SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 26, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Mazzarelli, Andrias, Manzanet-Daniels, Gesmer, JJ.

1298 Coast to Coast Energy, Inc., et al.,
Plaintiffs-Appellants,

Margaret M. Spence, et al.,
Plaintiffs,

-against-

Mark Gasarch, et al.,
Defendants-Respondents.

John and Jane Does 1-100,
Defendants.

Index 651670/10

Law Offices of Edward J. Boyle, Manhasset (Edward J. Boyle of counsel), for appellants.

Law Offices of Mark Gasarch, New York (Mark Gasarch of counsel), for Mark Gasarch and Petro-Suisse Limited, respondents.

Engelhardt Law, New York (David Engelhardt of counsel), for John Wampler, respondent.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered July 24, 2014, which, to the extent appealed from as limited by the briefs, granted defendant John Wampler's motion to dismiss the third amended complaint in its entirety, on

jurisdictional grounds, and granted the motion of defendants Mark Gasarch and Petro-Suisse Limited to dismiss plaintiffs' causes of action for breach of fiduciary duty, breach of the covenant of good faith and fair dealing, unjust enrichment, and plaintiffs' demand for punitive damages, and dismissed the fraud cause of action only insofar as asserted by plaintiffs Mark Gonsalves, Lawrence Doherty, and the Coast to Coast plaintiffs, affirmed, without costs.

Pursuant to CPLR 302(a)(1) a New York court may exercise personal jurisdiction over a nondomiciliary if the nondomiciliary has purposefully transacted business within the state and there is "a substantial relationship between the transaction and the claim asserted" (*Paterno v Laser Spine Inst.*, 24 NY3d 370, 376 [2014] [internal quotation marks omitted]). "Purposeful activities are volitional acts by which the non-domiciliary avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws" (*id.* [internal quotation marks omitted]). "More than limited contacts are required for purposeful activities sufficient to establish that the non-domiciliary transacted business in New York" (*id.*).

On a motion to dismiss pursuant to CPLR 3211(a)(8), the

plaintiff has the burden of presenting sufficient evidence, through affidavits and relevant documents, to demonstrate jurisdiction (*see Fischbarg v Doucet*, 9 NY3d 375, 381 n5 [2007]; *Copp v Ramirez*, 62 AD3d 23, 28 [1st Dept 2009], *lv denied* 12 NY3d 711 [2009]). Here, plaintiffs failed to carry their burden in pleading purposeful activities in New York by defendant John Wampler, allegedly a resident of Switzerland and Texas, sufficient to establish long-arm jurisdiction pursuant to CPLR 302(a)(1).

The dissent would hold that in the third amended complaint plaintiffs adequately pleaded jurisdiction under CPLR 302(a)(1) based on allegations that Wampler "transacted" business in New York through his agents, defendants Mark Gasarch and Petro-Suisse Limited (PSNY).

To establish that a defendant acted through an agent, a plaintiff must "convince the court that [the New York actors] engaged in purposeful activities in this State in relation to [the] transaction for the benefit of and with the knowledge and consent of [the defendant] and that [the defendant] exercised some control over [the New York actors]" (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]). "[T]]o make a prima facie showing of control, 'a plaintiff's allegations must sufficiently

detail the defendant's conduct so as to persuade a court that the defendant was a primary actor' in the specific matter in question; control cannot be shown based merely upon a defendant's title or position within the corporation, or upon conclusory allegations that the defendant controls the corporation" (*Northern Val. Partners, LLC v Jenkins*, 23 Misc 3d 1112(A), ***4 [Sup Ct, New York County 2009] *quoting Karabu Corp. v Gitner,* 16 F Supp 2d 319, 324 [SD NY 1998]; *see also Polansky v Gelrod*, 20 AD3d 663, 664 [3d Dept 2005]).

The dissent contends that the third amended complaint satisfies these principles by virtue of plaintiff's allegations that Wampler was in daily communication with PSNY concerning the subject oil exploration partnerships and drilling operations, that Wampler instructed Gasarch concerning distributions and "routinely" directed him to transfer funds, and that Gasarch acted for the benefit of and with the knowledge and consent of Wampler, who exercised "some control." However, Wampler's status as a principal of PSNY does not in and of itself confer jurisdiction. Plaintiffs failed to allege facts demonstrating that Wampler controlled Gasarch and PSNY's activities sufficient to support New York jurisdiction, and plaintiff's vague, conclusory and unsubstantiated allegations do not suffice to

establish long arm jurisdiction (*see Cotia (USA) Ltd. v Lynn Steel Corp.*, 134 AD3d 483, 484 [1st Dept 2015] ["Plaintiff has offered nothing but conclusory assertions to support long-arm jurisdiction under CPLR 302 (a)(1)"]; *Polansky v Gelrod*, 20 AD3d at 664 ["plaintiff offers only the conclusory allegation that Gelrod was their agent, with no supporting evidentiary facts establishing control").

The allegations that Gasarch only accessed PSNY's New York bank accounts at Wampler's direction were previously asserted upon information and belief in the second amended complaint, and plaintiffs offered no new facts or explanation for the change in the third amended complaint. Although plaintiffs added an allegation that "according to bank records, Wampler would routinely direct Gasarch to withdraw investor funds from PSNY," they provided no details regarding any such bank records or how they might reflect Wampler's involvement, and did not attach the bank records as an exhibit to their complaint.

The allegation that Wampler was in daily communication with PSNY concerning the oil exploration partnerships and drilling operations is conclusory, and plaintiff failed to proffer any specific facts to demonstrate how or when Wampler participated in preparing the Private Placement Memoranda for the investments.

Similarly, the allegation that Gasarch acted for benefit of and with knowledge and consent of Wampler, who exercised "some control" contains no detail as to what statements were made, when they were made, what contract they were made in regards to, and whether or not the alleged misrepresentations were relied upon in such a way that would imply liability.

The dissent also cites plaintiffs' allegations that Wampler personally solicited plaintiffs' investment in the funds during several visits to New York in 2006 and 2007. However, "the transitory presence of a corporate official" does not support jurisdiction (*see Fischbarg v Doucet*, 9 NY3d at 380) and plaintiffs do not explain how Wampler engaged in any tortious or actionable misconduct at these meetings that would subject him to jurisdiction in New York. There is no indication when the first two meetings took place, other than providing the year; there is no detail as to where the first meeting took place; it is not clear which drilling projects the meetings pertained to; and the allegations of Wampler's alleged misrepresentations are provided in only very general terms (*see Mahtani v C. Ramon*, 168 AD2d 371 [1st Dept 1990]). It is not alleged that Wampler negotiated with a party, and the center of gravity of the contract was in

Trinidad and Tobago.[1]

Plaintiff-appellant Mark Gonsalves has not pleaded his reliance on the alleged misrepresentations, or injury, sufficient to support a claim for fraud, as he did not allege that he invested in the partnerships at issue (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). The Coast to Coast entities have not stated a claim for fraud, because they, too, have not alleged injury (*id.*).

The causes of action for breach of fiduciary duty, unjust enrichment, and breach of the implied covenant of good faith and fair dealing were properly dismissed as duplicative of the breach of contract cause of action, which was sustained as against the defendants other than Wampler (*Feld v Apple Bank for Sav.*, 116 AD3d 549, 551 [1st Dept 2014], *lv denied* 23 NY3d 908 [2014];

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[1]As the dissent observes, the Court of Appeals concluded in *Fischbarg* that defendants' retention and subsequent communications with plaintiff in New York established a continuing attorney-client relationship in this state and thereby constituted the transaction of business under CPLR 302(a)(1). However, in *Fischbarg* the record established that defendants called Fischbarg, a New York attorney, in order to represent them in an action in Oregon, entered into a retainer agreement, and participated in that relationship via telephone calls, faxes and e-mails over many months. Thus, the Court found that defendants purposefully projected themselves into New York. In contrast, here plaintiffs rely on conclusory allegations and have not demonstrated that Wampler engaged in sustained and substantial business with plaintiffs in New York.

Ellington v Sony/ATV Music Publ. LLC, 85 AD3d 438, 439 [1st Dept 2011]).

Plaintiffs have not alleged that defendants acted with the requisite "high degree of moral turpitude" to support their demand for punitive damages (*Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 85 AD3d 457, 458 [1st Dept 2011] [internal quotation marks omitted]).

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

All concur except Manzanet-Daniels, J. who dissents in part in a memorandum as follows:

MANZANET-DANIELS, J. (dissenting in part)

I disagree with the majority that the motion court properly dismissed the complaint in its entirety against defendant Wampler on jurisdictional grounds. In my view, plaintiff has sufficiently alleged that Wampler is subject to long-arm jurisdiction under CPLR 302(a)(1).

"[A] court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent . . . transacts any business within the state or contracts anywhere to supply goods or services in the state" (CPLR 302[a][1]). "[P]roof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted" (*Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 71 [2006], *cert denied* 549 US 1095 [2006]; *Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]).

The third amended complaint sufficiently alleges that Wampler "transacted" business through his New York agents PSNY and Gasarch. Plaintiffs allege that Wampler was in daily communication with PSNY's New York office concerning the subject oil exploration partnerships and the drilling operations of

affiliated overseas entities. Plaintiffs allege that Wampler instructed Gasarch concerning account distributions and "routinely" directed Gasarch to withdraw investor funds from PSNY and transfer them to defendants' personal accounts. PSNY and Gasarch acted "for the benefit of and with the knowledge and consent of [the] defendant[] and that [defendant] exercised some control over [the agent] in the matter" so as to subject Wampler to jurisdiction under the long-arm statute (*Kreutter*, 41 NY2d at 467).

The majority maintains that plaintiffs' allegations are conclusory and unsubstantiated. However, the majority fails to meaningfully distinguish the allegations in this case from those found to be sufficient in other cases involving the transaction of business through an agent within the meaning of the long-arm statute (*see e.g. Kreutter*, 71 NY2d 460 [Texas defendants which marketed oil investments through New York corporate agent transacted business within the meaning of the long-arm statute]; *Holmes v First Meridian Planning Corp.*, 155 AD2d 813 [3d Dept 1989] [Florida mortgage company transacted business through New York corporate agent alleged to have falsely represented the value of certain condominiums where the New York agent received commissions from the Florida company and solicited business for

it by advising the plaintiffs of the availability of obtaining a mortgage from the Florida company]).

Wampler's argument that he is not an alter-ego of PSNY, while relevant to the issue of substantive liability, is not relevant to the issue of whether he transacted business through an agent so as to subject him to personal jurisdiction *(see Kreutter* at 469-470).

Further, plaintiffs allege that Wampler himself personally solicited plaintiffs' investment in the funds during several visits to New York in 2006 and 2007. Gonsalves alleges that Wampler met with him in New York in 2006 "to describe the oil wells to be drilled in Trinidad – while knowing that no such wells would ever be drilled." During this meeting, Wampler "pointed to the past 'success' of the drilling programs since 2003, the number of wells drilled, the amount of production, and the revenues earned as evidence of the program's viability and robustness." These representations were allegedly "false and deliberately contrived by Wampler" to induce Gonsalves and potential investors to invest in the Trinidad operations.

Gonsalves alleges that Wampler met with him in 2007 at PSNY's New York offices, to "describ[e] the quick profit from" Coast to Coast Energy, which Gonsalves and Wampler formed in

2005, as well as "the continued supply of new investors, and the time needed for fund raising [sic] to continue."

Plaintiffs also allege that Wampler and Gasarch met Russack at PSNY's New York offices in May 2005 "for the purpose of selling an interest in a drilling rig to Russack, as part of [the] oil equipment scheme." Wampler allegedly "pointed to the prior successes of the oil exploration partnerships as evidence of the viability and legitimacy of the oil equipment investment, while knowing that such evidence was completely fabricated and false."

Plaintiffs sufficiently allege that Wampler "transacted business" within the meaning of the long-arm statute (*see e.g. Corporate Campaign v Local 7837, United Paperworkers Intl. Union*, 265 AD2d 274 [1st Dept 1999] [daily communication, together with twelve trips to New York by the defendant's representatives, subjected the defendant to long-arm jurisdiction]; *Urfirer v S.B. Builders, LLC*, 95 AD3d 1616, 1618 [3d Dept 2012] [allegations that the defendant extensively communicated with subcontractors electronically and via telephone and traveled to New York to supervise the project sufficient to withstand motion to dismiss]; *Stardust Dance Prods., Ltd. v Cruise Groups Intl., Inc.*, 63 AD3d 1262 [3d Dept 2009] [attendance at two meetings in 2007, during

which the defendant was alleged to have solicited travelers for dance cruises by displaying promotional materials and responding to inquiries, raised a question concerning whether the defendant had transacted business within the meaning of the statute]). While the oil exploration partnerships may have been located in the Caribbean, the complaint alleges that Wampler met with investors in New York for the purposes of soliciting their participation in the venture, and to sell interests in a drilling rig as part of the alleged scheme. I would accordingly reverse the order appealed to the extent it dismissed the claims against Wampler.

The cases upon which the majority relies in finding otherwise are wholly inapposite, involving the failure to allege the requisite nexus between the transaction and the defendant's activities (*see Mahtani v C. Ramon*, 168 AD2d 371 [1st Dept 1990] ["[v]ague references by plaintiff to discussions had in New York which could have taken place either before or long after the transaction complained of fail to demonstrate purposeful activity by the defendants in this State that was undertaken in connection with the transactions at issue"]), or an isolated shipment of goods to an out-of-state defendant who then failed to pay, the "classic instance in which personal jurisdiction is found *not* to

exist" (*Cotia (USA) Ltd. v Lynn Steel Corp.*, 134 AD2d 483 [1st Dept 2015] [internal quotation marks and citations omitted]). In *Fischbarg v Doucet* (9 NY3d 375 [2007]), another case cited by the majority, the Court of Appeals held that the retention of a New York attorney by a California plaintiff for purposes of litigating a case in Oregon did in fact constitute the transaction of business within the meaning of the long-arm statute (*id.*).

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

ENTERED: JANUARY 26, 2017

CLERK

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

2119 Jose Gutierrez, Index303022/13
Plaintiff-Respondent,

-against-

Srenick, Inc., et al.,
Defendants-Appellants.

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, Bronx County (Donna Mills, J.), entered on or about February 16, 2016,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated December 1, 2016,

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

ENTERED: JANUARY 26, 2017

CLERK

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

2122 Alberto Burgos-Lugo, Index 151768/12
Plaintiff-Appellant,

-against-

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

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Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Susan Paulson of counsel), for respondents.

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Order, Supreme Court, New York County (Frank P. Nervo, J.), entered on or about July 7, 2015, which, to the extent appealed from, granted defendants' motion for summary judgment to the extent of dismissing plaintiff's state and federal claims for malicious prosecution and his federal claims for assault, battery, and excessive force; denied defendants' motion for summary judgment on plaintiff's federal false arrest, false imprisonment, and illegal search and seizure claims; and denied plaintiff's cross motion for summary judgment on his federal claims for assault, battery, false arrest, false imprisonment, and illegal search and seizure, unanimously modified, on the law, to deny defendants' motion as to plaintiff's federal assault and battery claims, and otherwise affirmed, without costs.

In this appeal, we address cross motions for summary judgment in a civil rights action arising out of plaintiff's arrest and the resulting narcotics possession prosecution, which was ultimately dismissed. The motion court denied plaintiff's cross motion for summary judgment in its entirety, denied defendants' summary judgment motion on plaintiff's claims for false arrest, false imprisonment, and illegal search and seizure, and granted defendants' summary judgment motion on all of plaintiff's other state and federal claims[1]. We affirm all of the motion court's order,[2] except to the extent of reinstating plaintiff's federal claims for assault and battery.

The motion court correctly concluded that an issue of fact

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[1] Before this motion practice, the parties stipulated to dismissal of several of plaintiff's original claims against the City of New York. In their appellate briefs, the parties agree that the only claims that survived the stipulation were plaintiff's federal excessive force, assault, battery, malicious prosecution, false arrest, false imprisonment, and illegal search and seizure claims against the individual defendants under 42 USC § 1983, and, plaintiff's state law malicious prosecution claim against the City of New York. These claims were the subject of the parties' cross motions for summary judgment.

[2] Although only plaintiff appeals from the motion court's order on that issue, defendants have asked us to exercise our power to search the record and grant their motion for summary judgment on plaintiff's false arrest, false imprisonment, and illegal search and seizure claims (*see Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106, 110-111 [1984]).

regarding probable cause for plaintiff's search, seizure, and arrest precluded summary judgment for any party on the federal claims of false arrest, false imprisonment, and illegal search and seizure. The indictment is some evidence that the arresting officer had probable cause to arrest plaintiff (*see Broughton v State of New York*, 37 NY2d 451, 458 [1975], *cert denied sub nom. Schanbarger v Kellogg*, 423 US 929 [1975]). However, the evidence was suppressed, the indictment was dismissed, and the testimony conflicts as to what the officer observed in the moments preceding his interaction with and subsequent arrest of plaintiff. "Given these factual disputes and the variety of inferences that could be drawn from them, the issue of probable cause could not be resolved as a matter of law . . ." *(Parkin v Cornell Univ.*, 78 NY2d 523, 530 [1991]). Accordingly, all parties' summary judgment motions on these claims were properly denied.

However, the issue of fact regarding probable cause should have led to the denial of not only plaintiff's but also defendants' summary judgment motion on plaintiff's federal assault and battery claims. This Court has held that "[an] issue of fact as to probable cause for [an] arrest precludes summary dismissal of [an] assault and battery claim" (*Mendez v City of*

New York, 137 AD3d 468, 471 [1st Dept 2016], citing *Johnson v Suffolk County Police Dept.*, 245 AD2d 340, 341 [2d Dept 1997]). Accordingly, we modify the motion court's order to the extent of reversing its dismissal of plaintiff's federal assault and battery claims and reinstating them.

As to plaintiff's remaining claims, we affirm their dismissal by the motion court.[3] The motion court properly dismissed plaintiff's federal excessive force claim because, although he complained that his handcuffs were too tight, there is no evidence of injury (*see Lynch v City of Mount Vernon*, 567 F Supp 2d 459, 468 [SD NY 2008]). Plaintiff's state malicious prosecution claim against the City and his federal malicious prosecution claim against the individual defendants were properly

[3] The parties argued the issue of a purported strip search claim by plaintiff in their briefs. However, plaintiff only alleged illegal strip search in his bill of particulars and in his claim for negligent supervision against the City which he voluntarily dismissed by stipulation. The motion court never explicitly ruled upon an illegal strip search claim although it referred to plaintiff being strip searched at a federal facility when it granted summary judgment to defendants on plaintiff's assault and battery claims. We decline to address this purported illegal strip search claim because it was not properly pleaded against these defendants by plaintiff. Alternatively, were we to address it, we would conclude that this purported illegal strip search claim should be dismissed as the record contains no evidence that either individual defendant authorized or conducted a strip search of plaintiff.

dismissed because there is no evidence of actual malice. The record does not demonstrate that defendants "'commenced the prior criminal proceeding due to a wrong or improper motive, something other than a desire to see the ends of justice served'" (*Du Chateau v Metro-North Commuter R.R. Co.*, 253 AD2d 128, 132 [1st Dept 1999], quoting *Nardelli v Stamberg*, 44 NY2d 500, 503 [1978]).

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: JANUARY 26, 2017

CLERK

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

2482 Brookwood Companies, Inc., Index 653723/14
Plaintiff-Appellant,

-against-

Alston & Bird LLP, et al.,
Defendants-Respondents.

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Storch Amini & Munves PC, New York (Steven G. Storch of counsel), for appellant.

Friedman Kaplan Seiler & Adelman LLP, New York (Eric Seiler of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered on or about September 30, 2015, which granted defendants' motion to dismiss the complaint, unanimously affirmed, with costs.

Plaintiff (Brookwood) is the former client of defendants (A&B) and this is an action for legal malpractice and other causes of action. The parties' dispute arises from an underlying patent infringement lawsuit that was brought against Brookwood in connection with work undertaken on behalf of the United States government (patent action).

A focal point of this appeal is Brookwood's claim that A&B, in the patent action, negligently litigated defenses that were available to Brookwood pursuant to 28 USC § 1498. 28 USC § 1498

provides that when a patent is infringed for the benefit of the United States government, the patent holder's remedy is against the United States in the United States Court of Federal Claims. Brookwood alleges that had A&B not been negligent, the motions that A&B eventually brought based on 28 USC § 1498 would have been granted and Brookwood would have avoided the approximately $10 million it expended on defending itself at trial and on appeal. Important in this analysis is the fact that Brookwood ultimately prevailed in the underlying patent action, achieving a judgment of noninfringement. The theory of Brookwood's malpractice case is not that but for A&B's negligence it would have prevailed in the patent action; rather Brookwood's claim is that but for the manner in which A&B interposed the defenses available to Brookwood under 28 USC § 1498, Brookwood would have prevailed without incurring the additional legal fees it expended. In other words, but for A&B's negligence, Brookwood could have achieved the same result more expeditiously and economically. The Supreme Court granted A&B's motion and dismissed the complaint in its entirety, holding, among other things, that the allegations did not support a finding of attorney negligence or of proximate cause. We now affirm.

28 USC § 1498(a)[1] authorizes government contractors to infringe on United States patents when providing goods and services for the government to the government's specifications. In those circumstances, the federal government waives immunity from suit, allowing the patent holder to sue it for any resulting infringement (*Madey v Duke Univ.*, 413 F Supp 2d 601, 606 [MD NC 2006]; *see also Windsurfing Intern., Inc. v Ostermann*, 534 F Supp 581, 587 [SD NY 1982]).

In 2006, the federal government solicited bids for production and delivery of cold-weather clothing for use by the military. At a presolicitation conference, Brookwood informed the government that it believed that compliance with the government's specifications for such garments could infringe on patents held by nonparty Nextec Applications, Inc. (Nextec). The

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[1]In its entirety, 28 USC § 1498(a) provides as follows:

> "Whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, the owner's remedy shall be by action against the United States in the United States Court of Federal Claims for the recovery of his reasonable and entire compensation for such use and manufacture."

government ultimately changed its specifications, but before doing so, a government specialist stated in an email to Brookwood that the government's standard patent infringement indemnity clause would be included in the contract stating, in sum and substance, that the government authorizes and consents to the use of any patented invention in fulfillment of its contracts (*see* CFR 48 CFR 52.227-1[a]). The government contract was ultimately awarded to Atlantic Diving Supply (ADS) and Brookwood was approved as ADS's subcontractor, responsible for manufacturing and supplying to ADS the fabric needed to fulfill the contract with the government. The contract provision identified in the government specialist's email was not included in the government's contract with ADS.

For a number of years preceding any of these events, Brookwood had hired A&B to perform nonlitigation intellectual property services, including preparing noninfringement opinions, the subject of which were some of the patents held by Nextec. After Nextec commenced the patent action, Brookwood retained A&B to defend it, specifically because of its pre-litigation familiarity with those patents. Brookwood now claims that had A&B disclosed that there was the potential for the attorney-client and/or work product privilege to be waived if the

noninfringement opinions were used in the patent action, Brookwood would not have retained the firm.

Nextec commenced the patent action against Brookwood in the Southern District of New York, alleging patent infringement and asserting both product and method claims (*Nextec Applications Inc. v Brookwood Cos.*, No. 07-CV-6901). The product claims pertained to the tangible aspects of Brookwood's manufacture of the fabric, whereas the method claims alleged infringement of Nextec's know-how or process used to apply a coating that gave fabrics their breathable, water-resistant characteristics.[2]

A&B filed an answer on Brookwood's behalf, which included a defense under 28 USC § 1498. It then brought two successive motions for partial summary judgment, each approximately one year apart. The first motion, made in June 2008, was made only after Nextec had narrowed its claims, for purposes of expert discovery. In the first motion, A&B sought dismissal under 28 USC § 1498, but limited only to Nextec's production claims against Brookwood's manufacture and sale of fabrics. In its January 6, 2009 order, the Southern District granted the motion in part,

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[2]*In re Kollar* (286 F3d 1326, 1332 [Fed Cir 2002]) contains a detailed explanation of the legal distinction between product and method (a)claims.

dismissing all claims related to fabrics Brookwood manufactured for ADS for eventual delivery to the federal government. The motion was, however, denied to the extent that Nextec raised issues of fact regarding whether some of the fabric Brookwood had delivered to ADS might have made its way into the marketplace and been made available to the general public.

Following the close of expert discovery related to the remaining claims, Brookwood moved for summary judgment as to the method claims in the complaint. Nextec separately moved for partial summary judgment at the time. A&B argued on behalf of Brookwood that Nextec's patents were invalid and/or that the methods used by Brookwood did not infringe on any of Nextec's patents. Alternatively, A&B argued that the claims should be dismissed pursuant to 28 USC § 1498(a) because Brookwood's infringement of Nextec's patents was necessary in order to comply with the government's specifications for the weatherproof garments. In its March 31, 2010 decision, the Southern District Court dismissed seven of the ten method claims (*see Nextec Applications v Brookwood Companies, Inc.* 703 F Supp 2d 390, 415 [SD NY 2010]). It denied, however, that part of Brookwood's motion made pursuant to 28 USC § 1498(a) as "premature" because it was at least plausible for a jury to conclude that it was not

necessary to infringe on the patents to fulfill the government contracts, while at the same time concluding the Brookwood did infringe on these two patents (*id.*). Only if infringement was "necessary" for Brookwood to fulfill its obligations to the government, would 28 USC § 1498(a) then require a nonmerits dismissal of the case from the District Court (*id.*).

Brookwood subsequently discharged A&B and went to trial represented by its new attorneys. Brookwood successfully obtained a judgment of noninfringement, which Nextec unsuccessfully appealed. Nextec then brought an action against the United States in the Court of Federal Claims, asserting the same claims that Brookwood had successfully defended in the Southern District Court (*Nextec Applications, Inc. v United States*, 114 Fed Cl 532, 534 [2014]). There is no dispute that Nextec had the right to reassert those same claims against the United States government in the Court of Federal Claims (*Richmond Screw Anchor Co. v U.S.*, 275 US 331, 343 [1928]), and Brookwood intervened in that action. Nextec eventually voluntarily dismissed that action with prejudice. This litigation ensued.

To sustain its cause of action for legal malpractice, Brookwood must show that A&B "failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of

the legal profession and that [A&B's] breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages" (*Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40, 49 [2015] [internal quotation marks omitted]). An attorney's conduct or inaction is the proximate cause of a plaintiff's damages if "but for" the attorney's negligence "the plaintiff would have succeeded on the merits of the underlying action" (*AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007]). Here, the issue is not "success," but whether absent A&B's alleged negligence, Brookwood would have sustained the expense of having to proceed to trial and further defend Nextec's claims against it (*Dombrowski v Bulson*, 19 NY3d 350 [2012]).

Although Brookwood admits that any argument regarding the timing or bifurcation of A&B's motions in the patent action is a "red herring," Brookwood explains in its brief that the crux of its malpractice claim pertains to the second summary judgment motion that A&B made with respect to the methods causes of action. Brookwood claims that A&B failed to include evidence required to establish the statutory defense under 28 USC § 1498(a), although that evidence existed and was readily accessible. Brookwood contends that A&B could "easily" have

proved that infringement of Nextec's methods patents was necessary by submitting an affidavit from one of Brookwood's own engineers attesting to the fact that other than the method utilized by Brookwood, there were no other known noninfringing methods of complying with the Government's specifications. Instead, A&B relied upon what it considered an admission by Nextec's engineer of that fact, a strategy that Brookwood contends doomed the motion to failure. The Southern District Court, however, accepted at "face value" Nextec's representation that it did not concede the issue of necessity, and denied A&B's motion because Nextec had made a showing of lack of necessity (703 F Supp 2d at 435). Given that Nextec did not concede the issue of necessity and vigorously opposed it, Brookwood's claim that a favorable affidavit from its own engineer would have made a difference in the disposition of the motion is, at best, unduly speculative. Significantly, an admission of infringement in connection with a necessity defense would have undercut Brookwood's alternative argument that it had not, in fact, infringed on Nextec's patents.

Decisions regarding the evidentiary support for a motion or the legal theory of a case are commonly strategic decisions and a client's disagreement with its attorney's strategy does not

support a malpractice claim, even if the strategy had its flaws. "[A]n attorney is not held to the rule of infallibility and is not liable for an honest mistake of judgment where the proper course is open to reasonable doubt" (*Bernstein v Oppenheim & Co.*, 160 AD2d 428, 430 [1st Dept 1990]). Moreover, an attorney's selection of one among several reasonable courses of action does not constitute malpractice (*see Rosner v Paley*, 65 NY2d 736, 738 [1985]; *Rodriguez v Lipsig, Shapey, Manus & Moverman, P.C.*, 81 AD3d 551, 552 [1st Dept 2011]). Brookwood has not alleged facts supporting its claim that A&B's evidentiary decision, to rely on Nextec's expert, rather than compromise the merits of Brookwood's position on other arguments, was an unreasonable course of action.

Other hindsight arguments concerning the nature and quality of the evidence supporting the second summary judgment motion in the patent action fare no better. There is no factual basis to conclude that the governmental email to Brookwood about the inclusion of a broad patent infringement indemnity clause would have changed the outcome of the motion because the clause never made its way into the government's contract with ADS. Nextec's attorney's letter stating that Brookwood necessarily infringed on Nextec's patents is hearsay. Not only was it apparently sent by

the attorney after the underlying lawsuit had been commenced, it was not based upon any personal knowledge. Thus, Brookwood's negligence claim is wholly speculative and "depend[s] on too many uncertainties" to support a conclusion that there would have been a more favorable, that is quicker, outcome in the underlying litigation (*Estate of Feder v Winne, Banta, Hetherington, Basralian & Kahn, P.C.*, 117 AD3d 541, 542 [1st Dept 2014]; *Sherwood Group v Dornbush, Mensch, Mandelstam & Silverman*, 191 AD2d 292, 294 [1st Dept 1993]). Having prevailed in the underlying patent action and having otherwise failed to plead negligence, Brookwood has also failed to show that its litigation expenditures were damages proximately caused by A&B's alleged negligence (*see e.g. Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer.*, 8 NY3d 438, 443 [2007]).

In support of its Judiciary Law § 487(1) claim, Brookwood alleges that A&B was deceitful by inducing Brookwood to retain it as its litigation counsel. Brookwood claims such deceit was perpetuated a number of ways. One way was by A&B failing to disclose that the Nextec-related patent noninfringement opinions A&B had prepared could not be used in the patent action to defend Brookwood against claims that it had acted willfully. Brookwood maintains that the reason A&B did not use them was that it would

have resulted in the waiver of the attorney-client privilege. Brookwood also claims that the reason A&B litigated the patent action in the manner it did was to ensure that the case would continue, essentially "churning" the case for A&B's own pecuniary gain. The motion court properly dismissed the Judiciary Law § 487 claim because there are insufficient facts from which to conclude that A&B intentionally deceived Brookwood, or that A&B otherwise acted so egregiously that Judiciary Law § 487 was violated (*Agostini v Sobol*, 304 AD2d 395, 396 [1st Dept 2003]; *Kaminsky v Herrick, Feinstein LLP*, 59 AD3d 1, 13 [1st Dept 2008], *lv denied* 12 NY3d 715 [2009]). Brookwood's arguments that A&B could not use its noninfringement opinions in the patent litigation because it would have waived the attorney-client privilege is incorrect as a matter of law. *In re Seagate Tech., LLC* (497 F3d 1360, 1374 [Fed Cir 2007], *cert denied* 552 US 1230 [2008])[3] held that the assertion of an advice of counsel defense in a patent infringement action does not automatically constitute

[3]*In re Seagate Tech., LLC* has been abrogated on other grounds by the United States Supreme Court's recent decision in *Halo Electronics, Inc. v Pulse Electronics, Inc.* (579 US – , 136 S Ct 1923 [2016]) wherein the Court rejected as "unduly rigid" *Seagate's* test to determine whether to award enhanced damages (*PPC Broadband, Inc. v Corning Optical Communications RF, LLC*, 2016 WL 3365437, *5, 2016 US Dist Lexis 78408, *16 [ND NY] June 16, 2016, Np. 5:11-cv-761 (GLS/DEP)]).

a waiver of the attorney-client privilege. We recognize that the opinion of counsel "may be relevant to the issue of willful infringement, for timely consultation with counsel may be evidence that an infringer did not engage in objectively reckless behavior" (*Aspex Eyewear, Inc. v Clariti Eyewear, Inc.*, 605 F 3d 1305, 1313 [Fed Cir 2010]). Even if the issue of attorney-client waiver was open to dispute, it had no bearing in the patent action because willfulness was never reached. Thus, the facts alleged do not support a finding of an intent to deceive or a chronic and extreme pattern of legal delinquency causing damages to Brookwood (*Wailes v Tel Networks USA, LLC*, 116 AD3d 625, 625-626 [1st Dept 2014]).

The breach of fiduciary duty cause of action was properly dismissed because it is duplicative of the legal malpractice claim. It is based on the same facts and allegations as the

legal malpractice cause of action (*see e.g. Bernard v Proskauer Rose, LLP*, 87 AD3d 412, 416 [1st Dept 2011]). Brookwood has abandoned its breach of contract cause of action.

We have examined Brookwood's other arguments and find them unavailing.

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

ENTERED: JANUARY 26, 2017

CLERK

Friedman, J.P., Moskowitz, Webber, Kahn, Gesmer, JJ.

2521-
2522 In re Tyson T., and Others,

Children Under Eighteen Years of Age, etc.,

Latoyer T.,
Respondent-Appellant,

Tyson T.,
Respondent-Appellant,

Commissioner of the Administration for Children's Services,
Petitioner-Respondent.

_____

Law Office Of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for Latoyer T., respondent-appellant.

Steven N. Feinman, White Plains, for Tyson T., respondent-appellant.

Zachary W. Carter, Corporation Counsel, New York (Julie Steiner of counsel), for respondent.

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

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Order of disposition, Family Court, New York County (Clark V. Richardson. J.), entered on or about October 6, 2015, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about June 2, 2015, which found that respondent mother and respondent father neglected the subject children Tyson T. and Shaun T., and derivatively neglected the

child Karen T., unanimously modified, on the law and the facts, to vacate the findings of neglect as to Tyson T. and enter a finding that respondent father and respondent mother derivatively neglected Tyson T., and otherwise affirmed, without costs.

A preponderance of the evidence supports the Family Court's finding that on December 6, 2012, the father neglected Shaun by inflicting excessive corporal punishment upon him by striking him with a plastic bat and belt, which caused the child's elbow to be scratched, bruised and swollen. Shaun's out-of-court statements were sufficiently corroborated by the caseworker's testimony as to her observations of his injuries and the photographs depicting them (see *Matter of Naomi J. [Damon R.]*, 84 AD3d 594 [1st Dept 2011]; *Matter of Jazmyn R. [Luceita F.]*, 67 AD3d 495 [1st Dept 2009]).

Given the conflicting explanations as to how Shaun's injuries occurred, Family Court was confronted primarily with issues of credibility, as to which its findings should be accorded great weight (*see Matter of Sheneika V.*, 20 AD3d 541, 542 [1st Dept 2005]), and are supported by the record. The father's and the caseworker's testimony are substantially similar as to what transpired during the December 6, 2012 incident, and the father has failed to present any reason to disturb the Family

Court's credibility determinations (*see Matter of Irene O.*, 38 NY2d 776, 777-778 [1975]). The fact that Shaun did not require medical treatment for his injuries does not preclude a finding of neglect against the father due to excessive corporal punishment (*see Matter of Adam Christopher S. [Deborah D.]*, 120 AD3d 1110, 1110 [1st Dept 2014]).

However, we find that the Family Court erred in entering a finding that the father inflicted excessive corporal punishment upon Tyson because there is no testimony that the child was physically or emotionally harmed as a result of his being disciplined by the father (*see Matter of Christy C. [Jeffrey C.]*, 74 AD3d 561, 562-563 [1st Dept 2010]). Instead, we enter findings of derivative neglect against the father as to Tyson, because a preponderance of the evidence shows that he was in the home when the December 6, 2012 incident occurred and was aware of what was transpiring (*see Matter of Deivi R. [Marcos R.]*, 68 AD3d 498, 498-499 [1st Dept 2009]). The findings of derivative neglect as to Karen were properly entered, because the record shows that she was present and aware of what was happening during the same incident.

As to the mother, petitioner failed to show by a preponderance of the evidence that she inflicted excessive

corporal punishment upon Tyson or Shaun. However, Shaun's testimony that the mother sat on the couch and observed the December 6, 2012 beating, which was corroborated by Karen's testimony, supported a finding that the mother neglected Shaun by failing to take any actions to protect Shaun and derivatively neglected Tyson and Karen, who were in the home and aware of what was transpiring (*see Matter of Alysha M.*, 24 AD3d 255 [1st Dept 2005], *lv denied* 6 NY3d 709 [2006]; *Matter of Rayshawn R.*, 309 AD2d 681 [1st Dept 2003]).

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

ENTERED: JANUARY 26, 2017

CLERK

Friedman, J.P., Moskowitz, Webber, Kahn, Gesmer, JJ.

2526 Marilyn Cattouse, et al., Index 301102/13
Plaintiffs-Appellants,

-against-

Keith Smith,
Defendant-Respondent.

_____

Krentsel & Guzman LLP, New York (Steven E. Krentsel of counsel), for appellants.

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

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about July 7, 2015, which granted defendant's motion for summary judgment dismissing the complaint due to plaintiffs' inability to meet the serious injury threshold of Insurance Law § 5102(d), unanimously affirmed, without costs.

Plaintiffs, Marilyn Cattouse and Michael Cattouse, and their daughter Laurie Cattouse, allege that they sustained serious injuries to their cervical and lumbar spines as the result of a motor vehicle accident. Defendant established, prima facie, that plaintiffs did not sustain serious injuries by submitting the affirmed report of an orthopedist, who found normal ranges of motion, negative test results, and resolved strains/sprains (*see Frias v Son Tien Liu*, 107 AD3d 589 [1st Dept 2013]; *Dorrian v*

Cantalicio, 101 AD3d 578 [1st Dept 2012]; *Paduani v Rodriguez*, 101 AD3d 470 [1st Dept 2012]). Defendant also submitted the report of a radiologist who opined that the MRI films of Marilyn's lumbar spine and of Laurie's cervical spine showed preexisting degenerative conditions, not causally related to the accident (*see Pommells v Perez*, 4 NY3d 566, 576-577 [2005]). Marilyn's medical records reflect that she had preexisting arthritis in her back, and Michael acknowledged at his deposition that he suffered prior neck injuries in another motor vehicle accident. Defendant also relied on Laurie's hospital and medical records showing that she had positive neck range of motion and her back complaints resolved without intervention at the hospital (*see Galarza v J.N. Eaglet Publ. Group, Inc.*, 117 AD3d 488 [1st Dept 2014]).

In opposition, plaintiffs failed to raise an issue of fact as to whether any of them suffered a serious injury causally related to the accident. They submitted reports from an orthopedist, who examined Marilyn and Michael shortly after the accident and about two years later, and found limited ranges of motion, and opined that the bulging and herniated discs found in MRI reports were causally related to the accident. The MRI reports reflected findings of degenerative joint disease, and

however, the orthopedist did not explain why that joint disease could not be ruled out as the cause of Marilyn's or Michael's injuries (*Rickert v Diaz*, 112 AD3d 451, 452 [1st Dept 2013]), or provide any objective basis to support a finding of aggravation of such preexisting conditions (*see Farmer v Ventkate*, 117 AD3d 562 [1st Dept 2014]; *Roach v Citywide Mobile Response Corp.*, 102 AD3d 576 [1st Dept 2013]). Absent objective evidence of injury, plaintiffs cannot demonstrate a serious injury (*see Hernandez v Cespedes*, 141 AD3d 483 [1st Dept 2016]).

As for Laurie, plaintiffs submitted the affidavit of a chiropractor who noted that she had undergone a brief period of treatment after the accident and found that she had relatively minor limitations in range of motion, which is insufficient to sustain a serious injury claim (*see Gaddy v Eyler*, 79 NY2d 955 [1992]). He did not address the hospital and medical records showing that she had no neck limitations or back pain shortly after the accident, rendering the opinion speculative (*see Jno-Baptiste v Buckley*, 82 AD3d 578 [1st Dept 2011]). Nor did Laurie submit her own radiologist's MRI report to rebut the findings of defendant's expert or provide a reasonable

explanation for her cessation of medical treatment after a brief course of chiropractic treatment after the accident and then a year later (*see Green v Domino's Pizza, LLC*, 140 AD3d 546 [1st Dept 2016]).

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

ENTERED: JANUARY 26, 2017

CLERK

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

2861 The People of the State of New York, Ind. 5124/10
Respondent,

-against-

James Williams,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sabrina Margret Bierer of counsel), for respondent.

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Judgment, Supreme Court, New York County (Maxwell Wiley, J. at motions; Ruth Pickholz, J. at jury trial and sentencing), rendered July 8, 2014, convicting defendant of robbery in the first degree, and sentencing him, as a second felony offender, to a term of 12 years, unanimously reversed, on the law, and the indictment dismissed.

The People concede that defendant's CPL 30.30 motion should have been granted. The People acknowledge that the record fails to support exclusion of a dispositive six-week period of delay on

the ground of consent (*see People v Barden*, 27 NY3d 550, 554-556 [2016]).

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

ENTERED: JANUARY 26, 2017

CLERK

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

2862 Dani II, Inc., Index 155670/13
Plaintiff-Respondent,

-against-

101 DuPont LLC, et al.,
Defendants-Appellants.

_____

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Marcia K. Raicus of counsel), for appellants.

Kudman Trachten Aloe LLP, New York (Paul H. Aloe of counsel), for respondent.

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Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered November 30, 2015, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the claims for damages incurred to plaintiff's business post-Super Storm Sandy, unanimously affirmed, with costs.

Assuming, arguendo, that defendants established prima facie that plaintiff's alleged losses were proximately caused by an act of God with no contributing negligence on their part (*see Prashant Enters. v State of New York*, 206 AD2d 729, 730-731 [3d Dept 1994]), plaintiff's evidence in opposition raises issues of fact whether defendants adequately responded to the prompt notice they were given that the storm had blown away part of the roof of

their commercial building, exposing the tenant spaces therein to significant water accumulation and damage, and whether the alleged inadequate action by defendants amounted to negligent conduct that proximately caused the additional damages alleged by plaintiff (*see Michaels v New York Cent. R.R. Co.*, 30 NY 564, 571 [1864]; *see also Birner v Bickford's, Inc.*, 280 App Div 911 [1st Dept 1952], *affd* 305 NY 664 [1953]).

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

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

ENTERED: JANUARY 26, 2017

CLERK

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

2863-
2863A In re Ne Veah M.,

A Child Under Eighteen Years
of Age, etc.,

Michael M.,
Respondent-Appellant,

Administration for Children Services,
Petitioner-Respondent.

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

Zachary W. Carter, Corporation Counsel, New York (Susan Paulson of counsel), for respondent.

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

_____

Order of disposition, Family Court, Bronx County (Linda B. Tally, J.), entered on or about August 13, 2015, to the extent it brings up for review a fact-finding order of the same court and Judge, entered on or about June 15, 2015, which denied respondent's motion to vacate his default and re-open the fact-finding hearing, which, after an inquest, determined that he sexually abused the subject child, unanimously affirmed, without costs. Appeal from fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of

disposition.

The Family Court properly exercised its discretion in denying respondent's motion to vacate his default because his moving papers failed to demonstrate a reasonable excuse for his absence (*see Matter of Isaiha M. [Atavia M.]*, 115 AD3d 575 [1st Dept 2014]). Although respondent's counsel appeared at the fact-finding hearing, he notified the court that he would not be participating and presented no explanation as to why respondent was not there (*see Matter of Jaquan Tieran B. [Latoya B.]*, 105 AD3d 498, 499 [1st Dept 2013]). Respondent's claim that he was prevented from appearing at the hearing by unforeseen circumstances beyond his control after he lost his wallet and attorney's contact information seven days earlier fails, because there was no explanation as to how that caused him to default or why he did not contact his attorney's office, the Bronx Defenders, and ask to speak with his attorney, and provided nothing to corroborate his claims (*see Matter of Gloria Marie S.*, 55 AD3d 320 [1st Dept 2008], *lv dismissed* 11 NY3d 909 [2009]). Given respondent's failure to establish a reasonable excuse for his default, this Court need not determine whether he demonstrated a meritorious defense to the petition's allegations (*see Matter of Raymond C.M. [Marilyn M.]*, 132 AD3d 512 [1st Dept

2015]; *Washington v Janati*, 118 AD3d 603 [1st Dept 2014]).

Even if this Court were to determine that respondent established a reasonable excuse for his default in appearance, his assertion that he will present evidence including expert testimony countering the allegations that he allowed or committed a sex offense against the child is insufficient to establish a meritorious defense (*see Matter of Giovanni Maurice D. [Wilner B.]*, 99 AD3d 631 [1st Dept 2012]; *Matter of Cain Keel L. [Derzerina L.]*, 78 AD3d 541 [1st Dept 2010], *lv dismissed* 16 NY3d 818 [2011]).

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

ENTERED: JANUARY 26, 2017

CLERK

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

2864 In re Makeba Carpenter, Index 154622/14
Petitioner-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent,

New York City Police Department,
et al.,
Defendants.

_____

Makeba Carpenter, appellant pro se.

Ledy-Gurren, Bass, D'Avanzo & Siff, LLP, New York (Deborah Bass of counsel), for respondent.

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Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered July 8, 2015, which granted defendants-respondents' motions to dismiss the complaint against the New York Police Department (NYPD), "Human Resources" and the New York City Housing Authority (NYCHA), unanimously affirmed, without costs.

The court properly dismissed the complaint against NYCHA for plaintiff's failure to file a timely notice of claim or to seek leave to file a late notice of claim within the applicable 1-year-and-90-day limitation period (*see* Public Housing Law § 157[2]; General Municipal Law §§ 50-e[1], 50-i[1][c]; *Davidson v Bronx Mun. Hosp.*, 64 NY2d 59, 61-62 [1984]; *Pierson v City of*

New York, 56 NY2d 950, 955-956 [1982]; *Fornabaio v City of New York*, 41 AD3d 125 [1st Dept 2007]). The court also properly dismissed the complaint against NYPD and "Human Resources," as agencies of the City are not amenable to being sued (see New York City Charter, Chapter 17, § 396), and plaintiff has failed to state facts sufficient to raise a cognizable cause of action.

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

ENTERED: JANUARY 26, 2017

CLERK

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

2865 Kenneth Orr, Index 603423/06
Plaintiff-Respondent,

-against-

Daniel Yun, et al.,
Defendants-Appellants.

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Heller, Horowitz & Feit, P.C., New York (Martin Stein of counsel), for appellants.

Richard Paul Stone, New York, for respondent.

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Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered July 13, 2016, which, to the extent appealed from, denied defendants' motion for partial summary judgment dismissing the claims for lost salary and violation of state and federal regulations and all claims against the individual defendant, unanimously modified, on the law, to grant the motion to the extent of dismissing plaintiff's lost salary claim and his breach of fiduciary duty claim based on regulatory violations, and otherwise affirmed, without costs.

Plaintiff was not entitled to lost salary because, even if his right to employment under the subject agreement had been triggered by his proper exercise of the option, any employment thereunder would have been at will because its duration was not

specified (*see Sabetay v Sterling Drug*, 69 NY2d 329, 333 [1987]).

The claim for breach of fiduciary duty, assuming that an underlying fiduciary relationship existed, was unsupported by evidence of any violation of state or federal regulations, which form the basis of plaintiff's claim for the breach; in opposition to defendants' express denial of any such violations, plaintiff's innuendo was plainly insufficient to withstand summary judgment.

The subject agreement, signed by the individual defendant without any indication of the capacity in which he signed, bears a heading stating that it is between the LLC defendant and plaintiff, but also contains a contradictory statement that it is between the individual defendant and plaintiff. Under the circumstances, it cannot be determined from the context whether it was intended that the individual defendant be personally bound (*see 150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1 [1st Dept 2004]).

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

ENTERED: JANUARY 26, 2017

CLERK

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

2866 The People of the State of New York, Ind. 3654/07
Respondent,

-against-

Paulino Valenzuela,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (William B. Carney of counsel), for appellant.

Paulino Valenzuela, appellant pro se.

Darcel D. Clark, District Attorney, Bronx (Justin J. Braun of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Alvin Yearwood, J.), rendered May 5, 2011, as amended May 6, 2011, convicting defendant, after a jury trial, of murder in the second degree, attempted murder in the second degree, criminal possession of a weapon in the second degree (two counts) and assault in the first degree, and sentencing him to an aggregate term of 90 years to life, unanimously modified, on the law, to the extent of directing that the sentence for a weapon possession conviction that is presently consecutive to the other sentences instead be served concurrently with the other sentences, resulting in a new aggregate term of 75 years to life, and otherwise affirmed.

The court providently exercised its discretion in denying

defendant's mistrial motion, made after five weeks of trial, when defense counsel announced that he would be unable to call his intended expert witness because the expert was no longer of the opinion that defendant acted under the influence of extreme emotional disturbance (EED). Initially, defendant's contention that the court applied the wrong standard is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that even though the court used inapplicable "manifest necessity" nomenclature, the context of its ruling demonstrates that it was in essence applying the proper "prejudicial" standard (*see* CPL 280.10[1]). We conclude, based on all the circumstances, that defendant's inability to call the expert was not so prejudicial as to warrant a mistrial. The trial court offered to grant a substantial adjournment for defendant to obtain another expert, and it offered to expedite the process. Ultimately, neither the prosecution nor the defense called any expert witnesses regarding the EED defense. Furthermore, the court permitted defendant to assert the defense based on nonexpert evidence, and it charged the jury that no expert testimony was necessary to establish that defense. In any event, any error was harmless because, even with expert testimony, there is no reasonable possibility that defendant

could have established his affirmative defense by a preponderance of the evidence. There was overwhelming evidence to refute that defense (*see e.g. People v Diaz*, 15 NY3d 40, 48 [2010]), including defendant's extensive premeditation of this crime of revenge, his calm surrender to authorities, and his statements undermining an EED defense.

The challenged portions of the prosecutor's summation do not warrant reversal (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]). While the statement that "[t]here is no psychiatrist testimony in this case" was improper, given the People's agreement to permit defendant to assert the defense without expert testimony, any prejudice was cured by the court's jury instruction.

Defendant received effective assistance of counsel under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). While defendant argues that defense counsel was ineffective for failing to make a timely request for an EED charge on the three attempted murder counts, defendant was not prejudiced because he was acquitted on two of those counts, and, as noted, the EED defense was so weak that there is no reasonable possibility that

such a charge would have led to a more favorable verdict on the remaining count.

Defendant's pro se ineffective assistance and related claims regarding the issue of mental competency are unreviewable on direct appeal because they involve matters outside the record. Accordingly, since defendant has not made a CPL 440.10 motion, the merits of these claims may not be addressed on appeal.

The record does not support a finding of separate acts so as to permit a consecutive sentence for a weapon possession conviction (*see* Penal Law § 70.25[2]; *People v Hamilton*, 4 NY3d 654 [2005]), and we modify accordingly.

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

ENTERED: JANUARY 26, 2017

CLERK

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

2867 EL-AD 250 West LLC, Index 652964/13
Plaintiff-Respondent,

-against-

Zurich American Insurance Company,
Defendant-Appellant.

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Mound Cotton Wollan & Greengrass LLP, New York (Mark S. Katz of counsel), for appellant.

Weg and Myers, P.C., New York (Joshua L. Mallin of counsel), for respondent.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about April 1, 2016, which, to the extent appealed from as limited by the briefs, denied defendant's motion for partial summary judgment declaring that plaintiff is not entitled under the insurance policy to recover for delay in completion damages, unanimously affirmed, without costs.

Ambiguity in the policy, coupled with extrinsic evidence tending to favor plaintiff's position, precludes a summary declaration that plaintiff is not entitled to recover for delay in completion damages (*see Stainless, Inc. v Employers Fire Ins. Co.*, 69 AD2d 27, 32 [1st Dept 1979], *affd* 49 NY2d 924 [1980]). The "Delay in Completion Coverage Schedule" states, "There shall be no Additional Named Insureds, unless otherwise endorsed," and

the only named insured endorsed is plaintiff, El-Ad 250 West. However, the business address is shown as "c/o El Ad IDB Las Vegas, LLC," in Las Vegas, Nevada. The "Site Risk Assessment - Builders Risk" report prepared and reviewed by defendant before the policy was issued identifies "EL-AD IDB Las Vegas, LLC" as the parent company and the assessed company and refers to "EL-AD" as an established Nevada development company; it shows the maximum estimated loss potential for "Soft Cost/Delay" as $7 million, and there is no evidence that this figure is exclusive to plaintiff, as opposed to its affiliated entities. Moreover, it is undisputed that the policy was intended "to insure against risks attendant to a commercial construction project on a specified parcel of property" (*New York Cas. Ins. Co. v Shaker Pine*, 262 AD2d 735 [3rd Dept 1999]), and there is evidence in the record indicating that defendant intended to insure the project

knowing that the different tiers of financing would be allocated among various "El-Ad" entities.

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

ENTERED: JANUARY 26, 2017

CLERK

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

2868 In re Brunilda Freytes, Index 101411/14
Petitioner-Appellant,

-against-

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

_____

Glass Krakower LLP, New York (Bryan D. Glass of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered April 30, 2015, denying the petition to, inter alia, annul respondents' determination, dated July 29, 2014, which upheld petitioner's unsatisfactory rating (U-rating) for the 2012-2013 school year, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner failed to show that the U-rating was arbitrary and capricious, or made in bad faith (*see generally Matter of Murnane v Department of Educ. of the City of N.Y.*, 82 AD3d 576 [1st Dept 2011]. The evidence shows that petitioner failed to timely complete a "curriculum map," which sets out the topics of study and general lesson plan for the school year, despite being

charged with overseeing the preparation of the map during the summer of 2012. Petitioner also failed to update the principal about the project, although the principal repeatedly checked on its status. Such conduct provided a rational basis for the U-rating, as did petitioner's failure to rectify the situation when her failure was first discovered in October 2012.

The various excuses proffered by petitioner do not warrant a finding that the U-rating was arbitrary and capricious under the circumstances. Rather, to accept petitioner's excuses would amount to improperly second guessing the determination that petitioner's failure to timely complete the curriculum map "reflected a pedagogical deficiency that merited a U-rating" (*Matter of Van Rabenswaay v City of New York*, 140 AD3d 596, 596 [1st Dept 2016]; see *Maas v Cornell Univ.*, 94 NY2d 87, 92 [1999]).

The record also contains substantiated allegations of verbal abuse against a student by petitioner. Petitioner was made aware of the allegations and was given an opportunity to submit a

written statement denying them (*see Matter of Brennan v City of New York*, 123 AD3d 607 [1st Dept 2014]).

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

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

ENTERED: JANUARY 26, 2017

CLERK

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Feinman, JJ.

2869 Touro College, et al., Index 159319/13
Plaintiffs-Appellants,

-against-

Novus University Corporation,
et al.,
Defendants-Respondents.

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Michael Newman, New York, for appellants.

Furgang & Adwar, LLP, New York (Armando Llorens of counsel), for respondents.

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Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered September 22, 2015, which granted defendants' motion to dismiss the complaint seeking declaratory relief pursuant to CPLR 3211(a)(2) and (7), unanimously affirmed, without costs.

Plaintiffs Touro College and Touro College Jacob D. Fuchsberg Law Center (Touro) seek a declaratory judgment that defendants Novus University Corporation, Novus Law School and Novus University Internet Publishing Group, Inc. (Novus) are "diploma mills" as defined in the Higher Education Opportunity Act of 2008, 20 USC § 1003, or in a standard dictionary. Touro, an institute of higher education, accredited by the American Bar Association (ABA), alleges that it and similarly-situated institutions have been harmed by Novus in that individuals who

have received degrees from Novus, an online, non-ABA accredited law school, have applied to Masters of Law programs at law schools, including Touro, while falsely representing that Novus was a foreign institution. Touro maintains that there is a justiciable controversy between Touro and Novus warranting declaratory relief (CPLR 3001), since Touro was forced to defend against "meritless" litigation instituted by a Novus graduate who was denied a Touro LLM, after he was admitted to the program based on such a misrepresentation (*Matter of Salvador v Touro Coll.*, 139 AD3d 1, 5 [1st Dept 2016]).

The motion court properly determined that there is no justiciable controversy between Touro and Novus. A declaratory judgment is intended "to declare the respective legal rights of the parties based on a given set of facts, not to declare findings of fact" (*Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 100 [1st Dept 2009], *lv denied* 15 NY3d 703 [2010]). The general purpose of a "declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations" (*James v Alderton Dock Yards*, 256 NY 298, 305 [1931]). Thus, a declaratory judgment requires a "justiciable controversy," in which not only does the plaintiff "have an interest sufficient to

constitute standing to maintain the action but also that the controversy involve present, rather than hypothetical, contingent or remote, prejudice to plaintiffs" (*American Ins. Assn. v Chu*, 64 NY2d 379, 383 [1985], *cert denied* 474 US 803 [1985]). Touro's allegations fail to identify any present controversy or disputed jural relationship between the parties to this action that would be resolved by issuance of the requested declaration.

That one of Novus's graduates brought a lawsuit against Touro does not constitute a justiciable controversy between Touro and Novus (*see Spitzer v Schussel*, 48 AD3d 233, 234 [1st Dept 2008]). To the extent Touro alleged that it was defrauded into accepting an individual who had a degree from Novus, it failed to allege that it relied on any misrepresentations made by Novus. Rather, Touro alleged that one of Novus's graduates had made misrepresentations concerning Novus's status as a foreign law school.

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

ENTERED: JANUARY 26, 2017

CLERK

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

2870 Great Location New York, Inc., Index 651252/15
Plaintiff-Appellant,

-against-

719 Seventh TIC 1 Owner, LLC,
Defendant-Respondent,

Ryung Hee Cho,
Defendant.

_____

Jaffe, Ross & Light LLP, New York (Burton R. Ross of counsel), for appellant.

Stempel Bennett Claman & Hochberg, P.C., New York (Richard L. Claman of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered March 24, 2016, which denied plaintiff's motion for summary judgment against defendant 719 Seventh TIC 1 Owner LLC (landlord), unanimously affirmed, without costs.

In a provision titled "Demolition," the commercial lease agreement between plaintiff and defendant landlord permitted the landlord to terminate the lease in the event it intended to demolish the building, provided that it gave the tenant six months' notice, and the landlord agreed to pay the tenant a surrender bonus promptly after the tenant vacated the premises, provided that the tenant "was not in default beyond any

applicable grace period with respect to a provision of the lease which Landlord reasonably believes to be material." Plaintiff's subtenant remained in possession of the leased premises for 26 days after the early termination of the lease.

An issue of fact exists whether plaintiff's consequent delay in surrendering the leased premises to the landlord constitutes a material default under the Demolition provision (*see Corona Grill Corp. v 1029 Sixth, LLC*, 11 AD3d 282 [1st Dept 2004]). An affidavit by the landlord's representative reflects that the landlord was ready to start demolition immediately after the termination of the lease, incurred carrying costs while waiting for delivery of vacant premises, and made $55,000 in incentive payments to the holdover subtenant and a sub-subtenant to mitigate damages.

Contrary to plaintiff's contention, there is nothing in the language of the Demolition provision that required the landlord to serve plaintiff with a notice to cure (*see Ahmed v C.D. Kobsons, Inc.*, 67 AD3d 467, 468 [1st Dept 2009]). Nor is the loss of payment for early termination of the lease "a 'forfeiture' as that term is used in the phrase 'the law abhors a forfeiture'" (*1029 Sixth v Riniv Corp.*, 9 AD3d 142, 150 [1st Dept 2004], *appeal dismissed* 4 NY3d 795 [2005]). Contrary to

plaintiff's contention, the judgment of possession named in the lease as a remedy for a holdover tenancy is not an exclusive remedy, especially given the cumulative remedies provision in the lease. The defense of impossibility of performance does not apply to anticipated risks, such as a subtenant's refusal to vacate the premises, that can be allocated in a lease (*see Kel Kim Corp. v Central Mkts.*, 70 NY2d 900, 902 [1987]).

Issues of fact also exist as to the propriety of the landlord's deductions from plaintiff's security deposit, relating, in part, to a long-running dispute as to the date on which rental payments were due, and including a deduction for the landlord's payments to the subtenant and sub-subtenant.

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: JANUARY 26, 2017

CLERK

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

2871 The People of the State of New York, Ind. 4366/10
Respondent,

-against-

Albert Carlo,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Joshua P. Weiss of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), rendered September 10, 2014, which adjudicated defendant a level two sexually violent sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion in declining to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]), in light of the seriousness of the underlying sex crime, committed with the use of force on a related minor, and defendant's prior criminal history, which includes a violent felony conviction. Defendant failed to elaborate on his medical

conditions or present any detailed evidence to suggest that a level two adjudication overassesses his dangerousness and risk of sexual recidivism (*id.* at 861). We have considered and rejected defendant's remaining arguments for a downward departure.

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

ENTERED: JANUARY 26, 2017

CLERK

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

2872 In re Darwin P.,

A Person Alleged to be a
Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

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Tamara A. Steckler, The Legal Aid Society, New York (Marcia Egger of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Qian Julie Wang of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about October 8, 2015, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of attempted sexual abuse in the second degree, and placed him on supervised probation for a period of 18 months, unanimously affirmed, without costs.

The court providently exercised its discretion in adjudicating appellant a juvenile delinquent and placing him on probation, because this was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]), in light of appellant's sexual conduct toward a much

younger child. An adjournment in contemplation of dismissal would not have ensured that, after its term expired, appellant remained in and satisfactorily completed an appropriate 18-month sex offender treatment program. While appellant asserts that a juvenile delinquency adjudication could theoretically subject him to sex offender registration in another jurisdiction, the Family Court Act provides remedies such as sealing that would minimize the likelihood of such a situation (*see Matter of Steven F.*, 127 AD3d 536, 537 [1st Dept 2015], *lv denied* 26 NY3d 006 [2015]).

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

ENTERED: JANUARY 26, 2017

CLERK

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

2873 Wilson Ortiz, et al., Index 152159/13E
Plaintiffs-Respondents,

-against-

Igby Huntlaw LLC,
Defendant,

A.E. Greyson & Co., Inc.,
Defendant-Appellant.

_____

Carol R. Finocchio, New York, for appellant.

Gorayeb & Associates, P.C., New York (Mark H. Edwards of counsel), for respondents.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered on or about May 19, 2016, which denied defendant A.E. Greyson & Co., Inc.'s (Greyson) motion for summary judgment dismissing plaintiffs' complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff Wilson Ortiz, an employee of nonparty Uriu, LLC, was injured when he fell from a ladder while painting in an apartment owned by defendant Igby Huntlaw LLC, which was dismissed from plaintiffs' action. Greyson was the general contractor, and its contract with Igby specifically excluded painting the apartment. Uriu was hired to do the painting.

Greyson is entitled to summary judgment dismissing the complaint. Where, as here, a plaintiff's work at the time of his accident is outside the scope of what has been contracted for by the owner and the general contractor, the general contractor has no right to control the work, and therefore cannot be liable under Labor Law §§ 240(1) or 241(6) (*Butt v Bovis Lend Lease LMB, Inc.*, 47 AD3d 338, 340-341 [1st Dept 2007]). Because Greyson had no authority to control Ortiz's injury-producing work, Ortiz's common-law negligence and Labor Law § 200 claims must be dismissed (*Williams v 7-31 Ltd. Partnership*, 54 AD3d 586, 586-587 [1st Dept 2008]).

Plaintiffs failed to raise a triable issue of fact.

Given the dismissal of Ortiz's claims, his wife's derivative claim also must be dismissed.

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

ENTERED: JANUARY 26, 2017

CLERK

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

2874-
2874A Index 651633/14

Loreley Financing (Jersey) No. 3, Limited, et al.,
Plaintiffs-Respondents,

-against-

Morgan Stanley & Co. Incorporated, et al.,
Defendants-Appellants,

Alpha Mezz CDO 2007-1, Ltd., et al.,
Defendants.

_____

Davis Polk & Wardwell LLP, New York (James P. Rouhandeh of counsel), for Morgan Stanley appellants.

Shearman & Sterling LLP, New York (K. Mallory Brennan of counsel), for Countrywide appellants.

Meister Seelig & Fein, LLP, New York (James M. Ringer of counsel), for respondents.

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Orders, Supreme Court, New York County (Jeffrey K. Oing, J.), entered July 29, 2016, which, to the extent appealed from, denied the motions of defendants Morgan Stanley & Co. LLC (f/k/a Morgan Stanley & Co. Inc.), Morgan Stanley & Co. International plc (f/k/a Morgan Stanley & Co. International Ltd.), Morgan Stanley Capital Services Inc., Countrywide Alternative Asset Management Inc., and Countrywide Securities Corp. (defendants) to dismiss plaintiffs' fraud claim, unanimously affirmed, with

costs.

Defendants contend that plaintiffs cannot establish justifiable reliance because they failed to make any inquiry after receiving the final offering memorandum, which warned, "Delinquencies and losses on, and claims for repurchase of, mortgage loans originated by some mortgage lenders have . . . resulted from fraudulent activities of borrowers, lenders and appraisers[,] including misstatements of income and employment history . . . and overstatements of the appraised value of mortgage properties." However, a plaintiff is required to make "additional inquiry" only if it "has hints of [a misrepresentation's] falsity" (*ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1044 [2015] [internal quotation marks omitted]). The disclosure in the final offering memorandum would not have given plaintiffs hints of the falsity of defendants' representation that defendant Countrywide Alternative Asset Management "would employ a detailed, loan-level, credit-driven analysis to select only the best collateral eligible for" the deal in question. On the contrary, plaintiffs allege, "Countrywide had repeatedly represented that the 'difficulties' of 'some mortgage lenders' did not include Countrywide and that Countrywide was uniquely equipped [to] analyze and recognize –

and thus avoid – such issues in the collateral that it would select."

In a footnote in their reply brief, defendants contend that their statements about Countrywide were mere puffery. Assuming that this contention can be considered, we find it unavailing.

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

ENTERED: JANUARY 26, 2017

CLERK

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

2875 Wells Fargo Bank, N.A., as Trustee for Securitized Asset Backed Receivables, LLC Trust 2005-FR4 Mortgage Pass-Through Certificates, Series 2005-FR4,
Plaintiff-Appellant,

-against-

Mbaye Ndiaye,
Defendant-Respondent,

United States of America, et al.,
Defendants.

Index 35070/15E

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Shapiro, DiCaro & Barak, LLC, Rochester (Ellis M. Oster of counsel), for appellant.

Stella Azie, Bronx, for respondent.

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Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered November 9, 2015, which granted the motion of defendant Mbaye Ndiaye to dismiss the complaint as against him with prejudice, unanimously reversed, on the law, without costs and the motion denied.

The dismissals of plaintiff's prior actions without prejudice premised on lack of standing were not dismissals on the merits for res judicata purposes (*see Tico, Inc. v Borrok*, 57 AD3d 302 [1st Dept 2008]). Despite the purportedly invalid assignment of the note to plaintiff, plaintiff may nevertheless

establish its standing by demonstrating that the note was in its possession or that it was delivered prior to the commencement of this action (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361-362 [2015]).

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

ENTERED: JANUARY 26, 2017

CLERK

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

2876 The People of the State of New York, Ind. 99027/14
Respondent,

-against-

Julio Paredes,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Paul A. Andersen of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Joseph J. Dawson, J.), entered August 6, 2014, which adjudicated defendant a level three predicate sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Defendant's prior felony sex crime conviction automatically resulted in an override to risk level three (*see People v Howard*, 27 NY3d 337, 342 [2016]). Accordingly, defendant qualifies as a level three offender independently of any point assessments. In any event, defendant's challenges to particular point assessments are unavailing. The court also providently exercised its discretion when it declined to grant a downward departure

(*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant were insufficiently substantiated and were outweighed by the seriousness of the underlying crime and defendant's prior felony conviction of a sex offense.

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

ENTERED: JANUARY 26, 2017

CLERK

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

2877 Stephanie Rosario, Index 302884/13
Plaintiff-Appellant,

-against-

Nancy J. Haber, Administratrix of
the Estate of Ira J. Panzer, et al.,
Defendants-Respondents.

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Pollack, Pollack, Isaac & DeCicco, LLP, New York (Jillian Rosen of counsel), for appellant.

Gannon, Rosenfarb & Drossman, New York (Lisa L. Gokhulsingh of counsel), for respondents.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered April 14, 2015, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff seeks damages for injuries she sustained when she slipped on a puddle as she descended the stairs in defendants' building. Defendants established prima facie that they did not have constructive notice of the puddle, i.e., that they did not have an opportunity before plaintiff's accident to discover and remedy the condition on the stairs, through plaintiff's testimony that, two minutes before the accident, she had ascended the stairs without incident and had not noticed the puddle

(*see Rivera v 2160 Realty Co., L.L.C.*, 4 NY3d 837 [2005]; *Early v Hilton Hotels Corp.*, 73 AD3d 559, 561 [1st Dept 2010]; *Espinal v New York City Hous. Auth.*, 215 AD2d 281 [1st Dept 1995]).

In opposition, plaintiff submitted no evidence to show that the puddle did not come into existence during the two minutes that elapsed between her ascent and her descent on the stairs.

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

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

ENTERED: JANUARY 26, 2017

CLERK

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

2878 Michael Rutkowski, et al., Index 109544/10
Plaintiffs-Appellants, 590847/11
590542/13

-against-

New York Convention Center Development Corporation, et al.,
Defendants-Respondents,

Freeman Decorating Services, Inc., et al.,
Defendants.

- - - - -

[And Third-Party Actions]

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Finkelstein & Partners, LLP, Newburgh (George M. Levy of counsel), for appellants.

Hannum, Feretic, Prendergast & Merlino, New York (David P. Feehan of counsel), for respondents.

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Order, Supreme Court, New York County (Richard F. Braun, J.), entered October 23, 2015, which, to the extent appealed from as limited by the briefs, granted defendants New York Convention Center Development Corporation, Nielsen Business Media, Inc. and the Nielsen Company (US), LLC's motion for summary judgment dismissing as against New York Convention Center Development Corporation the Labor Law § 240 claim and the Labor Law § 241(6) claim insofar as it is predicated on Industrial Code (12 NYCRR) § 23-1.8(c)(1), unanimously reversed, on the law, without costs,

and the motion denied.

Plaintiff Michael Rutkowski was removing furniture from an exhibition booth at the conclusion of a trade show when a lighting bar simultaneously being removed from the top of the booth by electricians fell and struck him in the head. Since his specific task at the moment the accident occurred was ancillary to and part of the larger demolition job of dismantling the booths, in which he was to participate, plaintiff was engaged in an activity within the purview of Labor Law §§ 240(1) and 241(6) (*see Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 882-883 [2003]; *Pino v Robert Martin Co.*, 22 AD3d 549 [2d Dept 2005]).

We reject defendant's contention that the lighting bar did not require securing with a safety device of the type contemplated by Labor Law § 240 because it was being carried by hand (*see Pritchard v Tully Constr. Co., Inc.*, 82 AD3d 730 [2d Dept 2011]). The lighting bar was an object that required securing to prevent it from becoming dislodged or falling during the work (*see Outar v City of New York*, 5 NY3d 731 [2005]). Further, in view of the weight of the lighting bar, we cannot conclude as a matter of law that the distance it fell was de minimis (*see Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 605 [2009]). Nor did defendants demonstrate that any securing

device would have defeated the task of removing the lighting bar (*cf. Salazar v Novalex Contr. Corp.*, 18 NY3d 134, 139-140 [2011] ["the installation of a protective device of the kind that (plaintiff) posits . . . would have been contrary to the objectives of the work plan"]).

12 NYCRR 23-1.8(c)(1), which mandates approved safety hats for persons "required to work or pass within any area where there is a danger of being struck by falling objects or materials," is sufficiently concrete to give rise to Labor Law § 241(6) liability (*see Bornschein v Shuman*, 7 AD3d 476, 478 [2d Dept 2004]; *Sikorski v Burroughs Dr. Apts.*, 306 AD2d 844, 845 [4th Dept 2003]; *but see Sajta v Latham Four Partnership*, 282 AD2d 969, 971 [3d Dept 2001]).

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

ENTERED: JANUARY 26, 2017

CLERK

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

2879 The People of the State of New York, Ind. 2135/13
Respondent,

-against-

Taye Elleby,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Samuel J. Mendez of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Patricia M. Nuñez, J .), rendered February 5, 2014, as amended March 14, 2014, convicting defendant, after a jury trial, of sex trafficking and two counts each of promoting prostitution in the second and third degrees, and sentencing him to an aggregate term of 10 2/3 to 32 years, unanimously affirmed.

Defendant failed to preserve his present challenges to the court's rulings permitting the People to examine one of the victims by leading questions as a hostile witness and impeach her with her grand jury testimony and other prior statements pursuant to CPL 60.35(1), and to the absence of a limiting instruction as to the prior statements. Although defendant objected to the admission of a transcript of the parts of the witness's grand

jury testimony used during her trial testimony on the ground that this violated his right of confrontation under *Crawford v Washington* (541 US 36 [2004]), his federal Confrontation Clause claim is unavailing because he had an opportunity to cross-examine the witness at trial. Defendant did not preserve his present claim that the evidence at issue violated his right of confrontation under the New York Constitution, which he claims provides broader protection (*see People v DiTommaso*, 127 AD3d 11, 20 [1st Dept 2015], *lv denied* 25 NY3d 1162 [2015]). We decline to review these contentions in the interest of justice. As an alternative holding, we find that any error was harmless in light of the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230 [1975]), which included, among other things, the testimony of another victim, and a wealth of bank, phone and Internet records that completely refuted defendant's testimony, in which he disclaimed any involvement in prostitution.

The court providently exercised its discretion in permitting the People to introduce a video of defendant performing a song in which he boasted about being a pimp, for the purpose of impeaching defendant's testimony that he had never been involved in prostitution (*see generally People v Fardan*, 82 NY2d 638, 646 [1993]). Defendant's arguments concerning the probative value of

this evidence, such that the performance was not a genuine admission of pimping, go to weight rather than admissibility. In any event, any error in the admission of the video and related matters was harmless for the reasons previously stated.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 26, 2017

CLERK

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

2880 In re Hilda Gil, Index 100406/14
Petitioner-Appellant,

-against-

The Department of Education of
the City of New York, et al.,
Respondents-Respondents.

Stewart Lee Karlin Law Group, PC, New York (Daniel E. Dugan of counsel), for appellant.

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

Judgment (denominated an order), Supreme Court, New York County (Paul Wooten, J.), entered April 21, 2015, which granted respondents' motion to dismiss the petition seeking to reverse their determination, dated December 9, 2013, terminating petitioner from employment as a paraprofessional, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

An aggrieved union member whose employment is subject to a collective bargaining agreement between the union and the employer must first avail herself of the grievance procedure set forth in the agreement before she can commence an action seeking relief under CPLR article 78 (*see Matter of Plummer v Klepak*, 48

NY2d 486, 489 [1979], *cert denied* 445 US 952 [1980]; *Matter of Cantres v Board of Educ. of City of N.Y.*, 145 AD2d 359, 360 [1st Dept 1988]; *Matter of Sapadin v Board of Educ. of City of N.Y.*, 246 AD2d 359, 360 [1st Dept 1998]).

Only when the union fails in its duty of fair representation can an employee go beyond the agreed grievance procedure in a collective bargaining agreement and litigate directly against the employer (*see Matter of City Empls. Union Local 237, IBT AFL-CIO v City of New York*, 28 AD3d 230, 231 {1st Dept 2006]).

Petitioner conceded that the grievance filed on her behalf by the union was not resolved at the time the petition was filed. Accordingly, the court properly concluded that she failed to exhaust her available contractual remedies.

Moreover, the petition did not allege a claim against the union, a necessary party, based on a breach of the duty of fair representation. Thus, this claim is unpreserved (*see Matter of Cocozzo v Ward,* 162 AD2d 202, 203 [1st Dept 1990]).

In any event, the petition did not allege facts sufficient to show that the union's lack of activity on petitioner's behalf was deliberately invidious, arbitrary or founded in bad faith (*see Board of Educ., Commack Union Free School Dist. v Ambach,* 70 NY2d 501, 508 [1987], *cert denied sub nom Margolin v Board of*

Educ., 485 US 1034 [1988]). Given petitioner's history of similar misconduct, a determination by the union not to go forward with arbitration, if made, was rational.

Petitioner was not entitled to a name-clearing hearing because, as the petitioner conceded, she did not allege dissemination or likely dissemination of the allegedly false charge of infliction of excessive corporal punishment on a student (*see Matter of Swinton v Safir,* 93 NY2d 758, 763-765 [1999]).

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

ENTERED: JANUARY 26, 2017

CLERK

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

2882 The People of the State of New York, Ind. 1761/14
Respondent,

-against-

Rajesh Bhowan,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Paul A. Andersen of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Steven Lloyd Barrett, J.), rendered October 27, 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: JANUARY 26, 2017

CLERK

Friedman, J.P., Richter, Saxe, Moskowitz, Kapnick, JJ.

2884-
2884A The People of the State of New York, Respondent,

Ind. 1831/10
87/11

-against-

Shanequa Mascall,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Elizabeth L. Isaacs of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Joshua P. Weiss of counsel), for respondent.

_____

Judgments, Supreme Court, Bronx County (Stephen J. Barrett, J.), rendered June 28, 2013, convicting defendant, upon her pleas of guilty, of criminal sale of a controlled substance in the third degree and assault in the third degree, and sentencing her to an aggregate term of six months, concurrent with five years' probation on the drug sale count, unanimously affirmed.

The court correctly denied defendant's suppression motion, without granting a hearing. Defendant failed to allege facts sufficient to demonstrate that an aerosol can, allegedly used as a weapon, was recovered from her person or from any place in which she had a legitimate expectation of privacy (*see People v Ramirez-Portoreal*, 88 NY2d 99, 108 [1996]; *People v Rodriguez*, 69

NY2d 159, 161 [1989]). Defendant claimed to have been unlawfully searched by the police, but she did not specifically claim that this search yielded any evidence. Despite ample opportunity to do so, she did not dispute the People's claim that an officer recovered the can from the floor in an apartment building hallway. Defendant's argument that her moving papers implicitly claimed that the can was taken from her person is unavailing.

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

ENTERED: JANUARY 26, 2017

CLERK

Friedman, J.P., Richter, Saxe, Moskowitz, Kapnick, JJ.

2885-
2885A-
2885B

Index 24222/14

Robert Jones,
Plaintiff-Appellant,

-against-

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

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

_____

Held & Hines, LLP, New York (James K. Hargrove of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Diana Lawless of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered November 12, 2015, which denied plaintiff's motion to, among other things, renew and reargue his prior application for leave to serve a late notice of claim upon defendant New York City Health and Hospitals Corporation (HHC), unanimously affirmed, without costs. Appeal from order, same court and Justice, entered April 22, 2015, which vacated an order, same court and Justice, entered on or about October 17, 2014, which had granted, upon HHC's default, plaintiff's application for leave to serve a late notice of claim upon HHC, unanimously

dismissed, without costs, as abandoned. Appeal from order, same court and Justice, entered June 1, 2015, which clarified the order entered April 22, 2015 to the extent of granting HHC's motion to vacate the order entered on or about October 17, 2014 and denying plaintiff's application for leave to serve a late notice of claim upon HHC, unanimously dismissed, without costs, as taken from a nonappealable order.

Although the motion court denied the motion to reargue as untimely, that part of the order is appealable because the court also addressed the merits of the motion and therefore effectively granted reargument (*see Liss v Trans Auto Sys.*, 68 NY2d 15, 20 [1986]; *see also Pezhman v Chanel, Inc.*, 126 AD3d 497 [1st Dept 2015]). Upon reargument, the motion court properly adhered to its original determination denying plaintiff's application for leave to serve a late notice of claim, because plaintiff failed to establish that the court had overlooked or misapprehended any issue of law or fact in making its original determination (CPLR 2221[d][2]; *see Pezhman*, 126 AD3d at 497). In support of his motion to reargue, plaintiff improperly submitted his affidavit, an expert's affidavit and a caregiver's affidavit, because those documents were not offered in support of its original application or in opposition to HHC's motion to vacate (*see* CPLR 2221[d][2];

Mazinov v Rella, 79 AD3d 979, 980 [2d Dept 2010]).

The motion court properly denied the motion for leave to renew, because plaintiff provided no explanation as to why he did not submit the aforementioned affidavits on the prior motions (CPLR 2221[e][3]; *300 W. Realty Co. v City of New York*, 99 AD2d 708, 709 [1st Dept 1984], *appeal dismissed* 63 NY2d 952 [1984]). Even were renewal granted in the interest of justice (*Mejia v Nanni*, 307 AD2d 870, 871 [1st Dept 2003]), the motion court properly determined that there was no basis for changing its original determination denying plaintiff leave to serve a late notice of claim. Among other things, plaintiff failed to establish that HHC had obtained actual notice of the essential facts of plaintiff's medical malpractice claim within 90 days after the claim arose or a reasonable time thereafter (*see* General Municipal Law § 50-e[5]; *Wally G. v New York City Health & Hosps. Corp. [Metro. Hosp.]*, 27 NY3d 672, 677 [2016]; *Matter of Kelley v New York City Health & Hosps. Corp.*, 76 AD3d 824, 827-828 [1st Dept 2010]).

Plaintiff has abandoned his appeal from the order entered April 22, 2015, because he has not raised any argument regarding the propriety of that order (*see 400 E. 77th Owners, Inc. v New York Eng'g Assn., P.C.*, 122 AD3d 474, 475 [1st Dept 2014]).

The order entered June 1, 2015 is not appealable as of right, because it did not determine a motion made upon notice (*see* CPLR 5701[a][2], [3]), and we decline to deem the notice of appeal from that order a motion for leave to appeal (*see Gross v 141-30 84th Rd. Apt. Owners Corp.*, 85 AD3d 447, 448 [1st Dept 2011]).

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

ENTERED: JANUARY 26, 2017

CLERK

Friedman, J.P., Richter, Saxe, Moskowitz, Kapnick, JJ.

2886-
2887 In re Tony R.,
Petitioner-Appellant,

-against-

Stephanie D.,
Respondent-Respondent.

_____

Larry S. Bachner, Jamaica, for appellant.

Mirkin & Gordon, P.C., Great Neck (Elisabetta Capizola of counsel), for respondent.

Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), attorney for the children.

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Appeal from order, Family Court, New York County (Douglas E. Hoffman, J.), entered on or about June 11, 2014, which granted respondent mother's motion, upon petitioner father's default, to dismiss his petition seeking modification of an order of custody, unanimously dismissed, without costs. Order, same court and Judge, entered on or about July 23, 2015, which denied petitioner's motion to vacate his default, unanimously affirmed, without costs.

No appeal lies from the order entered upon petitioner's default (*see Benitez v Olson*, 29 AD3d 503 [2d Dept 2006]).

Family Court properly denied petitioner's motion to vacate

his default, since he failed to demonstrate both a reasonable excuse for the default and a meritorious claim (*see* CPLR 5015[a][1]; *Mutual Mar. Off., Inc. v Joy Constr. Corp.*, 39 AD3d 417, 419 [2007]). His excuse that he was delayed climbing the stairs to the courtroom is unavailing, given that the courthouse had fully functioning elevators. Notably, he also had an extensive history of failing to appear, resulting in the dismissal of numerous prior petitions. Moreover, the father failed to make an evidentiary showing to demonstrate the need for a change in custody in order to ensure the continued best interest of the children (*see Sano v Sano*, 98 AD3d 659, 659 [2d Dept 2012]). Many of his allegations were unsupported and patently incredible.

Family Court possessed ample information regarding the numerous factors it was required to consider in its analysis of the children's best interest. Thus, it had a sound and substantial basis upon which to determine that it was in the children's best interest to remain in the mother's custody, even without a full evidentiary hearing (*see Matter of Bouie v Arvelo-Smith*, 12 AD3d 668 [2d Dept 2004]; *compare S.L. v J.R.*, 27 NY3d 558, 564 [2016] [hearing required where a court relied on, among other things, hearsay statements and an untested expert

opinion]). The court was familiar with the parties' extensive history and their demeanor and, thus, was in a position to reasonably determine that there had been no change in circumstances that would warrant a change in custody (*see Matter of Vangas v Ladas*, 259 AD2d 755 [2d Dept 1999]).

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

ENTERED: JANUARY 26, 2017

CLERK

Friedman, J.P., Richter, Saxe, Moskowitz, Kapnick, JJ.

2888 Richard J.J. Scarola, Index 652705/15
Plaintiff-Respondent,

-against-

Verizon Communications, Inc.,
Defendant-Appellant.

_____

Phillips Lytle LLP, Buffalo (Sean C. McPhee of counsel), for appellant.

Richard J.J. Scarola, respondent pro se.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered May 26, 2016, which, insofar as appealed from, denied defendant's motion to dismiss the cause of action under General Business Law § 349, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

The complaint fails to allege any of the three elements of a claim under General Business Law § 349 (*see Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]). First, the challenged conduct, i.e., defendant's continuing to bill plaintiff for telecommunications services, and harassing him for payment, after the relevant account was closed, was not consumer-oriented. The account was a business, not a consumer, account. Nor did

defendant's conduct have "a broader impact on consumers at large" (*see Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25 [1995]; *Cruz v NYNEX Info. Resources*, 263 AD2d 285, 290 [1st Dept 2000] ["The statute's consumer orientation does not preclude its application to disputes between businesses per se, but it does severely limit it"]). Plaintiff's conclusory allegations as to the effect of the conduct on other consumers are insufficient to transform a private dispute into conduct with further-reaching impact (*see Camacho v IO Practiceware, Inc.*, 136 AD3d 415 [1st Dept 2016]; *Golub v Tanenbaum-Harber Co., Inc.*, 88 AD3d 622, 623 [1st Dept 2011], *lv denied* 19 NY3d 806 [2012]).

Second, the continued billing after termination of the account was not deceptive or materially misleading, because it was clearly in error and not "likely to mislead a reasonable consumer acting reasonably under the circumstances" (*Oswego*, 85 NY2d at 26).

Third, plaintiff does not allege that he was injured as a result of defendant's alleged deceptive acts. While he was not required to plead reliance, plaintiff was required to allege that he was deceived (*see id.*). The complaint does not so allege.

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

ENTERED: JANUARY 26, 2017

CLERK

Friedman, J.P., Richter, Saxe, Moskowitz, Kapnick, JJ.

2889 In re Glen Bolofsky, etc., et al., Petitioners-Appellants, Index 100049/14

-against-

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

Edelstein & Grossman, New York (Jonathan I. Edelstein of counsel), for appellants.

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

Order and judgment (one paper), Supreme Court, New York County (Margaret A. Chan, J.), entered March 18, 2015, which, insofar as appealed from as limited by the briefs, dismissed, in part, petitioners' fourth cause of action, and dismissed, in their entirety, the fifth and sixth causes of action, unanimously affirmed, without costs.

With respect to the fourth cause of action regarding Vehicle and Traffic Law (VTL) § 240(1)'s hearing notice requirements, the court properly limited petitioners' requested relief to that which is required under the statute, by directing respondent Parking Violations Bureau (PVB) to send written notice by first class mail of the date of each hearing on each parking violation,

listing the tickets in the order in which they will be heard, and including warnings that failure to appear shall be deemed an admission of liability that could result in entry of a default judgment. Nothing in VTL § 240(1) requires respondents to employ a calendaring system that enables petitioner to choose the order in which the tickets are adjudicated. Petitioners fail to establish that any burdens on them that result from respondents' policies with respect to the order in which parking tickets are heard rise to the level of a due process violation.

As to the fifth cause of action, the court properly found that respondents' use of "reason codes" to identify petitioners' primary defense to a parking violation and the basis for respondents' determination does not violate the due process obligation to provide sufficient information for an intelligent appellate review. To the extent the use of reason codes fails to set forth an adequate basis for review, and the recording of the oral hearing does not provide clarification, petitioners may appeal the decision administratively to an appeals board, and after that may commence an article 78 proceeding to challenge the particular decision.

With respect to the sixth cause of action, to the extent any of the petitioners have standing to assert challenges to the

Stipulated Fine Program and Commercial Abatement Program, the court properly found that the PVB did not overstep its statutory authority in adopting rules and regulations that further the purposes of the underlying statutory scheme (VTL § 237[3]; Administrative Code of City of NY § 19-203[c]) and are not inconsistent with the statutory language or its underlying purposes (*Matter of General Elec. Capital Corp. v New York State Div. of Tax Appeals, Tax Appeals Trib.*, 2 NY3d 249, 254 [2004]). Further, the settlement programs have a rational basis and do not violate equal protection.

We have considered petitioners' remaining arguments and find them unavailing.

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

ENTERED: JANUARY 26, 2017

CLERK

Friedman, J.P., Richter, Saxe, Moskowitz, Kapnick, JJ.

2890 In re KJ, Petitioner,

-against-

New York City Housing Authority, Respondent.

Index 401622/13

KJ, petitioner pro se.

David I. Farber, New York (Melissa R. Renwick of counsel), for respondent.

Final determination of respondent, dated May 1, 2013, terminating petitioner's Section 8 rent subsidy, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court pursuant to CPLR 7804[g] by order of Supreme Court, New York County [Peter H. Moulton, J.], entered February 13, 2015), dismissed, without costs.

Substantial evidence supports the agency's determination that petitioner violated her obligation under governing rules to permit the agency to inspect her apartment (*see Matter of Arrocha v Board of Educ. of City of N.Y.*, 93 NY2d 361, 363 [1999]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222,

230-231 [1974]). Substantial evidence likewise supports the finding that petitioner's request that her disabling mental illness, which caused her to suffer panic attacks at the prospect of any person entering her apartment, be accommodated by indefinitely waiving the inspection requirement, was unreasonable.

In response to petitioner's request for an accommodation, the agency attempted, at length, and for years, to engage in an interactive dialogue with her, in an effort to find a way to accommodate her disability. Petitioner rejected every overture. Among other things, petitioner refused to permit any inspection supervised by a friend, or by the building owner, or while she was otherwise not in the apartment. Most notably, petitioner repeatedly refused the agency's offer to have one of its social workers work with her to find a way to accommodate her disability. The interactive process "contemplates that both sides will work together to assess whether [a covered person's] disability can be reasonably accommodated" (*Thompson v City of New York*, 2002 WL 31760219, *8, 2002 US Dist LEXIS 23675, *25 [SD NY, Dec. 9, 2002, No. 98-CV-4725 (GBD)]). Petitioner here failed to carry out her own obligation to "act reasonably" in response to the agency's accommodation overtures (*Jochelman v New York*

State Banking Dept., 2010 NY Slip Op 32750[U], *9 [Sup Ct, NY County 2010], *affd* 83 AD3d 540 [1st Dept 2011]).

Under the circumstances, in which the agency acted with great forbearance over a period of nearly five years, attempting all the while to work with petitioner to accommodate her disability, the penalty imposed does not shock the judicial conscience (*see Pell*, 34 NY2d at 234-235).

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

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

ENTERED: JANUARY 26, 2017

CLERK

Friedman, J.P., Richter, Saxe, Moskowitz, Kapnick, JJ.

2891-
2892 The People of the State of New York,
Respondent,

-against-

Leston Kelly,
Defendant-Appellant.

Ind. 4380/10

_____

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

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

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Order, Supreme Court, Bronx County (Ralph Fabrizio, J.), entered September 12, 2014, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant were

adequately taken into account by the risk assessment instrument, or were outweighed by the seriousness of the underlying sex crimes committed against defendant's young stepdaughter, which continued for over five years (*see e.g. People v Ogata*, 124 AD3d 416, 416 [1st Dept 2015], *lv denied* 25 NY3d 908 [2015]).

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

ENTERED: JANUARY 26, 2017

CLERK

Friedman, J.P., Richter, Saxe, Moskowitz, Kapnick, JJ.

2893 Second 82nd Corp., Index 570261/11
Petitioner-Appellant, 53945/10

-against-

Raymond Robin Veiders,
Respondent-Respondent,

"John Doe", et al.,
Respondents.

_____

Judith M. Brener, New York (Jeffrey M. Goldman of counsel), for appellant.

Crumiller P.C., New York (Susan K. Crumiller of counsel), for respondent.

_____

Order, Appellate Term of the Supreme Court, First Department, entered April 28, 2016, affirming a judgment of the Civil Court, New York County (Sabrina B. Kraus, J.), entered on or about October 14, 2014, after a nonjury trial, dismissing the petition in this holdover proceeding, unanimously affirmed, without costs.

The trial court's determination that respondent tenant's absence from his rent-stabilized apartment for more than 183 days per year during the relevant period was excusable (*see* Rent Stabilization Code [9 NYCRR] §§ 2520.6[u]; 2523.5[b][vi]; 2524.4[c]) and is supported by a fair interpretation of the

evidence, including the credible testimony of respondent and his sister that respondent returned to the apartment periodically, did not remove his personal belongings from the premises, never sublet the apartment, and paid New York City self-employment taxes

(*see 409-411 Sixth St., LLC v Mogi*, 22 NY3d 875 [2013]). The record shows that respondent listed the apartment as his address on his federal, state, and city tax returns, among numerous other documents filed with public agencies (*see* 9 NYCRR 2520.6[u][1]). While the record also includes documents on which respondent listed his mother's residence in Clarence, New York, as his address, the trial court, which was in a position to assess the credibility of witnesses, credited respondent's explanation for the discrepancy (*see 300 E. 34th St. Co. v Habeeb*, 248 AD2d 50, 55 [1st Dept 1997]).

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

ENTERED: JANUARY 26, 2017

CLERK

Friedman, J.P., Richter, Saxe, Moskowitz, Kapnick, JJ.

2895 Yonas Berhe, Index 151508/13
Plaintiff-Appellant,

-against-

The Trustees of Columbia University
in the City of New York, et al.,
Defendants-Respondents.

_____

Michelstein & Associates, PLLC, New York (Stephen J. Riegel of counsel), for appellant.

Rivkin Radler, LLP, Uniondale (Merril S. Biscone of counsel), for respondents.

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Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered July 20, 2015, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants made a prima facie showing that plaintiff was in their special employ by demonstrating that they "control[led] and direct[ed] the manner, details and ultimate result of [his] work" (*Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 558 [1991]; *see Warner v Continuum Health Care Partners, Inc.*, 99 AD3d 636 [1st Dept 2012]). The general manager of defendants' catering facility, Faculty House, requested plaintiff, a server, by name from the temporary employment agency through which plaintiff was

assigned to Faculty House, retained the right to discharge him from Faculty House, and provided his uniform jacket. The general manager planned each event according to a particular schedule, menu, and sequence, with specific tables and tasks assigned to different servers, including plaintiff; the employment agency had no involvement in or knowledge of these details. The general manager arranged the schedules of the workers, including plaintiff, and their hours, and either he or a banquet manager dictated their break and meal times. The general manager was also present at each event to ensure proper service, including by plaintiff, and that the event proceeded according to plan.

That plaintiff may not have required instruction to serve or clear a particular course because he was experienced is insufficient to raise an issue of fact as to defendants' control over his work (*see Warner*, 99 AD3d at 637).

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

ENTERED: JANUARY 26, 2017

CLERK

Friedman, J.P., Richter, Saxe, Moskowitz, Kapnick, JJ.

2896-
2897 In re Manuel P. A.,
Petitioner-Appellant,

-against-

Emilie B.,
Respondent-Respondent.

_____

J. Douglas Barics, Commack, for appellant.

Chemtob Moss & Forman, LLP, New York (Susan M. Moss of counsel), for respondent.

Kenneth M. Tuccillo, Hastings on Hudson, attorney for the child.

_____

Appeal from order, Family Court, New York County (Adetokunbo O. Fasanya, J.), entered on or about January 21, 2016, to the extent it awarded $33,701.50 of interim counsel fees to the respondent mother in the form of sanctions against the petitioner father, unanimously dismissed, without costs.

This appeal was improperly taken from a nondispositional Family Court order without leave of court (Family Ct Act § 1112; 22 NYCRR 600.3; CPLR 5512(a); *Matter of Lutfee M.*, 157 AD2d 604 [1st Dept 1990], *lv denied* 75 NY2d 710 [1990]). The father has presented no excuse for his failure to move for leave to appeal apart from being a pro se litigant at the time of the filing; nor has he presented any showing why any such motion should be

granted. Absent an explanation as to why he failed to follow the proper procedure or should be treated differently from any other litigant that falls within the general rule prohibiting an appeal from a nonfinal order in Family Court, the father's appeal is dismissed.

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

ENTERED: JANUARY 26, 2017

CLERK

Friedman, J.P., Richter, Saxe, Moskowitz, Kapnick, JJ.

2898-
2898A Gulcin Brunson,
Plaintiff-Appellant,

-against-

Saint Vincent's Catholic Medical
Centers of New York, et al.,
Defendants-Respondents.

Index 107010/09

Drohan Lee LLP, New York (Vivian Rivera Drohan of counsel), for appellant.

Shaub, Ahmuty, Citrin & Spratt, LLP, New York (Sofya Uvaydov of counsel), for respondents.

Judgment, Supreme Court, New York County (Geoffrey D. Wright, J.), entered October 14, 2014, awarding defendant judgment on a jury verdict, and bringing up for review an order, same court and Justice, entered September 15, 2014, which, inter alia, denied plaintiff's motion to set aside the verdict and for a new trial under CPLR 4404(a), unanimously affirmed, without costs. Appeal from the order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The jury found that defendant hospital's negligence in maintaining the sidewalk was not a proximate cause of plaintiff's accident. Plaintiff's argument of an inconsistent verdict is unpreserved (*see Barry v Manglass*, 55 NY2d 803, 806 [1981]). In

any event, this case does not present a situation where the questions of negligence and proximate cause are inextricably interwoven (*see KBL, LLP v Community Counseling & Mediation Servs.*, 123 AD3d 488 [1st Dept 2014]), and the verdict was supported by a fair interpretation of the evidence (*see Lolik v Big V Supermarkets*, 86 NY2d 744 [1995]; *White v New York City Tr. Auth.*, 40 AD3d 297, 297-298 [1st Dept 2007]). While plaintiff claimed that she tripped on a hole in the sidewalk, the emergency room nurse noted in the hospital record that based on what plaintiff told her, someone had bumped into plaintiff while she was bending over to unlock her bike. Further, the nurse's notation is consistent with the testimony of both plaintiff's and defendant's experts that the pattern of the fractures in plaintiff's wrist indicated that she fell forward with her hands outstretched, as opposed to the side of her hand striking the ground, as well as plaintiff's admission that she sustained an abrasion in her right knee. The jury's resolution of other

conflicting evidence and credibility determinations are entitled to deference (*see Sulay L. v New York City Tr. Auth.*, 128 AD3d 475, 476 [1st Dept 2015]; *Manne v Museum of Modern Art*, 39 AD3d 368 [1st Dept 2007]).

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

ENTERED: JANUARY 26, 2017

CLERK

Friedman, J.P., Richter, Saxe, Moskowitz, Kapnick, JJ.

2900 The People of the State of New York, Ind. 2017/09
Respondent,

-against-

Johnny Lynch,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Lisa Packard of counsel), and DLA Piper LLP (US), New York (Marc A. Silverman of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Herbert J. Adlerberg, J.H.O. at hearing; Charles H. Solomon, J. at plea and sentencing), rendered April 27, 2010, convicting defendant of criminal possession of a controlled substance in the fourth degree, and sentencing him to a term of one year, unanimously affirmed.

The court properly denied defendant's suppression motion.

There is no basis for disturbing the factfinder's credibility determinations, including the finding that an officer smelled the odor of marijuana emanating from defendant's car during a traffic stop.

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

ENTERED: JANUARY 26, 2017

CLERK

Friedman, J.P., Richter, Saxe, Moskowitz, Kapnick, JJ.

2901-
2901A Index 162168/14

Greg Waltman,
Plaintiff-Appellant,

The G1 Quantum Fund,
Plaintiff,

-against-

Time Warner Inc., et al.,
Defendants-Respondents.

_____

Greg Waltman, appellant pro se.

Davis Wright Tremaine LLP, New York (Jeremy A. Chase of counsel), for respondents.

_____

Appeals from orders, Supreme Court, New York County (Debra A. James, J.), entered May 21, 2015 and October 2, 2015, which granted defendants' respective motion to dismiss the complaint and enjoined the individual plaintiff from initiating any further litigation on any claim against defendants without prior approval of the Administrative Judge of the court in which plaintiff seeks to bring further litigation, deemed to be appeals from the subsequent judgments (CPLR 5501[c]), same court and Justice, entered February 10, 2016, and August 18, 2016 dismissing the complaint, and as so considered, said judgments unanimously affirmed, without costs.

Plaintiffs' complaint is barred under res judicata, since a judgment on the merits exists from a prior action between the same parties involving the same subject matter (*Matter of Hunter*, 4 NY3d 260, 269 [2005]).

The motion court properly enjoined the individual plaintiff to the extent indicated (*Matter of Sud v Sud*, 227 AD2d 319, 319 [1st Dept 1996]).

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

ENTERED: JANUARY 26, 2017

CLERK

Friedman, J.P., Richter, Saxe, Moskowitz, Kapnick, JJ.

2903 In re New York City Asbestos Litigation — Index 190272/14

- - - - -

Susan Krok as Administratrix for the Estate of Raymond J. Krok, Sr., etc.,
Plaintiff-Respondent,

-against-

AERCTO International, Inc., et al.,
Defendants,

The Nash Engineering Company,
Defendant-Appellant.

_____

McGivney & Kluger, P.C., New York (Kerryann M. Cook of counsel), for appellant.

Weitz & Luxenberg, P.C., New York (Chris Romanelli of counsel), for respondent.

_____

Order, Supreme Court, New York County (Peter H. Moulton, J.), entered April 12, 2016, which denied defendant Nash Engineering Company's motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Defendant failed to establish prima facie that plaintiff's decedent could not have been exposed to its products or the asbestos contained therein (*see Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575 [1st Dept 2016]). Its reliance on the decedent's inability to identify its product as a source of his

exposure to asbestos is misplaced (*see id.*; *Salerno v Garlock Inc.*, 212 AD2d 463 [1st Dept 1995]). In any event, plaintiffs raised an issue of fact by submitting evidence that defendant's asbestos-containing pumps were present on the ship to which the decedent was assigned as a boiler tender fireman.

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

ENTERED: JANUARY 26, 2017

CLERK

Friedman, J.P., Richter, Saxe, Moskowitz, Kapnick, JJ.

2904 The People of the State of New York, Ind. 4046/13
Respondent,

-against-

James Haywood,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Rebecca Hausner 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 (Eduardo Padro, J.), rendered March 18, 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: JANUARY 26, 2017

CLERK

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

Friedman, J.P., Richter, Saxe, Moskowitz, Kapnick, JJ.

2907 In re Branic International Realty Corp., Petitioner, Index 101228/14

-against-

The City of New York Environmental Control Board, Respondent.

_____

Rosenberg Calica & Birney LLP, Garden City (Ronald J. Rosenberg of counsel), for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Scott Shorr of counsel), for respondent.

_____

Determination of respondent New York City Environmental Control Board, dated June 26, 2014, finding that petitioner violated Administrative Code of City of NY § 28-118.3.2, and imposing a penalty therefor, unanimously annulled, on the law, without costs, and the petition in this proceeding brought pursuant to CPLR article 78 (transferred to this court by the order of Supreme Court, New York County [Carol E. Huff, J.], entered June 9, 2015), granted.

The determination that petitioner violated Administrative Code of City of NY § 28-118.3.2 by having its premises at 2690 Broadway, in Manhattan, used as a transient hotel contrary to the records of the Department of Buildings (DOB) is not supported by

substantial evidence (*see Terrilee 97th St., LLC v New York City Envtl. Control Bd.*, 102 AD3d 637 [1st Dept 2013]). The DOB inspector who issued the notice of violation admitted at the hearing that he treated petitioner's three adjoining buildings, located at 2686, 2688, and 2690 Broadway, as one, and was unable to identify any apartments he visited at 2690 Broadway or any occupants he spoke with in that building (*compare Matter of Grand Imperial, LLC v City of New York*, 115 AD3d 436 [1st Dept 2014]).

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

ENTERED: JANUARY 26, 2017

CLERK

Friedman, J.P., Richter, Saxe, Moskowitz, Kapnick, JJ.

2908 The People of the State of New York, Ind. 179/14
Respondent,

-against-

Bradley J. Hough,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael J. Obus, J.), rendered April 3, 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: JANUARY 26, 2017

CLERK

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