process, they would become nonrespirable, although it was unclear whether resins were used in manufacturing brakes and brake linings in the 1960s and 1970s, or a more recent addition. For example, plaintiffs later pointed to a study initiated in 1975 following a meeting between Ford and government agencies, among others, which stated that used brakes contain "typical chrysotile asbestos fibers along with a wide range of other forms of crystalline and fibrous materials."

The jury heard from both parties' experts that studies have been undertaken to determine whether workers in certain environments where asbestos was typically and/or necessarily present, or who were engaged in certain asbestos-related work, were at a greater risk of asbestos-related disease. Defendant

[3] It was unclear whether Dr. Finley was testifying about modern brakes and brake linings, or brakes and brake linings produced and used in the 1960s and 1970s, the health hazards of which were becoming apparent in the 1970s, as seen in internal Ford documents discussed below.

noted that there are 21 epidemiological studies finding no increased risk of mesothelioma among garage workers exposed to chrysotile asbestos. One recent study of brake mechanics showed a statistically significant risk, although the study was of a different type than the others.

Dr. Markowitz testified that in his opinion, the 21 studies were not relevant to Juni's work situation. He explained that there simply are no studies that have specifically looked at whether garage mechanics who regularly work with brakes and other friction products develop mesothelioma at a higher rate than others. The reasons are varied. One is that the number of garage mechanics working with friction products is relatively small and it is accordingly difficult to assemble a large enough number to undertake an occupational or cohort study. The majority of studies on this topic have used an alternative acceptable epidemiologic study, the case-control study, which compares people who develop mesothelioma and those who do not. However, until relatively recently, there was no medical classification for mesothelioma as a cause of death, thus skewing statistics to underreport deaths from mesothelioma. Such studies would take decades to complete, given the long latency from exposure to disease manifestation. Additionally, the fact that there is only a year or two at most from the onset of

mesothelioma until death further hampers the ability to collect high quality data concerning work life and exposure to asbestos products.

Dr. Markowitz's discussion of the studies was partly corroborated by defendant's occupational epidemiologist, Mary Jane Teta, Ph.D., who stated she was not aware that any of those studies were designed to track garage mechanics working with asbestos-containing friction products. The jury heard that Dr. Teta herself had conducted a study of "automobile repair and related services," in the 1980s, which found that working with friction products did not enhance developing mesothelioma. However, upon questioning, she conceded that she did not know whether any of her study's subjects were actually vehicle mechanics, and there may not have been any included.

Plaintiffs also offered Jacqueline Moline, M.D., an internal medicine and occupational and environmental science expert, to establish specific causation. She testified that based on her review of Juni's medical records and deposition testimony about the particulars of his work life, in her medical opinion, Juni had died from mesothelioma caused by cumulative exposures to asbestos. Dr. Moline's opinion was based on her extensive background with patients with asbestos exposure who had also worked with brakes and clutches and had similar descriptions of

their exposures as Juni's; her knowledge of industrial hygiene studies finding elevated levels of dust from the manipulation of brakes; medical and scientific literature; animal studies; and studies by various professional, national and international organizations.

Dr. Moline agreed that there were no measurements to quantify Juni's direct or indirect exposure to asbestos dust, at any location. She explained that Juni worked in locations where "historically" there have been various kinds of exposures to asbestos. It was the cumulative exposure to asbestos-containing products, over more than two decades of work, that was a substantial contributing factor in causing his disease, she concluded. It is not possible to pinpoint which particular exposure to asbestos caused his mesothelioma. However, she explained, a general consensus in the scientific community has developed that there are indicia of dangerous levels of exposure to asbestos, in particular the presence of visible dust generated in the course of working with asbestos products. Visible dust, Dr. Moline explained, is "a surrogate" for an amount of asbestos dust known to be capable of causing mesothelioma, although it is expected that even at very low levels of exposure, with no dust visible, there is an increased risk of cancer. Juni's testimony, she noted, was that during his many years of working at the

garages, he had breathed in visible dust generated in the course of his work and from the work of other mechanics. This alone is sufficient to establish that his work with the friction products, and the presence of other workers generating dust by working with asbestos products, caused Juni's mesothelioma. She agreed, however, that dust generated from friction products that did not contain asbestos would not contain asbestos and would not be a cause of mesothelioma. The majority suggests that her testimony that the visibility of dust was itself proof that there was a hazardous level of respirable asbestos was fatally undermined by her statement that studies have shown that there is only about one percent of asbestos fibers in worn brakes. This, however, merely reflects the existence of competing evidence to be assessed by the jury.

Dr. Markowitz testified in the same vein that there is no safe level of asbestos exposure. Exposure to asbestos causes an increased risk of disease, and it is the cumulative exposures that can ultimately cause disease.

Defendant strenuously disagreed. Its toxicologist, Dr. Finley, offered a different theory, that for every chemical, there is a dose below which there is no effect, and that chrysotile asbestos-exposure associated with brake repair is too

low to cause any increase in the risk of disease.[4] In contrast, *defendant's* occupational epidemiologist, Dr. Teta, testified that there is no known safe level of exposure to asbestos, an opinion in accord with Dr. Moline's.

The jury had before it internal documents, as mentioned above, from Ford written in the years 1973-1983 concerning asbestos found in a variety of automotive components, and worker safety. The documents show that in the early 1970s, Ford was aware, based on troubling air samples, that workers who did brake and clutch repairs in particular were exposed to a much greater risk of developing cancer and mesothelioma than other workers. Ford introduced internal safety procedures to reduce the amount of asbestos released into the air and to contain the asbestos to certain areas. It directed that the use of compressed air and dry brushing to clean brakes and clutches be completely discontinued. An August 1983 bulletin, from Ford's Employee Health Services, warned of the risks of asbestos dust, including mesothelioma, from clutch and brake linings. The bulletin described asbestos fibers as "nearly indestructible" and

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[4] It bears noting that defendant attempted to question whether Juni's mesothelioma was caused by his exposure to asbestos in the 4 ½ years working as a driver and a courier in the early 1960s, before he began working with Ford products at the O&R garages.

indicated that a potential health risk arises whenever asbestos fibers are released into the air as dust. Plaintiffs contend that Juni and his coworkers were not informed by Ford of the findings of its internal studies and recommendations.

Following the close of testimony, the trial court charged the jury that "there may be more than one cause of an injury," and the cause may be "substantial even if you assign a relatively small percentage to it." The jury found Ford 49% liable for causing Juni's mesothelioma.

Ford moved, posttrial, to vacate the verdict and dismiss the complaint as a matter of law, based on legal insufficiency. In the alternative, defendant sought to have the verdict set aside as against the weight of the evidence and a new trial ordered and/or other relief. The trial court granted the first branch of the motion, finding that plaintiffs had not introduced sufficient evidence tending to show that Arthur Juni's exposure to asbestos from Ford's brakes, clutches, and gaskets was a significant contributing factor in causing his mesothelioma.

Discussion

The burden on a movant seeking to have a jury verdict set aside and judgment entered in favor of the moving party under CPLR 4404(a) is a heavy one. A court must exercise considerable deference in exercising its discretionary power to set aside a

jury verdict (*see Rose v Conte*, 107 AD3d 481, 484 [1st Dept 2013]). A jury verdict in favor of a party should not be set aside unless that jury "could not have reached the verdict upon any fair interpretation of the evidence" (*Lichtenstein v Bauer,* 203 AD2d 89, 89 [1st Dept 1994]; *see also Jackson v Mungo One*, 6 AD3d 236 [1st Dept 2004]). The court must view the evidence in a light most favorable to the nonmovant (*see Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]). The movant must persuade the court that there was "simply no valid line of reasoning and permissible inferences which could possibly lead rational [persons] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards,* 45 NY2d 493, 499 [1978]). Importantly, if the evidence is such "that it would not be utterly irrational for a jury to reach the result it has determined upon, and thus a valid question of fact does exist, the court may not conclude that the verdict is as a matter of law not supported by the evidence" (*id.*; see also *Blum v Fresh Grown Preserve Corp.,* 292 NY 241, 245 [1944]; *Guiton v Gottlieb*, 236 AD2d 203 [1st Dept 1997]). The Court of Appeals has very recently reiterated the movant's high burden in *Killon v Parrotta* (28 NY3d 101 [2016]), again holding that a jury verdict is insufficient only when it is "utterly irrational" (*id.* at 108).

This litigation was essentially a battle of the experts.

The parties produced conflicting expert evidence as to whether chrysotile asbestos in friction products can cause disease, whether asbestos causes disease by cumulative exposures or only after a certain amount of exposure, and whether Juni had been exposed to a sufficient level of asbestos from Ford's products to cause his mesothelioma, among other issues. The jurors were also presented with differing methods to weigh the evidence. It is well established that it is within the province of the jury to reject or accept an expert's testimony in whole or in part; the weight to be given to opinion evidence and expert evidence is ordinarily entirely for the jury's determination (*see Matter of City of New York [Fifth Ave. Coach Lines]*, 22 NY2d 613, 630 [1968]).

A major issue before the jury, and the issue on appeal, was causation. *Parker v Mobil Oil Corp.* (7 NY3d 434 [2006]), addressing a claim that years of workplace exposure to benzene in gasoline had caused acute myelogenous leukemia, articulates what has become a well-established rule in New York in toxic tort cases, namely that "an opinion on causation should set forth a plaintiff's exposure to a toxin, that the toxin is capable of causing the particular illness (general causation) and that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation)" (*id.* at 448). *Cornell v 360 W.*

51st St. Realty, LLC (22 NY3d 762 [2014]), concerning a claim of illness from interior mold, holds that it is the plaintiff's burden "to establish sufficient exposure to a substance to cause the claimed adverse health effect" (22 NY3d at 784, citing *Parker* at 449). *Cornell* stated that, "'[a]t a minimum, . . . there must be evidence from which the factfinder can conclude that the plaintiff was exposed to levels of th[e] agent that are known to cause the kind of harm that the plaintiff claims to have suffered'" (*Cornell* at 784, quoting *Wright v Willamette Indus., Inc.*, 91 F3d 1105, 1107 [8th Cir 1996]).

New York's highest Court has not specifically addressed the sufficiency of proof needed to establish causation in an asbestos claim. This Court, and others, have accepted a consensus from the medical and scientific communities that even low doses of asbestos exposure, above that in the ambient environment, are sufficient to cause mesothelioma. Mesothelioma is a "rare and deadly cancer," with 70 to 80% of all cases reporting a history of asbestos exposure at work (*Matter of New York City Asbestos Litig.*, 5 NY3d 486, 490 n2 [2005]; *see also Dollas v W.R. Grace & Co.*, 225 AD2d 319, 320 [1st Dept 1996], quoting *O'Brien v National Gypsum Co.*, 944 F2d 69, 72 [2d Cir 1991] [mesothelioma is "'an exceedingly rare disease . . . whose only known cause is exposure to asbestos'"]). We have been persuaded that medical

science has been unable to determine a minimum level of exposure to asbestos below which it is not disease producing; every inhalation of visible asbestos-laden dust contributes to the cumulative dose responsible for the mesothelioma. Because of the lengthy gap between exposure and manifestation of disease, we recognize the difficulty in determining which of several asbestos-containing products used by a plaintiff was the cause of the disease or to what degree, and both before and subsequent to *Parker*, we have accepted not only an established link between asbestos and mesothelioma, but that visible dust released from an asbestos product contains high levels of fibers of asbestos capable of producing disease.

The leading case directly concerning the sufficiency of the evidence in a claim of asbestos exposure is *Lustenring v AC&S, Inc.* (13 AD3d 69 [1st Dept 2004], *lv denied* 4 NY3d 708 [2005]), decided prior to *Parker.* While *Lustenring* pre-dates *Parker,* I do not read it as being in conflict with *Parker*, and maintain that it should continue to be followed.

In *Lustenring*, competent evidence was provided of long periods of daily working in dust laden with asbestos generated from products containing asbestos, and valid expert testimony that dust raised from manipulating asbestos products, "necessarily" contains enough asbestos to cause mesothelioma (13

AD3d at 70). This Court agreed that there was no need for a *Frye* hearing because it is sufficiently established that visible dust from asbestos and asbestos-containing products contains hazardous levels of asbestos, and allows a physician expert to testify that the product was a substantial factor in causing the disease. There was no novel scientific technique or application of science at issue, and it was the jury's duty to determine the credibility of the plaintiffs' arguments concerning causation as compared to the defendants' arguments.

Subsequent decisions from trial courts and this Department often, but not always, reference *Lustenring*, and even when they do not, they employ the same understanding that a plaintiff's expert's opinion is based on established scientific opinion supplemented by the plaintiff's particular history of exposure (*see e.g. Matter of New York City Asbestos Litig.*, 24 AD3d 375, 375-376 [1st Dept 2005] [holding that "[t]he link between asbestos and disease is well documented"; jury to decide whether the asbestos contained in the defendant's product could be released in respirable form so as to cause disease]; *Matter of New York Asbestos Litig.*, 28 AD3d 255, 256 [1st Dept 2006] [regular exposure to dust from working with the defendant's asbestos-containing gaskets and packing; citing *Lustenring*]; *Matter of New York City Asbestos Litig.*, 143 AD3d 483 [1st Dept

2016] [electrician exposed to boilers and their concomitant dust, as well as dust created from mixing asbestos concrete powder which filled the air and settled on everything; citing *Lustenring*]; *Matter of New York City Asbestos Litig.*, 143 AD3d 485 [1st Dept 2016] [mechanic and electrician removed asbestos-containing insulation from valves, and mixed asbestos-containing insulation cement, both generating visible asbestos dust; citing *Lustenring*]).

In *Penn v Amchem Prods.* (85 AD3d 475 [1st Dept 2011]), cited by the majority as an example of a decision determining causation based on more than "the mere presence of visible dust," there was testimony by the plaintiff of visible dust emanating from working with asbestos-laden dental liners, and expert testimony that this dust "must have contained" enough asbestos to cause the plaintiff's mesothelioma.[5] Such expert testimony is very similar to the testimony provided by plaintiffs' experts here, which was enough to show a scientific expression of the level of plaintiff's exposure, and Ford's liability.

I would note that we have held that a plaintiff need not show the precise causes of the decedent's damages, but only facts

[5] As to the differences between the plaintiff's description of the dental liners and the codefendant representatives' description, we held it "simply raised a credibility issue for the jury (*id.* at 476).

and conditions from which the defendant's liability can be reasonably inferred (*see Lloyd v W.R. Grace & Co.-Conn.*, 215 AD2d 177 [1st Dept 1995]; *see also Matter of New York City Asbestos Litig.*, 116 AD3d 545 [1st Dept 2014]). A plaintiff must provide evidence of a link between the claimed negligence and his or her injuries; in a product liability case, there must be shown a link between the injuries and a manufacturer's defectively designed product (*see Miller v Akronchem Corp.*, 276 AD2d 447 [1st Dept 2000], *lv denied* 96 NY2d 716 [2001]).

The majority agrees with the trial court that the proof in a claim involving disease caused by asbestos must be analyzed using the same method as that used to analyze exposure to benzene in gasoline, and or interior mold -- *Parker* and *Cornell*, respectively. The trial court acknowledged that mesothelioma is caused only by asbestos exposure, but framed the question as "whether chrysotile asbestos, as contained within friction products, causes mesothelioma, an issue closely analogous to that addressed in *Parker*, namely, whether benzene, as contained in gasoline, causes [acute myelogenous leukemia]."

Defendant maintained that Juni's "regular" exposure to Ford-manufactured or distributed friction products required a quantification of the exposure and because plaintiffs' experts did not and could not quantify the dosage of decedent's exposure

to asbestos from Ford products, they had not shown a scientific expression of Juni's exposure. Ford further argued that a "link" or an "association" between asbestos and mesothelioma is not, in itself, sufficient to establish a foundation for an expert's opinion, and the presence of dust does not, in itself, prove that a hazardous dosage of asbestos fibers was inhaled.

Defendant posits a much too narrow foundation for establishing causation in an asbestos claim, which, if the trial court and the majority are correct, means no asbestos litigant will be able to prevail. *Parker* explicitly recognized that in toxic tort cases it is often "difficult or impossible to quantify" a plaintiff's exposure to the toxin (7 NY3d at 447). The Court explained that as long as the plaintiff's experts use a method generally accepted in the scientific community to establish causation, it "is not always necessary" to posit an "exact number" for the amount to which the plaintiff was exposed (*id.* at 448).[6] The method need not be quantification or dose-response analysis, and may include "qualitative" methods; the Court recognized that it is "inappropriate to set an

[6] We have held that "general acceptance" does not "necessarily mean that a majority of the scientists involved subscribe to the conclusion, but that those espousing the theory or opinion have followed generally accepted scientific principles and methodologies in reaching their conclusions" (*Nonnon v City of New York*, 88 AD3d 384, 394 [1st Dept 2011]).

insurmountable standard that would effectively deprive toxic tort plaintiffs of their day in court" (7 NY3d at 447).

The concurrence characterizes my position as creating an "exception" to *Parker*'s rule, in order to accommodate the specifics of asbestos claims. I disagree. I am merely reaffirming what has been for many years the basis of this Department's decisions in asbestos cases, a well-considered method for determining liability when the claim is injury caused by exposure to asbestos-containing products. It is a fact that, in most, if not all, asbestos exposure cases, numerical quantification of a plaintiff's exposure would be impossible. Because such quantification is not required either by the precedents of this Court or the Court of Appeals, the trial court's imposition of such a requirement, affirmed by a majority of this court, represents an abrupt rupture in the asbestos jurisprudence of this state (*see* Michael Hoenig, Complex Litigation, *Ruling on Asbestos Experts a Potential Game Changer*, NYLJ Online, May 11, 2015).[7] This wrong turn ignores that mesothelioma takes decades to manifest, and the victim is generally long retired from the workplace where exposure

[7] Available at https://advance.lexis.com/search?crid=a19cf69e-651c-45b1-bf05-5560b5hhhhe52&pdsearchterms=LNSDUID-ALM-NYLJ-1202725929581&pdbypasscitatordocs [*etc*.] [accessed Feb. 3, 2017].

occurred. Witnesses have died. Work sites very often no longer exist, and when operational, most did not monitor and make records of air quality. The subject materials or products containing asbestos are no longer in existence and cannot be tested.

For these reasons, the standard being adopted by the majority erects an insurmountable hurdle requiring plaintiffs to recreate the work environment, to establish precise exposure levels, dust and fiber counts, air quality levels throughout the day, and so on, or to test the asbestos-containing materials or items so as to demonstrate how much asbestos was present and subject to release into the air through the work process, becoming respirable. Indeed, this is why experts in asbestos litigation rely not only on the clear link between mesothelioma and asbestos, but indicia such as the visible presence of asbestos-containing dust to establish quantity. As noted by plaintiffs, the well respected Reference Manual on Scientific Evidence (3d ed 2011), compiled by the Federal Judicial Center and National Research Council of the National Academies, indicates in a footnote that "[i]n asbestos litigation, a number of courts have adopted a requirement that the plaintiff demonstrate (1) regular use by an employer of the defendant's asbestos-containing product, (2) the plaintiff's proximity to

that product, and (3) exposure over an extended period of time" (*id.* at 587 n 111, citing *Lohrmann v Pittsburgh Corning Corp*, 782 F2d 1156, 1162-1164 [4th Cir 1986], and *Gregg v V-J Auto Parts, Inc.*, 596 Pa 274, 291, 943 A2d 216, 226 [2007]). That is what occurred at this trial.

The jury's verdict finding Ford 49% responsible for causing decedent's mesothelioma after 25 years of exposure to asbestos-containing products sold or distributed by Ford was based on a fair interpretation of the totality of the evidence and an assessment of the credibility of the experts, and was not "utterly irrational" (*Killon*, 28 NY3d at 108). The evidence, viewed in the light most favorable to plaintiffs, was legally sufficient and the disputed issues were properly submitted to the jury for factual determination. By setting aside this verdict the trial court and the majority have usurped the jury's function and redefined the nature of proof required to establish specific causation in asbestos cases.

Accordingly, I would reverse the trial court's order setting aside the verdict on the grounds of legal insufficiency and would remand this matter for consideration of the remaining grounds for posttrial relief sought by Ford, but not addressed by

the trial court (*see Stewartson v Gristede's Supermarket*, 271 AD2d 324, 325 [1st Dept 2000]).

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

ENTERED: FEBRUARY 28, 2017

CLERK

Tom, J.P., Saxe, Richter, Gische, Gesmer, JJ.

2680-
2681 In re Ruth Joanna O. O.,

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

Melissa, O.,
Respondent-Appellant,

The Administration for Children's
Services,
Petitioner-Respondent.

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Steven N. Feinman, White Plains, for appellant.

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

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

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Order of fact-finding, Family Court, Bronx County (Joan L. Piccirillo, J.), entered on or about January 23, 2015, affirmed, without costs.

Opinion by Tom, J.P. All concur except Saxe and Gesmer, JJ. who dissent in an Opinion by Gesmer, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David B. Saxe
Rosalyn H. Richter
Judith J. Gische
Ellen Gesmer, JJ.

2680-2681

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In re Ruth Joanna O. O.,

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

Melissa O.,
Respondent-Appellant,

The Administration for Children's Services,
Petitioner-Respondent.

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Respondent mother appeals from the order of fact-finding of the Family Court, Bronx County (Joan L. Piccirillo, J.), entered on or about January 23, 2015, which, after a hearing, determined that she neglected the subject child.

Steven N. Feinman, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Emma Grunberg and Fay Ng of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Susan Clement and Kristen Calabrese of counsel), attorney for the child.

TOM, J.P.

In this child protective proceeding, appellant Melissa O. (the mother) appeals from the finding of the Family Court that she neglected her three-month old baby girl. After being discovered at 3 a.m. walking in the middle of a road in Texas, suffering from delusions and talking to herself while her infant daughter was left in the front seat of a vehicle stopped somewhere on the road, the mother was hospitalized in a Texas psychiatric ward. Thereafter, the mother, due to her abnormal, aggressive and threatening behavior, was examined by two psychiatrists in New York who determined she was delusional and assessed her as suffering from psychosis. Although she was prescribed medication for her condition, the mother never acknowledged her serious mental health condition and refused to take the medication. In addition, the mother's unfounded fear that her infant daughter had been raped led her to repeatedly "check" the child's physical condition and then make an unnecessary trip to the hospital.

Because a preponderance of the evidence in the record supports the finding that the mother's untreated mental condition exposed the child to a substantial risk of harm (Family Court Act § 1046[b][i]; *see Matter of Isaiah M. [Antoya M.]*, 96 AD3d 516, 517 [1st Dept 2012]), we affirm.

I. Facts

On May 16, 2013, the Administration for Children's Services (ACS) filed a neglect petition against the mother alleging, inter alia, that while the mother was hospitalized from May 4 to May 9, 2013 at Green Oaks Hospital in Texas, she was diagnosed with severe mood disorder with psychosis and postpartum depression, refused to take her prescribed medication (Risperdal), and was referred for further mental health services. The petition alleged that the mother suffered from a mental illness that impaired her ability to care for the child, and had placed the child at imminent risk of harm.

Before a hearing could be held, by order dated May 16, 2013, Family Court temporarily placed the child with the maternal aunt but permitted the mother to reside in the same home provided she not be left alone with the child.

At the fact-finding hearing, the court received in evidence an Office of Children and Family Services Intake Report, dated May 13, 2013, called in by Julie Burkes, a child protective worker at the Department of Family and Protective Services in Plano, Texas. The report stated that on May 3, 2013, the mother was found walking in the middle of a Texas road, talking to herself. The mother stated that she had killed her husband, that she and her daughter were "the devil," and that she also was

Jesus's wife. At the time of those statements and observations, the child was found in the front seat of the mother's car. The mother was "extremely delusional and hyper religious," and was taken to a "mental health facility," where she remained until May 9, 2013, but was "non-compliant" and "refused medications."

During the mother's hospitalization in Texas, her cousin, who lived in the area, was called to take the child. Upon her release, her sister from New York picked her up and subsequently the mother and child returned to New York.

The court also received in evidence medical records from New York City's St. Barnabas Hospital (SBH) pertaining to the mother's treatment there on May 11 and 12, 2013. According to those records, around noon on May 11, 2013, one day after returning from Texas, the mother walked into the SBH emergency room with the child, and the mother's sister, asking that the child "be check[ed]." The mother presented with "erratic behavior." Specifically, she was "screaming" and told triage personnel that she had been raped while in a psychiatric hospital in Texas. Medical personnel were unable to obtain her vital signs due to her "aggressive" behavior.

At around 12:50 p.m., the mother told medical personnel in the adult emergency department that a "[F]ree [M]ason kill[ed]" and "raped" "my baby," and thus the child needed to be medically

examined. The mother also stated that she herself was raped by a "Free Mason" and she wanted to be tested for sexually transmitted diseases. She "was acting irrationally, screaming, and [she] want[ed] to walk out" of the hospital with the child. She also exhibited "threatening behavior" and was assessed as suffering from "[p]sychosis" and constituting a "threat to staff and other patients," such that she had to be "physically restrained" and sedated with Haldol and Versed by injection. A psychiatric evaluation was ordered for the mother, and the child was taken to the pediatric unit.

At around 1:35 p.m., an emergency department physician, Jean Dorce, spoke to the mother's sister, who stated, inter alia, that the mother had been stopped by police in Dallas, Texas and brought to a hospital, where she was diagnosed with an "unknown" psychiatric condition and released with a prescription for medication. The mother's sister also stated that the mother had returned to New York from Dallas on the night of May 10, 2013.

During a psychiatric consult conducted at SBH by Dr. Jean Robert Jacques on the night of May 11, 2013, the mother was unable to provide "a relevant history," except to say that police officers in Texas had brought her to a psychiatric hospital, where she remained for one week, that she "was medicated" there but had "refuse[d] meds," and that while she had been

hospitalized, her cousin "raped" the child. Dr. Jacques found the mother to be "paranoid, suspicious and guarded." Her thought content was marked by "paranoid ideation." She had "poor" judgment, "limited" insight, and "fair" cognition. Dr. Jacques diagnosed the mother with "psychosis NOS [not otherwise specified]" and directed that she be held in the emergency department for further evaluation and administered Risperdal. However, the mother once again refused that medication and it was not administered.

The following morning, the mother was evaluated by Dr. Salim Al Salem, to whom she reported, inter alia, that she was separated from her husband a month ago due to "domestic violence" and that her husband was "a member of [the] [F]ree [M]ason cult," whose other members were "backing him," which explained why she had been denied gas at a Texas gas station. As for the events that led to her hospitalization in Dallas, she reported that she had driven with the child from Louisiana to the home of a cousin, whom she believed was "doing witchcraft" that "affected [the child]." She left her cousin's home to find a motel, but police officers "followed" her and removed the child from her care, delivered the child to her cousin, and brought her to a psychiatric hospital. When she was discharged from the hospital, she picked up the child and, along with her sister, flew from

Dallas to New York City.

The mother brought the child to SBH for a medical examination because she believed the child had been raped by her cousin. The rape claim was based on having observed a "cotton bud" lubricated with "[V]aseline" "go high up in [the child's] rectum" when she was dealing with the child's constipation.

Dr. Al Salem diagnosed the mother with "[d]elusional [d]isorder" and concluded that she currently was having a "delusion of persecutory type." After he spoke to the mother's sister and learned that she was willing to have the mother live with her, he directed that the mother receive Abilify, with the "first dose NOW" and a 30-day supply to be provided to her at discharge, along with a referral for follow-up care at Fordham Tremont Mental Health Center (Fordham Tremont).

The SBH emergency department discharge note listed the mother's discharge diagnosis as delusional disorder, "[a]ctive," and indicated that medications were "given as ordered" with instruction to follow up with Fordham Tremont "in 3-7 days."

The medical records also include entries dated June 11, 2013, when the mother came to the emergency department requesting to be reevaluated because she believed that she might not need medication anymore, and noted that she wanted to breast feed her child and that the medication was too costly. A "psych consult"

was ordered, but the mother "left against medical advice" before one could be completed. However, the mother was given a refill of her medication "as a courtesy" and written instructions to follow up with Fordham Tremont. The followup was noted to be "urgent."

At the hearing, ACS caseworker Vanessa Wallace, who had been assigned to this matter, testified that, regarding her hospitalization in Texas, the mother told her that police officers had stopped her on a "highway" because they were Free Masons, who were "trying to take [the child]." The mother showed Ms. Wallace her discharge papers, dated May 8, 2013, from the Texas hospital (Green Oaks), and the papers indicated that the mother had "refused" medication. The mother told Ms. Wallace that Green Oaks had prescribed her Risperdal, but she did not take it because she was not "crazy."

The mother also reported to Ms. Wallace that after she put a Q-tip in the child's rectum, she concluded that her cousin had raped the child, noting that before the child had stayed with the cousin, a Q-tip would not go "all the way in." The mother did not tell Ms. Wallace that the child had been bleeding. The mother also asserted that she had been restrained at SBH when she did not want medical personnel to examine the child. Although she had been prescribed Abilify, she did not inform her doctor of

her complaints about Abilify's side effects, and the mother told Ms. Wallace that she was not going to take Abilify. The mother also told Ms. Wallace that she had been directed to follow up with Fordham Tremont within three to seven days, but that the mother admitted she had still not done so by the seventh day.

The mother testified at the hearing that her daughter was born on February 14, 2013 and that the mother was her primary caretaker. She breast-fed her, changed her diapers and bathed her. The mother claimed that while she cared for the child, the child was always healthy and that she took the child to the pediatrician for regular checkups.

After separating from her husband in March 2013, she and the child lived together at a friend's house in Louisiana, but later they had to leave the state because they had "nowhere to stay." When she decided it was more economical to fly to New York from Dallas, Texas, rather than from Louisiana, she called her cousin, Francis Monio, who lived in Dallas, and asked him to "keep [her] for two days." However, when she arrived there, she learned that Monio wanted to separate her from the child because he had received a phone call from someone stating that the mother "was sick" and could not go to New York with the child. The mother then "decided not to stay" with Monio and went to find a motel.

According to the mother, at 3:00 a.m. on May 9, 2013, after

she had driven 300 miles towards Dallas, she parked her car on the side of the road to rest. While she was standing by her car on the side of the road to retrieve her cell phone from the backseat, police officers approached her, handcuffed her, and removed her to a psychiatric facility. She did not understand why the police officers had done this, and while in the hospital, she was not given a chance to talk, other than to say that she was "not sick." The mother was aware that Green Oaks medical personnel had diagnosed her with severe mood disorder with psychosis and prescribed her Risperdal, but she disagreed with the diagnosis and did not know why they prescribed her Risperdal, remarking, "I am not insane." Although she insisted she took some of her prescribed medication while in the hospital, she admitted she stopped taking it because "it made her sick."

After her release from Green Oaks on May 9, 2013, she and her sister picked up the child from Monio's home and then went to a motel, where she realized that the child was not feeling well. Between the time she left Monio's home on May 9, 2013, and when she brought the child to SBH on May 11, 2013, the child had been crying and without appetite, and she had a fever, a diaper rash, and a bloody discharge that the mother observed every time she changed the child's diaper. As the child was "really bleeding" "out of her behind," and was crying from pain, the mother's

"first thought" was that Monio had sexually abused the child. The mother noted that she was sensitive to sexual abuse because she had been sexually abused as a child.

When she returned to New York, she took the child to SBH where she removed the child's diaper to show a nurse the bleeding and "the nurse saw what [she] was talking about." The nurse then spoke to the mother's sister — to whom the mother had previously shown the blood — after which the nurse called five or six security workers, who restrained the mother to a bed and took the child away. The mother did not know why the nurse had wanted her sister "to take over" or why hospital staff did not allow her to be present for the child's examination.

The mother told the SBH psychiatrist that she was not mentally ill, but merely that she had a "marital issue." She also complained to him that "nobody wants to listen to [her]." When she left SBH, she was given a prescription for Abilify. However, she did not comply with her medication regimen because the medication had made her feel sick. The physician who prescribed her Abilify had told her that she "just [had] stress," which the mother wanted to treat with "family support," not medication. The mother also claimed that the medication cost too much money out-of-pocket, which she did not have, and that she only had Medicaid coverage in Louisiana. She never contacted

Medicaid officials about obtaining medical coverage in New York State.

The mother also denied telling Ms. Wallace that she had put something in the child's rectum or any of her concerns about the Free Masons. A day after her discharge from SBH, the mother reported the child's bleeding to New York City police officers, but they had "refused to [take] a report."

In an oral fact-finding decision, later reflected in its written order, the court found that ACS had established the allegations in the petition by a fair preponderance of the credible evidence. The court credited the testimony of Ms. Wallace, finding it to be consistent with the medical records, and did not credit the mother's testimony, which it found "incredible." The court concluded that the mother "suffers from a mental illness, which impairs her ability to care for [the child], and that her conduct in failing to take prescribed medication and follow up with outpatient mental health services constitutes neglect."

II. Discussion

The overwhelming evidence in the record — much of which is entirely ignored by the dissent — showed that the mother was suffering from mental illness, that she lacked insight into her illness and need for treatment, and that her mental condition

interfered with her judgment and parenting abilities, thus placing her infant daughter, who was totally dependent on the mother, at imminent risk of physical, mental, or emotional impairment (*see Matter of Isaiah M. [Antoya M.]*, 96 AD3d 516, 517 [1st Dept 2012]; *Matter of Naomi S. [Hadar S.]*, 87 AD3d 936 [1st Dept 2011], *lv denied* 18 NY3d 804 [2012]).

More specifically, the record evidence established that the mother had multiple delusional episodes, the most serious of which involved her being found on a Texas road in the middle of the night, uttering bizarre statements while her infant daughter was left in the front seat of her vehicle. That particular episode led to a one-week hospitalization in Texas where the mother was noncompliant and refused to take medication for her condition.

Back in New York, the mother continued to exhibit extremely concerning behavior. Her unfounded belief that her baby daughter had been raped led her to bring the child to the hospital where the mother behaved irrationally, and was aggressive and threatening. This behavior led to the mother being restrained, sedated and hospitalized. While hospitalized, the mother continued to make strange and unfounded claims regarding her child being raped, which had caused her to repeatedly check her daughter's rectum. She was diagnosed with "psychosis NOS" and as

having "[d]elusional disorder," yet continued to refuse necessary medication.

In an unscheduled visit a month after being released from the hospital in New York, the mother sought approval to cease all medications, despite the directions she had been given, and then left against medical advice when a psychological evaluation was requested.

The mother repeated her various bizarre and unfounded beliefs to the ACS caseworker, including her baseless fears about her daughter's rectum. She also admitted to the caseworker that, despite being prescribed Abilify for her condition, she would not take that medication, and denied that she had a mental health condition.

Finally, the mother's own testimony demonstrated her denial of her mental health condition and poor insight about her condition. Her testimony also corroborated that she repeatedly failed to comply with her medication regimen.

In sum, rather than minimize and separate each individual piece of evidence as insufficient for a neglect finding, as the dissent does, we find that the totality of the evidence in the record clearly established that the child is a neglected child (Family Ct Act §§ 1012[f][i][B]).

A neglected child is one whose "physical, mental or

emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent . . . to exercise a minimum degree of care" (Family Ct Act §1012[f][i]). It is well settled that "[a] respondent's mental condition may form the basis of a finding of neglect if it is shown by a preponderance of the evidence that his or her condition resulted in imminent danger to the child[]" (*Matter of Noah Jeremiah J. [Kimberly J.]*, 81 AD3d 37, 42 [1st Dept 2010][alterations in original]; Family Ct Act § 1046[b][i]).

In this case, the mother presented a risk of harm to her child through her unfounded fears that her daughter had been raped, since these fears resulted in the mother on different occasions "testing" the child to see if she was raped, by checking her diaper and by sticking a Q-tip inside her, and making an unnecessary trip to the hospital (*see Matter of Kiemiyah M. [Cassiah M.]*, 137 AD3d 1279, 1280 [2d Dept 2016] [four-month-old child was in "imminent risk of harm" if left with mother, who called the police numerous times to report people outside the shelter threatening her and the child, which the evidence at the hearing established were delusions]).

Further, the mother displayed a "lack of insight" into her illness by refusing to agree that she had any mental health condition, despite her diagnoses, and by repeatedly refusing to

comply with her medication regimen (*see Matter of Naomi S.*, 87 AD3d at 937 ["child's physical, mental or emotional condition was in imminent danger of becoming impaired as a result of the mother's long-standing history of mental illness and resistance to treatment"]; *see also Matter of Jacob L. [Chasitiy P.]*, 121 AD3d 502 [1st Dept 2014] ["record demonstrated [mother's] lack of insight into her illness and repeated relapses due to her noncompliance with treatment and prescribed medication"]).

Significantly, lack of evidence as to actual injury to the child is inconsequential. "A showing that [the child was] impaired by [the mother's] failure to exercise a minimum degree of care is not required for an adjudication of neglect; it is sufficient that [the child was] 'in imminent danger of becoming impaired'" (*Matter of Annalize P. [Angie D.]*, 78 AD3d 413, 414 [1st Dept 2010]; *see also Nicholson v Scoppetta*, 3 NY3d 357, 369 [2004] ["'Imminent danger' reflects the Legislature's judgment that a finding of neglect may be appropriate even when a child has not actually been harmed"]). Indeed, the imminent danger standard exists specifically to protect children who have not yet been harmed and to prevent impairment (*see Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 79 [1995]).

With regard to mental illness, we have previously found that

a parent suffering from untreated paranoid delusions presents an imminent risk of harm to children who are placed in her care (*see Matter of Michael P. [Orthensia H.]*, 137 AD3d 499 [1st Dept 2016]; *see also Matter of Immanuel C.-S. [Debra C.]*, 104 AD3d 615 [1st Dept 2013]). The fact that these cases also included evidence of actual harm to the children does not somehow indicate that a risk of imminent harm is not sufficient to sustain a neglect finding, as the dissent suggests. Nor does our holding constitute a "drastic change in the law," as the dissent suggests. It would be irrational for the court, with knowledge of a risk of imminent harm to the child, not to act until actual harm is inflicted. This would be an absurd result. The child's safety and welfare should be the paramount concern and all necessary actions should be taken to prevent any harm to the child.

The neglect finding was not based only on the mother's mental illness. Rather, it was based on her mental condition in conjunction with her failure to comply with her medication regimen and follow-up treatment, and the fact that her mental illness impaired her ability to care for her infant daughter, and caused her to keep unnecessarily checking her daughter for evidence of rape. In other words, "the finding of neglect was appropriate here since [the mother] displayed a lack of insight

into the effect of her illness on her ability to care for the child" (*Matter of Lakiyah M. [Shacora M.]*, 136 AD3d 424, 425 [1st Dept 2016]). The dissent concedes that we have previously found neglect as a result of a parent's mental illness where the parent "lacked insight into the effect of the untreated mental illness," even where there is no finding of actual harm to the child. Thus, the dissent's reliance on *Matter of Nialani T. (Elizabeth B.)* (125 AD3d 672, 674 [2d Dept 2015]), where there was no "causal connection between the mother's mental illness and actual or potential harm to the subject child," is inapposite.

Nor is there any validity to the dissent's position that "[t]here is no evidence whatsoever in the record" to support the Family Court's findings that the mother failed to engage in mental health services as recommended by physicians at SBH, and that the mother, "as a consequence of her mental illness, failed to exercise a minimum degree of care for the child, resulting in harm or imminent risk of harm to the child."

Regarding the failure to seek follow-up treatment, the ACS caseworker specifically testified that the mother told her that she failed to follow up with Fordham Tremont within seven days as directed. The dissent states that this testimony is contradicted by the May 12, 2013 medical records, which "establish that the seventh day after the mother's release from St. Barnabas had not

yet occurred when the caseworker interviewed the mother." However, the June 11, 2013 medical records in evidence demonstrate that nearly one month after she was initially directed to follow up with Fordham Tremont the mother was again directed to follow up there, and that the need to do so was urgent. The Family Court thus could make a fair inference from these records that the mother had not followed up as directed.

As for exposing the child to the risk of harm, the mother's unfounded allegations that her daughter was raped caused her to repeatedly check her child's rectum, including inserting a Q-tip inside her, and caused her to take the child to the hospital, subjecting her to an unnecessary examination. The fact that the mother was loving and nurturing at other times, as stressed by the dissent, is of no moment. The mother may have much maternal love for her child but her mental illness and refusal to get treatment posed an imminent risk of harm to the child. The child was also placed in imminent risk of harm when left alone in a car on the road at 3 a.m. while the mother was walking in the middle of the road, delusional and talking to herself.

The dissent disputes that the mother's claim that her daughter was raped was unfounded. However, there were no medical records or any other evidence submitted to substantiate that claim. Contrary to the dissent's suggestion, we are not placing

the burden of proof on the mother to prove her daughter was raped. Rather, we find the evidence and facts of this case made her statement not believable. The mother's denial at the hearing of the statements she made to the caseworker and the staff at SBH regarding how her use of a Q-tip made her believe her daughter was raped calls the whole rape allegation into question. The mother's at times demented and delusional statements on this point, including that she was Jesus's wife, and that her three-month-old baby was the devil, and was killed and raped by a Free Mason and by her cousin, combined with the absurdity of the Q-tip test and proof of her mental illness, permit for a reasonable inference that her bare claim, without more, that her baby was raped was unfounded. Moreover, Family Court did not credit the mother's testimony and the court's credibility determinations are entitled to deference on appeal, and should not be disturbed (*see Matter of Irene O.*, 38 NY2d 776, 777, 778 [1975]).

Similarly, contrary to the dissent's contention, the evidence showed that the mother repeatedly checked her daughter for evidence of rape. According to the caseworker, the mother checked the child's rectum with a Q-tip and had reported that on previous occasions the Q-tip "would not go all the way in," thus indicating she inserted the Q-tip more than once; the medical records from SBH note the mother made a similar statement. The

mother also testified that after her discharge from SBH she checked her daughter again and reported it to police officers.

The dissent's attack on the court's findings that the mother did not take medication similarly lacks a foundation. The dissent also points to the facts that the mother was "calm," "cooperative," and was "psychiatrically cleared" following her delusional episode and sedation at SBH. Once again, the dissent downplays the abnormal, agressive, and threatening behavior exhibited by the mother and the incoherent statements made to the police officers and hospital staff, which resulted in her hospitalization in psychiatric wards in Texas and at SBH.

Initially, the fact that the mother presented as calm and cooperative at one point in time does not in any manner rule out mental illness. In any event, the record evidence clearly supports the finding that the mother had a mental illness. Notably, we have repeatedly held that "[e]xpert testimony or a definitive psychiatric diagnosis is not required to show a parent suffers from a mental illness because 'the consequences of the proceedings are temporary rather than permanent'" (*Matter of Jayvien E. [Marisol T.]*, 70 AD3d 430, 436 [1st Dept 2010]; *see also Matter of Devin M. [Margaret W.]*, 119 AD3d 435 [1st Dept 2014]; *Matter of Liarah H. [Dora S.]*, 111 AD3d 514 [1st Dept 2013]).

No medical expert was needed to determine that the child had been placed at risk by the mother's delusional thinking and her actions based on such delusional thoughts. A mentally healthy "new parent" would not conclude her three-month-old child was raped because a Q-tip she placed into the child's rectum went all the way in and then subject the child to an unnecessary trip to the hospital for examination.

The dissent, to reach her conclusion, minimizes the mother's non-compliance with her medication regimen. Far from simply failing to take medication "for one day" as the dissent describes it, the record, including the mother's own testimony, demonstrates that the mother repeatedly failed and refused to comply with her medication regimen. Commencing with her hospitalization in Texas, the mother refused prescribed medications. Her poor insight and noncompliance continued when she was hospitalized at SBH and refused Risperdal. The mother also told the ACS caseworker and testified that she did not and would not take Abilify, despite having been prescribed it at SBH, and offered various insufficient excuses, including its cost and its side effects. The mother also demonstrated extremely poor insight into her condition, testifying that she could treat it with "family support" rather than medication.

Contrary to the dissent's position, the evidence regarding

the mother's delusional episode and hospitalization in Texas was properly considered as part of the evidence supporting the neglect finding, and there is no basis for this Court not to rely on it.

Furthermore, contrary to the dissent's contention, Family Court properly conformed the pleadings to the proof, and the mother was afforded due process because she was able to contest the evidence and cross-examine the witnesses at the hearing.

In sum, the record demonstrates that the mother had a serious mental illness but showed poor insight into her illness, and placed her child at imminent risk of harm by failing to comply with follow-up treatment and her medication regimen. There is ample evidence in the record to show that the mother suffers from a mental health condition that needs to be monitored and treated with medications so that she may appropriately care for herself and her daughter, and have a chance to be reunited with her daughter, should that be the ultimate disposition in this matter.

Accordingly, the order of fact-finding, Family Court, Bronx County (Joan L. Piccirillo, J.), entered on or about January 23, 2015, which, after a hearing, determined that respondent mother neglected the subject child, should be affirmed, without costs.

All concur except Saxe and Gesmer, JJ.
who dissent in an Opinion by Gesmer, J.

GESMER, J. (dissenting)

I respectfully dissent. The Family Court failed to make a finding that the respondent Melissa O.'s (mother) conduct impaired or threatened to impair her child's physical, mental or emotional condition, and therefore had no basis to hold that she neglected the child. I would further find that there was no admissible evidence before the Family Court from which it could have made such a finding. Accordingly, I would reverse the decision of the Family Court.

In a child protective proceeding, petitioner has the burden to prove abuse or neglect by a preponderance of the evidence (Family Ct Act § 1046[b][i]). "[A] party seeking to establish neglect must show . . . first, that a child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship" (*Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]; *see also* Family Ct Act § 1012[f][i][B]). Imminent danger "must be near or impending, not merely possible" (*Nicholson v Scoppetta*, 3 NY3d at 369). While a parent's mental illness may be an appropriate basis for a neglect petition under the right circumstances, "'proof of mental illness

alone will not support a finding of neglect'; the evidence 'must establish a causal connection between the parent's condition, and actual or potential harm to the children'" (*Matter of Nialani T. [Elizabeth B.]*, 125 AD3d 672, 674 [2d Dept 2015]; *see also Matter of Jayvien E. [Marisol T.]*, 70 AD3d 430, 435-436 [1st Dept 2010]). "A finding of neglect should not be made lightly" (*Matter of Jayvien E.*, 70 AD3d at 435).

In this case, the Family Court held a fact-finding hearing at which it heard testimony from the ACS caseworker and the mother, and received in evidence only three exhibits: the medical records of St. Barnabas Hospital, where the mother was hospitalized for 24 hours; the Intake Report from the Office of Children and Family Services (ORT); and a group of photographs of the child. In its decision, the Family Court found that the mother

> "fails to provide the subject child . . . with proper supervision or guardianship in that [the mother] suffers from a mental illness which impairs her ability to care for [the child]. I further find that [the mother] has failed to take prescribed medication and has failed to engage in mental health services and that her conduct in failing to take prescribed medication and engage in mental health services constitutes neglect."

This was erroneous for two reasons. First, it finds neglect without a finding, or any support in the record for a finding, that the child was harmed or at imminent risk of harm. Second,

it makes findings not supported by admissible evidence in the record.[1]

I agree that the mother suffered from a mental illness, but that finding alone is insufficient for a neglect finding as a matter of law (*Nicholson v Scoppetta*, 3 NY3d at 368; Family Ct Act § 1012 [f][i]). There is no evidence whatsoever in the record to support the other two elements necessary for a finding of neglect in this case: that the mother failed to engage in mental health treatment as recommended by physicians at St. Barnabas, and, more significantly, that the mother, as a consequence of her mental illness, failed to exercise a minimum degree of care for the child, resulting in harm or imminent risk of harm to the child.

The only facts that the Family Court could properly consider in finding neglect are those occurring prior to the date the

[1] Respectfully, and as discussed below, I also find no basis in the trial record for the additional findings by my colleagues in the majority that the mother's fear that the child had been sexually abused was "unfounded," that she made an unnecessary trip to the hospital to have the child checked, that she "repeatedly check[ed]" her child for evidence of rape, including by inserting a Q-tip into her rectum, or that she "repeatedly" failed to comply with medication or other mental health treatment.

petition was filed, May 16, 2013.[2] Those facts, based on the testimony and evidence at trial are as follows. The mother states that she is from the Republic of the Congo, and has asylum status in the United States. The child was born on February 14, 2013. On May 11, 2013, the mother and child, accompanied by the mother's sister, appeared in the emergency room of St. Barnabas Hospital. The mother told staff there that she believed her cousin had sexually assaulted her daughter, and asked that the child be examined. She also stated that she had been raped, and asked to be tested for sexually transmitted diseases.

The mother told hospital staff that approximately a month earlier, she and the child had left the home they had shared with the mother's husband in Louisiana, due to domestic violence. The mother stated to St. Barnabas staff that she had been in Texas, staying with her cousin who lives there. When she left to go to a motel, the mother was detained by the police, who brought her daughter to the cousin's home and took the mother to a

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[2] The Family Court apparently sought to justify its consideration of events occurring after the date of filing of the petition by stating at the conclusion of the testimony that "on the court's own motion, the pleadings are conformed to the proof." However, by doing so, it deprived the mother of due process, in that she was not provided an opportunity to respond to the amended petition (*cf.* Family Ct Act § 1051[b]). Accordingly, I respectfully submit that it is error for the majority to rely on any events after the filing of the petition.

psychiatric hospital. After a one-week stay, she was discharged on May 10, 2013 pursuant to a court order. Immediately after her release, the mother and her sister retrieved the child from the cousin's home, and flew to New York, arriving at St. Barnabas on May 11, 2013.

When the mother arrived at St. Barnabas with her sister and baby at approximately 11:30 a.m. on May 11, she was exhibiting "erratic behavior, screaming and upset . . . aggressive," and the hospital staff were unable to take the mother's vital signs. As a result, hospital staff restrained and sedated her. However, upon waking that evening, the mother was calm and cooperative, and spoke logically, and remained so until her discharge in "stable" condition at about noon the following day. The period of time during which the mother's behavior at St. Barnabas was "aggressive" was at most a few hours. According to the psychiatrist who examined her on May 12, "she denie[d] hallucinations," and also denied suicidal or homicidal thoughts or plans, "in particular toward her baby daughter." Based on the psychiatric evaluation, she was psychiatrically cleared, and discharged with a 30-day supply of Abilify and directions to follow up with Fordham Tremont Community Mental Health Center (Fordham Tremont) within seven days.

The next day, May 13, 2013, the ACS caseworker, Ms. Wallace,

interviewed the mother at her sister's home.

On May 16, 2013, ACS filed its petition. The child was placed with the maternal aunt, in whose home the mother also lived, on condition that the mother not be left alone with the child.

The Family Court's conclusion that the mother suffered from a mental illness is supported by the records from St. Barnabas, which state that she was diagnosed with delusional disorder. The note by the psychiatrist who made that diagnosis further states that the mother was "calm, cooperative, with well articulated and goal directed speech, which is coherent." He further found that the mother was "psychiatrically cleared" for discharge. This finding alone would not support a finding of neglect.

The Family Court and my colleagues in the majority base their determination that the mother did not take prescribed medication on the mother's statement to the ACS caseworker on May 13, 2013, the day following her discharge, that she had not taken the medication prescribed to her at St. Barnabas, and her statement to the caseworker and hospital staff that she had refused medication prescribed in Texas the week prior. Since she had only been out of the hospital in Texas for one day before she came to New York, she could only have failed to take the medication prescribed in Texas for one day. I would find that

her failure to take the medication prescribed in Texas and by St. Barnabas for one day does not constitute a basis for a neglect finding.[3]

The Family Court and the majority apparently based their conclusion that the mother had failed to engage in mental health services on a belief that she had failed to comply with St. Barnabas's recommendation that she follow up with Fordham Tremont within seven days following her discharge on May 12, 2013; that is, by May 19, 2013. The only evidence to support the finding as to the mother's noncompliance is the caseworker's testimony that, at the time of her initial interview with the mother on May 13, 2013, the mother had not yet contacted Fordham Tremont. However, as of that date, she was not yet out of compliance with St.

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[3] The majority, citing cases where a parent's repeated relapses due to failure to comply with treatment resulted in a finding that the child was neglected (*Matter of Jacob L. [Chastiy P.]*, 121 AD3d 502 [1st Dept 2014]; *Matter of Naomi S. [Hadar S.]*, 87 AD3d 936, 937 [1st Dept 2011], *lv denied* 18 NY3d 804 [2012]), bases its finding that the mother "repeatedly" failed to comply with her medication regimen on the "totality" of the evidence in the record. However, the only evidence in the record that the mother ever failed to comply with medication prior to filing of the petition is her admission to St. Barnabas staff and the ACS caseworker that she did not take medication prescribed to her in Texas a few days before, and her admission to the ACS caseworker that she had not taken the medication prescribed at St. Barnabas the day before. These allegations covering a matter of days, even if true, do not amount to a finding that the mother "repeatedly failed and refused to comply with her medication regimen."

Barnabas's recommendation; in fact, her time to do so had not even run on the date the petition alleging the mother's noncompliance was filed, May 16, 2013. Accordingly, the record does not support a finding that the mother failed to comply with St. Barnabas's recommendation that she follow up with Fordham Tremont for treatment by May 19, 2013. The majority notes that the caseworker testified that the mother told her she had not gone to Fordham Tremont by the seventh day. However, this testimony is directly contradicted by the medical records in evidence, which establish that the seventh day after the mother's release from St. Barnabas had not yet occurred when the caseworker interviewed the mother.[4]

More importantly, there is no evidence to support the Family Court's statement that the mother, as a result of her mental illness, failed to exercise a minimum degree of care for the child, or that this harmed or placed the child at imminent risk

[4] The majority also notes that the mother returned to St. Barnabas on June 11, 2013 to discuss her medication prescription. However, this does not support a conclusion that the mother failed to follow through with treatment for two reasons. First, this medical record was made nearly a month after the neglect petition was filed, and therefore may not be considered to proved the facts alleged in the petition. Second, the ACS caseworker testified on cross-examination that the Mother told her the medication prescribed made her sick, and that the caseworker told the Mother to speak to her doctors about this. Accordingly, if the mother returned to the hospital to discuss her medication, she was complying with the caseworker's recommendation.

of harm. Indeed, the ACS caseworker testified that the mother is a "very loving mother" and "very nurturing," that the mother attended to the child appropriately, that the child did not appear to be in any pain, but rather appeared "good," and that the caseworker saw nothing wrong with the child.

The Family Court's and the majority's conclusion that the mother's illness had an adverse effect on her child is apparently based on her having brought her daughter to St. Barnabas Hospital to be examined because she feared that her daughter had been sexually abused in Texas. Although the child was evaluated in the St. Barnabas pediatric department, no evidence was presented at the fact-finding hearing that the child was not well-cared for or was found to be in any distress. I respectfully disagree with the majority's finding that the mother's fear was "unfounded," and that her taking the child to St. Barnabas was "unnecessary." I find no support for such a finding in the record. Indeed, the Family Court did not make either of these findings.[5] Furthermore, there is absolutely no evidence in the trial record that the mother took the child to be examined for possible sexual

[5] The majority improperly shifts the burden to the mother to prove that her daughter had been raped; rather, it was the obligation of ACS to prove the allegations of the petition that the mother had obtained improper or unnecessary medical care for her daughter (Family Ct Act §§ 1046[b][i]; 1051[a]).

abuse on any other occasion. Accordingly, the mother's having taken the child to St. Barnabas on one occasion to address her concern is not an appropriate basis for a finding that the child was harmed or at imminent risk of harm by reason of the mother's mental illness.

There is also no evidence that the mother "ke[pt] unnecessarily checking her daughter for evidence of rape," as the majority states. The St. Barnabas records include the mother's statement to the evaluating psychiatrist in which she explained her fear that the child had been sexually abused by stating, "because as my daughter get constipated, and I use vasal[i]ne on cotton bud, which started to go high up in her rectum." The ACS caseworker testified that the mother made a similar statement about this single incident to her. More importantly, there is no evidence that the mother's use of a cotton bud to treat constipation on one occasion harmed the child in any way.[6] The Family Court was no doubt appropriately concerned about strange-sounding statements made by the mother to St. Barnabas staff and the ACS caseworker, as are my colleagues in the majority.

[6] The majority suggests that, because the mother became concerned that the cotton bud went in further than it had before, the mother must have been using the cotton bud to check for rape on prior occasions. I find no support for this contention, and neither did the Family Court.

However, the psychiatrist at St. Barnabas cleared the mother for discharge, and the caseworker observed that the mother appropriately cared for her child. Notably, at trial, the mother showed no sign of delusional thinking. In any event, the statements, without more, are insufficient for a finding of neglect.

To the extent that Family Court based its finding of neglect on incidents alleged to have occurred in Texas just prior to the mother's hospitalization at St. Barnabas, I would find that there is insufficient evidence that the child was harmed or at imminent risk of harm during that period as well. Aside from the mother's statements to St. Barnabas personnel, discussed above, the only evidence of those events was from the ORT and the mother's statements to the ACS caseworker, upon which my colleagues in the majority rely heavily. The statements in the ORT concerning the events in Texas reflected the worker's notes of a conversation with a child protective services worker in Texas who was first contacted on May 10, 2013, after the mother had left Texas. All of the information conveyed by the Texas worker appears to be hearsay, and we should not rely on it. As to the mother's statements about the events in Texas, she admitted that the police took her to Green Oaks Hospital, that the police took her daughter to her cousin's home, and that, upon the mother's

discharge several days later, the mother and her sister picked up the child and traveled together to New York. There was no indication from the mother's statements, or any other evidence, that the child was harmed or at imminent risk of harm during the events in Texas.

In light of the lack of actual evidence of injury to the child, ACS and the attorney for the child argue that "courts have found that paranoid behavior . . . is sufficient to show risk of impairment to the child." My colleagues in the majority appear to agree with this drastic change in the law. However, none of the cases cited by ACS, the attorney for the child, or in the majority opinion support this claim. In the majority of those cases, there was evidence that the child's mental or physical condition was actually impaired due to the parent's mental illness (*Matter of Michael P. [Orthensia H.]*, 137 AD3d 499, 500 [1st Dept 2016] [child's teeth decayed, evidencing mentally ill mother's failure to provide basic dental care]; *Matter of Immanuel C.-S. [Debra C.]*, 104 AD3d 615 [1st Dept 2013] [mentally ill mother's home in "deplorable condition," and child had not seen doctor or dentist in several years]; *Matter of Kiemiyah M. [Cassiah M.]*, 137 AD3d 1279, 1280 [2d Dept 2016] [witness testified to seeing infant dressed only in diaper, shivering by open window while mother was distracted by delusions]; *Matter of*

Yu F. [Fen W.], 122 AD3d 761, 762 [2d Dept 2014] [psychiatrist and hospital social worker testified that child would be at risk if returned to mother, because of her untreated mental illness]; *see also Matter of Noah Jeremiah J. [Kimberly J.]* 81 AD3d 37, 40 [1st Dept 2010] [mother's psychiatrist testified about her mental illness and that, without medication, she could not care for son]). Similarly, the majority cites to *Matter of Annalize P. (Angie D.)* (78 AD3d 413 [1st Dept 2010]), where the mother was found to have failed to provide her children with adequate supervision, including by permitting the child to have 5 excused and 24 unexcused school absences in a school year. I do not disagree with my colleagues that a showing of imminent harm due to inadequate care is sufficient for a neglect finding. However, here, petitioner has not proved harm or imminent harm, or that the mother failed to provide adequate guardianship. It has shown only that she suffered from a mental health condition, which is not adequate for a neglect finding without more.

The only cases cited by ACS or the attorney for the child, or in the majority opinion, that do not include a description of actual harm to the child as a result of a parent's mental illness specifically found that the mentally ill parent lacked insight into the effect of the untreated mental illness, and that this

affected the parent's ability to care for the child[7] (*Matter of Jalicia G. [Jacqueline G.]*, 130 AD3d 402, 403 [1st Dept 2015]; *Matter of Jacob L. [Chastity P.]*, 121 AD3d 502 [1st Dept 2014]; *Matter of Essence V.*, 283 AD2d 652, 653 [2d Dept 2001]).[8] In *Matter of Isaiah M. (Antoya M.)* (96 AD3d 516 [1st Dept 2012]), cited by the majority, the mother, who was involuntarily hospitalized for a month, testified that she had auditory hallucinations telling her to harm her child (*id.* at 517). There is no such finding in this case, or any basis for one. Indeed, the evaluating psychiatrist at St. Barnabas determined that the mother denied any homicidal ideation, "in particular toward her baby daughter," and psychiatrically cleared her for discharge.

These cases are distinguishable in other respects as well. In *Matter of Jalicia G.*, this Court found that the child was in

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[7] Thus the majority is incorrect in stating that I concede that a parent's lack of insight into his or her mental illness provides a basis for a finding of neglect; rather, ACS must prove that the parent's lack of insight affected the parent's ability to care for the child.

[8] ACS also cites to *Matter of Caress S.* (250 AD2d 490 [1st Dept 1998]). However, this case predates the Court of Appeals' opinion in *Nicholson v Scoppetta* (3 NY3d 357), which holds that a finding of neglect must be based on both a failure by the parent to provide a minimum degree of care, and resulting harm or imminent risk of harm to the child (*see also In re Jayvien E.*, 70 AD3d at 435-436). Accordingly, to the extent that *Caress S.* held that a finding that a parent's mental illness alone is sufficient for a neglect finding, that case is no longer good law.

imminent harm because of the child's exposure to domestic violence in the home (130 AD3d at 403). In *Matter of Jacob L.*, the mother had multiple extended psychiatric hospitalizations and repeated relapses due to her noncompliance with treatment (121 AD3d at 502).[9] In *Matter of Essence V.*, the court specifically found that the mother was unable to care for the child without treatment, including medication (283 AD2d at 653). Moreover, none of those cases alter the rule that a neglect finding requires a determination that a child is impaired or at imminent risk of impairment as a result of the parent's failure to provide a minimum degree of care, including as a result of the parent's mental illness (*Nicholson v Scoppetta*, 3 NY3d at 368; *Matter of Jayvien E.*, 70 AD3d at 435-436). Finding only that a parent suffered from delusional disorder, persecutory type, is simply not sufficient for a finding of neglect. Since petitioner failed to show either that the mother's mental illness caused her to

[9] Similarly, in *Matter of Naomi S. (Hadar S.)* (87 AD3d 936 [1st Dept 2011] *lv denied* 18 NY3d 804 [2012]), cited by the majority, the mother had had multiple extended hospitalizations and repeated relapses of her mental illness, due to her failure to comply with treatment, and there was a finding that release of the child would pose dangers to the child (*id.* at 937) Moreover, the focus in that case was whether or not services were required for the mother after the father obtained custody of the child (*id.*)

fail to exercise a minimum degree of care for the child, or that he child was ever harmed or at imminent risk of harm as a consequence of such failure, I would reverse the Family Court order of fact-finding and dismiss the petition.

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

ENTERED: FEBRUARY 28, 2017

CLERK

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

2992 Transit Funding Associates, LLC, et al., Plaintiffs-Respondents-Appellants, Index 652346/15

-against-

Capital One Equipment Finance Corp., Formerly known as All Points Capital Corp. doing business as Capital One Taxi Medallion Finance, et al., Defendants-Appellants-Respondents.

_____

Skadden, Arps, Slate, Meagher & Flom LLP, New York (Alexander C. Drylewski of counsel), for appellants-respondents.

Molo Lamken LLP, New York (Robert Kry of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered July 21, 2016, modified, on the law, to grant defendants' motion as to the claims for breach of contract and breach of the implied covenant, and to declare that plaintiffs are liable to defendants under the loan agreement and the guaranties, and otherwise affirmed, without costs.

Opinion by Saxe, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Dianne T. Renwick
David B. Saxe
Paul G. Feinman
Ellen Gesmer, JJ.

2992
Index 652346/15

_____x

Transit Funding Associates, LLC, et al.,
Plaintiffs-Respondents-Appellants,

-against-

Capital One Equipment Finance Corp., Formerly known as All Points Capital Corp. doing business as Capital One Taxi Medallion Finance, et al.,
Defendants-Appellants-Respondents.

_____x

Cross appeals from the order of the Supreme Court, New York County (Saliann Scarpulla, J.), entered July 21, 2016, which, to the extent appealed from as limited by the briefs, denied defendants' motion to dismiss as to the claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and declaratory judgments with respect to the loan agreement and the guaranties, and granted the motion as to the claims for fraud and breach of the letter agreement.

Skadden, Arps, Slate, Meagher & Flom LLP, New York (Alexander C. Drylewski, George A. Zimmerman and Patrick G. Rideout of counsel), for appellants-respondents.

Molo Lamken LLP, New York (Robert Kry, Steven F. Molo and Michelle J. Parthum of counsel), for respondents-appellants.

SAXE, J.

This appeal requires us to consider whether a loan agreement that gives the lender broad authority to deny "any" funding requests "in its sole and absolute discretion" and allows the lender to condition its approval "for any [] reason" can be violated, or the covenant of good faith breached, by the lender's rejection during the term of the contract of all further funding requests, for its own business reasons. We conclude that the contract's language precludes holding the lender liable on either theory.

Plaintiff Transit Funding Associates, LLC. (TFA), a financing company that loaned money to Chicago taxi owners and drivers for the purchase of taxi medallions, entered into a commercial loan agreement with defendant lender, Capital One Taxi Medallion Finance, under which Capital One agreed to fund a loan facility for plaintiff. From 2006 to 2009, before it entered into the credit facility with Capital One, TFA had worked with a local Chicago bank, Cole Taylor Bank, where it had a $20 million credit facility. In March 2009, Capital One allegedly induced Transit Funding to leave Cole Taylor and embark on a joint venture with it whereby TFA would generate business, handle collections, and perform back-office functions, while Capital One provided funding for the venture. The parties would share

profits and losses, and TFA affiliates would guarantee TFA's obligations.

Initially, Capital One provided TFA with a $35 million credit line that allowed TFA to draw down advances as it made medallion loans. Over the years, Capital One increased the credit line in successive steps so that, by April 2012, it stood at $80 million. Accordingly, TFA expanded its business from 130 medallion loans to more than 750 medallion loans.

On April 6, 2012, Capital One and TFA entered into the loan agreement in question, which provided TFA with an $80 million credit line. The agreement provided that Capital One would continue funding advances, as in Section 2.1(c), which provided that Capital One "will make Advances to [TFA] from time to time until the close of business on [the Termination Date] ... in such sums as [TFA] may request." However, that general obligation of Capital One was substantially limited by section 2.1(g) of the loan agreement, which gave Capital One the complete authority to decline to advance funds:

> "Notwithstanding anything to the contrary contained herein, [Capital One] reserves the right to make or decline any request for an Advance in its sole and absolute discretion and may condition the availability of an Advance upon, among other things, (i) that no Default or Event of Default occurring hereunder or under any Loan Document exists and continues beyond the expiration of applicable notice and cure periods; or (ii) the maintenance of a satisfactory financial condition by [TFA] and all Guarantors; or (iii)

> for any other reason determined by [Capital One] in its sole and absolute discretion."

In connection with the loan agreement, Capital One and TFA entered into a "Revolving Advised Line of Credit Promissory Note" for the $80 million principal. Plaintiffs Patton Corrigan and Michael Levine, the principals and sole owners of TFA, along with various TFA affiliates, entered into written guaranties dated April 6, 2012, unconditionally and absolutely guaranteeing TFA's obligations to Capital One under the loan agreement.

In April 2013, Capital One began internal discussion of the possibility that it would abandon the joint venture and the Chicago medallion market. However, in reliance on assurances by Capital One representatives, on July 31, 2013, the parties renewed the credit facility under the loan agreement to July 1, 2014, with an automatic three-month extension to October 1, 2014.

However, before expiration of the loan agreement, Capital One abruptly began denying all loan advances, regardless of the creditworthiness or circumstances of particular medallion owners. In fact, on February 25, 2014, Capital One denied a request for $1.3 million to fund three loans, even though it had previously approved those loans. TFA later learned that Capital One had begun collaborating with the ride-sharing service Uber, a direct competitor to medallion taxi drivers. In particular, Capital One

entered into a joint venture with Uber whereby Uber customers received a discount when they paid with their Capital One credit card, and new customers got two free rides up to $60.

In March 2014, TFA asked Capital One for permission to sell the 48 medallions that its affiliates had pledged as security, and offered to substitute all cash proceeds as security. Capital One refused, thereby preventing TFA from liquidating these assets at an opportune time.

It is plaintiffs' position that Capital One undermined TFA's ability to carry on its business, effectively destroying the Chicago medallion loan market by causing all similar funding to dry up, and destroyed TFA's collateral. Ultimately, TFA was effectively forced into liquidation. It began winding down its lending operations and used proceeds it received to pay back its loan facility.

Because the winding down process would take time, the parties extended the terms of the credit facility with a letter agreement dated September 16, 2014. The letter agreement extended the credit facility for 365 days after the closing date, specified to be "not later than September 30, 2014." It reduced the lending limit from $80 million to $57.2 million, and required that all proceeds arising from the collateral be applied to amounts due under the facility. Corrigan, Levine, and the TFA

affiliates guaranteed TFA's obligations under the letter agreement.

Plaintiffs claim that Capital One violated the terms and covenants of the letter agreement as well as the loan agreement. Plaintiffs assert specifically that despite the closing deadline set for September 30, 2014, Capital One did not provide draft closing documents for review and execution until November 7, 2014, and that, although TFA commented on the draft closing documents within one week, and objected to the new proposed provision calling for liens on assets of TFA affiliates, in December 2014, Capital One told TFA that it would not release the documents until after it had completed field evaluations, and demanded 20 different categories of documents from TFA. TFA cooperated fully, and the examination was completed by December 31, 2014. Capital One then demanded field examinations of the guarantors. Such examinations were neither authorized by the letter agreement nor "usual and customary." TFA's affiliates raised concerns that the process would be very burdensome and had not been required in the past. However, Capital One refused to explain its purpose.

On January 6, 2015, Capital One further demanded that TFA submit a borrowing base certificate and cure a $1.1 million deficiency. After a Capital One representative acknowledged that

there was no requirement in the letter agreement for the borrowing base demand, that the sought disclosures were not contractually required, and that his colleagues were on a "witch hunt," the representative was fired by Capital One.

On April 2, 2015, Capital One sent TFA's principals -- rather than their known legal counsel -- a proposed standstill agreement, which imposed burdensome conditions on TFA, including requiring that TFA (1) make admissions regarding its alleged default of the loan agreement, (2) not make any more loans to anyone in excess of $25,000, (3) pay a default interest rate on the amounts owed, even though the parties were still negotiating, (4) pay $600,000 plus legal fees, and (5) waive all rights or claims of any kind that they had against Capital One. It had been signed by Capital One and backdated to December 1, 2014, and did not acknowledge the existence or terms of the letter agreement. Subsequent negotiations were fruitless.

Capital One initiated an action to enforce the guaranties, and TFA commenced this contract action, containing causes of action for (1) breach of the loan agreement, (2) breach of the covenant of good faith and fair dealing with respect to the loan agreement, (3) breach of fiduciary duty toward TFA and the guarantors, (4) fraud with respect to Capital One's alleged misstatements and omissions regarding its commitment to the joint

venture, (5) unfair competition, (6) negligent impairment of collateral, (7) breach of the letter agreement, (8)a declaratory judgment that the loan agreement is invalid and unenforceable against TFA and the guarantors, that Capital One materially breached and repudiated the agreement, and that TFA and the guarantors have no liability to Capital One, and (9) a declaratory judgment that the guarantors are not liable to Capital One under their guaranties.

Capital One moved to dismiss the complaint in its entirety. The motion court, to the extent relevant on appeal, dismissed the claims for fraud and breach of the letter agreement, but declined to dismiss the claims for breach of the loan agreement, breach of the implied covenant of good faith and fair dealing, and declaratory judgments with respect to the loan agreement and the guaranties.

Capital One appeals from the denial of its motion to dismiss the breach of contract, breach of the implied covenant of good faith and fair dealing, and declaratory judgment claims. TFA and the guarantors appeal from the dismissal of their claims for fraud and breach of the letter agreement.

Capital One moved separately for summary judgment in lieu of complaint against Corrigan and Levine on the guaranties. The court denied the motion. The appeal from that order is decided

simultaneously herewith (Appeal No. 2993).

We uphold the dismissal of the claims for fraud and breach of the letter agreement, but modify to dismiss TFA's claims for breach of the loan agreement and breach of the implied covenant of good faith and fair dealing, and to declare in defendant's favor with respect to liability under the agreements.

In view of the provisions of the loan agreement expressly allowing Capital One to deny any requests for advances in its "sole and absolute discretion," and specifically authorizing Capital One to deny any such requests for any reason, it cannot be said that Capital One violated the contract by failing to advance funds as requested, even if that decision put TFA out of business.

Although "[i]n New York, all contracts imply a covenant of good faith and fair dealing in the course of performance" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144 [2002]), the existence of the covenant cannot be relied on as grounds for TFA's action.[1] The covenant of good faith and fair dealing cannot negate express provisions of the agreement (*see 767 Third*

[1] To the extent defendants may not have framed their argument to the motion court regarding the claim for violation of the covenant of good faith and fair dealing precisely as they do on appeal, we address the merits of their argument here since it is a pure question of law (*see Buttitta v Greenwich House Coop. Apts., Inc.*, 11 AD3d 250 [1st Dept 2004]).

Ave. LLC v Greble & Finger, LLP, 8 AD3d 75 [1st Dept 2004]), nor is it violated where the contract terms unambiguously afford Capital One the right to exercise its absolute discretion to withhold the necessary approval (*see Moran v Erk*, 11 NY3d 452 [2008]). Where a contract allows one party to terminate the contract in "its sole discretion" and for "any reason whatsoever," the covenant of good faith and fair dealing cannot serve to negate that provision (*see ELBT Realty, LLC v Mineola Garden City Co., Ltd.*, 144 AD3d 1083, 1084 [2d Dept 2016] [internal quotation marks omitted]; *see also National Westminster Bank, U.S.A. v Ross*, 130 BR 656, 679 [SD NY], *affd sub nom Yaeger v National Westminter*, 962 F2d 1 [2d Cir 1992]; *Cookware Company [USA], LLC v Austin,* 2016 WL 7378762, *8, 2016 US Dist LEXIS 177691, *21 [SD NY 2016]). Notably, where the parties intended to limit either party's rights under the loan agreement so that they could only be exercised "in good faith," they specifically included such language; for example, section 1.1 of the agreement allows Capital One to establish a valuation methodology "in its sole and absolute discretion *exercised in good faith*." In contrast, the provision of section 2.1 authorizing Capital One to decline any request for an advance "in its sole and absolute discretion" lacks any such limitation requiring Capital One to act in good faith when doing so. Because Capital One's

complained-of conduct consists entirely of acts it was authorized to do by the contract, its alleged motivation for doing so is irrelevant. Simply put, an intent to put TFA out of business cannot justify a lawsuit for a claimed breach of the covenant where the express provisions of the agreement allowed Capital One to act as it did.

The causes of action for declaratory relief concern the separate litigation brought by Capital One to enforce the guaranties of the loan agreement. They rely on the provisions of those guaranties creating a limitation of liability where there is "a final adjudication by a court of competent jurisdiction of a valid defense to [TFA]'s obligations under the Loan Documents to payment of its liabilities." In support of their claims for declaratory judgments, plaintiffs allege that breach of contract and negligent interference with collateral constitute valid defenses to TFA's obligations under the loan agreement. However, breach of contract and negligent interference with collateral are not defenses to TFA's liability under the loan agreement; they are merely counterclaims. The adjudication of these claims will not affect TFA's liability for repayment of the amounts borrowed before the breach occurred, but, had the claims been brought in the same litigation, could have resulted in a setoff from the amount TFA owed (*see generally Metropolitan Switch Bd. Mfg. Co.,*

Inc. v B & G Elec. Contrs., Div. of B & G Indus., Inc., 96 AD3d 725 [2d Dept 2012]; *Color Mate v Chase Manhattan Bank*, 168 AD2d 534 [2d Dept 1990]).

Accordingly, the order of the Supreme Court, New York County (Saliann Scarpulla, J.), entered July 21, 2016, which, to the extent appealed from as limited by the briefs, denied defendants' motion to dismiss as to the claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and declaratory judgments with respect to the loan agreement and the guaranties, and granted the motion as to the claims for fraud and breach of the letter agreement, should be modified, on the law, to grant defendants' motion as to the claims for breach of contract and breach of the implied covenant, and, to declare that plaintiffs are liable to defendants under the loan agreement and the guaranties, and otherwise affirmed, without costs.

All concur.

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

ENTERED: FEBRUARY 28, 2017

CLERK