SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 21, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Renwick, J.P., Richter, Tom, Gesmer, Oing, JJ.

5573 Peter Beard, et al., Index 651504/15
Plaintiffs-Respondents,

-against-

Bernie Chase, et al.,
Defendants-Appellants.

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Davidoff Hutcher & Citron LLP, New York (Joshua S. Krakowsky of counsel), for appellants.

Grossman LLP, New York (Judd B. Grossman of counsel), for respondents.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered June 23, 2017, which granted plaintiffs' motion for partial summary judgment on their causes of action for a declaration, conversion, and replevin, and declared that plaintiff Peter Beard is the sole owner of the subject art work, is affirmed, without costs.

The motion court correctly found that the works of art at issue were goods, and thus that the purported oral agreement to sell them was barred by the statute of frauds (*see* UCC 2-201;

American-European Art Assoc. v Trend Galleries, 227 AD2d 170 [1st Dept 1996); *compare National Historic Shrines Found., Inc. v Dali*, 1967 WL 8937 [Sup Ct, NY County 1967]). Defendants' wire transfers to a third party, who then purportedly remitted the funds to plaintiffs, were not unequivocally referable to the agreement alleged, such as to deem the agreement partially completed and outside the statute of frauds (*see Anostario v Vicinanzo*, 59 NY2d 662, 664 [1983]). Alternative explanations, including that the funds were for financing other projects involving the third party, defeat such claims (*see Baytree Assoc. v Forster*, 240 AD2d 305, 307 [1st Dept 1997], *lv denied* 90 NY2d 810 [1997]).

Defendants' argument that the transcripts of plaintiff Beard's testimony should not have been considered, since the deposition was not yet concluded, is academic, given that plaintiffs met their burden as movants to show that there was no written contract between the parties with affidavits, and without the transcripts (*compare Stern v Inwood Town House*, 22 AD2d 650 [1st Dept 1964]). Plaintiffs were not required, as movants, to disprove any possible defenses defendants might assert in opposition to their motion, such as partial performance (*see C.H. Sanders Constr. Co. v Bankers Tr. Co.*, 123 AD2d 251, 252 [1st

Dept 1986]).

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

All concur except Richter and Tom, JJ. who dissent in a memorandum by Tom, J. as follows:

TOM, J. (dissenting)

In this dispute over three works of art by plaintiff Peter Beard, defendants raised issues of fact as to whether the parties' oral agreement to sell the works was completed, or at least partially performed, thus removing the agreement from the requirements of the statute of frauds (*see Baje Realty Corp. v Cutler*, 284 AD2d 282, 283 [1st Dept 2001]; *Sands v Feldman*, 243 AD2d 294 [1st Dept 1997]; *Guterman v RGA Accessories*, 196 AD2d 785 [1st Dept 1993]). Accordingly, I dissent and would reverse Supreme Court's grant of partial summary judgment to plaintiffs.

Plaintiff Peter Beard is a renowned artist, whose signature works are photo collages, often featuring African landscapes and animals, including elephants. Plaintiff Peter Beard Studio LLC (the Studio) was created to "protect and provide a market for" Beard's works and is authorized to sell Beard's original artwork when it is being sold for the first time. Beard's wife, nonparty Nejma Beard (Nejma), is the president of the Studio and Beard's authorized agent. Defendant Bernie Chase is an art collector who has amassed a considerable collection of Beard's artwork over the years, and an investor in defendant art gallery Phillippe Hoerle-Guggenheim. The three pieces of artwork at issue in this case are entitled "The Snows of Kilimanjaro," "765 Elephants," and

"Paradise Lost" (the Works).

In or around October 2013, Beard's longtime friend and occasional artistic collaborator, nonparty Natalie White, introduced him to Chase. At that time, Beard participated in two photo shoots in New York City that were organized by Chase and his friends and that Chase agreed to substantially fund. The shoots involved numerous well known models who would be photographed, and Beard would then work the photographs into his signature collages. Among others, Chase and White attended the shoots. Following the shoots, Beard "hand-worked" the photographs in a room paid for by Chase at the Soho Grand Hotel.

During the same time period, Beard also created original works from earlier photographs, including the Works. While Chase contends he reached an agreement with Beard to purchase the Works, Beard maintains that he never entered into such an agreement. Instead, Beard alleges that after he created the Works at White's Manhattan apartment, the Works were taken without his permission or consent.

Beard further alleges that he did not know where the Works were located until he learned of their display by the Hoerle-Guggenheim gallery in February 2015. Plaintiffs' counsel immediately demanded the return of the Works and sought to

resolve the matter. However, plaintiffs later learned that defendants were actively marketing the Works for sale.[1]

In May 2015, plaintiffs commenced this action seeking a declaratory judgment and asserting claims for conversion, replevin and tortious interference with economic advantage.

In an affidavit in support of plaintiffs' motion for summary judgment, Beard did not dispute that Chase organized the October 2013 photo shoots or that he substantially funded them. He also agreed that he created the Works during that time, including working on them at White's apartment in front of Chase, among others. He again claimed that the Works were taken from the apartment without his consent or permission. He also averred that he never agreed to sell the Works and that he did not authorize anyone (other than the Studio) to sell the Works. He added that he was not compensated for the Works.

In contrast to his affidavit, at his partially completed deposition,[2] Beard testified that the Works had not actually been

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[1]765 Elephants was sold to a nonparty on or about February 7, 2015 for $185,000 and is no longer in the possession or control of defendants.

[2]Beard was sick in the fall of 2013 and had a stroke in November 2013 for which he was hospitalized. He may have suffered from confusing episodes during that time. He also had a history of drug use, and blood work taken in the hospital may

completed. While he did not think he ever agreed to selling his work to Chase, it was possible that they had discussed it. He denied that White told him that she was selling the Works on his behalf to Chase. In any event, he insisted he was not compensated for the Works.

Although he didn't recall the circumstances, Beard agreed that he had signed an affidavit in connection with this suit, but stated that he had not read it before signing it, observing that it was "just words. Unbelievable," "in a huge area of bulls**t." He went to the deposition because he was told he had to go, but the deposition was simply wasting everyone's time. Inconsistent with his position in this action, Beard stated that he had no objections to Chase selling the Works.

Beard agreed he was sick in 2013 and had a stroke, but he did not know whether he experienced any confusional episodes. Yet, he did experience confusional episodes and memory loss at the time of a giant Polaroid shoot at which he met Chase. He denied having been hospitalized for a dangerous amount of drugs in his system, although he "[p]ossibly [had] a little, but not

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have found narcotic substances in his system. After he appeared for his deposition in August 2015, his attorneys advised defendants' counsel in October 2015 that due to his health Beard could not continue his deposition.

much," "[m]arijuanna," and it "could have been [cocaine]."

In her affidavit in support of the motion, Nejma Beard stated that the Studio, which she runs, is the sole entity authorized to sell Beard's work. In that role, the Studio maintains an archive of his artwork, photographs each new work, and marks each work with a special ink stamp to prevent and deter counterfeits. She explained that at no time did the Studio agree to sell the Works. She further explained how she came to learn of the display of the Works and about defendants marketing the Works for sale, and her concerns about the impact it could have on the market for Beard's work.

At her deposition, Nejma also testified that she and her husband commenced this lawsuit because Bernie Chase was a "pathological liar" and a "parasite" who was trying to steal from her husband. She also believed that White and Elizabeth Fekkai, Beard's friend, were involved in the scheme. She first learned about the Works' existence by a Google alert that linked her to an article about the Hoerle-Guggenheim Gallery offering the Works for sale. When she asked Beard about the Works, he said that they were his, adding, "[H]ow the hell did they get there [the Hoerle-Guggenheim]?" Nejma noted that Beard was also diagnosed in 2013 with bipolar disorder after she had him sent to the

hospital.

In their "statement of undisputed facts," plaintiffs' acknowledged defendants' claim that Chase purchased the Works in two separate "handshake" deals with Beard, but stressed Beard's poor health at the time.

Plaintiffs argued that summary judgment should be granted because of the absence of a written agreement that identified the parties, the purchase price and other material terms and that was signed by Beard or an authorized agent. They contended that the purported agreements did not fall within any of the exceptions to the statute of frauds. They also argued that defendants failed to establish that the contract was completed.

In opposition, Chase submitted an affidavit and deposition testimony in which he explained that White was Beard's associate and initially informed him that he could purchase some of the final works from the model photo shoots. When Chase and Beard met in October 2013, they "hit it off," and when Chase told Beard of his interest in his work, Beard replied that he would be happy to create some new works for him.

A week later, at White's apartment, Chase bought two works in progress. According to Chase, he and Beard reached an agreement, alone in White's bedroom, whereby he would pay $50,000

for Snows of Kilimanjaro and $30,000 for 765 Elephants. The two then returned to the living room and informed White of the agreement, shaking hands in front of her and several others. Beard finished the Works while staying at the Soho Grand Hotel. Chase asserted that he was present when Beard worked on the pieces and that he "help[ed] in the artistic process," making suggestions, which he and Beard would discuss. Chase then took possession of the Works from White's apartment, where they had been taken after leaving the Soho Grand, from October to December of 2013.

Beard told Chase that he should pay the purchase price directly to White. Because Beard wanted an assistant to help him create the pieces, Chase paid Eva Bastianon, an artist and White's roommate, $11,000 in cash to do so. Chase also purchased Bastianon a diamond bracelet. Beard and Bastianon then worked on the pieces at White's apartment between October 18 and 23 of 2013.

Then, on October 25, 2013, Chase wired $50,000 to White, which is reflected in an annexed wire transfer confirmation. Before the two photo shoots, which took place on October 28 and 29, 2013, Chase took possession of 765 Elephants and Snows of Kilimanjaro. On October 28, 2013, Chase saw White hand Beard an

envelope that she said contained $10,000 in cash.

At some point between the two shoots, Beard told Chase he had another work for him and showed him a photograph that would become the centerpiece to Paradise Lost. The two agreed that Chase would pay $40,000 for that piece. Beard directed Chase to pay $20,000 to White, $10,000 to Beard, and $10,000 to Ingrid Levin, Beard's girlfriend, to pay for surgery. Chase states that he gave Beard and Levin those sums in front of a number of witnesses.

On November 15, 2013, Chase wired another $50,000 to White, which is reflected in a wire transfer confirmation. According to Chase, that was the balance of what he owed for the Works.

After the second photo shoot, which took place on November 18 and 19, 2013, Beard needed a place to work on the Polaroids, some of which Chase had purchased separately, and on the Works. Apparently, White did not want Beard to use her apartment for the Works, and Beard asked Chase to pay for a room in the Soho Grand Hotel, to which he agreed. In this regard, Chase attached credit card statements and bills from the Soho Grand reflecting that he paid a total of $83,782.61 for rooms and related charges between October and December 2013.

Chase further noted that sometime after the second photo

shoot, he asked Beard to work on Paradise Lost as discussed. He also asked Beard to do additional work on 765 Elephants. Beard then worked on those pieces at the Soho Grand; Chase attached photographs he took on his iPhone of Beard working on 765 Elephants and Paradise Lost on November 22, 2013.

In early December 2013, Beard wanted to work in White's apartment, and had Paradise Lost transported there. When the piece was completed Chase accepted it from Beard at White's apartment. Beard and Chase continued to work on other pieces at the Soho Grand through December 2013.

Chase had Beard sign the backs of the pieces to authenticate them. He rejected the claim that any of the Works were stolen, and reiterated that Beard created the pieces specifically for him and that Chase was involved in the artistic process. Chase stressed that he paid $100,000 to White, $11,000 to Beard's assistant, $10,000 to Beard, and $10,000 to Levin at Beard's direction. He also paid for the hotel, food, art supplies, and miscellaneous expenses.

At his deposition, while Chase testified that he wired money to White, he could not say which wire transfer record was for the Works, since he was also wiring White money as a purchaser of pieces created in the giant Polaroid shoot White had arranged.

However, Chase also stated that he "ha[d] on [his] books" that the wire transfers on October 25 and November 15, 2013, were for the Works. He also could not say whether he or a company he owned actually paid the transfers, but maintained that it did not matter, because he was the ultimate owner, no matter who paid for them.

Chase conceded that he also spent around $110,000 in connection with the two photo shoots, and that he bought four pieces from that shoot out of around 100 that were made. He also admitted that he did not have a written agreement from Beard concerning their deal regarding the first two pieces, other than Beard signing the back of the pieces. Nor did he have a written agreement regarding the third piece.

Chase also denied that Beard was impaired at the time of the agreements. In that regard, he stated that at all relevant times Beard appeared lucid, coherent, and in command of his faculties, and that Beard's rational mental state is best demonstrated by the outstanding works he created at that time.

Chase believed that Beard was being forced to "lie" by his wife Nejma. Relatedly, he understood that Nejma had a documented history of asserting legal claims against persons who own Beard's work "in an attempt to improperly control the market for Peter

Beard works, as well as attempt to control Peter Beard's life and finances."[3]

In her affidavit, Natalie White stated that Beard, who was her longtime friend and who she sometimes assisted, complained to her that "other people" controlled his finances, and he enlisted her help in selling additional artwork so he could generate income without the involvement or interference of other parties. At her deposition, she clarified that she meant that Beard wanted to make money without Nejma having access to it. When a piece of his art was sold, the purchaser would pay White, and then she would use it to pay his various personal expenses. She would receive a 15% to 20% "commission" "on works that [she] sold for him."

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[3]Attached to the opposition papers was a February 24, 2013 New York Magazine article by Robert Kolker in which Nejma is described as trying to control the market for Beard's work "for financial and legacy reasons" and as making efforts to "claw back" some of the works Beard has given away over the years. One friend accused Nejma of "trying to control the purse strings and keep [Beard] on a short leash." The article also describes Beard's long history of being part of the international art and party scene and his habit of giving away his works, including, in one instance, to a mailman. Sources note that Nejma did not like this habit, and she began preventing the sale of his work, and ended relationships with two galleries in order to better control the market. One source noted that Beard "made a lot of transactions that were not in his best interest at times when he did not have money, and probably a lot of those transactions were done without documentation."

In the fall of 2013, White was working with Beard on the giant Polaroid shoots, with plans for him to turn the photographs into his signature photo-collages. The expense of the shoots was significant, and both she and Chase provided financing.[4] During the same time period, she spoke with Beard about Chase purchasing some of his works, and the two men met at her apartment. After speaking privately in her bedroom, the men told her that Beard had agreed to sell Chase two works for $80,000. She would be given the money by Chase, and would then give it to Beard by paying his expenses as he needed.

That same month, she gave Chase a handwritten receipt "memorializ[ing]" the transaction. The receipt, dated October 23, 2013, was attached to her affidavit, and indicated the above terms, although it also stated that Chase was to pay her $10,000 a month until paid in full. White also confirmed that Beard and Chase entered into a separate agreement to purchase Paradise Lost for $20,000. Accordingly, at some later point when Chase asked her for a receipt for all three pieces, she prepared a handwritten memorandum stating that Chase purchased all three pieces for $100,000, which he had paid in full.

[4]The Polaroid shoots cost her over $100,000, and she would ultimately sue Beard over them.

White averred that Chase wired her a total of $100,000, as reflected in her attached bank statements. She stated that from that total she took a $15,000 commission, paid $15,000 to Elizabeth Fekkai, an art dealer who assisted Beard, and paid the balance to Beard. She explained that she paid out the money to Beard in small installments, sometimes of only several hundred dollars in cash. As examples, she pointed to withdrawals of $1,000, $800, and $500 on three days in October 2013, as well as other similar withdrawals and larger withdrawals up to $9,000 continuing into November and December 2013, which were reflected in her attached bank statements.

In addition, at Beard's direction, White wired $2,900 to Ingrid Levin, as reflected in her bank statements. She also paid various tabs for meals and events, as reflected in her statements. White also paid $26,700 to Dr. Steven M. Butensky, DDS, to pay for Beard's new upper teeth. White kept a ledger of all such payments, which she no longer had, because she had given it to Beard at his request.

White also confirmed that the two unfinished pieces were brought to her apartment and that her roommate Eva Bastianon assisted Beard in creating the Works. She also noted that Chase paid for Beard's room in the Soho Grand. She denied that the

Works were stolen or that Beard was not compensated for them. She also denied that Beard was impaired at the times of the agreements, and noted he was lucid, coherent, and in command of his faculties during that time period.

At her deposition, White noted that Beard had been hospitalized at some point during this time period. White could not distinguish on her bank statement between deposits representing money given to her by Chase for the Polaroid shoots and money given to her by Chase for the purchase of the Works. White stated that "[i]t didn't really matter," since she knew the total amount due for each transaction, and Chase had paid all sums due.

White described assisting Beard with the sale of other pieces in 2009, and explained that she similarly took a commission and worked with Fekkai, and that she and Fekkai gave Beard money in installments.

Eva Bastianon stated in her affidavit that she assisted Beard in creating the pieces at issue and that Chase was often present during the work. She also assisted Beard with the photo shoots. She also noted that some of the work was completed in the apartment she shared with White and that some of the work was done in the Soho Grand Hotel. Bastianon attached photographs

showing Beard, Chase and herself with the Works, both at her apartment and at the hotel.

Bastianon corroborated that Chase paid her to work on the Works, and bought her a diamond bracelet, and that she observed White give $10,000 in cash to Beard during the work; White and Beard told her the money was for the Works. She also saw White give Beard cash on many other occasions. Throughout the artistic process, while Beard would reject Chase's ideas for how to complete the Works, he would acknowledge that the Works were for Chase. Bastianon thus knew that Beard was aware he was creating the Works for Chase. She also denied any claim that the Works were stolen.

After noting that during that time period she was working closely with Beard often in 12-hour shifts and for seven days a week, Bastianon remarked that at no time was Beard under the influence of alcohol or drugs and that he appeared to be lucid and competent at all times. At her deposition, Bastianon noted that Beard's stroke had not taken place until around Thanksgiving of 2013, well after the agreements between Beard and Chase had been made.

Fekkai testified that when Beard told her that he had sold the first two works to Chase, she told him that the amount was

too low, and tried to stop the deal. However, Beard told her that he had shaken hands and the pieces were Chase's. At that time, Beard was sober and lucid.

Fekkai also learned that Beard sold a third piece to Chase for $20,000 or $40,000. During the photo shoots, she visited Beard nearly every day, and he never appeared incapacitated. She also observed White give Beard cash whenever he needed money. Fekkai also denied that the Works were stolen or that Beard was impaired at the time of the agreements.

She had no personal knowledge of the sales or their terms. She paid for dental work for Beard in the amount of $26,700, because she was his friend, and after that White reimbursed her with funds out of the sale to Chase. She had opened a special savings account in which she held Beard's money.

Based on the foregoing evidence, defendants argued that the statute of frauds was inapplicable because the agreement was completed. In the alternative, they argued that there was an issue of fact regarding partial performance. They also argued that the contract was one for services, and thus fell outside the scope of the statute of frauds.

Plaintiffs met their prima facie burden by demonstrating that there was no written agreement for the sale of the Works,

valued at over $500, signed by Beard (see UCC 2-201). In this regard, while the handwritten receipts provided by White may constitute some evidence of oral agreement, they were insufficient to constitute written agreements. Indeed, they were not signed by Beard, and it is unclear that they reference the Works, since they do not refer to "The Snows of Kilimanjaro," "765 Elephants," and "Paradise Lost." Rather, they reference "1 elephant kilo, I elephant herd, 1 elephant." Nor do these receipts clearly identify the parties to the transaction, the time frame for payment, or the correct total amount owed (*see MP Innovations, Inc. v Atlantic Horizon Intl., Inc.*, 72 AD3d 571, 572 [1st Dept 2010]).

In addition, although there were conflicts between Beard's affidavit and deposition testimony, he did not have knowledge of an agreement, and denied that he was paid for the Works. He also denied consenting to White selling the Works on his behalf.

It is well settled that paintings are goods governed by the UCC and subject to its statute of frauds, and thus this purported agreement cannot be considered one for services (*see American-European Art Assoc. v Trend Galleries,* 227 AD2d 170 [1st Dept 1996]; *Rosenfeld v Basquiat*, 78 F3d 84, 93 [2d Cir 1996]).

However, the evidence submitted by defendants raised an

issue of fact as to whether the oral agreement had been completed or at least partially performed, thereby removing the agreement from the requirements of the statute of frauds. In particular, Chase testified that he agreed to pay $120,000 for the works, which were specifically made for him by Beard, and that he wired $100,000 to White at Beard's direction. Chase also paid $10,000 in cash directly to Beard, $10,000 to Levin at Beard's direction, and $11,000 to Bastianon to work as Beard's assistant. Chase also explained that the deal was done this way specifically because Beard wanted to keep Nejma from knowing about it. Chase's testimony was corroborated by wire transfer statements and by hotel receipts showing that he also paid for rooms where Beard could finish the Works at the Soho Grand Hotel.

White also explained that she often worked with Beard to sell his work so he could generate income without the involvement or interference of other parties, especially Nejma. As is alleged to have occurred here, White stated that when a piece of his art was sold, the purchaser would pay White, and then she would use it to pay Beard's various personal expenses. In this case, she corroborated that Chase wired her $100,000 for the Works, and she paid Beard's various expenses, made other payments at his direction, and gave him cash periodically. Critically,

she denied that the Works were stolen or that Beard was not paid for them.

Bastianon also confirmed that Chase paid her to work on the Works, and bought her a diamond bracelet, that she observed White give $10,000 in cash to Beard during the work, and further that White and Beard told her the money was for the Works. She also saw White give Beard cash on many other occasions. Bastianon also observed Beard and Chase working on the Works and Beard's acknowledgment that the Works were for Chase. Similarly, Fekkai testified that Beard told her he agreed to sell the Works to Chase, and that he observed White give cash to Beard whenever he needed funds.

All of the defense witnesses denied that the Works were stolen and denied that Beard was impaired at the time of the agreements or during the time of the photo shoots.

Full performance by both sides removes the contract from the statute of frauds (see *Guterman v RGA Accessories*, 196 AD2d 785, 785-786 [1st Dept 1993]; *Tip Top Farms v. Dairylea Coop.*, 114 AD2d 12, 32 [2d Dept 1985] ["complete performance by both parties will take a contract out of this statute"], *affd* 69 NY2d 625 [1986], *cert denied* 481 US 1029 [1987]). As this Court remarked long ago, "It is difficult to see how the Statute of Frauds can

be availed of to set aside a completed transaction" (*De Heirapolis v Reilly*, 44 App Div 22, 24 [1st Dept 1899], *affd* 168 NY 585 [1901]).

Stated differently, "The Statute of Frauds applies only to executory, and not to executed, agreements. Hence, when an oral contract has been fully performed by both parties, according to its terms, the Statute of Frauds no longer affects it" (61 NY Jur 2d Frauds, Statute of § 256). Further, UCC 2-201(3)(c) provides that the statute does not serve as a bar to claims concerning goods that have already been delivered and accepted or paid for pursuant to an oral agreement, and defendants have submitted evidence that the Works have been both delivered and accepted and paid for.

Specifically, defendants raised an issue of fact as to whether Chase fully performed the contract by paying the entire amount due to White, Beard, Levin and Bastianon, and whether Beard fully performed by consenting to Chase taking the Works upon their completion. Indeed, in contrast to plaintiff's unsubstantiated statements, defendants presented evidence from multiple witnesses and corroboration from documentary evidence. It is therefore my opinion that the substantial evidence of a fully performed agreement submitted by defendants warrants a

trial.

In the alternative, defendants raised issues of fact as to whether defendants' partial performance was "unequivocally referable" to the agreement (*see Anostario v Vicinanzo,* 59 NY2d 662, 664 [1983]*; Baje Realty Corp.*, 284 AD2d at 283 [finding issues of fact as to whether defendants' partial performance was "unequivocally referable" to the agreement]; *H.P.P. Ice Rink v New York Islanders*, 251 AD2d 249, 249 [1st Dept 1998] ["Review of the record reveals that there are triable questions of fact as to whether defendant's remittance to plaintiff of a check for $22,000 and its involvement in meetings regarding the construction of the subject ice rinks, as well as its assisting plaintiff to finance the rinks, constituted partial performance 'unequivocally referable' to the oral partnership agreement alleged by plaintiff, and, as such, sufficient to take the alleged agreement out of the Statute of Frauds"]).

In particular, the testimony by Chase and White raised issues of fact as to why Chase made the payments as described and why the Works were created in the first place. While it may not be absolutely certain that particular payments were made in connection with the purported oral agreement, it cannot be said that they were definitely not made in connection with it.

Further, to the extent there may have been a lack of clarity by both Chase and White as to which wire transfers were for the Works, and why Chase's company made the transfers on his behalf, this is all the more reason that a trial is warranted. In any event, Chase consistently pointed to the transfers on October 25, 2013 and November 15, 2013 as relating to this agreement.

Moreover, as to the alternative explanations that some of these payments were for financing the photo shoots or to purchase Beard's other works, these should not be grounds to find that the payments were definitively not referable to the oral agreements and to award summary judgment to plaintiffs. To the contrary, they demonstrate why a trial is warranted. Nor should plaintiffs be granted summary judgment because Chase made the payments to White and not directly to Beard, since the evidence showed that that arrangement was at Beard's direction.

There is yet another reason why the conflicting evidence in this record dictates against granting plaintiffs summary judgment, to wit, the principle of equitable estoppel. A trier of fact could conclude that it would be inequitable to permit Beard to avoid the parties' oral contract based on the evidence of full or partial performance in the record. Notably, "the

equity doctrine is designed to prevent a party from inducing full or partial performance from another and then claiming the sanctuary of the statute of frauds" (*Eujoy Realty Corp. v Van Wagner Communications, LLC*, 22 NY3d 413, 426 [2013], citing *Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group*, 93 NY2d 229 [1999]). In this case, defendants have presented evidence that a jury could find establishes that an oral agreement was reached by the parties and that Chase was induced by the agreement to pay $120,000 for the Works.

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

ENTERED: JUNE 21, 2018

CLERK

Manzanet-Daniels, J.P., Gische, Andrias, Kapnick, Kern, JJ.

6921 The People of the State of New York, Ind. 320/14
Respondent,

-against-

Miguel Caro,
Defendant-Appellant.

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Niall MacGiollabhui, New York, for appellant.

Darcel D. Clark, District Attorney, Bronx (Andrew J. Zapata of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Eugene Oliver, J.), rendered July 19, 2016, as amended August 10, 2016, convicting defendant, after a jury trial, of criminal sexual conduct against a child in the second degree and endangering the welfare of a child, and sentencing him to an aggregate term of five years, unanimously affirmed.

We find that defendant failed to preserve any objection that the 911 call was neither an excited utterance nor a present sense impression, and we decline to review it in the interest of justice.

The court, however, properly permitted the victim to testify that she had written in her diary what defendant "was doing to [her]" and that he had "touched" her. This testimony, in the

context of the victim's sister's report of the crime to the police after reading the diary entry, was admissible for the "relevant, nonhearsay purpose of completing the narrative of events leading to the defendant's arrest" (*see People v Ludwig*, 24 NY3d 221, 231 [2014]). Although a limiting instruction would have been appropriate, none was requested, and its absence does not warrant reversal.

In any event, the evidentiary rulings were harmless, because both the victim and her sister testified at trial and their credibility was tested by cross-examination (*see id.* at 230).

The court providently exercised its discretion in precluding inquiry into the victim's allegation of sexual abuse by her mother's previous boyfriend, which occurred years before the events at issue, when the victim was six years old. The earlier, single incident was very different from the extensive, continuing course of sexual conduct alleged in this case, and, contrary to defendant's argument, there was nothing in the police records

relating to the earlier allegation to suggest that it was falsely made (*see People v McCray*, 23 NY3d 193, 199-200 [2014]).

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

ENTERED: JUNE 21, 2018

CLERK

Manzanet-Daniels, J.P., Gische, Andrias, Kapnick, Kern, JJ.

6922 Deutsche Bank National Trust Company, etc.,
Plaintiff-Respondent,

-against-

The Board of Managers of the 225 East 86th Street Condominium,
Defendant-Appellant,

Desert Eagle Management Inc., et al.,
Defendants.

Index 850101/16

Charles E. Boulbol, P.C., New York (Charles E. Boulbol of counsel), for appellant.

Eckert Seamans Cherin & Mellott, LLC, White Plains (Kenneth J. Flickinger of counsel), for respondent.

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered on or about May 23, 2017, which, insofar as appealed from, denied the cross motion of defendant Board of Managers of the 225 East 86th Street Condominium (Board) to dismiss the complaint for lack of personal jurisdiction and as time-barred, and granted plaintiff's motion for an extension of time to serve the complaint pursuant to CPLR 306-b, unanimously affirmed, without costs.

The court in the first foreclosure action found that plaintiff lacked standing to commence the 2008 action. In light

of its lack of standing, plaintiff's purported acceleration of the note was a nullity, and thus the statute of limitations did not begin to run and the current action was not time-barred (*see EMC Mtge. Corp. v Suarez*, 49 AD3d 592, 593 [2d Dept 2008]).

Furthermore, the motion court providently exercised its discretion in finding that plaintiff's diligence, combined with an alleged default of a mortgage with a principal of $455,200, warranted an additional amount of time to complete service. To hold otherwise would amount to an unjust windfall to the Board, which was aware of the mortgage at the time the subject unit was purchased (*see Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105-106 [2001]).

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

ENTERED: JUNE 21, 2018

CLERK

Manzanet-Daniels, J.P., Gische, Andrias, Kapnick, Kern, JJ.

6923 In re Madison Mia B.,
also known as Madison B.,

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

Katherine Janet B., also known
as Katherine B.
Respondent-Appellant,

SCO Family Services,
Petitioner-Respondent.

_____

Douglas H. Reiniger, New York, for appellant.

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

Diaz & Moskowitz, PLLC, New York (Hani M. Moskowitz of counsel), attorney for the child.

_____

Appeal from order of fact-finding and disposition, Family Court, New York County (Stewart Weinstein, J.), entered on or about March 3, 2017, which, upon respondent mother's default, determined that she suffers from mental illness, terminated her parental rights to the subject child and transferred custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously dismissed, without costs, as taken from a nonappealable paper.

The order was entered upon the mother's default, and therefore is not appealable (*see* CPLR 5511; *see Matter of Felicia Malon Rogue J. [Lena J.]*, 146 AD3d 725 [1st Dept 2017]; *Matter of Natalie Maria D. [Miguel D.]*, 73 AD3d 536 [1st Dept 2010]).

In any event, clear and convincing evidence, including the psychologist's uncontroverted expert testimony that the mother suffers from severe bipolar disorder, supported the determination that she is presently and for the foreseeable future unable to provide proper and adequate care for the child (Social Services Law § 384-b[4][c], [6][a]; *Matter of Genesis S. [Irene Elizabeth S.]*, 70 AD3d 570 [1st Dept 2010]). Because the mother refused to appear for several scheduled mental health evaluations, petitioner relied upon the mother's detailed mental health records, which revealed that she had exhibited increasingly violent and self-injurious behaviors since the age of seven, resulting in numerous psychiatric hospitalizations throughout her young life. Although the mother had shown some progress in her treatment and had positive interactions with the child during

supervised visitation, the expert stated, without contradiction, that she had never experienced a sustained period of improvement.

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

ENTERED: JUNE 21, 2018

CLERK

Manzanet-Daniels, J.P., Gische, Andrias, Kapnick, Kern, JJ.

6924 Rosa Ramirez, Index 305525/12
Plaintiff-Respondent,

-against-

Our Lady of Refuge Catholic Church,
Defendant-Appellant,

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

_____

Leahey & Johnson, P.C., New York (Jason Paget of counsel), for appellant.

Burns & Harris, New York (Judith F. Stempler of counsel), for Rosa Ramirez, respondent.

Zachary W. Carter, Corporation Counsel, New York (Ingrid R. Gustafson of counsel), for the City of New York, New York City Department of Education and New York City Board of Education, respondents.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about June 14, 2017, which granted defendants The City of New York, New York City Department of Education and New York City Board of Education's (the City defendants) motion for summary judgment dismissing the complaint as against them, and which denied as moot defendant Our Lady of Refuge Catholic Church's (the Church) cross motion to strike the City defendants' answer for failure to comply with the court's discovery order, unanimously affirmed, without costs.

Plaintiff sustained injuries as she was leaving the Church when a gust of wind caused a New York Police Department barricade on the street to strike her. The Church used the barricade as well as a second barricade to block off the street so it could be used as a play area by students from the Church as well as students from a school located across the street from the Church.

The City defendants satisfied their prima facie burden that they did not create or have actual or constructive notice of the alleged hazardous barricade which caused plaintiff's accident by submitting the deposition testimony of the Church's pastor, who stated that the Church was responsible for placing the barricades on the street and would store them in its parking lot when they were not being used. Although the Church borrowed the barricades for long-term use from the Police Department, the Police Department would not inspect the barricades. If the barricades became defective, the Church would inform the Police Department, which would replace them. The pastor also testified that on the day of plaintiff's accident, there was nothing wrong with the subject barricade, and that the Church continued to use the barricade after the accident. This testimony along with the testimony of the custodial engineer at the school across the street from the Church that he was not aware of anyone being hurt

by the barricades satisfied the City defendants' prima facie burden (*see Castore v Tutto Bene Rest. Inc.*, 77 AD3d 599, 599 [1st Dept 2010]).

In opposition, the Church and plaintiff failed to raise an issue of fact because they did not submit any evidence that the Church did not possess, control, or maintain the barricade that caused plaintiff's accident. It is of no moment that the students from the school across the street also used the play street, as there is no evidence that this special use was a cause of plaintiff's accident (*see Santana v City of New York*, 282 AD2d 208, 208-209 [1st Dept 2001]).

The court also correctly denied as moot the Church's cross motion to strike the City defendants' answer for failure to produce a witness with knowledge about the ownership, control, and maintenance of the barricade. After the court stayed decision on the City defendants' summary judgment motion until they produced a witness, the City defendants produced a police officer from the Police Department's Barrier Unit for deposition. He testified that a search regarding the Police Department's loan of the barricade to the Church did not yield any results. The production of the witness complied with the court's discovery order, and there is nothing to indicate that the delay in

producing the witness was willful or contumacious.

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

ENTERED: JUNE 21, 2018

CLERK

Manzanet-Daniels, J.P., Gische, Andrias, Kapnick, Kern, JJ.

6925 45 Renwick Street, LLC, Index 159939/14
Plaintiff-Respondent,

-against-

Lionbridge, LLC,
Defendant-Appellant.

_____

Mark D. Mermel, Lake Success, for appellant.

Venable LLP, New York (Michael J. Volpe and Cindy E. Zuniga of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered April 21, 2017, which granted plaintiff's motion for summary judgment dismissing defendant's counterclaims, directed the escrow agent to disburse funds to plaintiff, awarded plaintiff reasonable attorneys' fees and costs in an amount to be determined by a referee, and denied defendant's cross motion for summary judgment on its counterclaims, unanimously affirmed, with costs.

Plaintiff seller and defendant buyer entered into a contract of sale, containing a New Jersey choice-of-law provision, which provided for the sale of seller's property located at 45 Renwick Street to defendant buyer. A few days prior to the time-is-of-the-essence closing date, buyer stated that it was refusing to

close because certain laws would limit its ability to develop the property. However, after the closing date passed and seller elected to terminate the contract and retain the deposit, buyer claimed that seller had not been ready, willing, and able to close because the property had an easement-covenant that had not been removed and therefore seller's representation in the contract that there would be no encumbrances on the property at closing was untrue. The easement-covenant, which allowed the subject property to encroach three inches onto neighboring property, was disclosed in a title report issued eight months prior to the scheduled closing.

In support of its motion for summary judgment, plaintiff seller demonstrated prima facie that it was ready, willing and able to perform on the closing date, and that buyer failed to demonstrate a lawful basis for not being obligated to close (*see Marioni v 94 Broadway, Inc.*, 374 NJ Super 588, 605-606 [NJ App Div 2005], *cert denied* 183 NJ 591 [2005]; *see also Rodriguez Pastor v DeGaetano*, 128 AD3d 218, 224 [1st Dept 2015]).

In opposition, defendant buyer failed to demonstrate that it had a lawful basis for refusing to close since the easement-covenant, which benefitted the property and was evident in the title survey, was a "permitted exception" as defined in schedule

1.21 of the contract for sale. Thus, buyer materially breached the contract when it failed to appear on the time-is-of-the-essence closing date, and, under the limited amendment to the Contract of Sale, seller is entitled to retain the deposit as liquidated damages (*see Metlife Capital Fin. Corp. v Washington Ave. Assocs. L.P.*, 159 NJ 484, 496 [1999]; *Donerail Corp. N.V. v 405 Park LLC*, 100 AD3d 131, 137-138 [1st Dept 2012]). Pursuant to the contract, plaintiff seller is also entitled to recover its attorneys' fees for both the proceedings before Supreme Court and this Court, to be determined, as directed by the court, by a referee.

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

ENTERED: JUNE 21, 2018

CLERK

Manzanet-Daniels, J.P., Gische, Andrias, Kapnick, Kern, JJ.

6926-
6927 The People of the State of New York,
Respondent,

-against-

Devar Hurd,
Defendant-Appellant.

Ind. 3134/13

_____

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

Devar Hurd, appellant pro se.

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

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Judgment, Supreme Court, New York County (Charles H. Solomon, J. at speedy trial motion; Roger S. Hayes, J. at jury trial and sentencing), rendered October 23, 2015, convicting defendant of criminal contempt in the second degree (seven counts), stalking in the fourth degree and harassment in the first degree, and sentencing him to an aggregate term of 7 years and 180 days, and judgment, same court (A. Kirke Bartley, Jr., J.), rendered March 31, 2016, convicting defendant, after a jury trial, of stalking in the second degree, and sentencing him to a concurrent term of 1⅓ to 4 years, unanimously affirmed.

We find unavailing defendant's challenges to the sufficiency

and weight of the evidence supporting the stalking and harassment convictions (*see People v Danielson*, 9 NY3d 342, 348 [2007]). The evidence of defendant's hundreds of tweets to the victim on Twitter, some of which were sexual, hostile, or aggressive in nature, established defendant's intent and the victim's reasonable fear, as required by the statutes, when viewed in light of all the circumstances, including orders of protection prohibiting defendant from contacting the victim or certain family members, issued in connection with defendant's prior conviction of stalking the same victim (*see People v Brown*, 61 AD3d 1007 [3d Dept 2007]; *see also People v Noka*, 51 AD3d 468 [1st Dept 2008], *lv denied* 11 NY3d 739 [2008]).

Defendant's challenge to venue as to the second-degree stalking count is unpreserved and affirmatively waived (*see People v Hand*, 140 AD3d 636 [1st Dept 2016], *lv denied* 28 NY3d 971 [2016]), and we decline to review it in the interest of justice. As an alternative holding, we find that the People met their burden of establishing by a preponderance of the evidence that venue was proper in New York County, where the victim viewed defendant's electronic communications (*see* CPL 20.40[1][a], [2][a]; 20.60[1],[3]). For the same reasons, we reject, on the merits, defendant's arguments regarding venue for the fourth-

degree stalking and harassment counts.

We have considered and rejected defendant's pro se speedy trial arguments.

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

ENTERED: JUNE 21, 2018

CLERK

Manzanet-Daniels, J.P., Gische, Andrias, Kapnick, Kern, JJ.

6928 Tabibnia SRL, Index 651928/11
Plaintiff-Respondent,

-against-

Khaledi Oriental Rugs, Inc., et al.,
Defendants-Appellants.

_____

Scarinci & Hollenbeck, LLC, New York (Dan Brecher of counsel), for appellants.

Akerman LLP, New York (Richard B. Brosnick of counsel), for respondent.

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Judgment, Supreme Court, New York County (Gerald Lebovitz, J.), entered May 1, 2017, awarding plaintiff a sum of money against defendants, unanimously affirmed, without costs.

A fair interpretation of the evidence supports the trial court's finding, based largely on its assessment of witness credibility, that defendants breached the parties' partnership agreement (*see Morwitz v De Angelis*, 155 AD3d 514 [1st Dept 2017]). While the parties did not enter into a written agreement, the court correctly found that a partnership existed based on the "conduct, intention, and relationship between the parties" (*Community Capital Bank v Fischer & Yanowitz*, 47 AD3d 667, 668 [2d Dept 2008]). Even apart from defendant Mehdi Khaledi's lack of credibility, as determined by the court, the

record supports the finding that a partnership was formed based on Mr. Khaledi's and plaintiff's principal's three discussions immediately preceding the carpet auction and the fact that the two were on the telephone together during the entire bidding process. The record establishes that the parties wished to do business together in the manner alleged by plaintiff.

A fair interpretation of the evidence supports the court's finding that defendants breached the partnership agreement by selling the carpet to a third party without notice to plaintiff. The court properly arrived at a fair market valuation of the carpet, used to calculate plaintiff's damages, based on its evaluation of witness credibility and the trial evidence (*see Credit Suisse First Boston v Utrecht-America Fin. Co.*, 84 AD3d 579, 580 [1st Dept 2011]).

The court's determination that Mehdi Khaledi is individually liable for the judgment is amply supported by the evidence at trial and at the posttrial hearing on that issue, which shows that Mr. Khaledi entered the partnership agreement in his individual capacity. He emailed plaintiff's principal from his personal email account to ask about the latter's interest in the carpet, and he signed the email individually, without any indication of or association with the corporate defendant. There

is no evidence in the record that Mr. Khaledi indicated that he was operating through Khaledi Inc.; indeed, there is no mention of the company at all.

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

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

ENTERED: JUNE 21, 2018

CLERK

Manzanet-Daniels, J.P., Gische, Andrias, Kapnick, Kern, JJ.

6929 The People of the State of New York, by Eric T. Schneiderman,
Plaintiff-Respondent,

-against-

Charter Communications, Inc., et al.,
Defendants-Appellants.

- - - - -

NCTA - The Internet & Television Association, Consumers Union, and Public Knowledge,
Amici Curiae.

Index 450318/17

_____

Latham & Watkins LLP, Washington, DC, (Matthew A. Brill of the bar of the District of Columbia, admitted pro hac vice of counsel), for appellants.

Eric T. Schneiderman, Attorney General, New York (Ester Murdukhayeva of counsel), for respondent.

Mintz Levin Cohn Ferris Glovsky & Opoeo, P.C., New York (Scott A. Rader of counsel), for NCTA - The Internet & Television Association, amicus curiae.

Institute for Public Representation Washington DC (Andrew Jay Schwartzman of counsel), for Consumers Union, amicus curiae.

Allison S. Bohm, Washington, DC (John Bergmayer of counsel), for Public Knowledge, amicus curiae.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered February 16, 2018, which denied defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

This civil enforcement action alleges that in the marketing of broadband Internet service defendants have engaged and continue to engage in fraudulent practices in connection with advertised promises to subscribers about Internet speeds and reliable access to online content. The complaint asserts claims pursuant to Executive Law § 63(12) and General Business Law §§ 349 and 350.

The court correctly rejected defendants' argument that the claims based on allegations of false promises about broadband speeds involve an irreconcilable conflict between federal and state law that requires a finding of preemption. The Federal Communications Commission's "Transparency Rule" requires providers of broadband service to "publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding use of such services" (47 CFR 8.3). Defendants make official disclosures about broadband speeds (actual speeds measured according to a testing protocol on the modems of consumers deemed representative) in accordance with the federal rule. The complaint alleges that defendants' use of their official disclosures in consumer advertisements is misleading,

because other statements in the advertisements give consumers the false impression that the disclosed speeds represent speeds that consumers can expect to experience on their devices, including wireless devices, consistently (*cf. Matter of People v Applied Card, Sys., Inc.*, 11 NY3d 105 [2008] [rejecting argument that false advertising claim was preempted by federal credit card disclosure requirements], *cert denied* 555 US 1136 [2009]). The Transparency Rule does not preempt state laws "that prevent fraud, deception and false advertising" (*id.* at 114).

The court correctly determined that the complaint's allegations about the advertisements' representations of speeds "up to" a certain level state a cause of action (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314 [2002]). Issues of fact exist as to whether defendants delivered the advertised speed levels consistently.

The court correctly declined to dismiss claims based on allegations about network quality and reliability on the ground that some of the language in the advertisements is mere puffery, because other statements in the advertisements are not mere puffery and are actionable (*see Bader v Siegel*, 238 AD2d 272 [1st Dept 1997]). Since the record does not include the full content of the advertisements cited in the complaint, it would be

premature to try to determine which, if any, of the cited advertisements do not support a false advertising claim because they are mere puffery.

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

ENTERED: JUNE 21, 2018

CLERK

Manzanet-Daniels, J.P., Gische, Andrias, Kapnick, Kern, JJ.

6930 RSSM CPA LLP, Index 653533/14
Plaintiff-Appellant,

-against-

Corey D. Bell, et al.,
Defendants,

-against-

Michael Bernstein,
Defendant-Respondent.

- - - - -

[And Third Party Actions]

_____

Garvey Schubert Barer, New York (Maurice W. Heller of counsel), for appellant.

Derfner & Gillett, LLP, New York (David P. Gillett of counsel), for respondent.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered January 9, 2017, which, to the extent appealed from as limited by the briefs, granted defendant Bernstein's motion for partial summary judgment on his first counterclaim to the extent it seeks the balance of his capital account and dismissing in part the causes of action for breach of fiduciary duty, breach of the duty of loyalty, tortious interference with contract, and tortious interference with prospective contractual relations as against him, unanimously

affirmed, without costs.

Defendant established prima facie on his breach of contract counterclaim that he was entitled to the balance of his capital account after leaving plaintiff's employ through his employment agreement, which provided that, upon his withdrawal from plaintiff "for any reason," plaintiff "shall pay to" defendant "the balance of his capital account" (*see generally Bailey v Fish & Neave*, 8 NY3d 523, 528 [2007]). In opposition, plaintiff failed to raise an issue of fact.

The parts of the breach of fiduciary duty and breach of the duty of loyalty causes of action based on allegations that defendant used plaintiff's confidential information to solicit clients and personnel away from plaintiff and that defendant improperly wrote off billable hours for clients and/or capped their bills are insufficiently particularized to raise an issue of fact, since they do not identify any of the clients or personnel referred to (see CPLR 3016[b]; *Schroeder v Pinterest Inc.*, 133 AD3d 12, 25 [1st Dept 2015]).

The parts of the cause of action for tortious interference with contract not based on the other individual defendants' contracts do not identify the contracts that were interfered with and therefore fail to raise an issue of fact as to their

existence (*see Little Rest Twelve, Inc. v Zajic*, 137 AD3d 540, 541 [1st Dept 2016]).

The parts of the cause of action for tortious interference with prospective economic relationships based on relationships with potential clients or unidentified former personnel of plaintiff are insufficient to show that plaintiff would have obtained those contracts but for defendant's tortious interference (*see Vigoda v DCA Prods. Plus*, 293 AD2d 265, 266-267 [1st Dept 2002]).

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: JUNE 21, 2018

CLERK

Manzanet-Daniels, J.P., Gische, Andrias, Kapnick, Kern, JJ.

6931 The People of the State of New York, Ind. 4132/14
Respondent,

-against-

Anthony Smalls,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (John L. Palmer of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered December 17, 2015, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree and false personation, and sentencing him, as a second felony offender, to an aggregate term of three to six 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]). There is no basis for disturbing the jury's credibility determinations, including its resolution of inconsistencies in testimony. In this incident where many people threw bottles at the police, the evidence, including a recorded phone call by defendant, amply supported the conclusion that

defendant at least possessed a bottle with intent to use it unlawfully, even if the bottle that struck an officer in the head was thrown by an unidentified person.

Based on the limited available record, we assume, without deciding, that the federal false arrest complaint about which the defense sought to cross-examine a police sergeant contained sufficient "specific allegations that are relevant to the credibility of the law enforcement witness" (*People v Smith*, 27 NY3d 652, 662 [2016]), and therefore that the court's order precluding such cross-examination was error. Nonetheless, any such error was plainly harmless (*see id.* at 670). The sergeant did not testify about the central issue of whether defendant threw a bottle at the injured officer; that testimony was provided by an officer who witnessed that part of the incident. Instead, the sergeant gave peripheral and essentially uncontested testimony about the surrounding events. We reject, as speculative, defendant's assertion that the proposed impeachment of the sergeant would have not only undermined his credibility in the eyes of the jury, but would have had the same effect regarding the principal eyewitness-officer, who was under the sergeant's supervision.

The court correctly received a recorded phone call made by

defendant while he was incarcerated, which contained statements that qualified as admissions because, notwithstanding any ambiguity, they could plainly be understood as inconsistent with defendant's position at trial (*see People v Collins*, 301 AD2d 452 [1st Dept 2002], *lv denied* 1 NY3d 570 [2003). In the phone call, defendant made statements that could readily be interpreted as at least admitting that he threw a bottle, while expressing skepticism about whether the prosecution could prove that the injured officer was hit by that particular bottle. As previously noted, the phone call provided highly probative evidence of defendant's guilt.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 21, 2018

CLERK

Manzanet-Daniels, J.P., Gische, Andrias, Kapnick, Kern, JJ.

6932-
6933-
6933A Index 651659/13

Vijay Singh,
Plaintiff-Respondent-Appellant,

-against-

PGA Tour, Inc.,
Defendant-Appellant-Respondent.

_____

Skadden, Arps, Slate, Meagher & Flom LLP, New York (Jeffrey A. Mishkin of counsel), for appellant-respondent.

Peter R. Ginsberg Law LLC, New York (Peter R. Ginsberg of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered May 15, 2017, insofar as it granted in part and denied in part defendant's motion for summary judgment dismissing plaintiff's claim of breach of the implied covenant of good faith and fair dealing, and denied in part plaintiff's motion for summary judgment on that claim, unanimously affirmed, with costs. Order, same court and Justice, entered on or about September 21, 2017, which upon reargument, adhered to the original order, unanimously affirmed, with costs. Appeal from the May 15, 2017 order, insofar as it denied plaintiff's motion to strike a witness's affidavit and to preclude the witness from testifying at trial, unanimously dismissed, without costs.

The motion court correctly denied summary judgment dismissing the cause of action against defendant for breach of the implied covenant of good faith and fair dealing based on defendant's alleged failure to exercise its discretion in good faith by summarily suspending plaintiff and publicly discussing the suspension (*see generally Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995]). Issues of fact exist as to whether defendant exercised such discretion arbitrarily, irrationally or in bad faith by failing to confer with or defer to the World Anti-Doping Agency (WADA), the alleged authority on the matter, prior to taking action against plaintiff and making public statements, since WADA's position on the substance at issue was nuanced. Issues of fact also exist on whether false and inaccurate statements made by Vowtow and Fincham implicating plaintiff's use of a banned substance were in violation of the implied covenant of good faith and fair dealing. The issue of whether and what damage resulted from any offending conduct remains an issue for trail. The court properly dismissed so much of that claim as relied on plaintiff's allegation that he was treated differently than other similarly situated members of the Tour.

No appeal lies from the May 15, 2017 order insofar as it

denied plaintiff's motion to strike a witness's affidavit and to preclude him from testifying at trial (*see Weatherbee Constr. Corp. v Miele*, 270 AD2d 182, 183 [1st Dept 2000]).

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

ENTERED: JUNE 21, 2018

CLERK

Manzanet-Daniels, J.P., Gische, Andrias, Kapnick, Kern, JJ.

6934 The People of the State of New York, Ind. 1850/09
Respondent,

-against-

Anonymous,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered April 22, 2011, convicting defendant, upon his plea of guilty, of murder in the second degree, and sentencing him to a term of 21 years to life, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to 19 years to life, and otherwise affirmed.

We find the sentence excessive to the extent indicated.

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

ENTERED: JUNE 21, 2018

CLERK

Manzanet-Daniels, J.P., Gische, Andrias, Kapnick, Kern, JJ.

6935 Sara R. B. Igtet, Index 152552/15
Plaintiff-Respondent,

-against-

Board of Managers of Trump International Hotel & Tower Condominium,
Defendant-Appellant,

Mintz, Levin, Cohn, Ferris, Glovsky, & Popeo, P.C., etc.,
Defendant.

_____

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz of counsel), for appellant.

Adam Leitman Bailey, P.C., New York (Jeffrey R. Metz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered November 23, 2016, which denied defendant Board of Managers of Trump International Hotel & Tower Condominium's motion for summary judgment dismissing the complaint and on its cross claim for a mandatory injunction against defendant escrow agent, unanimously modified, on the law, to grant the motion to the extent of declaring in defendant Board's favor with respect to the funds held in escrow, and directing the escrow agent to release the escrowed funds to the Board, and otherwise affirmed, without costs.

Plaintiff's apartment in defendant's building, as well as other units, hotel rooms, and common elements of the building, sustained damage after a pipe supplying water to plaintiff's kitchen sink sprang a leak. The Board undertook to repair the damage, and charged plaintiff for its expenses. Ultimately, plaintiff placed money in an escrow account pending resolution of this dispute. The escrow agreement provided, inter alia, that the funds would be released to the Board 12 months after the date of the agreement's execution upon written notice that the dispute had not been resolved (the forfeiture clause).

There having been no final resolution of this dispute within 12 months after the execution of the escrow agreement, the Board established prima facie its entitlement to the escrowed funds in accordance with the agreement's unambiguous forfeiture clause (*see Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]; *Highbridge House Ogden LLC v Highbridge Entities LLC*, 155 AD3d 505 [1st Dept 2017]). In opposition, plaintiff failed to raise an issue of fact as to the Board's right to the funds.

Plaintiff also failed to raise an issue of fact as to her contention that the Board acted in bad faith to prevent the dispute from reaching a final resolution within 12 months after the execution of the escrow agreement. There is no evidence of

bad faith on the Board's part in the record. Nor did plaintiff show that she took any good faith steps to move the matter forward during the relevant period. Indeed, she now seeks discovery of the apartment, which she no longer owns, without explaining why she never inspected or photographed the offending pipe during the year in which she still owned the apartment following the leak.

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

ENTERED: JUNE 21, 2018

CLERK

Manzanet-Daniels, J.P., Gische, Andrias, Kapnick, Kern, JJ.

6939 Rose Trentman, Index 154734/15
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

_____

Greenberg Law, P.C., New York (Robert J. Menna of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for respondent.

_____

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered December 27, 2016, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established entitlement to judgment as a matter of law in this action where plaintiff alleges that on November 12, 2014 she was injured when she tripped and fell on a hole in the roadway, away from the curb. Defendant submitted evidence showing that it lacked prior written notice of the alleged defect (Administrative Code of City of NY § 7-201[c][2]; *see Brown v City of New York*, 150 AD3d 615 [1st Dept 2017]).

In opposition, plaintiff failed to raise a triable issue of fact as to whether defendant had prior written notice or as to

whether defendant created the subject hole (*see generally Yarborough v City of New York*, 10 NY3d 726, 728 [2008]). Plaintiff relied on several August 2014 Department of Transportation inspections of defects located in the general vicinity of her fall as constituting either written acknowledgment of the defect or evidence that defendant had immediately created the condition during unspecified road repair work. However, records regarding other defects that were repaired in a certain area do not provide written notice of the specific defect that allegedly caused plaintiff's injury (*see Kalsmith v City of New York*, 158 AD3d 442 [1st Dept 2018]; *Stoller v City of New York*, 126 AD3d 452 [1st Dept 2015]). Furthermore, evidence that defendant repaired a defect several months before plaintiff's accident does not provide a basis for an inference that the repair resulted in an immediately hazardous

condition (*see Arzeno v City of New York*, 128 AD3d 527 [1st Dept 2015], *lv denied* 26 NY3d 914 [2015]).

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

ENTERED: JUNE 21, 2018

CLERK

Manzanet-Daniels, J.P., Gische, Andrias, Kapnick, Kern, JJ.

6940-
6941N People's Capital and Leasing Corp., Index 651602/12
Plaintiff-Respondent,

-against-

1 800 Postcards, Inc., et al.,
Defendants-Appellants.

_____

Law Offices of Michael S. Doran, LLC, New York (Michael S. Doran of counsel), for appellants.

Moritt Hock & Hamroff LLP, Garden City (Alexander D. Widell of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 30, 2017, which, to the extent appealed from as limited by the briefs, denied defendants' motion for leave to amend the answer to add counterclaims for malicious prosecution and tortious interference with contract, and granted plaintiff's motion to strike defendants' jury demand, unanimously affirmed, without costs.

We affirm the denial of defendants' motion for leave to amend. While malicious prosecution claims can be premised on civil proceedings (*see Thomas v G2 FMV LLC*, 147 AD3d 700 [1st Dept 2017]; *Facebook, Inc. v DLA Piper LLP [US]*, 134 AD3d 610 [1st Dept 2015], *lv denied* 28 NY3d 903 [2016]), the proposed

malicious prosecution counterclaim is time-barred. The underlying action was dismissed in defendants' favor more than one year before defendants moved for leave to amend (*see* CPLR 215[3]; *Syllman v Nissan*, 18 AD3d 221 [1st Dept 2005]). Contrary to defendants' arguments, under the circumstances of this case, neither CPLR 203(d) nor CPLR 203(f) avails them. The proposed counterclaim fails, moreover, due to defendants' failure to adequately allege special damages (*Engel v CBS, Inc.*, 93 NY2d 195, 205 [1999]).

In support of the proposed claim for tortious interference with contract, defendants failed to allege a causal connection between plaintiff's allegedly tortious conduct – nondisclosure of its side agreement with Mitsubishi Lithographic Presses (MLP) – and MLP's alleged breach of its purchase agreement with defendants (*see White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]).

Defendants waived trial by jury in the agreement at issue. Their efforts to sever the waiver provision while otherwise enforcing what they claim is a valid agreement are unavailing

(*see Sherry Assoc. v Sherry-Netherland, Inc.*, 273 AD2d 14, 15-16 [1st Dept 2000]).

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: JUNE 21, 2018

CLERK

Manzanet-Daniels, J.P., Gische, Andrias, Kapnick, Kern, JJ.

6942N In re John Del Monaco, etc., et al., Index 652966/15
Petitioners-Respondents,

-against-

Warren Diamond,
Respondent-Appellant,

American Self-Storage Management
Association LLC, et al.,
Nominal Defendants.

_____

Brief Carmen & Kleiman, LLP, New York (Ira Kleiman of counsel), for appellant.

Friedman Kaplan Seiler & Adelman LLP, New York (Bruce S. Kaplan Of counsel), for respondents.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered May 25, 2017, which found respondent to be in civil contempt of court, and ordered him to return misappropriated funds as directed, unanimously affirmed, with costs, and, nostra sponte, sanction respondent (22 NYCRR 130-1.3) in the amount of $10,000, payable to the Clerk of Supreme Court, New York County, for transmittal to the Commissioner of Taxation and Finance.

Supreme Court confirmed an arbitration panel's determinations that respondent misappropriated more than $2 million in corporate funds, should be enjoined from removing any cooperate assets, and must pay petitioner's costs and fees. The

court ordered respondent to make full restitution, and to pay the costs and fees by a date certain. In addition, petitioner served respondent with restraining notices which prohibited his transfer of corporate funds or property until judgment was paid. Not only did respondent thereafter fail to make payment as mandated by the court, he admittedly misappropriated corporate funds and deposited them in accounts he maintained exclusively for that sole purpose. Under these circumstances, Supreme Court providently exercised its discretion by holding respondent in civil contempt for admittedly violating the terms of the court's judgment, as well as several restraining notices.

Respondent's argument that despite the court's order holding him liable and directing him to repay the misappropriated funds, petitioner was responsible for enforcing the judgment by levying on the jointly-held companies is without merit on its face. Nor did the court's mandates impinge upon respondent's right to arbitration of corporate disputes, as it is hornbook law that the civil contempt order vindicated petitioner's rights under the court's judgments and the restraining notices (*see Matter of McCormick v Axlerod*, 59 NY2d 574, 582-583 [1983]).

The broad pattern of respondent's conduct, evidenced by the record, amply shows his disregard of the court's authority (*see*

Levy v Carol Mgt. Corp., 260 AD2d 27, 33 [1st Dept 1999]). Even though respondent concedes to wilfully violating the court's mandates, his appellate brief argues - with no support in the record - that petitioner's motive in seeking contempt penalties was improper. Under these circumstances, in the exercise of discretion, we, nostra sponte, impose frivolous appeal sanctions (22 NYCRR 130-1.3) against respondent of $10,000, payable to the Clerk of Court for transmittal to the Commissioner of Taxation and Finance.

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

ENTERED: JUNE 21, 2018

CLERK

Richter, J.P., Tom, Mazzarelli, Gesmer, Moulton, JJ.

6943 The People of the State of New York, Ind. 12/14
Respondent,

-against-

Erik White,
Defendant-Appellant.

_____

Christina Swarns, Office of the Appellate Defender, New York (Humzah Soofi of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered December 4, 2015, convicting defendant, upon his plea of guilty, of manslaughter in the first degree, and sentencing him to a term of 15 years, unanimously modified, on the law, to the extent of vacating the sentence and remanding the matter to the sentencing court for a youthful offender determination, and otherwise affirmed.

As the People concede, defendant is entitled to an express

youthful offender determination pursuant to *People v Rudolph* (21 NY3d 497 [2013]).

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

ENTERED: JUNE 21, 2018

CLERK

Richter, J.P., Tom, Mazzarelli, Gesmer, Moulton, JJ.

6944 EDJ Realty, Index 158552/16E
Plaintiff-Appellant,

-against-

New York State Division of Housing and Community Renewal ("DHCR"), et al.,
Defendants-Respondents.

_____

Novick, Edelstein, Lubell, Reisman, Wasserman & Leventhal, P.C., Yonkers (Jason Fuhrman of counsel), for appellant.

Mark F. Palomino, Division of Housing and Community Renewal, New York (Jeffrey G. Kelly of counsel), for respondents.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered on or about July 25, 2017, which, inter alia, granted defendants' motion to dismiss the complaint, unanimously affirmed, with costs.

This action is barred by the doctrine of res judicata. Plaintiff raised matters before the motion court that could have been raised, and in fact were actually raised, in the extensive prior proceedings in which plaintiff challenged the very same

orders that it challenges here (see *Xiao Yang Chen v Fischer*, 6 NY3d 94, 100 [2005]; *Marinelli Assoc. v Helmsley-Noyes Co.*, 265 AD2d 1, 5 [1st Dept 2000]).

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

ENTERED: JUNE 21, 2018

CLERK

Richter, J.P., Tom, Mazzarelli, Gesmer, Moulton, JJ.

6945-
6946 In re Elizabeth R.,
Petitioner-Appellant,

Brenda P.-H.,
Respondent-Appellant,

Renzo H., et al.,
Respondents-Respondents,

_____

Tennille M. Tatum-Evans, New York, for Elizabeth R., appellant.

Neal D. Futerfas, White Plains, for Brenda P.-H, appellant.

Zachary W. Carter, Corporation Counsel, New York (Jessica Miller of counsel), for Administration for Children's Services, respondent.

Dawn M. Shammas, New York, for Sheltering Arms Children and Family Services, respondent.

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

_____

Orders, Family Court, New York County, (Stewart H. Weinstein, J.), entered on or about February 24, 2017, which, inter alia, dismissed the applications of petitioner maternal grandmother for guardianship of the subject child, Alexander H., and custody of the subject child, Kaylene H., unanimously affirmed, without costs.

The record establishes that it was not in the children's best interests to uproot them from their stable and loving foster

homes, where they are well-cared for, with foster parents who wish to adopt them and are most likely to encourage a relationship with their siblings (*see Matter of Jaffa Wally F.*, 60 AD3d 409 [1st Dept 2009]; *Matter of Taaliyah Simone S.D.*, 28 AD3d 371 [1st Dept 2006]). Contrary to petitioner's argument, her unsuitability as a guardian and custodian of the subject children was well-supported by the record, including, but not limited to her repeated failure to acknowledge the mother's culpability in the severe abuse of three of her children, as well as her lack of insight into the children's history of abuse and emotional needs (*see Matter of Jessica MM.*, 122 AD2d 462, 465 [3d Dept 1986], *lv denied* 68 NY2d 612 [1986]).

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

ENTERED: JUNE 21, 2018

CLERK

Richter, J.P., Tom, Mazzarelli, Gesmer, Moulton, JJ.

6947 Adine Davis, Index 22997/12E
Plaintiff-Respondent,

-against-

Pathmark, et al.,
Defendants-Appellants,

Bruckner Plaza Shopping Center, LLC,
Defendant.

_____

Mound Cotton Wollan & Greengrass LLP, New York (William D. Wilson of counsel), for appellants.

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

_____

Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered September 20, 2017, which granted plaintiff's motion to strike the answer of defendants Pathmark and Pathmark Store, Inc. pursuant to CPLR 3126, and thereupon granted plaintiff summary judgment on the issue of liability, unanimously affirmed, without costs.

Although it was demanded within days of plaintiff's slip and fall, defendants failed to preserve a video recording of its store that depicted the area of plaintiff's fall prior to it occurring. Instead, a store employee selectively edited the video to retain only that portion showing approximately 30

seconds prior to plaintiff's fall and the fall itself. Without the video recording, plaintiff may be unable to establish the origin of the liquid on the floor that she claims caused her to fall, and thus be unable to establish the requisite notice of the alleged condition (*see Vincent L. v AKS 183rd St. Realty Corp.*, 118 AD3d 602 [1st Dept 2014]; *Bear, Stearns & Co. v Enviropower, LLC*, 21 AD3d 855 [1st Dept 2005], *appeal dismissed* 6 NY3d 750 [2005]). Despite a court order and a discovery conference stipulation, defendants failed to explain why the remainder of the video became unavailable.

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

ENTERED: JUNE 21, 2018

CLERK

Richter, J.P., Tom, Mazzarelli, Gesmer, Moulton, JJ.

6948 The People of the State of New York, Respondent, Ind. 2984/12 691/13

-against-

Sharief Fletcher, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Daniel P. Conviser, J.), rendered September 2, 2014, as amended October 6, 2014, convicting defendant, after a jury trial, of burglary in the second degree, criminal contempt in the first degree (six counts), endangering the welfare of a child (two counts) and aggravated harassment in the second degree, and sentencing him to an aggregate term of six years, unanimously affirmed.

Defendant's challenges to the sufficiency and weight of the evidence supporting his burglary conviction are unavailing (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence warranted an inference that, beyond his unlawful entry into the victim's apartment, defendant intended to violate a separate provision of the order of protection obtained by the victim,

namely a provision that prohibited any contact with her (*see People v Lopez*, 147 AD3d 456 [1st Dept 2017], *lv denied* 29 NY3d 999 [2017]; *People v Carpio*, 39 AD3d 433 [1st Dept 2007], *lv denied* 9 NY3d 873 [2007]).

The court properly admitted as excited utterances the victim's statements to a responding police officer. Officers who arrived at the victim's apartment within a few minutes of a radio run observed that the victim was crying and her hands were shaking as she told the police that she had just argued with defendant, who had wielded a knife in front of her and her two young daughters. The evidence supports the conclusion that the victim made these statements while still under the influence of the stress of this startling event (*see People v Brown*, 70 NY2d 513, 520-522 [1987]; *People v Caviness*, 38 NY2d 227, 231 [1975]; *People v Smith*, 37 AD3d 333, 334 [1st Dept 2007], *lv denied* 8 NY3d 950 [2007]).

Regardless of whether defendant's waiver of all cross-examination of the victim also waived any claim that the admission of her excited utterances violated his right of confrontation, we find no violation of the Confrontation Clause

(*see Davis v Washington*, 547 US 813, 822 [2006]; *People v Nieves-Andino*, 9 NY3d 12, 15-16 [2007]; *People v Turner*, 143 AD3d 582, 583 [1st Dept 2016]).

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

ENTERED: JUNE 21, 2018

CLERK

Richter, J.P., Tom, Mazzarelli, Gesmer, Moulton, JJ.

6949-
6950 In re Charles Sukenik, Deceased.

File 20A/14

- - - - -

Vivian J. Sukenik,
Petitioner-Appellant.

_____

Farrell Fritz, P.C., Uniondale (Eric W. Penzer of counsel), for appellant.

_____

Decree, Surrogate's Court, New York County (Nora S. Anderson, S.), entered November 16, 2016, pursuant to an order, same court and Surrogate, entered June 28, 2016, which denied the petition to reform an inter vivos trust and designation on an IRA beneficiary form, unanimously reversed, on the law, and the petition granted, without costs. Appeal from above order unanimously dismissed, without costs, as subsumed in the appeal from the decree.

The petition should have been granted. Decedent's intent to minimize taxes and provide for his wife of 39 years was apparent in the donative instruments. The Will and Trust agreements demonstrated his intent to take full advantage of all deductions and exemptions provided by law. For example, Article One, paragraph C of the Trust agreement specifically stated that the Trust funds could be transferred to the philanthropic fund only

if it was a tax exempt entity, and Article Three authorized the trustee to sell assets in order to minimize taxes payable by beneficiaries. Article Eleventh of the Will also permitted the executor to make certain elections in order to reduce taxes. Furthermore, the presumption that testators intend to take full advantage of tax deductions and exemptions, the lack of opposition, including by the State of New York, and the presumption in favor of widows, all favor petitioner's requested reformation (*see e.g. Matter of Berger*, 57 AD2d 591 [2d Dept 1977]; *Matter of Hicks*, 10 Misc 3d 1078[A], 2006 NY Slip Op 50118[U] [Sur Ct, Nassau County 2006]; *Matter of Lepore*, 128 Misc 2d 250 [Sur Ct, Kings County]).

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

ENTERED: JUNE 21, 2018

CLERK

Richter, J.P., Tom, Mazzarelli, Gesmer, Moulton, JJ.

6951-
6952 Index 102889/09

Kathleen Bednark,
Plaintiff-Respondent,

-against-

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

Heron Real Estate Corp.,
Defendant-Appellant,

BP America, Inc. et al.,
Defendants.

_____

Carman, Callahan & Ingham, LLP, Farmingdale (James M. Carman of counsel), for appellant.

Rheingold, Giuffra, Ruffo & Plotkin, LLP, New York (Jeremy A. Hellman of counsel), for Kathleen Bednark, respondent.

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

Lawrence Heisler, Brooklyn (Timothy J. O'Shaughnessy of counsel), for New York City Transit Authority and Manhattan and Bronx Surface Transit Operating Authority, respondents.

_____

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered on or about May 11, 2017, which, insofar as appealed from, denied the motion of defendant Heron Real Estate Corp. (Heron) to set aside the verdict as against it, unanimously affirmed, without costs.

Heron is the owner of the property abutting the defective

sidewalk on which plaintiff fell when alighting from a Transit Authority bus. On a prior appeal, this Court affirmed the denial of Heron's motion for summary judgment and reinstated the complaint as against defendant City of New York, finding that there was an issue of fact as to whether or not the area of the sidewalk where plaintiff fell was "within a designated bus stop location," which would be the City's responsibility to maintain rather than Heron's responsibility (127 AD3d 403, 404 [1st Dept 2015]; *see* Administrative Code of City of NY § 7-210).

At trial, the City's witness testified that the bus stop area extended 158 feet from the bus stop sign located beyond Heron's property, including a "no standing" zone in front of Heron's property. The City's witness made clear that his testimony about the length of the bus stop concerned an area in the street or roadway, not the sidewalk. He also testified that the City was responsible for maintaining the roadway and bus stop signs, and that he did not know who was responsible for maintaining the sidewalk. Thus, the evidence did not establish as a matter of law that the area where plaintiff fell was within a City designated bus stop (*compare Phillips v Atlantic-Hudson, Inc.*, 105 AD3d 639 [1st Dept 2013]).

Accordingly, the jury's finding that plaintiff did not fall

within a designated bus stop was supported by the evidence, and was not "utterly irrational" so as to warrant setting aside the verdict based on insufficiency grounds (*Killon v Parrotta*, 28 NY3d 101, 108 [2016] [internal quotation marks omitted]). Nor was the verdict based upon an unfair interpretation of the evidence, so as to justify setting aside the verdict as against the weight of the evidence (*see id.* at 107-108).

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

ENTERED: JUNE 21, 2018

CLERK

Richter, J.P., Tom, Mazzarelli, Gesmer, Moulton, JJ.

6953 Justina Carrero, Index 301282/16
Plaintiff-Appellant,

-against-

The New York City Housing Authority,
Defendant-Respondent.

_____

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

Wilson Elser Moskowitz Edelman & Dicker, LLP, New York (Patrick J. Lawless) of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about May 9, 2017, which granted defendant's motion to dismiss the complaint and to strike plaintiff's errata sheet purporting to correct the transcript of her General Municipal Law § 50-h hearing testimony, and denied plaintiff's cross motion to amend the complaint, unanimously affirmed, without costs.

Supreme Court correctly struck plaintiff's errata sheet purporting to correct the transcript of her General Municipal Law § 50-h hearing testimony, because plaintiff made numerous substantive changes to the testimony without providing a sufficient explanation for them (CPLR 3116[a]; *see e.g. Cataudella v 17 John St. Assoc., LLC*, 140 AD3d 508 [1st Dept 2016]; *Torres v Board of Educ. of City of N.Y.*, 137 AD3d 1256 [2d

Dept 2016]).

The court properly granted defendant's motion to dismiss the complaint because defendant did not have sufficient notice of the cause of the incident before plaintiff commenced this action. Neither plaintiff's inconsistent statements and testimony after service of the notice of claim, nor the ambiguous photographs produced, offered any assistance in identifying the cause of the accident (*see Reyes v City of New York*, 281 AD2d 235 [1st Dept 2001]; *Rodriguez v City of New York*, 38 AD3d 268 [1st Dept 2007]).

The court providently exercised its discretion in denying plaintiff leave to amend the complaint since defendant would be prejudiced.

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

ENTERED: JUNE 21, 2018

CLERK

Richter, J.P., Tom, Mazzarelli, Gesmer, Moulton, JJ.

6955 The People of the State of New York, Ind. 1801/14
Respondent,

-against-

Musin Green,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Melissa C. Jackson, J. at suppression hearing; Anthony Ferrara, J. at plea and sentencing), rendered April 1, 2016, as amended June 14, 2016, convicting defendant of attempted rape in the first degree, sexual abuse in the first degree, burglary in the second degree (three counts), attempted burglary in the second degree, possession of burglar's tools and criminal possession of stolen property in the fifth degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 16 years to life, unanimously affirmed.

Defendant made a valid waiver of his right to appeal, which forecloses review of his suppression claims. The court's oral colloquy with defendant concerning the waiver carefully separated

the right to appeal from the rights automatically forfeited by a guilty plea, and defendant's responses demonstrated his understanding of the appellate rights he was waiving. The combination of this colloquy and the thorough written waiver that defendant signed after consulting with his attorney met or exceeded the requirements for a valid waiver (*see People v Bryant*, 28 NY3d 1094 [2016]). We have considered and rejected defendant's remaining arguments concerning the waiver.

Regardless of whether defendant made a valid waiver of his right to appeal, we find that the court properly denied his suppression motion. The record supports the hearing court's findings that the identification procedures were not unduly suggestive and that the statements defendant made after receiving *Miranda* warnings were sufficiently attenuated from other statements that the court suppressed for lack of such warnings.

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

ENTERED: JUNE 21, 2018

CLERK

Richter, J.P., Tom, Mazzarelli, Gesmer, Moulton, JJ.

6957 The People of the State of New York, SCID 30107/15
Respondent,

-against-

Joseph J. Santana,
Defendant-Appellant.

_____

Christina A. Swarns, Office of The Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Arlene D. Goldberg, J.), entered on or about September 10, 2015, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assigned points under the risk factor for continuing course of sexual misconduct. The victim's statements and the police reports were reliable hearsay, which the court properly considered (*see* Correction Law § 168-n[3]; *People v Mingo*, 12 NY3d 563, 571-572 [2009]; *People v Sanford*, 130 AD3d 486, 487 [1st Dept 2015], *lv denied* 26 NY3d 908 [2015]). The court also properly relied on the victim's statement to a nurse that the sexual abuse began when she was eight years old and

continued up until the charged offense, when she was nine years old, notwithstanding the fact that the victim could not specify the dates of the commission of the particular sex offenses. The court also properly relied on proof of defendant's earlier sexual contact with the victim for which he was neither indicted nor charged (*see People v Epstein*, 89 AD3d 570, 570 [1st Dept 2011]).

The court providently exercised its discretion in declining to grant a downward departure (*see People v Gillotti*, 23 NY3d 841, 861 [2014]). The mitigating factors cited by defendant were adequately accounted for in the risk assessment instrument, and were in any event outweighed by the seriousness of the underlying crime.

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

ENTERED: JUNE 21, 2018

CLERK

Richter, J.P., Tom, Mazzarelli, Gesmer, Moulton, JJ.

6958-
6959 The People of the State of New York, Ind. 3723/12
Respondent, 68742C/12

-against-

Anthony Martinez,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Waleska Suero Garcia of counsel), for respondent.

_____

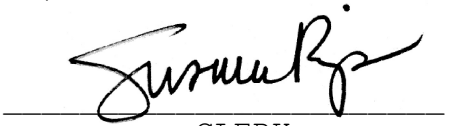
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Alvin Yearwood, J.), rendered April 24, 2014 and a judgment of resentence, same court and Justice, rendered December 14, 2016,

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.

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

ENTERED: JUNE 21, 2018



CLERK

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

Richter, J.P., Tom, Mazzarelli, Gesmer, Moulton, JJ.

6962N Oved & Oved, LLP, Index 652932/12
Plaintiff-Respondent,

-against-

Ted Zane,
Defendant-Appellant.

_____

Law Office of Neil J. Saltzman, New York (Neil J. Saltzman of counsel), for appellant.

Oved & Oved, LLP, New York (Edward C. Wipper of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered February 10, 2017, which, inter alia, denied defendant's motion to disqualify plaintiff to act as counsel in this action seeking to recover legal fees, unanimously affirmed, with costs.

Defendant's motion was properly denied because "[w]hile the disciplinary rules preclude an attorney from acting as both witness and advocate in the same proceeding, the prohibition does not apply where, as here, the attorney is a litigant" (*Walker & Bailey v We Try Harder,* 123 AD2d 256, 257 [1st Dept 1986]). The fact that plaintiff is seeking to recover fees under a theory of quantum meruit does not compel a different result. Furthermore, rule 1.9 of the Rules of Professional Conduct (22 NYCRR 1200.0), which seeks to avoid a conflict of interest between an attorney's

former and current client on a substantially related matter, does not apply here, where the attorney is acting pro se to recover legal fees (*see id.*).

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

ENTERED: JUNE 21, 2018

CLERK

Richter, J.P., Tom, Mazzarelli, Gesmer, Moulton, JJ.

6963N Elmrock Opportunity Master Fund I, L.P., Plaintiff-Appellant, Index 653300/16

- against -

Citicorp North America, Inc., et al., Defendants-Respondents.

_____

Kaplan Fox & Kilsheimer LLP, New York (Gregory K. Arenson of counsel), for appellant.

Goodwin Procter LLP, New York (Samuel J. Rubin of counsel), for respondents.

_____

Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered November 8, 2017, to the extent it permitted defendant to withhold from disclosure under the common interest doctrine communications between defendants or their representatives or attorneys and nonparty LDVF I LA Power LLC or nonparty Fortress Investment Group, LLC, or either of their representatives or attorneys, that do not relate solely to the contemplation or prosecution of litigation, unanimously affirmed, with costs.

The record demonstrates that the common interest agreement was entered into in reasonable anticipation of litigation (*see Ambac Assur. Corp. Countrywide Home Loans, Inc., 27 NY3d 616,*

620 [2016]). Indeed, plaintiff alleges that defendants breached their duty to protect its interests by failing to "commence litigation to establish" the parameters of the appraisers' valuation determinations. While defendants did not commence such a suit, they entered into the Supplemental Appraisal Protocols, which provided for judicial review of the precise question urged by plaintiff. Plaintiff can hardly claim that litigation that it demanded, and that defendants provided for, could not reasonably have been anticipated. It is of no consequence that defendants ultimately settled the dispute without filing suit.

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

ENTERED: JUNE 21, 2018

CLERK