SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 4, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Richter, Mazzarelli, Gische, JJ.

16588 The People of the State of New York, Ind. 847/13
Respondent,

-against-

Rhuster Etheart,
Defendant-Appellant.

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

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Appeal from judgment, Supreme Court, New York County (Rena K. Uviller, J. at plea; Robert M. Stolz, J. at sentencing), rendered December 4, 2013, convicting defendant of criminal possession of stolen property in the fourth degree, and sentencing him, as a second felony offender, to term of 1½ to 3 years, held in abeyance, motion by assigned counsel to be relieved denied without prejudice to renewal pending further information from assigned counsel as to her communications with defendant regarding his appeal.

Assigned counsel asserts that defendant has not authorized

her to pursue certain potentially viable appellate issues. However, although defendant was apparently paroled to United States immigration authorities in 2014, assigned counsel's letter to defendant dated September 18, 2015, along with a copy of the brief filed with this court, was sent to a residential address. Accordingly, we hold the appeal in abeyance and deny assigned counsel's motion without prejudice to renewal upon a showing that defense counsel has communicated to defendant through the immigration authorities or that counsel has attempted to communicate with defendant in another manner that is reasonably calculated to provide notice regarding his appeal or that counsel otherwise communicated with defendant to the extent required by *People v Saunders* (52 AD2d 833 [1976]).

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

ENTERED: MAY 4, 2017

CLERK

Friedman, J.P., Sweeny, Renwick, Andrias, Manzanet-Daniels, JJ.

3523 In re Michael Kunz, M.D., Index 530352/16
Petitioner-Respondent,

-against-

Shahadoth C.,
Respondent-Appellant.

_____

Marvin Bernstein, Mental Hygiene Legal Service, New York (Diane Goldstein Temkin of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Seth M. Rokosky of counsel), for respondent.

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Appeal from order, Supreme Court, New York County (Carol Ruth Feinman, J.), entered June 16, 2016, which granted the petition and authorized petitioner to involuntarily administer medical treatment to respondent for up to six months, unanimously dismissed, without costs, as moot.

By its own terms, the order which respondent seeks to challenge expired on December 16, 2016. Furthermore, it is undisputed that, in November 2016, respondent was transferred to another medical facility, and petitioner no longer has any direct

stake in respondent's medical treatment. Accordingly, the order is moot, and, under the circumstances presented, the exception to the mootness doctrine is inapplicable (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

The Decision and Order of this Court entered herein on March 28, 2017 is hereby recalled and vacated (*see* M-1736 decided simultaneously herewith).

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

ENTERED: MAY 4, 2017

CLERK

Sweeny, J.P., Mazzarelli, Moskowitz, Kahn, JJ.

3358 Epstein Engineering, P.C., Index 603146/08
Plaintiff-Appellant,

-against-

Thomas Cataldo, et al.,
Defendants-Respondents.

_____

Warshaw Burstein, LLP, New York (Bruce H. Wiener of counsel), for appellant.

Jane M. Myers, P.C., Hauppauge (James E. Robinson of counsel), for Thomas Cataldo and Cataldo Engineering, P.C., respondents.

Ira Daniel Tokayer, New York, for Steve Gregorio, respondent.

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Order, Supreme Court, New York County (George J. Silver, J.), entered October 8, 2015, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment on the issue of liability on its second through fifth causes of action alleging breach of fiduciary duty and the duty of loyalty, unfair competition, conversion, and fraud, unanimously affirmed, without costs.

The motion court properly denied plaintiff's motion for summary judgment on its second cause of action for breach of the fiduciary duty of loyalty. Even assuming that plaintiff has established that defendants were disloyal in operating a competing business while employed by plaintiff, plaintiff has

failed to establish that defendants usurped any corporate opportunity, by showing that it was seeking any of defendants' allegedly competing projects, or that its survival was jeopardized by its failure to acquire any of those projects (*see Lee v Manchester Real Estate & Constr., LLC*, 118 AD3d 627, 628 [1st Dept 2014]; *Alexander & Alexander of N.Y. v Fritzen*, 147 AD2d 241, 246-247 [1st Dept 1989]).

In light of plaintiff's argument that defendants' "disloyal conduct also requires findings of liability for [plaintiff's] other causes of action," and since plaintiff does not posit any independent damages for any of those claims, summary judgment was also properly denied as to plaintiff's remaining claims for unfair competition, conversion, and fraud (*see e.g. Perez v Violence Intervention Program*, 116 AD3d 601, 602 [1st Dept 2014], *lv denied* 25 NY3d 915 [2015]). In any event, plaintiff failed to

establish entitlement to summary judgment as to any of those claims.

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

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

ENTERED: MAY 4, 2017

CLERK

Richter, J.P., Andrias, Kahn, Gesmer, JJ.

3603 Dorothy Jones, Index 301984/11
Plaintiff-Appellant,

-against-

New York-Presbyterian Hospital
also known as Columbia University
Medical Center, et al.,
Defendants-Respondents.

_____

Burns & Harris, New York, (Judith F. Stepmler of counsel), for appellant.

Martin Clearwater & Bell LLP, New York (Barbara D. Goldberg of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered November 1, 2016, which granted defendants' motion to vacate and set aside a jury verdict and dismiss the complaint, unanimously reversed, on the law, without costs, the motion denied, the verdict reinstated, and the matter remanded for the court's consideration of defendants' alternative request for relief.

Plaintiff tripped and fell in the vestibule of the Harkness Pavilion, which is owned and maintained by defendants New York-Presbyterian Hospital a/k/a Columbia University Medical Center and New York Presbyterian Healthcare System, Inc.

At trial, plaintiff testified that after she entered the

vestibule, her left foot got caught on "a dirty [surgical or food service] cap," and she lost her balance. Plaintiff "started to propel forward and then [her right] foot went down into a little hole," causing her to lose her balance a second time. Testimony by defendant's employee established that the vestibule had flooded a month earlier, and four damaged ceramic floor tiles were removed. The tiles had not been repaired by the date of the accident. Instead, defendants' maintenance department covered the area with a rubber rain mat, which would bend when people walked over it. Thus, the evidence establishes, and the jury found, that the cap, the missing tiles, and the mat were concurrent causes of plaintiff's injuries.

However plaintiff failed to establish by a preponderance of the evidence that defendants caused the cap to be left on the ground (*see Briggs v Pick Quick Foods, Inc.*, 103 AD3d 526, 526 [1st Dept 2013]; *Stevens v Loblaws Market*, 27 AD2d 975 [4th Dept 1967]). Furthermore, because plaintiff testified that the cap was not visible and apparent, defendants did not have constructive notice that it was on their floor (*see Lance v Den-Lyn Realty Corp.*, 84 AD3d 470, 470 [1st Dept 2011]). Finally, plaintiff failed to establish that the presence of caps was a recurring condition in the vestibule, because there is no

testimony that established any complaint to defendants about the caps being on the vestibule's floor (*see Kobiashvilli v Hill*, 34 AD3d 746, 747 [2d Dept 2006], *appeal dismissed* 8 NY3d 905 [2007]).

On the other hand, it is undisputed that defendants knew that there was a hole and/or indentation in their vestibule's floor and that their employees had placed the mat onto the floor to cover the defect. Given this evidence, the jury had ample reason to find defendants liable, even in the absence of a finding that defendants were on notice of any condition related to the caps.

Accordingly, we find that the court erred in setting aside the jury verdict in plaintiff's favor and directing a verdict in defendant's favor, because defendants failed to show that there was no valid line of reasoning and were no permissible inferences which could lead a rational person to the conclusion reached by the jury.

We note that defendant's motion to set aside the verdict asked, as alternative relief, that the court direct a new trial on damages unless plaintiff stipulated to a substantial reduction

in damages. Since the motion court granted the motion to set aside the verdict, it did not rule on this prong of the motion. Upon remand, we direct that it do so.

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

ENTERED: MAY 4, 2017

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Webber, JJ.

3725 The People of the State of New York, Ind. 2559/13
Respondent,

-against-

Tatyana Gudin,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Stephen J. Kress of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered November 12, 2014, convicting defendant, upon her plea of guilty, of criminal possession of a controlled substance in the seventh degree, and sentencing her to a term of six months, unanimously affirmed.

The court properly denied defendant's suppression motion, without granting a hearing. Defendant did not preserve her specific argument that the lack of information from the People concerning the basis for the searches at issue completely exempted her from the requirement of making allegations of fact in her motion (*see People v Wright*, 54 AD3d 695, 696 [2d Dept 2008], *lv denied* 12 NY3d 922 [2009]), and we decline to review it in the interest of justice. As an alternative holding, we find

it unavailing. A suppression motion must be in writing, state the legal ground of the motion and "contain sworn allegations of fact," made by defendant or "another person" (CPL 710.60[1]). Here, defendant's motion to suppress the fruits of a search of her purse and a bag contained no factual allegations whatsoever, conclusory or otherwise, but only stated legal conclusions. Notwithstanding the limited information provided by the People, defendant presumably had personal knowledge of those circumstances of the searches that occurred in her presence, and was at least obligated to make factual allegations, to the best of her ability (*see People v Vega*, 210 AD2d 41 [1st Dept 1994], *lv denied* 85 NY2d 915]; *compare People v Hightower*, 85 NY2d 988, 990 [1995] [minimal factual allegations, as opposed to legal conclusions, warranted hearing in light of minimal information supplied to defendant]).

To the extent the record permits review, we find 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]). Regardless of whether counsel should have filed a more appropriate suppression motion or replied to the People's opposition, defendant has not shown that she was prejudiced.

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

ENTERED: MAY 4, 2017

CLERK

Sweeny, J.P., Gische, Kahn, Gesmer, JJ.

3884 The People of the State of New York, Ind. 4601N/13
Respondent,

-against-

Sheldon Herron,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered March 4, 2015, convicting defendant, after a jury trial, of assault in the second degree and resisting arrest, and sentencing him, as a second violent felony offender, to an aggregate term of five years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Initially, we find no basis for disturbing the jury's credibility determinations.

The evidence supports an inference that the injury to a detective who was attempting to arrest defendant was more than mere "petty slaps, shoves, kicks and the like" (*Matter of Philip A.*, 49 NY2d 198, 200 [1980]), and that it caused "more than

slight or trivial pain" (*People v Chiddick*, 8 NY3d 445, 447 [2007]). The injury to the detective's hand caused pain that lasted at least a week, required the use of pain relievers, and interfered with the detective's ability to work and perform other activities. The detective's hand was also splinted during an emergency room visit, which was followed up by other medical examinations. The jury was entitled to base its finding of substantial pain on the detective's testimony (*see People v Guidice*, 83 NY2d 630, 636 [1994]), which was corroborated in any event.

The evidence also established that the injury was caused by defendant when he was resisting arrest. Even if the precise manner in which the injury was caused is unknown, the only rational explanation of the injury is that defendant caused it in the course of his violent struggle with the detective.

The evidence also established that the detective was performing a lawful duty (Penal Law § 120.05[3]), consisting of arresting defendant for selling drugs. The fact that the jury acquitted defendant of the sale charge does not warrant a different conclusion (*see People v Rayam*, 94 NY2d 557 [2000]), particularly because the People were only required to prove that

the detective had probable cause for an arrest, not that defendant was guilty beyond a reasonable doubt of the crime for which he was being arrested.

Defendant's arguments concerning the People's summation and the court's charge do not warrant reversal.

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

ENTERED: MAY 4, 2017

CLERK

Sweeny, J.P., Gische, Kahn, Gesmer, JJ.

3885 In re Tyrese C.,

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

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

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

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Order of disposition, Family Court, New York County (Adetokunbo Fasanya, J.), entered on or about February 25, 2016, 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 assault in the third degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court providently exercised its discretion when it denied appellant's request for an adjournment in contemplation of dismissal. Probation 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]). The court reasonably found that the level and duration of supervision afforded by a probationary disposition was necessitated by the seriousness of the underlying act of violence and appellant's behavioral issues, including marijuana abuse.

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

ENTERED; MAY 4, 2017

CLERK

Sweeny, J.P., Gische, Kahn, Gesmer, JJ.

3886 Galopy Corporation International, N.V., Plaintiff-Respondent-Appellant, Index 151766/15

-against-

Deutsche Bank, A.G., Defendant-Appellant-Respondent.

_____

Allen & Overy LLP, New York (Pamela Rogers Chepiga of counsel), for appellant-respondent.

Schlam Stone & Dolan LLP, New York (Erik S. Groothuis of counsel), and Selvaratnam Law Office, New York (Troy Selvaratnam of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered August 18, 2016, which granted defendant's motion to dismiss the causes of action for promissory estoppel, unjust enrichment, and money had and received, and denied the motion to dismiss as to the cause of action for breach of contract, unanimously modified, on the law, to grant the motion as to the breach of contract cause of action, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

The breach of contract claim is barred by the statute of frauds. The alleged oral contract had a settlement date of July 10, 2011, and therefore could not be performed within a year (*see*

General Obligations Law § 5-701[a][1]). The possibility of its being terminated earlier does not remove the contract from the scope of the statute of frauds (*D & N Boening v Kirsch Beverages*, 63 NY2d 449, 456-457 [1984]). Unlike the situation in *Financial Structures Ltd. v UBS AG* (77 AD3d 417 [1st Dept 2010]), which involved an oral agreement with "methods of acceleration" that "would . . . advance[] the period of fulfillment" (*id.* at 418 [internal quotation marks omitted]), the termination provision in this case unwound and canceled the transaction.

The promissory estoppel and unjust enrichment claims are duplicative of the breach of contract claim (*see Brown v Brown*, 12 AD3d 176 [1st Dept 2004]). A claim for money had and received lies only in the absence of an agreement (*Parsa v State of New York*, 64 NY2d 143, 148 [1984]).

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

ENTERED: MAY 4, 2017

CLERK

Sweeny, J.P., Gische, Kahn, Gesmer, JJ.

3887 Dawn Bortman, Index 652924/13
Plaintiff-Respondent,

-against-

Henry Lucander,
Defendant-Appellant.

_____

The Mintz Fraade Law Firm, PC, New York (Alan P. Fraade of counsel), for appellant.

_____

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered June 4, 2014, which granted the petition to confirm a FINRA arbitration award, unanimously affirmed, with costs.

An arbitral award can only be challenged under the criteria set forth in CPLR 7511 (*see Ingham v Thompson*, 113 AD3d 534 [1st Dept 2014], *lv denied* 22 NY3d 866 [2014]). Respondent's procedural arguments that there was an agreement to arbitrate in New York and that the panel should have adjourned the hearing are not recognized grounds to bar confirmation (*id.*; CPLR 7510). In any event, they were waived by his participation in the arbitration, through his answer, selection of arbitrators, two motions to remove arbitrators, and two motions to dismiss (*see Matter of Meisels v Uhr*, 79 NY2d 526, 538 [1992]).

Although an agreement can supersede FINRA's arbitration

rules (*see Goldman, Sachs & Co. v Golden Empire Sch. Fin. Auth.*, 764 F3d 210, 215 [2d Cir 2014]), the alleged agreement here was never placed into the record, and even accepting respondent's characterization, it still provided for arbitration, albeit in New York rather than Florida.

Similarly, respondent's argument with regard to the failure to adjourn is unavailing. Not only is it not a ground under CPLR 7511, but even under the Federal Arbitration Act, refusal to adjourn where a party has full notice and provides no excuse for not attending is not misconduct (*see* 9 USC 10[a][3]; *ARW Expl. Corp. v Aguirre*, 45 F3d 1455, 1464 [10th Cir 1995]).

Respondent's arguments of arbitrator bias are cognizable; however, he failed to substantiate them. His allegations that one arbitrator was biased because he was once bankrupt, and another because he had once represented a claimant at a FINRA arbitration, are insufficient (*see generally Matter of CPG Constr. & Dev. Corp. v 415 Greenwich Fee Owner, LLC*, 117 AD3d 623 [1st Dept 2014]).

Finally, we decline to consider respondent's argument based on standing, which is predicated on documents and factual allegations never presented to the FINRA arbitration panel, as a basis to deny confirmation.

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

ENTERED: MAY 4, 2017

CLERK

Sweeny, J.P., Gische, Kahn, Gesmer, JJ.

3888 The People of the State of New York, Ind. 1691/06
Respondent,

-against-

Joan Vasquez,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered June 26, 2007, as amended May 9, 2013, convicting defendant, after a jury trial, of burglary in the first degree (two counts), robbery in the first degree and robbery in the second degree (two counts), and sentencing him, as a second violent felony offender, to an aggregate term of 20 years, unanimously affirmed.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record, relating to counsel's strategy, preparation and thought processes (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]), and we reject defendant's argument that trial counsel's

ineffectiveness is apparent on the face of the record. Although defendant made a CPL 440.10 motion claiming ineffectiveness, the motion was based on events that had allegedly occurred before trial, and it did not raise any of defendant's present arguments; in any event, the motion was denied and a justice of this Court denied leave to appeal. Accordingly, the merits of defendant's ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that either of counsel's alleged errors fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 4, 2017

CLERK

Sweeny, J.P., Gische, Kahn, Gesmer, JJ.

3889 John E. Steffan, as Executor of the Estate of Anne McLaughlin Doris, Plaintiff-Appellant, Index 150020/11

-against-

Mitchell E. Wilensky, Defendant-Respondent.

Schwartz, Ponterio & Levenson, PLLC, New York (Brian Levenson of counsel), for appellant.

Mitchell E. Wilensky, New York, respondent pro se.

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered July 13, 2015, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for summary judgment, unanimously modified, on the law, to dismiss the second, third, and sixth affirmative defenses, and otherwise affirmed, without costs.

In support of his legal malpractice claim, plaintiff failed to establish prima facie that his predecessor executor would have prevailed in a Surrogate's Court proceeding against a bank but for defendant's negligence in not bringing such a proceeding sooner (*see LaRusso v Katz*, 30 AD3d 240, 243 [1st Dept 2006]).

Banking Law § 675(b) states that the making of a deposit in the name of a depositor (in the instant action, the decedent,

Anne McLaughlin Doris) and another person (Bridie McKiernan) "shall . . . be prima facie evidence . . . of the intention of both depositors . . . to create a joint tenancy and to vest title to such deposit . . . in such survivor." As the evidence submitted with plaintiff's opening motion papers (e.g., the transcript of defendant's deposition) shows, the predecessor executor would have had difficulty adducing "clear and convincing evidence that the account was opened only as a matter of convenience" (*Pinasco v Del Pilar Ara*, 219 AD2d 540, 540 [1st Dept 1995]). His conversations with Doris, which tended to show that the account was a convenience account, could have been excluded pursuant to the Dead Man's Statute (CPLR 4519), and he would have had to rely on defendant's testimony about his telephone conversation with McKiernan, because McKiernan could not be located.

Because plaintiff failed to make a prima facie case, it is unnecessary to decide if defendant raised a triable issue of fact in opposition to plaintiff's motion.

By his silence in his opposition brief, defendant concedes, as plaintiff argues, that the second, third, and sixth affirmative defenses should be dismissed.

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

ENTERED: MAY 4, 2017

CLERK

Sweeny, J.P., Gische, Kahn, Gesmer, JJ.

3890 Myron Kirk Walker, Index 158775/13
Plaintiff-Respondent,

-against-

Gray Line New York,
Defendant-Appellant.

_____

Gallo Vitucci Klar LLP, New York (Mary L. Maloney of counsel), for appellant.

Becker & D'Agostino, P.C., New York (Michael D'Agostino of counsel), for respondent.

_____

Order, Supreme Court, New York County (Leticia M. Ramirez, J.), entered December 9, 2016, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant failed to establish entitlement to judgment as a matter of law in this action where plaintiff alleges that he was struck by defendant's red double decker tour bus that had the words "Gray Line" on the side. Defendant's submissions did not demonstrate that the bus that struck plaintiff was not a Gray

Line bus (*see Jiann Hwa Fang v Metropolitan Transp. Auth.*, AD3d, 2017 NY Slip Op 01681 [2d Dept 2017]). In fact, defendant's submissions included plaintiff's deposition testimony and photographs of its buses that correspond with the description provided by plaintiff at his deposition.

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

ENTERED: MAY 4, 2017

CLERK

Sweeny, J.P., Gische, Kahn, Gesmer, JJ.

3891 The People of the State of New York, Sci 3190/14
Respondent,

-against-

Sharif Singletary,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (William Terrell III 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, Bronx County (Alvin Yearwood, J. at plea; Raymond L. Bruce, J. at sentencing, re-plea and resentencing), rendered September 15, 2015,

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

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

ENTERED: MAY 4, 2017

CLERK

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

Sweeny, J.P., Gische, Kahn, Gesmer, JJ.

3892 Board of Managers of St. James's Tower Condominium,
Plaintiff-Respondent,

-against-

Dorothea Kutler,
Defendant-Appellant,

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

Index 106826/11

_____

Lanin Law P.C., New York (Scott L. Lanin of counsel), for appellant.

Robinson Brog Leinwand Greene Genovese & Gluck P.C., New York (Roger A. Raimond of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Carol E. Huff, J.), entered March 10, 2015, which, among other things, granted the court-appointed receiver's motion for judgment in the amount of $40,000 in the receiver's favor and against defendant Dorothea Kutler, and granted plaintiff's cross motion for an order directing the receiver to pay plaintiff any balance in the receiver's account after deduction of the receiver's fees, costs and expenses from the amount of the judgment, unanimously affirmed, without costs.

The express language of the condominium's bylaws permitted the appointment of a receiver, without notice, to collect unpaid

common charges in this foreclosure action. Further, the record demonstrates that while defendant, an owner of an apartment in the condominium, paid maintenance arrears after plaintiff board filed a notice of lien and commenced the action to foreclose on the lien, she still owed plaintiff for assessments, late fees and associated attorney's fees. Accordingly, plaintiff was entitled to seek judgment for these fees, which constitute common charges under the bylaws (*see Board of Mgrs. of One Strivers Row Condominium v Giwa*, 134 AD3d 514, 514 [1st Dept 2015]). We reject defendant's claim that she was entitled to a mandatory mortgage foreclosure settlement conference, particularly since the court directed the parties to engage in settlement conferences to resolve this matter, and it appears that defendant, for the most part, refused to participate.

We have considered defendant's remaining arguments, as well as plaintiff's argument regarding defendant's right to appeal, and find them unavailing.

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

ENTERED: MAY 4, 2017

CLERK

Sweeny, J.P., Gische, Kahn, Gesmer, JJ.

3893 Richard Molloy, et al., Index 154407/13
Plaintiffs-Appellants,

-against-

Long Island Railroad, et al.,
Defendants-Respondents.

_____

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

Landman Corsi Ballaine & Ford P.C., New York (William G. Ballaine of counsel), for respondents.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered September 24, 2015, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion for summary judgment as to liability under Labor Law § 240(1), and granted defendants' cross motion for summary judgment dismissing the Labor Law §§ 240(1) and 200 and common-law negligence claims and the Labor Law § 241(6) claim predicated on violations of Industrial Code (12 NYCRR) §§ 23-1.7(f) and 23-1.30, unanimously affirmed, without costs.

Plaintiff Richard Molloy was injured when he fell from the cab of a locomotive on which he was a brakeman. As a matter of law, alighting from a construction vehicle does not pose an elevation-related risk calling for any of the protective devices listed in Labor Law § 240(1) (*Bond v York Hunter Constr.*, 95 NY2d

883, 884-885 [2000]). The Industrial Code provisions cited as predicates for the Labor Law 241(6) claim have no application to plaintiff's accident. Defendants may not be held liable under Labor Law § 200 or in common-law negligence, because plaintiff's injuries arose out of the means and methods of his work, which defendants demonstrated they did not supervise or control (*see Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund. Co., Inc.*, 104 AD3d 446, 449 [1st Dept 2013]).

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

ENTERED: MAY 4, 2017

CLERK

Sweeny, J.P., Gische, Kahn, Gesmer, JJ.

3894-
3895 Index 159192/15

Thomas Caso,
Plaintiff-Appellant,

-against-

Miranda Sambursky Sloane Sklarin
Ver Veniotis LLP, et al.,
Defendants-Respondents.

_____

Alexander J. Wulwick, New York, for appellant.

Furman Kornfield & Brennan LLP, New York (A. Michael Furman of counsel), for respondents.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered May 26, 2016, which granted defendants' motion to dismiss solely to the extent of dismissing the complaint for failure to state a cause of action, unanimously reversed, on the law, without costs, and the motion denied in its entirety. Order, same court and Justice, entered on or about October 31, 2016, which granted plaintiff's motion insofar as it sought leave to reargue defendants' motion to dismiss, denied plaintiff's motion insofar as it sought leave to renew and to amend the complaint, and, upon reargument of the motion to dismiss, adhered to the original determination, unanimously reversed, on the law and the facts, without costs, leave to amend the complaint granted, and the appeal therefrom otherwise dismissed as academic.

In this legal malpractice action, plaintiff, the victim of a hit-and-run accident, alleges that defendants, who represented him in the underlying personal injury action, were negligent in failing to prepare and present the testimony of the sole eyewitness; that defendants' negligence caused a verdict against him; and that he sustained actual damages. Specifically, plaintiff alleges that, prior to the eyewitness's deposition testimony two years after the accident, defendants failed to refresh the eyewitness's memory by showing him the police record of a phone call he made shortly after the accident, in which he described the hit-and-run vehicle as a green garbage truck with a flat front. The eyewitness then testified to the contrary at his deposition, stating that the garbage truck he remembered fleeing the scene had a round front, not a flat front. Plaintiff alleges that but for defendants' negligence in handling the key witness in his case, he would have prevailed, as the driver operated a green garbage truck with a flat front, and the driver had already admitted to a route that would have placed him at the scene on the day and time of the accident. These allegations are sufficient to survive a CPLR 3211(a)(1) and (7) motion to dismiss, as nothing in the record conclusively establishes a defense as a matter of law (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]) and plaintiff has adequately pleaded a claim for legal

malpractice (*see Global Bus. Inst. v Rivkin Radler LLP*, 101 AD3d 651, 651 [1st Dept 2012]; *see also Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]).

Leave to amend is proper, since plaintiff's proposed amendments are not "patently devoid of merit" and will not prejudice or surprise defendants (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 499 [1st Dept 2010]; *see* CPLR 3025[b]).

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

ENTERED: MAY 4, 2017

CLERK

Sweeny, J.P., Gische, Kahn, Gesmer, JJ.

3896 The People of the State of New York, Ind. 3876/13
Respondent,

-against-

Gregory Diaz,
Defendant-Appellant.

_____

Stanley Neustadter, Cardozo Appeals Clinic, New York (Peter Lushing of counsel), for appellant.

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

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Judgment, Supreme Court, Bronx County (Ralph Fabrizio, J.), rendered January 30, 2015, convicting defendant, after a jury trial, of robbery in the second degree, criminal possession of a weapon in the second degree, criminal possession of a controlled substance in the seventh degree and unlawful fleeing a police officer in a motor vehicle in the third degree, and sentencing him, as a second felony offender, to an aggregate term of 15 years, unanimously affirmed.

The court providently exercised its discretion in denying defendant's request for a missing witness charge. The request, which came at a charge conference after defendant had testified and both sides had rested, was plainly untimely (*see People v Gonzalez*, 68 NY2d 424, 428 [1986]; *People v Medina*, 35 AD3d 163, 163 [1st Dept 2006], *lv denied* 8 NY3d 925 [2007]), and

defendant's present argument that he could not have made the request earlier is without merit. The People also established that the witness was unavailable (*see People v Savinon*, 100 NY2d 192, 198-200 [2003]). Although the victim described this witness as a friend, he had not seen or heard from him since the incident, long before trial, and the People had no contact information or any starting point for attempting to locate the witness.

Defendant's arguments regarding the sufficiency and weight of the evidence supporting his conviction of unlawful fleeing a police officer in a motor vehicle are unavailing. The evidence established defendant's accessorial liability for the conduct of the driver of the car in which defendant and the driver fled from the police (*see* Penal Law § 20.00). There is no basis for disturbing the jury's credibility determinations.

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

ENTERED: MAY 4, 2017

CLERK

Sweeny, J.P., Gische, Kahn, Gesmer, JJ.

3897 The People of the State of New York, Respondent, Ind. 5477/12

-against-

Robert Pastore, Defendant-Appellant.

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

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

_____

Judgment, Supreme Court, New York County, (Roger S. Hayes, J.), rendered July 17, 2013, convicting defendant, after a jury trial, of promoting prison contraband in the first degree, and sentencing him to a determinate term of 1½ to 4½ years, unanimously affirmed.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2009]). There is no basis for disturbing the jury's credibility determinations. There was ample evidence that defendant knowingly possessed the scalpel that was discovered in his cell during a routine search, given, among other things, that it was a single-occupancy cell, inmates were not permitted to go other inmate's cells, and there was no evidence that someone other than defendant occupied the cell

between its last search and the search that revealed the contraband. The fact that no other inmate was housed in this cell between the two searches was established by a combination of the specific recollection of a Department of Correction captain and evidence of the Department's procedures in searching cells at the time of a transfer of inmates.

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

ENTERED: MAY 4, 2017

CLERK

Sweeny, J.P., Gische, Kahn, Gesmer, JJ.

3899 Dian Kui Su, et al., Index 601752/08
Plaintiffs-Appellants-Respondents,

-against-

Sing Ming Chao, et al.,
Defendants-Respondents-Appellants,

Ah Wah Chai, etc.,
Defendant-Respondent.

_____

Joseph & Smargiassi, LLC, New York (John Smargiassi of counsel), for appellants-respondents.

Law Firm of Hugh H. Mo, P.C., New York (Pedro Medina of counsel), for respondents-appellants.

Mark C. Sternick, Flushing, for respondent.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered on or about September 19, 2016, which granted defendants' motions for summary judgment dismissing the second amended complaint, and denied plaintiffs' motion for, among other things, partial summary judgment on their breach of fiduciary duty claim and leave to amend the complaint to add a plaintiff, unanimously modified, on the law, to grant plaintiff leave to amend to the extent indicated herein, and otherwise affirmed, without costs.

Dismissal of the second amended complaint was warranted, as the complaint mixes individual claims with derivative claims (*see Abrams v Donati*, 66 NY2d 951 [1985]). However, leave to amend

the complaint to clearly delineate the claims should have been granted (*see id.* at 954; *see also Davis v Scottish Re Group Ltd.*, 138 AD3d 230, 235 [1st Dept 2016]). In addition, plaintiffs may amend the complaint and caption to add, as a plaintiff, a predecessor in interest to plaintiff Quality Lumber & Building Supplies, Inc. (Quality) (*see* CPLR 1003, 3025[b]).

The motion court correctly found that there was an issue of fact as to whether the majority shareholder defendants breached their fiduciary duty by causing defendant Kingsland Group, LLC to usurp Quality's opportunity to acquire certain properties. In particular, there is conflicting testimony concerning when Quality abandoned the negotiations to acquire the properties. The length of time between the last offer by Quality and the acquisition by Kingsland was relevant to whether Quality had a "tangible expectancy" of purchasing the properties, and, thus,

whether it was a corporate opportunity usurped by Kingsland (*Alexander & Alexander of N.Y. v Fritzen*, 147 AD2d 241, 247-248 [1st Dept 1989]).

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

ENTERED: MAY 4, 2017

CLERK

Sweeny, J.P., Renwick, Gische, Gesmer, JJ.

3900 The People of the State of New York, Ind. 4111/13
Respondent,

-against-

Juan Mendoza,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sabrina Margaret Bierer 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 (Marcy L. Kahn, J.), rendered February 11, 2015,

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

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

ENTERED: MAY 4, 2017

CLERK

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

Sweeny, J.P., Gische, Kahn, Gesmer, JJ.

3901 The People of the State of New York, Ind. 5865/14
Respondent,

-against-

Chafik Hassane,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Oliver McDonald 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 (Charles H. Solomon, J.), rendered October 6, 2015,

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

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

ENTERED: MAY 4, 2017

CLERK

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

Sweeny, J.P., Gische, Kahn, Gesmer, JJ.

3902 Neil Hutchins, Index 251490/14
Plaintiff-Appellant,

-against-

Peter Hutchins,
Defendant-Respondent,

Virginia Lindsey-Hutchins,
Defendant.

_____

Neil Hutchins, appellant pro se.

Law Office of Amy Posner, New York (Amy Posner of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered March 25, 2016, which denied plaintiff's motion for summary judgment, and granted defendant Peter Hutchins's cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff and defendant Peter Hutchins are brothers. In 1984, their parents executed a contract with Peter and his then-wife, defendant Virginia Lindsey-Hutchins, to live on defendants' property in Bohemia, New York until their deaths. In exchange, the parents agreed to pay $35,000 for an addition to defendants' home, and to pay defendants $200 in monthly rent. The contract included a provision whereby upon the parents' deaths and the sale, rental, or vacatur of defendants' home,

plaintiff would be paid $10,000. It also included a provision that defendants could cancel the contract if they provided the parents with written notice and $35,000.

In 1990, defendants sold their Bohemia, New York home, and the parents and defendants moved to a home in Blue Point, New York. The parties continued to perform under the contract, with the parents living on defendants' property and paying $200 in monthly rent. By 2013, the father had passed away, and the mother agreed to accept $35,000 and cancel the contract. Supreme Court properly denied plaintiff's summary judgment motion. Plaintiff has not shown that the contract is still enforceable or that the conditions precedent to his receiving $10,000 were satisfied before the contract was cancelled (i.e., that both parents had passed away or that defendants had sold, rented, or vacated the relevant property) (*see e.g. Broadwell Am., Inc. v Bram Will-El LLC*, 32 AD3d 748, 752 [1st Dept 2006], *lv denied* 8 NY3d 805 [2007]).

Supreme Court also properly granted defendant's motion for summary judgment dismissing the complaint. Defendant provided prima facie evidence of entitlement to judgment by submitting the 1984 contract, which allowed defendants to cancel the contract upon notice and payment of $35,000 to the parents, and a written acknowledgment by the mother of receipt of payment and

cancellation of the contract in December 2013. Defendant also provided evidence that the mother had no cognitive issues.

In response, plaintiff failed to raise a triable issue of fact, as he presented no evidence to dispute the cancellation of the contract or the mother's mental ability. Plaintiff's conclusory statements that the mother must have been threatened and coerced into cancelling the contract do not raise an issue of fact as he does not attest to being present to any conversation between defendants and the mother, and the cancellation acknowledgment itself does not evidence such threats.

To the extent plaintiff argues that defendants failed to provide written notice of cancellation of the 1984 contract, as required under paragraph 3 therein, that right accrued to the benefit of the mother, and she was free to waive it, as evidenced by her acceptance of $35,000, which the contract stated was a condition to cancellation (*see Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104 [2006]).

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

ENTERED: MAY 4, 2017

CLERK

Sweeny, J.P., Gische, Kahn, Gesmer, JJ.

3905-
3906-
3907 Index 653468/15

Wimbledon Financing Master Fund, Ltd.
Plaintiff-Appellant,

-against-

Weston Capital Management LLC, et al.,
Defendants,

Marshall Manley,
Defendant-Respondent.

_____

Kaplan Rice LLP, New York (Michelle A. Rice of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered August 25, 2016, dismissing the complaint as against defendant Marshall Manley, and bringing up for review, an order, same court and Justice, entered May 18, 2016, which granted defendant Manley's motion to dismiss pursuant to CPLR 3012(b) and denied plaintiff's cross motion pursuant to CPLR 3012(d) for an extension of time to serve its complaint, unanimously reversed, on the law, without costs, the judgment vacated, defendant's motion denied, plaintiff's cross motion granted, the complaint reinstated, and defendant directed to

accept service thereof. Appeals from orders, same court and Justice, entered May 18, 2016 and July 22, 2016, unanimously dismissed, without costs, as subsumed in the appeal from the judgment and as academic, respectively.

Plaintiff commenced this securities fraud action against 26 defendants by filing a summons with notice on October 16, 2015, and served defendant Manley pursuant to CPLR 308(2) twelve days later. On November 3, 2015, before plaintiff had filed proof of service, defendant served a demand for a complaint pursuant to CPLR 3012(b). Plaintiff, taking the position that the demand was a nullity, asked defendant to agree to accept a complaint served by the end of December. Defendant refused, and instead moved to dismiss the action on November 24, the 21st day after service of its demand. Plaintiff served a complaint on December 24, 2015.

We agree with the motion court that under CPLR 3012(b), defendant was permitted to serve a demand for a complaint after being served, notwithstanding that service was not technically "complete." The time frames applicable to defendants set forth in CPLR 3012(b) are deadlines, not mandatory start dates (*see Micro-Spy, Inc. v Small*, 9 AD3d 122, 125 [2d Dept 2004], citing 23rd Ann Report of NY Jud Conf at 271, 273 [1978]). In the cases relied on by plaintiff, the defendants' demands were ineffective to trigger plaintiff's time to serve a complaint pursuant to CPLR

3012(b) because the defendants had not yet been served with a summons with notice, and the CPLR makes no provision for an appearance or a demand for a complaint before the summons is served (*see e.g. Howard B. Spivak Architect, P.C. v Zilberman*, 59 AD3d 343, 344 [1st Dept 2009]; *Ryan v High Rock Dev., LLC*, 124 AD3d 751, 752 [2d Dept 2015]; *Micro-Spy* at 124).

However, plaintiff's cross motion should have been granted. Plaintiff demonstrated a reasonable excuse based on its misunderstanding of the applicable time limits, as well as the complexity of the fraud case (*see Hernandez v Chaparro*, 95 AD3d 745 [1st Dept 2012]*; Brooklyn Union Gas Co. v Aaer Sprayed Insulations*, 158 AD2d 292 [1st Dept 1990]). Plaintiff also adequately demonstrated the potential merits of its claims against Manley through the affirmation of counsel, who, based on her personal involvement in the investigation and review of files (*see R.I.C.E. Corp. v Metropolitan Life Ins. Co.*, 288 AD2d 148 [1st Dept 2001]), detailed the factual basis for the fraud claims and for inferring that Manley aided and abetted the scheme, and submitted supporting documentation. We further consider that plaintiff's delay in service of the complaint in this complex litigation was relatively brief, there was a lack of any prejudice to defendant, and the strong public policy in favor of resolving cases on the merits (*see Artcorp Inc. v Citirich Realty*

Corp., 140 AD3d 417 [1st Dept 2016]; *Aquilar v Nassau Health Care Corp.*, 40 AD3d 788 [2d Dept 2007]; *Guzetti v City of New York*, 32 AD3d 234 [1st Dept 2006]).

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

ENTERED: MAY 4, 2017

CLERK

Richter, J.P., Andrias, Moskowitz, Feinman, Kapnick, JJ.

3908 The People of the State of New York, Respondent, SCI 316/00

-against-

Arelis Young,
Defendant-Appellant.

_____

Labe M. Richman, New York, for appellant.

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

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Order, Supreme Court, New York County (Laura A. Ward, J.), entered on or about September 1, 2011, which denied defendant's CPL 440.10 motion to vacate a judgment of conviction, same court (Arlene Goldberg, J. at plea; Laura A. Ward, J. at sentencing), rendered March 2, 2000, unanimously affirmed.

Since defendant's motion was made entirely on grounds that are not pursued on appeal, her present claims relating to the actions or inactions of the plea court and counsel are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversing the order.

Defendant's claim that the plea court (Arlene D. Goldberg, J.) gave misleading information about the immigration consequences of the plea (*see People v Peque*, 22 NY3d 168, 193-97

[2013], *cert denied* 574 US __, 135 S Ct 90 [2014]) is based on the face of the record and therefore is not cognizable on a CPL article 440 motion, notwithstanding that a *Peque* claim may lead to additional fact-finding (*see People v Llibre*, 125 AD3d 422, 423 [1st Dept 2015], *lv denied* 26 NY3d 969 [2015]). Moreover, *Peque* is only retroactive to cases pending on direct appeal (*id.* at 424). In any event, the plea court provided a satisfactory warning of the potential deportation consequences of the plea.

Defendant's claim that her plea counsel rendered ineffective assistance by failing to negotiate a plea with more favorable immigration consequences is unsupported by anything in the record. The claim that a more immigration-favorable plea might have been available is speculative (*see People v Olivero*, 130 AD3d 479, 480 [1st Dept 2015], *lv denied* 26 NY3d 1042 [2015]), and the submissions on the motion fail to establish any

reasonable probability that the People would have made such an offer (*see Lafler v Cooper*, 566 US ___, ___, 132 S Ct 1376, 1384-1385 [2012]).

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

ENTERED: MAY 4, 2017

CLERK

Richter, J.P., Andrias, Moskowitz, Feinman, Kapnick, JJ.

3911-
3912 The People of the State of New York,
Respondent,

-against-

Albert Cruz,
Defendant-Appellant.

Ind. 1963/11
3796/12

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

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

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Michael R. Sonberg, J.), rendered November 30, 2012,

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 judgments so appealed from be and the same are hereby affirmed.

ENTERED: MAY 4, 2017

CLERK

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

Richter, J.P., Andrias, Moskowitz, Feinman, Kapnick, JJ.

3913 In re Matthew Louis S.,

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

Raymond R.,
Respondent-Appellant,

The Children's Village,
Petitioner-Respondent,

Gynger Ruth S., et al.,
Respondents.

_____

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

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

Karen D. Steinberg, New York, attorney for the child.

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Order of fact-finding and disposition (one paper), Family Court, Bronx County (Linda Talley, J.), entered on or about January 8, 2016, which, to the extent appealed from, after a hearing, terminated respondent father's parental rights to the subject child on the ground of permanent neglect, and committed custody and guardianship of the child jointly to The Children's Village and the Commissioner of Social Services of the City of New York, for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and

convincing evidence which demonstrates that the agency made diligent efforts to encourage and strengthen the parental relationship by, among other things, referring respondent father for parenting skills and anger management programs, random drug screens, mental health evaluation and services, as well as scheduling visitation with the child and making referrals for a visitation coach (*see Matter of Ashley R. [Latarsha R.]*, 103 AD3d 573, 574 [1st Dept 2013], *lv denied* 21 NY3d 857 [2013]; *see also Matter of Marissa Tiffany C-W. [Faith W.]*, 125 AD3d 512 [1st Dept 2015]; *Matter of Alani G. [Angelica G.]*, 116 AD3d 629 [1st Dept 2014], *lv denied* 24 NY3d 903 [2014]).

Notwithstanding the agency's diligent efforts, the father failed to comply with required services and permanently neglected the child (*see Matter of Charles Michael J.*, 58 AD3d 401 [1st Dept 2009]).

Having previously participated in parenting skills and anger management programs, as well as engaging with visitation coaches, the father's behavior during visits only worsened, and his visitation never progressed beyond supervised visits at the agency (*see Matter of Emanuel N.F.*, 22 AD3d 288, 289 [1st Dept 2005]; *Matter of Jonathan Jose T.*, 44 AD3d 508, 509 [1st Dept 2007]).

The record supports the determination that termination of

the father's parental rights is in the best interests of the child, and a suspended judgment is unwarranted. There was no evidence that he had any feasible plan to care for the child (*see Matter of Olushola W.A.*, 41 AD3d 179 [1st Dept 2007]; *Matter of Mia Tracy-Nellie G.*, 299 AD2d 186 [1st Dept 2002]).

A suspended judgment would serve only to prolong the child's lack of permanence, and would not have been in the child's best interests (*see Matter of Julianna Victoria S. [Benny William W.]*, 89 AD3d 490, 491 [1st Dept 2011], *lv denied* 18 NY3d 805 [2012]). The child's interests would best be served by freeing him for adoption by his long-term, pre-adoptive, non-kinship foster mother, who has met all of his needs and wishes to adopt him, and with whom he is well-bonded. The foster mother has cared for him since August 2010, when he was approximately four months old, and has provided him with a stable and loving home, the only home he has ever known (*see Matter of Cameron W. [Lakeisha E.W.]*, 139 AD3d 494, 494-495 [1st Dept 2016]; *Matter of Autumn P. [Alisa R.]*, 129 AD3d 519 [1st Dept 2015]).

The father's argument that he was deprived of due process as a result of the court's temporary suspension of his visitation pending the resolution of the on-going termination of parental rights proceeding is unpreserved (*see Matter of Ana M.G. [Rosealba H.]*, 74 AD3d 419 [1st Dept 2010]) and unavailing (*see*

Matter of Carlos G. [Bernadette M.], 84 AD3d 629 [1st Dept 2011]).

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

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

ENTERED: MAY 4, 2017

CLERK

Richter, J.P., Andrias, Moskowitz, Feinman, Kapnick, JJ.

3914- Index 602503/08
3915 Susan Reinhard,
Plaintiff-Respondent,

-against-

Connaught Tower Corporation,
Defendant-Appellant,

Arthur S. Olick,
Defendant.

- - - - -

Real Estate Board of New York,
Amicus Curiae.

_____

Gartner + Bloom, PC, New York (Arthur P. Xanthos of counsel), and Axelrod, Fingerhut & Dennis, New York (David L. Fingerhut of counsel), for appellant.

London Fischer LLP, New York (Daniel Zemann, Jr. of counsel), for respondent.

Stroock & Stroock & Lavan LLP, New York (Eva Talel of counsel), for amicus curiae.

_____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered February 1, 2016, which, to the extent appealed from as limited by the briefs, after a nonjury trial, found defendant Connaught Tower Corporation liable and awarded plaintiff certain maintenance payments, interest, and reasonable attorneys' fees, unanimously reversed, on the law and the facts, without costs, the finding of liability and award vacated, the complaint dismissed, and the matter remanded for a hearing and

determination as to Connaught's attorneys' fees. Appeal from order, same court and Justice, entered August 3, 2016, which, to the extent appealed from, granted plaintiff's motion for reargument, unanimously dismissed, without costs, as academic.

The finding of liability against Connaught, the owner of a cooperative building in which plaintiff purchased shares, was not based on a fair interpretation of the evidence (*see Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992]). The evidence failed to show that the odor of cigarettes rendered plaintiff's apartment uninhabitable, breached the proprietary lease, or caused plaintiff to be constructively evicted. In particular, plaintiff's evidence failed to show that the odor was present on a consistent basis and that it was sufficiently pervasive as to materially affect the health and safety of occupants (*see Park W. Mgt. Corp. v Mitchell*, 47 NY2d 316, 327-328 [1979], *cert denied* 444 US 992 [1979]). Plaintiff's witnesses testified that they smelled smoke in the apartment on a handful of occasions over the years, and the source of the smoke was never identified. Moreover, plaintiff lived in Connecticut, near her workplace, and only intended to stay in the apartment occasionally (*see Leventritt v 520 East 86th St.*, 266 AD2d 45, 45-46 [1st Dept 1999], *lv denied* 94 NY2d 760 [2000]; *Halkedis v Two E. End Ave. Apt. Corp.*, 161 AD2d 281, 282 [1st Dept 1990], *lv denied* 76 NY2d

711 [1990]).

Plaintiff correctly conceded at oral argument that her claim of constructive eviction is time-barred (*see Kent v 534 E. 11th St.*, 80 AD3d 106, 111-112 [1st Dept 2010]).

Connaught is entitled to attorneys' fees pursuant to CPLR 3220. Accordingly, we remand for a hearing and determination as to those fees.

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

ENTERED: MAY 4, 2017

CLERK

Richter, J.P., Andrias, Moskowitz, Feinman, Kapnick, JJ.

3916 Kenneth LaRiviere, Index 102006/15
Plaintiff-Appellant,

-against-

Anthony Williams, et al.,
Defendants-Respondents.

_____

Kenneth LaRiviere, appellant pro se.

Andrews Kurth Kenyon LLP, New York (Anju Uchima of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about April 7, 2016, which, in an action arising out of defendants' refusal to authenticate a certain painting, granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

This Court, in considering a similar case, held that "[h]aving the status of the de facto sole arbiter of authenticity of an artist's work is not automatically coupled with a legal obligation to take any particular steps regarding authentication. . . [L]egal obligations must be grounded in contractual duties, tort duties or statutory duties" (*Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 110 [1st Dept 2009], *lv denied* 15 NY3d 703 [2010]). In his complaint, plaintiff does not allege any legal obligation that defendants

had to take any steps to authenticate plaintiff's alleged Jackson Pollock painting. Accordingly, plaintiff failed to state a cause of action upon which relief may be granted (*see* CPLR 3211[a][7]).

Furthermore, plaintiff is collaterally estopped from bringing this action (CPLR 3211[a][5]). In a prior action, Supreme Court determined that plaintiff's allegations regarding the authenticity of the painting were unsupportable (*LaRiviere v Thaw*, 2000 NY Slip Op 50000[U], *7 [Sup Ct, New York County 2000]). In rejecting plaintiff's claims of authenticity of the painting, the court in that action made a final determination, and plaintiff had a full and fair opportunity to contest the decision (*see Schwartz v Public Adm'r of County of Bronx*, 24 NY2d 65, 71 [1968]).

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

ENTERED: MAY 4, 2017

CLERK

Richter, J.P., Andrias, Moskowitz, Feinman, Kapnick, JJ.

3918 Greg Waltman, Index 156844/14
Plaintiff-Appellant,

The GI Quantum Fund, LLC,
Plaintiff,

-against-

Berkshire Hathaway Inc., et al.,
Defendants-Respondents.

_____

Greg Waltman, appellant pro se.

Clyde & Co US LLP, New York (Michael A. Knoerzer of counsel), for Berkshire Hathaway Inc., respondent.

Stagg, Terenzi, Confusione & Wabnik, LLP, Garden City (Thomas E. Stagg of counsel), for JPMorgan Chase Bank N.A., respondent.

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered on or about March 10, 2016, which denied pro se plaintiff's motion for a default judgment, and granted defendants Berkshire Hathaway Inc.'s and JPMorgan Chase Bank N.A.'s cross motions to dismiss the complaint, and for an order prohibiting plaintiffs from the commencement of any action or proceeding against either defendant without first obtaining the permission of the administrative judge, unanimously affirmed, without costs.

Plaintiff Waltman commenced this action based upon broad-ranging, difficult to comprehend allegations against the defendants for "elaborate communications fraud to cover up shadow

banking and insider trading fraud."

As a threshold matter, plaintiff abandoned his appeal from the order granting defendants' motions to dismiss, for failure to address the merits of that decision in his brief (*McCabe v 148-57 Equities Co.*, 305 AD2d 231, 232 [1st Dept 2003]). If considered on the merits, dismissal was correctly granted as plaintiff failed to state any cognizable cause of action (*Di Nezza v Credit Data of Hudson Val.*, 166 AD2d 768, 768-769 [3d Dept 1990], *lv dismissed, denied* 77 NY2d 935 [1991]; *Galatowitsch v New York City Gay & Lesbian Anti-Violence Project*, 1 AD3d 137, 137 [1st Dept 2003], *lv denied* 1 NY3d 507 [2004]). Moreover, plaintiff did not obtain personal jurisdiction over the defendants, as he failed to serve the summons and complaint on a law firm that was representing defendants in this matter (CPLR 3211[a][8]; 311[a][1]). To the extent plaintiff asserts claims arising out of insider trading and manipulation of the commodities market, he lacks standing to sue, as the claim should have been brought derivatively (*see Broome v ML Media Opportunity Partners*, 273 AD2d 63, 64 [1st Dept 2000]), and the corporate plaintiff lacks standing to proceed pro se (CPLR 321; *see Matter of Tenants Comm. of 36 Gramercy Park v New York State Div. of Hous. & Community Renewal*, 108 AD3d 413, 413-414 [1st Dept 2013], *lv dismissed* 22 NY3d 990 [2013]; *Michael Reilly Design, Inc. v Houraney*, 40 AD3d

592, 593-594 [2d Dept 2007]).

Given plaintiffs' prior history of baseless complaints, the order prohibiting plaintiffs from commencing any lawsuits without prior judicial permission was proper (*see e.g. Melnitzky v Uribe*, 33 AD3d 373, 373 [1st Dept 2006]).

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

ENTERED: MAY 4, 2017

CLERK

Richter, J.P., Andrias, Moskowitz, Feinman, Kapnick, JJ.

3922 The People of the State of New York, Respondent, Ind. 5310/14

-against-

Jose Cepeda, Defendant-Appellant.

_____

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

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Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered April 28, 2015, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: MAY 4, 2017

CLERK

Richter, J.P., Andrias, Moskowitz, Feinman, Kapnick, JJ.

3924 Steven Manfredonia, et al., Index 114242/11
Plaintiffs-Respondents, 590643/12

-against-

Gateway School of New York,
Defendant-Appellant.

- - - - -

Gateway School of New York,
Third-Party Plaintiff-Respondent,

-against-

Kaback Enterprises, Inc.,
Third-Party-Defendant-Appellant-Respondent.

_____

McGaw, Alventosa & Zajac, Jericho (Ross P. Masler of counsel), for Kaback Enterprises, Inc., appellant-respondent.

Cornell Grace, P.C., New York (Amy L. Schaefer of counsel), for Gateway School of New York, appellant/respondent.

Hach & Rose LLP, New York (Robert F. Garnsey of counsel), for respondents.

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Order, Supreme Court, New York County (Donna M. Mills, J.), entered May 23, 2016, which, insofar as appealed from as limited by the briefs, denied the motions of Gateway School of New York (Gateway) and Kaback Enterprises, Inc. (Kaback) for summary judgment dismissing plaintiffs' cause of action under Labor Law § 240(1), and denied the motion of Kaback seeking dismissal of Gateway's third-party contractual indemnity claim against it, unanimously modified, on the law, to the extent of dismissing the third-party contractual indemnity claim, and otherwise affirmed,

without costs. The Clerk is directed to enter judgment in favor of Kaback dismissing the third-party complaint.

Gateway and Kaback failed to establish entitlement to judgment as a matter of law on the Labor Law § 240(1) claim. Although there is evidence showing that plaintiff Steven Manfredonia, a Kaback employee, in violation of Kaback's safety manual, improperly stood on the top cap of a six-foot A-frame ladder to reach his work,(*see e.g. Robinson v East Med. Ctr., LP*, 6 NY3d 550 [2006]), there is also evidence supporting plaintiff's claim that his fall was caused by the ladder's side hinge breaking and the ladder collapsing, and not the method in which he used the device (*see Lizama v 1801 Univ. Assoc., LLC*, 100 AD3d 497 [1st Dept 2012]). Thus it cannot be said as a matter of law that plaintiff was the sole proximate cause of the accident (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]).

The court erred, however, in finding that questions of fact precluded dismissal of Gateway's contractual indemnity claim against Kaback. The contract does not express the type of clear

and unmistakable manifestation of intent to indemnify that is required (*see Hooper Assoc. v AGS Computers, Inc.*, 74 NY2d 487, 491 [1989]; *Cordeiro v TS Midtown Holdings, LLC*, 87 AD3d 904, 907 [1st Dept 2011]).

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

ENTERED: MAY 4, 2017

CLERK

Richter, J.P., Andrias, Moskowitz, Feinman, Kapnick, JJ.

3926-
3927 The People of the State of New York, Ind. 4314N/11
Respondent, 4247N/11

-against-

Epifanio Santiago,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Lauren J. Springer of counsel), for appellant.

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

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An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Daniel Conviser, J.), rendered July 1, 2014, and July 29, 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 judgments so appealed from be and the same are hereby affirmed.

ENTERED: MAY 4, 2017

CLERK

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

Richter, J.P., Andrias, Moskowitz, Feinman, Kapnick, JJ.

3928-
3929N Index 150457/16

In re Kathleen K. Johnson,
et al.,
Petitioners-Appellants,

-against-

Union Bank Of Switzerland, AG
Respondent-Respondent.

_____

The Dweck Law Firm, LLP, New York (Jack S. Dweck of counsel), for appellants.

Katten Muchin Rosenman, LLP, New York (David L. Goldberg of counsel), for respondent.

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Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered on or about August 24, 2016, which denied petitioners' motion pursuant to CPLR 3102(c) for pre-action disclosure, unanimously affirmed, with costs. Order, same court and Justice, entered November 29, 2016, which, upon reargument, adhered to the determination on the original motion, unanimously affirmed, without costs.

Supreme Court properly exercised its discretion in denying petitioners' motion for pre-action discovery on the ground that, while the motion was pending, petitioners commenced an action, i.e., filed a summons and complaint (*see Matter of Goldstein v New York Daily News*, 106 AD2d 323 [1st Dept 1984]). Disclosure may only be obtained under CPLR 3102(c) "[b]efore an action is

commenced."

Petitioners also failed to demonstrate that they have a meritorious cause of action and that the information they seek is "material and necessary to the actionable wrong" (*Holzman v Manhattan & Bronx Surface Tr. Operating Auth.*, 271 AD2d 346, 347 [1st Dept 2000]). Rather, they seek broad discovery to determine whether they may have a valid cause of action against Union Bank of Switzerland or other possible wrongdoers (*see Bishop v Stevenson Commons Assoc., L.P.*, 74 AD3d 640 [1st Dept 2010], *lv denied* 16 NY3d 702 [2011]).

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

ENTERED: MAY 4, 2017

CLERK

Richter, J.P., Andrias, Moskowitz, Feinman, Kapnick, JJ.

3930N Buchanan Capital Markets, LLC formerly known as Marcum Buchanan Associates, LLC,
Plaintiff-Appellant,

-against-

Joanne DeLucca, et al.,
Defendants,

Michael Callahan,
Defendant-Respondent.

Index 651913/16

The Roth Law Firm, PLLC, New York (Richard A. Roth of counsel), for appellant.

Nixon Peabody LLP, Jericho (James W. Weller of counsel), for respondent.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered July 29, 2016, which granted defendant Michael Callahan's motion to stay arbitration demanded by plaintiff pursuant to CPLR 7503©, unanimously affirmed, without costs.

Defendant Callahan entered into an employment agreement with Marcum Buchanan Associates, LLC (Marcum), which contained noncompete and arbitration clauses, and which provided that Callahan's services "are special, unique and of extraordinary character" and that the parties had "a special confidential relationship." Such personal services contracts generally are not freely assignable (*see Wien & Malkin LLP v Helmsley-Spear,*

Inc., 6 NY3d 471, 482 [2006], *cert dismissed* 548 US 940 [2006]; *Eisner Computer Solutions v Gluckstern*, 293 AD2d 289 [1st Dept 2002]). While covenants not to compete in employment contracts may be assignable without the parties' consent (*id.*), that depends on the parties' intent (*see Archer Worldwide v Mansbach*, 289 AD2d 349 [2d Dept 2001]). Plaintiff Buchanan Capital Markets, LLC (Buchanan), as the proponent of arbitration, "has the burden of demonstrating that the parties agreed to arbitrate the dispute at issue" (*Eiseman Levine Lehrhaupt & Kakoyiannis, P.C. v Torino Jewelers, Ltd.*, 44 AD3d 581, 583 [1st Dept 2007]), and has failed to provide evidence that the parties intended Callahan's agreement with Marcum "to be assignable when it was originally executed" (*Archer Worldwide* at 349).

Moreover, the evidence does not support Buchanan's contention that there was no assignment, but merely a change of name after Vincent Buchanan purchased Marcum. Vincent Buchanan

himself averred that there was an assignment of "assets, rights, and liabilities" from Marcum to Buchanan, and his affidavit fails to establish that Buchanan continued as the same company after the purchase.

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

ENTERED: MAY 4, 2017

CLERK

Richter, J.P., Andrias, Moskowitz, Feinman, Kapnick, JJ.

3931N Jacqueline Racer, Index 159409/13
Plaintiff-Respondent,

-against-

Mazel, USA LLC, doing business as
D-Hairemoval Beauty Concept,
Defendant-Appellant.

_____

Marks, O'Neill, O'Brien, Doherty & Kelly, P.C., New York (Jenna L. Caldarella of counsel), for appellant.

Bernstone & Grieco LLP, New York (Peter B. Croly of counsel), for respondent.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered April 14, 2016, which, to the extent appealed from, granted plaintiff's motion to strike the answer for failure to comply with discovery demands, unanimously affirmed, without costs.

The record establishes willful and contumacious behavior on defendant's part warranting the sanction of striking the answer (*see generally Rosario v New York City Hous. Auth.*, 272 AD2d 105 [1st Dept 2000]). Defense counsel's affirmation in opposition to

the motion demonstrates that defendant ceased cooperating in the defense of this action by failing to respond to counsel's communications regarding the necessity of providing the outstanding discovery.

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

ENTERED: MAY 4, 2017

CLERK