SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 6, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

2004N In re The People of the State of New York, Respondent, Ind. 30222/15

-against-

Conrado Juarez,
Defendant,

Frances Robles,
Nonparty Appellant.

- - - - -

The Reporters Committee for Freedom of the Press and 57 Media Organizations,
Amici Curiae.

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Levine Sullivan Koch & Schulz, LLP, New York (Katherine M. Bolger of counsel), for appellant.

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

Baker & Hostetler, LLP, Washington, D.C., (Mark I. Bailen of counsel), for amici curiae.

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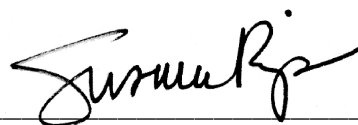
Upon remittitur from the Court of Appeals (_NY3d_, 2018 NY Slip Op 04684 [2018], appeal from an order, Supreme Court, New York County (Bonnie Wittner, J.), entered on or about August 4,

2016, which denied nonparty appellant's motions to quash subpoenas requiring her testimony and the production of notes relating to her jailhouse interview of the defendant in the underlying criminal proceeding, unanimously dismissed, without costs, as taken from a nonappealable order.

"[N]o appeal lies from an order arising out of a criminal proceeding absent specific statutory authorization" (*Matter of People v Juarez*, _NY3d_, 2018 NY Slip Op 04684 [2018]), quoting *People v Santos*, 64 NY2d 702, 704 [1984]). As pertinent to the issue in this case, "an order determining a motion to quash a subpoena . . . issued in the course of prosecution of a criminal action, arises out of a criminal proceeding for which no direct appellate review is authorized" (*id.*; *see* CPL art 450).

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

ENTERED: SEPTEMBER 6, 2018



CLERK

Richter, J.P., Andrias, Webber, Gesmer, Moulton, JJ.

6571 The People of the State of New York, Ind. 286/93
Respondent,

-against-

Joseph McNeil,
Defendant-Appellant.

____

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

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

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Order, Supreme Court, New York County (Daniel P. Conviser, J.), entered on or about June 1, 2016, which denied defendant's CPL 440.20 motion to vacate his sentence, unanimously affirmed.

In 1983, defendant was convicted of first-degree manslaughter, a Class B violent felony, and sentenced to 4 to 12 years incarceration. In January 1993, defendant was charged with two counts of second-degree robbery, a Class C violent felony. On October 20, 1994, after a jury trial, defendant was convicted on both counts. On January 10, 1995, defendant appeared for sentencing. Pursuant to CPL 400.15, defendant was arraigned on a predicate violent felony statement, and adjudicated a predicate felon. At sentencing, the court noted defendant's "extensive prior criminal history" and stated that "it was to sentence the

defendant as a second violent felony offender." Defendant was sentenced to concurrent prison terms of 6 to 12 years.[1]

Now, over 21 years later, defendant claims that he was unlawfully sentenced as a second felony offender, when he should have been sentenced as a second violent felony offender. His argument is that the court erred in his favor by imposing a lesser predicate felony adjudication than the one required by his prior record. It is apparent that defendant seeks a resentencing in order to "to upset sequentiality for purposes of determining whether the conviction . . . can serve as a predicate for multiple felony offender status" (*People v Perez*, 142 AD3d 410, 416 [1st Dept 2016], *affd* 31 NY3d 964(2018).

As defendant was not "adversely affected" by any perceived error by the court in sentencing him, and, indeed, benefitted from the imposition of a less serious predicate status, defendant's CPL 440.20 claim must be rejected without consideration of the merits of his argument that the court erred when it pronounced sentence.(CPL 470.15[1]; *People v Covington*,

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[1]As noted by the motion court, in 1995, a second felony offender convicted of second degree robbery could receive a maximum sentence of from 6 to 12 years incarceration. A second violent felony offender convicted of second degree robbery could receive a maximum sentence of from 8 to 15 years incarceration.

88 AD3d 486, 486 [1st Dept 2011] [rejecting defendant's request for a further resentence where the original sentence "unlawfully omitted the required period of post-release supervision, thus freeing defendant from having to serve such a term, *lv denied* 18 NY3d 858 [2015]; *People v Garcia*, 298 AD2d 107, 108 [1st Dept 2002] [defendant failed to show he was adversely affected by a ruling in his favor allowing his attorney to engage in gender-based discrimination during jury selection] *lv denied* 99NY2d 558 [2012]; *People v Flores*, 167 AD2d 160, 160 [1st Dept 1990] [vacatur of the sentence not required where defendant who was a second violent offender received a minimum sentence of one third the maximum as opposed to one half the maximum, since defendant was the "beneficiary of the error and no prejudice ensue[d] to him"] *lv denied* 77 NY2d 906 [1991]; see also *People v Witherspoon*, 100 AD3d 809 [2d Dept 2012], *lv denied* 20 NY3d 1105 [2013] [defendant was not entitled to vacatur of his sentence where he was illegally sentenced as a second felony offender rather than a second violent felony offender, because "he was not adversely affected by any illegality in the sentence]; *People v McKinney*, 162 AD3d 1073 [2d Dept 2018] [defendant not adversely affected by erroneously being sentenced as a second felony offender as opposed to a second violent felony offender and

therefore is not entitled to vacatur of the sentence or withdrawal of the plea on that basis].

In all the above cited cases, the courts relied upon CPL 470.15(1) to deny direct appeals from sentences that were equal to or shorter than the sentence the defendant would have received if the alleged error in sentence had not occurred. We hold today that CPL 470.15(1) equally bars appeals from motions which challenge such alleged sentencing errors. To do otherwise would lead to the anomalous result that a defendant could achieve a result by motion which could not be obtained on a direct appeal.

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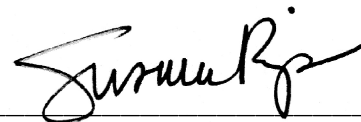

CLERK

Friedman, J.P., Sweeny, Kapnick, Kahn, Oing, JJ.

6582 The People of the State of New York, Ind. 9990/87
Respondent,

-against-

Gerald Francis,
Defendant-Appellant.

____

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

Cyrus R. Vance, Jr., District Attorney, New York (Samuel Z. Goldfine of counsel), for respondent.

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Order, Supreme Court, New York County (Edward J. McLaughlin, J.), entered on or about April 22, 2016, which denied defendant's CPL 440.20 motion to set aside his sentence, unanimously affirmed.

Defendant claims that on his 1988 conviction of third-degree weapons possession he was unlawfully sentenced, as a first felony offender, to a term of six months' incarceration concurrent with five years' probation, when he should have been sentenced, as a second felony offender, to at least two to four years in state prison, due to his 1982 conviction for criminal sale of a controlled substance in the fifth degree. Thus, he is essentially claiming that the court erred in his favor by imposing a lesser sentence than the one required by his prior

record. Defendant acknowledges that he seeks a resentencing in order to ultimately move to withdraw his plea on the ground that the new, lawful sentence would be contrary to his original plea agreement. The 1988 conviction is also one of the bases of defendant's 1997 adjudication as a persistent violent felony offender.[1]

Under this Court's established precedent, however, because defendant was not "adversely affected" by the court's error in sentencing him on his 1988 conviction in this case, and, indeed, benefitted from the imposition of a lesser sentence than he would have received had he been properly adjudicated, defendant's CPL 440.20 claim must be rejected without consideration of its merits (CPL 470.15[1]; *see also People v Garcia*, 298 AD2d 107, 108 [1st Dept 2002] [holding that the defendant did not show that "he was 'adversely affected' [CPL 470.15(1)] by a ruling in his favor" that purportedly permitted his attorney to discriminate based on

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[1] The legality of defendant's adjudication and sentencing for his 1997 conviction is pending before this Court and scheduled for argument in the October 2018 Term (*People v Benjamin*, Calendar No. 2018-505). In addition, the appeal from another of his subsequent convictions is pending before us on similar issues, having to do with his adjudication for his 1991 conviction as a second violent felony offender, and is also scheduled for the October 2018 Term (*People v Gould*, Calendar No. 2017-1042).

gender during jury selection], *lv denied* 99 NY2d 558 [2002]; *People v Flores*, 167 AD2d 160, 160 [1st Dept 1990] [finding that the defendant's illegal sentence, a minimum sentence that was too low for a second violent felony offender, did not have to be vacated since defendant was "the beneficiary of an error, and no prejudice ensue[d] to him"], *lv denied* 77 NY2d 906 [1991]). We note that other precedent is in accord (*see e.g. People v McKinney*, 162 AD3d 1073, 1074 [2d Dept 2018] [citing *People v Witherspoon*, 100 AD3d 809, 809-810 [2d Dept 2012], *lv denied* 20 NY3d 1105 [2013] [defendant, notwithstanding having been illegally sentenced as a second felony offender rather than a second violent felony offender, was not entitled to vacatur of his sentence because "he was not adversely affected by any illegality in the sentence"]; *People v Chapman*, 229 AD2d 789 [3d Dept 1996] [refusal to consider court's improper questioning of jurors not addressed for failure of defendant to allege prejudice, citing CPL 470.15]; *compare People v Estremera*, 30 NY3d 268, 273 [2017] [defendant adversely affected by violation of his right under CPL 380.40 to be present for CPL 70.85 resentencing]).

Although this Court's previous decision in *People v Gould* (131 AD3d 874 [1st Dept 2015]) concerns defendant (under the name

of Gould), it does not help him here. In *Gould*, the People conceded the necessity of defendant's resentencing (*see* 131 AD3d at 874), a circumstance not present here. Moreover, in *Gould*, this Court had no occasion to consider the effect of the CPL 470.15(1) jurisdictional bar on defendant's appeal because the issue was not raised on appeal.

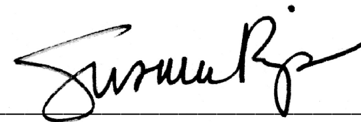
As we have no jurisdiction to reach the merits of defendant's claim, his argument as to the illegality of his sentence in unavailing (*cf. People v Scarborough*, 66 NY2d 673 [1985], *revg on dissenting mem of Boomer, J.*, 105 AD2d 1107, 1107-1109 [4th Dept 1984]; *People v Heisler*, 150 AD3d 612, 614 [1st Dept 2017], *lv denied* 30 NY3d 950 [2017]; *People v Gould*, 131 AD3d at 874 [all holding that recidivist sentencing is mandatory]).

For the same reason, we need not reach the issue of whether the motion court providently exercised its discretion in denying

defendant's motion (his second) on CPL 440.20(3) grounds (*see People v Thomas*, 153 AD3d 860 [2d Dept 2017], *lv granted* 30 NY3d 1064 [2017]).

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

ENTERED: SEPTEMBER 6, 2018



CLERK

Manzanet-Daniels, J.P., Tom, Andrias, Kapnick, Singh, JJ.

6793 Gary Gordon, et al., Index 155715/12
Plaintiffs-Appellants,

-against-

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

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

Fabiani Cohen & Hall, LLP, New York (Allison A. Snyder of counsel), for respondents.

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Order, Supreme Court, New York County (Gerald Lebovits, J.), entered on or about April 11, 2016, which, insofar as appealed from as limited by the briefs, granted the motion of defendants City of New York (City) and Long Island Railroad (LIRR) for summary judgment dismissing the complaint as against them, and denied plaintiffs' motion for partial summary judgment on the issue of liability on the Labor Law § 240(1) claim, unanimously modified, on the law, to the extent of granting plaintiffs' motion as against defendant Metropolitan Transportation Authority (MTA), and otherwise affirmed, without costs.

Plaintiff Gary Gordon was injured when he fell from a ladder while working on a construction project designed to bring LIRR service to Grand Central Terminal (GCT). MTA had contracted with

plaintiff's employer for the performance of the work including the excavation of rock under GCT. On the day of the accident, plaintiff was instructed to re-position a stadium light that was approximately 15-to-20 feet above the tunnel floor. He and a coworker retrieved a ladder because no manlifts were available and placed the ladder on the tunnel floor, which was covered in muddy water and debris. When plaintiff ascended the ladder and attempted to move the light, the ladder slipped out from under him and fell to the tunnel floor.

The motion court properly found that defendants LIRR and the City satisfied their prima facie burden of establishing that they were not subject to liability as "owners" within the purview of Labor Law §§ 240(1) and 241(6). The affidavits submitted by the City and LIRR on their motion established that neither was the owner, lessee, licensee or occupant of the tunnel where the accident occurred, that neither was a party to any contract for plaintiff's work on the subject premises, and that neither performed, supervised or controlled any construction work at the subject premises. The affidavit testimony was based on each affiant's "work and job duties" at their respective employers which rendered them "knowledg[able] of and [] fully familiar with the business operations" of the City and LIRR. In response,

plaintiffs failed to proffer any competent evidence that disputed the allegations in defendants' affidavits, and thus, did not raise a triable issue of fact. Moreover, plaintiff's sole theory of the City's ownership asserted on appeal, that it owned the land on which the project was located, was not raised before the motion court and is not properly before this Court (*see Diarrassouba v Consolidated Edison Co. of N.Y. Inc.*, 123 AD3d 525 [1st Dept 2014]).

However, plaintiffs were entitled to summary judgment on the issue of liability on the § 240(1) claim as against the MTA. The record establishes that the ladder that was provided to plaintiff failed to provide proper protection for him to perform the elevation-related task of re-positioning the stadium light, and MTA's opposition failed to raise a triable issue of fact (*see Klein v City of New York*, 89 NY2d 833, 835 [1996]; *Plywacz v Broad St. LLC,* 159 AD3d 543 [1st Dept 2018]). Contrary to the contention that an issue of fact exists as to whether a platform was available to secure the ladder to, there is nothing in the record to support that. In fact the engineer merely testified that there "may or may not have been" platforms available to tie the ladder to.

We have considered the remaining arguments and find them unavailing.

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

ENTERED: SEPTEMBER 6, 2018

CLERK

Renwick, J.P., Richter, Webber, Kern, Moulton, JJ.

6835N Maria Blake, Index 30084/15
Plaintiff-Respondent,

-against-

Gregory Blake,
Defendant-Appellant.

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Hasapidis Law Offices, Scarsdale (Annette G. Hasapidis of counsel), for appellant.

Felder, Felder and Nottes, P.C., New York (Daniel H. Stock of counsel), for respondent.

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Order, Supreme Court, New York County (Frank P. Nervo, J.), entered March 9, 2017, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for pendente lite relief to the extent of ordering defendant to pay plaintiff, pendente lite, monthly spousal maintenance and basic child support retroactive to November 16, 2015, 78% of all school-related, child care, and extracurricular activity expenses for the parties' children, 78% of the carrying expenses on the marital residence, 78% of expenses related to the use of plaintiff's vehicle, and interim counsel and expert fees, and denied, sub silentio, defendant's cross motion to transfer the matter to New Jersey, unanimously modified, on the law, to delete the awards of carrying expenses on the marital residence and

expenses related to the use of plaintiff's vehicle, and otherwise affirmed, without costs.

Defendant failed to establish that modification of the pendente lite maintenance and basic child support awards before trial is warranted (*see e.g. Wittich v Wittich*, 210 AD2d 138, 140 [1st Dept 1994]). He argues that the court erred in attributing income to him of $833,605, and claims that that number does not represent his actual take-home pay, whereas the $226,340 cash distribution from his solely-owned investment banking firm, Brocair Partners, LLC, does. The court was not required to rely upon defendant's own account of his finances, and, in any event, the remedy for a dispute as to the proper amount of defendant's income is a prompt trial (*id.*).

The court acted within its discretion in departing from Child Support Standards Act guidelines for purposes of calculating defendant's pendente lite child support obligations (*see Asteinza v Asteinza*, 173 AD2d 515 [2d Dept 1991]) and in considering the parties' resources and the family's pre-commencement standard of living (*see Lapkin v Lapkin*, 208 AD2d 474 [1st Dept 1994]). However, the court erred by, without explanation, ordering defendant to pay carrying costs on the marital residence and vehicle expenses, in addition to the

temporary maintenance and child support awarded, since these amounts are encompassed in the maintenance and child support awards (*see Francis v Francis*, 111 AD3d 454 [1st Dept 2013]).

No basis exists to grant defendant’s motion to transfer this matter to New Jersey. Under CPLR 327, the forum non conveniens statute, a court may not transfer a matter to another state, but may only stay or dismiss the action, relief defendant did not seek. In any event, we implicitly rejected defendant’s arguments in a previous appeal (156 AD3d 523 [2017]), and see no reason, at this stage of the litigation, to stay or dismiss the action to allow the financial matters to be litigated in New Jersey.

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

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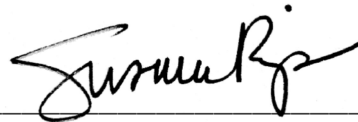

CLERK

Richter, J.P., Webber, Kahn, Kern, Oing, JJ.

6854-
6855 Tamara Behan, Index 303383/10
Plaintiff-Respondent,

-against-

Andrew N. Kornstein,
Defendant-Appellant.

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Alexander Potruch, LLC, Garden City (Alexander Potruch of counsel), for appellant.

Chemtob Moss Forman & Beyda, LLP, New York (Joshua Forman of counsel), for respondent.

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Judgment, Supreme Court, New York County (Marilyn T. Sugarman, Special Referee), entered July 24, 2017, which, to the extent appealed from as limited by the briefs, granted plaintiff wife exclusive use and occupancy of the marital residence through June 2020 and directed defendant husband to continue paying the mortgage, maintenance, and assessments thereon, awarded plaintiff 15% of the fair market value of defendant's medical practice at the date of commencement of the action, distributed equally the value of the parties' house in Connecticut after awarding defendant a separate property credit, distributed equally the parties' jointly titled bank accounts, distributed 25% of defendant's individually titled brokerage accounts to plaintiff,

distributed equally the marital portion of the parties' retirement accounts, distributed equally the value of the parties' art, jewelry, and certain furnishings purchased during the marriage, directed defendant to maintain his life insurance policy in the amount of $2,000,000 and to name plaintiff as irrevocable beneficiary, and awarded plaintiff counsel fees, unanimously modified, on the law and the facts, to direct that plaintiff's exclusive use and occupancy of the marital residence, and defendant's obligation to pay the mortgage, maintenance, and assessments thereon, shall continue only through December 2018, to reduce the amount of life insurance that defendant is required to maintain to $750,000, to distribute plaintiff's retirement accounts as provided herein, to vacate the award to plaintiff of 15% of the value of defendant's medical practice, and otherwise affirmed, without costs. The Clerk is directed to enter an amended judgment accordingly. Order, same court (Deborah A. Kaplan, J.), entered April 21, 2017, which, to the extent appealed from as limited by the briefs, found defendant in civil contempt, unanimously affirmed, without costs.

Initially, we reject plaintiff's argument that the appeal should be dismissed for defendant's failure to comply with CPLR 5528. We find the appendix that defendant submitted is

sufficient to permit full consideration of the issues raised on appeal. Moreover, while plaintiff is correct that defendant's brief contains factual assertions without supporting references to the appendix (*see* CPLR 5528[a][3], [b]; 22 NYCRR 600.10[d][2][iii]), we do not find this a ground for dismissal.

The court providently exercised its broad discretion in granting plaintiff exclusive use and occupancy of the former marital residence in view of the fact that plaintiff and the parties' child had been residing in the apartment since the commencement of the action.

The court properly determined, based on the parties' financial circumstances and pre-divorce standard of living, that plaintiff was entitled to maintenance in the form of defendant's payment of the mortgage, maintenance, and assessments on the apartment (*see Alexander v Alexander*, 116 AD3d 472, 473 [1st Dept 2014], *lv denied* 26 NY3d 915 [2016]). Contrary to defendant's contention, the grant of this specific relief, although plaintiff only requested it for the first time in her posttrial brief, does not violate his due process rights. This relief is warranted by the facts, namely, that plaintiff and the child had been living in the apartment, and is similar to the relief plaintiff sought before trial, which was to buy out defendant's interest in the

apartment (*see Clair v Fitzgerald*, 63 AD3d 979 [2d Dept 2009]). Further, Domestic Relations Law § 236(B)(5) empowers the court to determine the use and occupancy of the marital residence "without regard to the form of ownership of such property" (*id.* subd [f]).

We modify the judgment, however, to direct that plaintiff's exclusive use and occupancy of the marital residence, and defendant's obligation to pay the mortgage, maintenance and assessments thereon, shall continue only through December 2018, and not through June 2020, as the court directed. "The purpose of maintenance is to give the recipient spouse a sufficient period to become self-supporting" (*Naimollah v De Ugarte*, 18 AD3d 268, 271 [1st Dept 2005] [internal quotation marks omitted]). The court found that plaintiff, a now 49-year-old college-educated professional, had an imputed annual income of $80,000 based on her work history, which included a position where she earned approximately $175,000 annually. Further, plaintiff was awarded a substantial sum in equitable distribution, and has been receiving maintenance, both temporary and pursuant to the judgment, for approximately eight years, almost as long as the parties' marriage (*see Spathis v Dulimof-Spathis*, 103 AD3d 599, 601 [1st Dept 2013], *lv denied* 22 NY3d 913 [2013], *cert denied* _ US _, 135 S Ct 140 [2014] [court providently exercised its

discretion in denying maintenance where the defendant, who was only 44 years old and capable of becoming gainfully employed, was awarded pendente lite maintenance for longer than the length of the parties' short marriage]).

The court properly distributed the parties' marital assets equally, including joint bank accounts, the marital value of the parties' house in Connecticut, and art, jewelry, and certain furnishings purchased during the marriage. Defendant's contention that plaintiff is entitled to no more than 10% of these marital assets because she made little financial contribution to the marriage has no basis in law or fact (*see Hartog v Hartog*, 85 NY2d 36, 47 [1995] [equitable distribution's purpose is to treat marriage as an "economic partnership"]). Nothing in the record supports defendant's contention that plaintiff is not entitled to 50% of the parties' marital assets.

Similarly, the court properly awarded plaintiff 25% of the individually titled brokerage accounts that defendant had held before the marriage but subsequently commingled with marital funds (*see Popowich v Korman*, 73 AD3d 515, 519-520 [1st Dept 2010]).

The court properly required defendant to maintain a life insurance policy naming plaintiff as the irrevocable beneficiary

(*see* DRL § 236[B][8][a]; *Cohen v Cohen*, 120 AD3d 1060, 1066 [1st Dept 2014], *lv denied* 24 NY3d 909 [2014]). However, the amount of insurance ordered by the court far exceeds that necessary to secure defendant's child support obligations (*see Hughes v Hughes*, 79 AD3d 473, 476-477 [1st Dept 2010], *lv denied* 22 NY3d 948 [2013]). Thus, the amount of insurance that defendant is required to maintain should be reduced from $2 million to $750,000. Defendant is permitted to decrease the amount of coverage each year commensurate with the amount of child support paid.

It is undisputed that defendant started his medical practice in 1996, approximately five years before the marriage. Any appreciation in its value attributable in part to plaintiff's contributions or indirect efforts has become marital property for the purposes of equitable distribution (*see Price v Price*, 69 NY2d 8, 17-18 [1986]). However, plaintiff failed to meet her burden to demonstrate the baseline value of the practice and the extent of its appreciation (*see Kurtz v Kurtz*, 1 AD3d 214 [1st Dept 2003]). Accordingly, we vacate the award to plaintiff of 15% of the value of the practice.

Although the court properly ordered that the marital portion of the parties' retirement accounts be distributed equally, it

failed to quantify the marital portion of plaintiff's accounts. Plaintiff's net worth statement lists two IRAs, and their value shortly after the date of commencement, but fails to indicate the date of acquisition for these accounts. On appeal, defendant maintains that the accounts are fully marital property, and in response, plaintiff does not argue otherwise. Rather, she incorrectly argues that the issue is moot. Because plaintiff has failed to meet her burden of establishing that any part of these IRAs is her separate property, the entirety of the accounts is marital and should be divided equally (*see Pedreira v Pedreira*, 17 AD3d 213, 214 [1st Dept 2005], *lv denied* 5 NY3d 716 [2005]). We reject defendant's contention that his defined benefit plan is separate property. Defendant's net worth statement lists a January 2003 date of acquisition for the account, which is after the parties were married. Thus, this account is entirely marital property.

The court properly awarded plaintiff counsel and expert fees, in addition to a previous interim counsel fee award, which amounts to approximately 70% of the legal fees she accrued through the end of the financial trial. The court took into account defendant's role in driving up legal fees, which included changing attorneys nine times, failing to comply with court

orders, and needlessly extending the trial with his belligerent behavior. Although the total fees incurred by plaintiff are high, defendant acknowledges that he had significant fees of his own. Under the circumstances, we see no reason to disturb the counsel fee award to plaintiff (*see Brantly v Brantly*, 89 AD3d 881, 883 [2d Dept 2011]).

Defendant is correct that his appeal from the order finding him in civil contempt for his repeated failure to comply with the pendente lite order is not moot merely because he has purged his contempt (*see Matter of April G. v Duane M.*, 105 AD3d 491 [1st Dept 2013]). On the merits, contrary to his argument, we find that defendant was not entitled to a hearing on his inability to pay (*see Rocco v Rocco*, 90 AD3d 886, 886 [2d Dept 2011]). He not only conceded that he was in violation of the pendente lite order, but he also failed to submit financial documentation to substantiate his claim of financial distress.

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

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

ENTERED: SEPTEMBER 6, 2018

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, P.J.
Peter Tom
Jeffrey K. Oing
Peter H. Moulton, JJ.

6223
Index 158948/16

____x

Christopher Morse,
Plaintiff-Respondent,

-against-

Fidessa Corporation, et al.,
Defendants-Appellants.
____x

Defendants appeal from the order of the Supreme Court, New York County (Arlene P. Bluth, J.), entered August 8, 2017, which, insofar as appealed from as limited by the briefs, denied their motion to dismiss the complaint.

Fox Rothschild LLP, New York (Daniel A. Schnapp and Gregg M. Kligman of counsel), for appellants.

Mark L. Lubelsky & Associates, New York (Mark L. Lubelsky and Josef K. Mensah of counsel), for respondent.

ACOSTA, P.J.

At issue in this matter of first impression is whether the New York City Human Rights Law's (HLR) prohibition against discrimination based on "marital status" encompasses a prohibition against discrimination on the basis of the identity of a person's spouse. In light of the uniquely broad and remedial purposes of the City HRL, we hold that "marital status" must be given a broader meaning than simply married or not married, and that it must encompasses other factors that may be used to deem the relationship "disqualifying," i.e., unacceptable. Accordingly, the complaint before us, which alleges that defendant Fidessa Corporation terminated plaintiff's employment after an employee who Fidessa believed was married to plaintiff left its employ states a cause of action for discrimination under the City HRL

I. Facts

Fidessa Corporation is a financial services company. Plaintiff, a former Fidessa employee, asserted a violation of the New York City Human Rights Law (Administrative Code of City of NY § 8-107 *et seq.*), by alleging that he was suspended and then fired by Fidessa because a co-employee, Lael Wakefield, whom Fidessa perceived to be plaintiff's spouse and with whom

plaintiff had two children, had left Fidessa to work for another financial services firm. Plaintiff also alleged that he was told that he was fired because of this perceived marital relationship, and that, if he divorced Wakefield, he would be reconsidered for re-employment.[1] Plaintiff identified a comparator: an unmarried couple where both partners initially worked for Fidessa, and one left to work for a different financial services firm, but the partner who remained at Fidessa was neither suspended nor fired.

Defendants moved to dismiss the complaint on the ground that City HRL's protection did not extend to employment decisions based on the identity of the employee's partner or spouse, but only on the basis of whether he or she was married or not. The motion court denied the motion. We now affirm.

II. Discrimination on the basis of marital status

The City HRL states, in relevant part:

> "It shall be an unlawful discriminatory practice: (a) For an employer or an employee or agent thereof, because of the actual or perceived . . . marital status . . .
> (2) To refuse to hire or employ or to bar or to discharge from employment such person or
> (3) To discriminate against such person in compensation or

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[1] Based on the allegations, it appears that plaintiff and Wakefield *were* divorced but continued to live together and to be perceived by Fidessa as being married to one another.

in terms, conditions or privileges of employment" (Administrative Code § 8-107[1]).

From the complaint it appears that Fidessa treated plaintiff and his partner differently from the aforementioned similarly situated couple based on its perception that they were married to one another and the members of the other couple were not. Thus, the question is whether discrimination based on "marital status" encompasses discrimination based on marital status in relation to a person relevant to Fidessa. In other words, is an employer prohibited from discharging an employee because of the employee's marriage to a particular person.

For the purposes of this analysis, the fact that defendant was not alleged to be "biased against" married couples in all circumstances is of no moment: the factor in terminating plaintiff's employment was plaintiff's marital status in relation to the employee who left the company. Thus, plaintiff's termination was based on his marital status.

A.

Before the passage of the Local Civil Rights Restoration Act of 2005 (Local Law No. 85) (the Restoration Act), the Court of Appeals had resolved the above-stated question -- without recourse to liberal construction analysis -- by holding that "a

distinction must be made between the complainant's marital status as such, and the existence of the complainant's disqualifying relationship -- or absence thereof -- with another person" (*see Levin v Yeshiva Univ.*, 96 NY2d 484, 490 [2001] [a housing discrimination case]). In *Levin*, the "disqualifying relationship" was one that was not a "legally recognized, family relationship []" (*id.* at 490-91). Thus, if a housing provider refused to rent to an unmarried person, *regardless of whether the unmarried person was living with another person*, its conduct would be actionable. However, if the housing provider treated an unmarried *couple* disadvantageously, that would not be actionable because the disadvantageous treatment would be based on the couple's marital status but on the disqualifying relationship (not being a "legally recognized, family relationship []").

Levin's holding was derived from *Matter of Manhattan Pizza Hut v New York State Human Rights Appeal Bd.* (51 NY2d 506 [1980]), an employment discrimination case brought under the New York State Human Rights Law, not the City HRL. *Manhattan Pizza Hut* ruled that the "plain and ordinary meaning of 'marital status' is the social condition enjoyed by an individual by reason of his or her having participated or failed to participate in a marriage" (51 NY2d at 511). That is, "when one is queried

about one's 'marital status', the usual and complete answer would be expected to be a choice among 'married', 'single', etc., but would not be expected to include an identification of one's present or former spouse and certainly not the spouse's occupation" (*id.* at 511-512).

The Restoration Act changed the judicial landscape with respect to the City HRL. A more recent enactment, Local Law No. 35 (Local Law 35) (2016) of City of New York, went even further. That law amended Administrative Code § 8-130 ("Construction") "to provide additional guidance for the development of an independent body of jurisprudence for the New York city human rights law that is maximally protective of civil rights in all circumstances" (Local Law 35 § 1).

In the March 8, 2016 report of the Committee on Civil Rights that accompanied Local Law 35 (the Committee Report[2]), the Council set forth its concerns:

> "Over at least the last 25 years, the Council has sought to protect the HRL from being narrowly construed by courts, particularly through major legislation adopted in 1991 and 2005. These actions have expressed a very specific vision: a

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[2] The Committee Report is available online at http://legistar.council.nyc.gov/View.ashx?M=F&ID=4293011&GUID=39C1DD6F-B6FD-41C1-9711-60A3E6F9F2E6.

> Human Rights Law designed as a law enforcement tool *with no tolerance for discrimination in public life*. The 2005 Restoration Act provided that the HRL is to be interpreted liberally and independently of similar federal and state provisions to fulfill the 'uniquely broad and remedial' purposes of the law. The Act amended the HRL's liberal construction provision, Administrative Code § 8-130, to accomplish this goal. *Some courts have recognized and followed this vision, but others have not, and many areas of the law remain as they were before the 2005 Restoration Act because they have not been scrutinized to determine whether they are consistent with the uniquely broad requirements of the HRL"* (at 8 [emphasis added]).

The amendment included ratification of three decisions under the City HRL: *Albunio v City of New York* (16 NY3d 472 [2011]); *Bennett v Health Mgt. Sys., Inc.* (92 AD3d 29 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]); and *Williams v New York City Hous. Auth.* (61 AD3d [1st Dept 2009], *lv denied* 13 NY3d 702 [2009]) (hereinafter the Committee Report cases) (Administrative Code § 8-130[c]). Each of the cases was described as having "correctly understood and analyzed the liberal construction requirement" of the City HRL, and as having "developed legal doctrines accordingly that reflect the broad and remedial purposes" of the HRL (*id.*) To ignore or deviate from any of the Committee Report cases would be to flout the Council's intent as to the HRL.

The Committee Report elaborated thus:

> "These cases do not just establish specific ways in which the HRL differs from its federal and state counterparts; they also illustrate a correct approach to liberal construction analysis and then develop legal doctrine accordingly. It is therefore important for courts to examine the reasoning of the cases—including their extensive discussions of why the U.S. Supreme Court's analysis can be inadequate to serve the purposes of the HRL—and then for courts to employ that kind of reasoning when tackling other interpretative problems that arise under the HRL. Finally, Int. No. 814-A [an earlier version of the bill] would remind courts that legal doctrine might need to be revised to comport with the requirements of § 8-130 of the Administrative Code" (Committee Report at 12-13).

Among other examples of the correct approach to enhanced liberal construction analysis under the Restoration Act, the Council quoted the following language from *Williams*:

> "[T]he Restoration Act notified courts that (a) they had to be aware that some provisions of the City HRL were textually distinct from its state and federal counterparts, (b) *all* provisions of the City HRL required independent construction to accomplish the law's uniquely broad purposes, and (c) cases that had failed to respect these differences were being legislatively overruled" (Committee Report at 10-11; see *Williams*, 61 AD2d at 67-68 [footnote omitted]).

Before the Restoration Act was enacted, there were few cases that distinguished between the City HRL and its state or federal counterpart, and the City HRL was not viewed as having "uniquely" broad purposes. Eleven years later, the Council was insisting that the "legislative overrule" be given effect.

Critically, the Council quoted *Williams* approvingly with respect to the purpose of the construction provision

(Administrative Code § 8-130):

> "The [*Williams*] court wrote that the liberal construction provision was envisioned as 'obviating the need for wholesale textual revision of the myriad specific substantive provisions of the law.' As the court further explained,
>
> "'While the specific *topical* provisions changed by the Restoration Act give unmistakable *illustrations* of the Council's focus on broadening coverage, section 8-130's specific *construction* provision required a "process of reflection and reconsideration" that was intended to allow independent development of the local law "in all its dimensions."'
>
> "Thus, 'areas of law that have been settled by virtue of interpretations of federal or state law "will now be reopened for argument and analysis . . . . As such, advocates will be able to argue afresh (or for the first time) a wide range of issues under the City's Human Rights Law . . . ."' The *Williams* court found that the HRL's text and legislative history represent a legislative desire that the HRL 'meld the broadest vision of social justice with the strongest law enforcement deterrent'" (Committee Report at 11; *see Williams*, 61 AD3d at 74, 77 n 24, and 68).

Thus, courts must to play a highly active role in the development of the City HRL by interpreting all cases in a manner consistent with the goal of providing unparalleled strength in deterring and remedying discrimination. As the Court of Appeals ruled in *Albunio* (16 NY3d 472), one of the Committee Report cases, all the provisions of the City HRL must be construed "broadly in favor of discrimination plaintiffs, to the extent

that such a construction is reasonably possible" (16 NY3d at 477-478).

B.

Our task in construing the term "marital status" is guided by the above-stated history. *Levin v Yeshiva Univ.* (96 NY2d 484 [2001]) relied in part on an interpretation of the New York State Human Rights Law and failed to engage in liberal construction analysis, let alone the enhanced liberal construction analysis intended by the comprehensive 1991 amendments to the City HRL (Local Law No. 39) (which were only brought to life in 2005, with the passage of the Restoration Act). Thus, *Levin's* interpretation of "marital status" cannot be sustained.

Indeed, *Levin* was cited in connection with the passage of the Restoration Act as illustrative of the cases that had "'either failed to interpret the City Human Rights Law to fulfill its uniquely broad purposes, ignore [*sic*] the text of specific provisions of the law, or both'" (*Williams*, 61 AD3d at 67 [quoting from transcript of Council debate]). With the passage of the Restoration Act, *Levin* "'and others like [it] will no longer hinder the vindication of our civil rights'" (*id.*, quoting from debate transcript).

Plainly, the Council rejected the "plain and ordinary"

meaning of "marital status" as set forth in *Manhattan Pizza Hut* (51 NY2d at 511-512) and consequently the distinction between marital status as such and marital status as a "disqualifying relationship."

"Marital status" may refer to whether an individual is married or not married. It may also refer to whether two individuals are married to each other or not married to each other. In instant case, it refers to the latter: the marital status of two people in relation to each other.

Enhanced liberal construction analysis is not only required to fulfill the intent of the City HRL but also aids in determining the "plain meaning" of the statutory language.

Encompassing the marital status of two people vis-a-vis one another within the meaning of the term "marital status" is, at minimum, a reasonable construction (*see e.g. Smith v Fair Empl. & Hous. Commn.*, 12 Cal 4th 1143, 1155, 913 P2d 909, 915 [Cal 1996] *cert denied* 521 US 1129 [1977]] [According to "(t)he usual and ordinary meaning of the words 'marital status,' as applied to two prospective tenants, [the rule] is that a landlord may not ask them whether they are married or refuse to rent to them because they are, or are not"] [footnote omitted]). As the most plaintiff-friendly reasonable interpretation, it is the one that

must be adopted (*Albunio*, 16 NY3d at 477-478).

It is also the interpretation that accords with the purposes of the City HRL and the best means of achieving those purposes. Looking to *Williams* for guidance, as required by Local Law 35, we find that *Williams* concluded that it was not appropriate to require sexual harassment to be "severe or pervasive" before it could be actionable under the City HRL, in contrast to federal and state human rights laws, because that would mean that discrimination was "allowed to play *some significant role* in the workplace" (61 AD3d at 76), and that state of affairs would run counter to the City HRL's mandate that discrimination be allowed to play *no* role.

Applying that reasoning to discrimination based on marital status, a narrow interpretation of "marital status" would allow a wide range of discriminatory conduct – including conduct arising out of assumptions based on stereotypes – to continue unabated. Only a broader interpretation of marital status will further the "play no role" standard.

Williams also reasoned that a broader liability standard (i.e., not excusing harassment that was less than "severe or pervasive") would maximize the deterrent effect of the law, a required consideration (*id.*). Indeed, this consideration, was

reemphasized by Local Law 35, which provided that exemptions from and exceptions to the law shall be construed narrowly, did so "in order to maximize deterrence of discriminatory conduct" (Administrative Code § 8-130[b]). Similarly, interpreting "marital status" to include the marital status of two people in relation to one another will maximize deterrence of discrimination based on marital status.

It is important to think in terms of the City HRL's ultimate object. The goal of discrimination law is to move decision-makers away from using protected class status as a proxy for rules unrelated to such status by which determinations that could properly be made. For example, an employer can, within limits not relevant here, prohibit business-related communications between any of its employees and any employees of another employer in the same field. If marital status ever a was legitimate proxy for a rule for protecting company secrets,[3] it is not an acceptable proxy now given today's social reality, as reflected in a variety of intimate relationships, including those of unmarried couples. The broader interpretation of marital

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[3] The record at this stage does not reveal the nature of Fidessa's concern about marital status.

status that we adopt today, will encourage covered entities to think seriously about their *substantive* concerns and tailor their policies to those legitimate concerns and not implicate protected class status.

Finally, the testimony of the Anti-Discrimination Center of Metro New York, Inc. was described by a council member at the time of the consideration and passage of the Restoration Act as "an excellent guide to the intent and consequences" of the Restoration Act (*Williams*, 61 AD3d at 68 n 7 [quotation marks omitted]).[4] This testimony provides important confirmation that enhanced liberal interpretation was contemplated to yield the result that a *couple's* marital status in relation to one another should not be permitted to be a basis for action by a covered entity. The testimony expressly cited *Levin*, describing it as "the case that held that discrimination against unmarried couples somehow does not constitute intentional discrimination on the basis of marital status" (April 14, 2014 testimony of Anti-Discrimination Center at 1-2, available online at

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[4] The Center's executive director, one of the principal authors of the Restoration Act (*id.* at 68 n 6), was the author of *A Return to Eyes on the Prize: Litigating Under the Restored New York City Human Rights Law*, 33 Fordham Urb LJ 255 (2006).

http://www.antibiaslaw.com/sites/default/files/all/CenterTestimony041405.pdf.) as a reason for amending the City HRL to insure its independent construction with a view toward how best to further the "especially broad purposes" of the law.

C.

Defendants' reliance on the decision of the New York City Commission on Human Rights in *Matter of Cerullo v Fricione*, dated April 15, 2011 (OATH Index Nos. 1865/10 and 1866/10), adopting a pretrial decision dismissing marital status claims (the ALJ decision), is misplaced for a variety of reasons.

As a preliminary matter, the ALJ decision is not entitled to deference by courts. "[W]here the question is one of pure statutory reading and analysis, . . . there is little basis to rely on any special competence or expertise of the administrative agency," and "courts are free to ascertain the proper interpretation from the statutory language and legislative intent" (*Matter of Smith v Donovan*, 61 AD3d 505, 508-509 [1st Dept 2009] [internal quotation marks omitted], *lv denied* 13 MY2d 712 [2009]; *see also Kurcsics v Merchants Mut. Ins. Co.,* 49 NY2d 451, 459 [1980]).

The ALJ's decision proceeds on the assumptions the employment context (as opposed to the housing context) was beyond

the Council's contemplation and that the decision to add domestic partnership status as a protected class was specific to housing-based concerns arising from the *Levin* decision (ALJ decision at 6-7). In fact, "partnership status" was added to all the principal contexts of discrimination, including employment discrimination (*see e.g.* Administrative Code § 8-107[1][a]). Moreover, the Council cannot be assumed to be unaware that *Levin* cited a definition of marital status that was first articulated in an employment discrimination context (*Levin*, 96 NY2d at 490).

To the extent that *Cerullo* is premised on the fact that an early version of the Restoration Act had made specific provision for the expansion of marital status coverage but not in the employment context[5] (ALJ decision at 6), it proceeds on faulty assumptions. That version had an anti-nepotism provision in the employment section of the law, further undercutting the argument that employment was beyond the Council's contemplation (*see* section 3 of the earlier version, proposing to add such a provision). The proposed anti-nepotism provision was mistakenly

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[5] That version, Intro "22" as opposed to Intro "22-A" may be found online at http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=441304&GUID=79DC9B4A-845F-4BDA-AA6C-D6F63F0C8A0B&Options=ID%7cText%7c&Search=0022 (the earlier version is accessed in the "version" dropdown at "*" not "A."

denominated as paragraph (g) of Administrative Code § 8-107. The denomination (g), however, only makes sense, given the structure of the City HRL at that time, as a proposed subparagraph under Administrative Code § 8-107(1), which addresses employment.

What *Cerullo* fails to note is that the Council explicitly chose another path for changing the definition of marital status. That is, it accepted the proposition that "[i]n respect to marital status, the addition of 'partnership status' is only an interim measure; the broader question will have to be revisited after the courts have re-examined their previous marital status rulings in light of each and all of the requirements of revised Section 8-130" (Anti-Discrimination Center testimony at 7). The testimony cited a 1977 New York City Human Rights Commission case that found that the City HRL was intended to deal with discrimination against unmarried couples (*id.* at n 11, citing *Mandel v Reinhart*, 1977 WL 52818, *7 (Comm on Human Rights, February 28, 1977]). Confirmation that the Council left the interpretation of "marital status" to the courts is found in the report of the Committee on General Welfare, which stated, "Pending judicial reconsideration of the proper scope of protection from discrimination based on marital status, this provision [partnership status] will ensure that" domestic

partners are protected "from all forms of discrimination addressed by the human rights law" (Report of Comm on Gen Welfare, 2005, NY City Legis Ann at 536).

The reasons the Council did not add a marital status provision in 2005 are open to speculation. Perhaps some Council members were dissatisfied not with the proposed expansion but with the safe-harbor provision that went along with it (the proposed expansion for anti-nepotism policies that were not a "subterfuge to evade the purposes of this chapter" [early version of Restoration Act, *supra* at § 3). Even in 1980, the dissent in *Manhattan Pizza Hut* expressed concerns about the impact of anti-nepotism policies (51 NY2d at 515-517); social realities -- including the increasing presence in society of unmarried couples -- had already changed significantly in the 25 years between that decision and the passage of the Restoration Act in 2005.

What there cannot be speculation about is these facts: (a) the Council, in leaving the parameters of "marital status" to the courts, could have narrowed the courts' mandate in one or more ways but did not; (b) the overall mandate to construe the City HRL to achieve its uniquely broad purposes was put in place for *all* issues, as reaffirmed by Local Law 35; (c) the liberal construction provision was envisioned as "obviating the need for

wholesale textual revision of the myriad specific substantive provisions of the law" (Williams, 61 AD3d at 74); (d) the narrow definition in *Levin* (96 NY@D at 490) of marital status for City HRL purposes was legislatively overruled; (e) providing City HRL protection for couples on the basis of whether or not they are married to one another involves an entirely plausible interpretation of "marital status"; and (f) encompassing "couples' protection" within the proscription against discrimination on the basis of marital status is the best way to achieve broad coverage of the City Law in accordance with the stated goal of the Council to "meld the broadest vision of social justice with the strongest law enforcement deterrent" (Committee Report at 11; see *Williams*, 61 AD3d at 68 [internal quotation marks omitted]).

As for exceptions to the rule of protecting couples regardless of their marital status in relation to one another, this Court recognizes that there are *legislative* arguments both for and against (depending on the exception, the context of the discrimination, and the availability of alternatives that are not based on protected class). But especially considering Local Law 35's addition of a provision insisting on narrow construction of exceptions and exemptions (Administrative Code § 8-130(b), we

leave it to the City Council to enact such exceptions or exemptions, if any, as it deems necessary.

Accordingly, the order of the Supreme Court, New York County (Arlene P. Bluth, J.), entered August 8, 2017, which, insofar as appealed from as limited by the briefs, denied defendants' motion to dismiss the complaint, should be affirmed, with costs.

Order Supreme Court, New York County (Arlene P. Bluth, J.), entered August 8, 2017, affirmed, with costs.

Opinion by Acosta, P.J. All concur.

Acosta, P.J., Tom, Oing, Moulton, JJ.

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

ENTERED: SEPTEMBER 6, 2018

CLERK

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on September 6, 2018.

PRESENT: Hon. David Friedman, Justice Presiding,
Barbara R. Kapnick
Marcy L. Kahn
Ellen Gesmer
Cynthia S. Kern, Justices.

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In the Matter of the Application for Approval of an Instrument Concerning

Serenity R. L.,

A Child Subject of a Foster Care Placement Proceeding under Social Services Law § 358-a.

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M-3771
Docket No. L-3961/18

Administration for Children's Services,
Petitioner-Respondent,

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Dawne A. Mitchell, Esq.,
The Legal Aid Society,
Juvenile Rights Division,
Attorney for the Child-Appellant.

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Leave having been sought to appeal from an interlocutory order of the Family Court, New York County, entered on or about July 23, 2018, and a motion having been made to stay the execution of the arrest warrant issued pursuant to said July 23, 2018 order, pending hearing and determination of the aforesaid appeal,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that leave to appeal is granted. That portion of the motion seeking a stay of the arrest warrant is granted on condition that appellant perfects the appeal on or before October 1, 2018 for the December 2018 Term. Assuming the appeal is so perfected, the Clerk is directed to calendar the appeal to be heard together with *Matter of Zavion O.,* Docket No. L-2512/17.

All concur except Friedman, J., who partially dissents as follows:

Friedman, J. (partially dissenting)

Insofar as the majority grants a stay, I respectfully dissent.

ENTERED:

CLERK