SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 30, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Moskowitz, Renwick, Manzanet-Daniels, JJ.

9873 B&C Realty, Co., Index 601110/10
Plaintiff-Appellant,

-against-

159 Emmut Properties LLC, et al.,
Defendants-Respondents.

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Goldberg Weprin Finkel Goldstein LLP, New York (Matthew E. Hearle of counsel), for appellant.

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

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Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered March 16, 2012, which, insofar as appealed from, granted defendants' motion to dismiss the complaint and vacate the notice of pendency, unanimously modified, on the law, to dismiss the fourth cause of action for bad faith/breach of the implied covenant of good faith and fair dealing as against defendants 159 Emmut Properties LLC (159 Emmut) and John Young without prejudice, and otherwise affirmed, without costs.

This action arises out of a transaction in which defendant 159 Emmut agreed to sell, and plaintiff agreed to buy, premises located at 159 Bleecker Street in Manhattan. For the purpose of reviewing the motion to dismiss, we assume the truth of the

following facts taken from the complaint and from the affidavit of plaintiff's architect submitted in opposition to the motion to dismiss (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]). Plaintiff alleges that the sale was to take place in two phases. The first phase was to be an Internal Revenue Code § 1031 like-kind exchange in which plaintiff would buy a 7% fee interest in the premises; in the second phase, plaintiff would buy the remaining 93% interest.[1] According to the complaint, 159 Emmut represented that the property was a legally constructed, eight-story building, and that the eighth floor contained two legally constructed rental units.

As of December 31, 2008, plaintiff and 159 Emmut entered into a "3rd Amendment to Sale-Purchase Agreement" (the third amendment). The third amendment provided that plaintiff "shall not file a Lis Pendens against the Premises for any reason." Further, the third amendment stated that by January 6, 2009, 159 Emmut would transfer to plaintiff the undivided 7% interest in the property for a price of $2 million. The parties also agreed that if the closing on the other 93% interest did not take place by October 6, 2009, plaintiff would transfer its 7% interest back

[1] As the complaint makes clear, a third party was originally set to buy the 93% interest, but that third party later assigned his acquisition rights so that plaintiff could buy the entire fee interest. 159 Emmut and the original buyer amended their sales contract twice, but those amendments are not at issue on this appeal.

to 159 Emmut for zero consideration and would forfeit the $2 million. To that end, the parties recited that plaintiff had executed a deed to its 7% interest in the property (the Return Deed); if recorded, the Return Deed would reconvey to 159 Emmut plaintiff's 7% interest. The Return Deed was to be placed in escrow with 159 Emmut's counsel, who was authorized to deliver it to 159 Emmut immediately if the closing on the 93% did not occur.

Further, pursuant to the third amendment, plaintiff and 159 Emmut entered into a contract of sale for the 7% interest. In that contract of sale, dated January 6, 2009, the parties stated that neither party relied upon any statement not set forth in the contract, and that plaintiff agreed to take title "as is."

According to plaintiff, it discovered around January 2010 that the property exceeded the maximum permissible height of 75 feet and therefore did not comply with the applicable New York City Zoning Resolution. Plaintiff alleges that defendant Young, on behalf of defendants 159 Emmut and 530 Emmut Properties, Ltd. (530 Emmut), made numerous misrepresentations about the premises, including misrepresentations about why the building had not yet received a certificate of occupancy (C of O). In August 2010, the property received a final C of O; it listed the number of stories in the building as seven, not eight.

Plaintiff alleges that once it discovered the true facts about the property, it sought to rescind the sale and to recover the $2 million it had paid for the 7% fee interest. Plaintiff

further alleges that it unsuccessfully sought to recover the Return Deed, which defendants filed after plaintiff failed to close on its remaining 93% interest.

The motion court properly dismissed the first through third causes of action – for fraudulent inducement, fraud, and promissory estoppel, respectively – against all defendants for lack of reasonable reliance, given the "as is" clause in the January 6, 2009 contract of sale between plaintiff and 159 Emmut (*see Danaan Realty Corp. v Harris*, 5 NY2d 317, 319-323 [1959]; *see also Arfa v Zamir*, 76 AD3d 56, 59-60 [1st Dept 2010], *affd* 17 NY3d 737 [2011]). What is more, defendant 530 Emmut was not a signatory to either the third amendment or the January 6, 2009 contract of sale. Nor can it be held liable for 159 Emmut's obligations merely by virtue of its status as a member of 159 Emmut (*Matias v Mondo Props. LLC*, 43 AD3d 367, 367-368 [1st Dept 2007]).

Plaintiff's argument that defendants sheetrocked the entrance to the eighth floor, programmed the elevator to skip that floor, and installed a deceptive elevator floor designation panel that omitted the eighth floor, is unavailing. Plaintiff should have been alerted to the building's structure by, among other things, comparing the building's 15 temporary C of Os to the "as-built" plans, because the temporary C of Os all showed that the building had eight stories while the "as-built" plans

indicated that the building had only seven stories (*see Danaan*, 5 NY2d at 322; *Arfa*, 76 AD3d at 59-60).

Plaintiff cannot sustain a claim that it has been deprived of the fruits of its contract with 159 Emmut. On the contrary, the Department of Buildings has issued a final C of O and has not issued any notices of violation for the building (*see Mason v 12/12 Realty Assoc.*, 158 AD2d 334, 335 [1st Dept 1990]). However, under certain circumstances, plaintiff might still be able to state a cause of action for breach of the implied covenant of good faith and fair dealing against 159 Emmut and Young. Therefore, we modify to make the dismissal of the fourth cause of action as against defendants 159 Emmut and Young without prejudice, rather than with prejudice.

The motion court properly dismissed plaintiff's sixth cause of action alleging conversion. As it accurately noted, to the extent plaintiff based that cause of action on an alleged conversion of its 7% fee interest in the premises, the claim must fail because a party may not sustain a claim for conversion of real property (*see Benn v Benn*, 82 AD3d 548, 550 [1st Dept 2011]).

Similarly, while a party can properly assert a claim for conversion of money (*Thys v Fortis Sec. LLC*, 74 AD3d 546, 547 [1st Dept 2010]) the $2 million cannot be the subject of a conversion claim here. Even accepting the truth of the allegations in the complaint, plaintiff does not allege that

defendants wrongfully exercised dominion over those funds in derogation of plaintiff's ownership (*Thyroff v Nationwide Mut. Ins. Co.*, 8 NY3d 283, 288-289 [2007] [conversion is the unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights][internal citations omitted]). On the contrary, by alleging that it agreed to, and did, transfer the funds in return for the 7% interest in the property, plaintiff tacitly concedes that possession of the money was authorized. Plaintiff also states in the complaint that it executed the Return Deed and placed it in escrow specifically so that 159 Emmut would have the ability to file it immediately if the closing for the 93% did not take place. As plaintiff avers, this eventuality did, in fact, come to pass. Further, as plaintiff also avers, these events all took place in the course of the parties' agreement, so that 159 Emmut's possession of the funds was not "without authority" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 50 [2006]).

Thus, plaintiff does not assert, in essence, that defendants interfered with plaintiff's ownership of the $2 million (*cf. Center for Rehabilitation and Nursing at Birchwood, LLC v S & L Birchwood, LLC*, 92 AD3d 711, 712 [2d Dept 2012] [in action regarding sale of a nursing facility, plaintiff alleged that defendant failed to remit accounts payable that were accrued before closing]). Rather, the complaint alleges that defendants

took the $2 million under false pretenses, knowing all the while that the building did not conform to the proper zoning standards and thus might not receive a final C of O. If anything, plaintiff's allegations either duplicate the dismissed fraud claim, or they amount to a claim that defendants intentionally deprived it of the benefit of its bargain.

The motion court properly dismissed the seventh cause of action for economic duress. As far as we can tell from the record, there was no contract between the parties before the third amendment of December 31, 2008. Thus, before that date, defendants were not legally required to sell the 7% interest in the premises to plaintiff by January 6, 2009. Hence, plaintiff's claim that it entered into the third amendment because of defendants' threats not to sell the 7% interest by January 6 fails to state a cause of action (*see 805 Third Ave. Co. v M.W. Realty Assoc.*, 58 NY2d 447, 453 [1983]).

The court properly vacated plaintiff's notice of pendency. The third amendment states that plaintiff "shall not file a Lis Pendens against the Premises *for any reason*" (emphasis added), not "for any reason having to do with the Return Deed." "[W]hen parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms" (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004] [internal quotation marks omitted]). This rule is

especially important "in the context of real property transactions" (*id.* [internal quotation marks omitted]).

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: MAY 30, 2013

CLERK

Tom, J.P., Sweeny, Moskowitz, Renwick, Clark, JJ.

8789 The People of the State of New York, Respondent, Ind. 1443/10

-against-

Derrick Miller, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Renee A. White, J.), rendered October 19, 2010, convicting defendant, after a jury trial, of four counts of grand larceny in the fourth degree and three counts of jostling, and sentencing him, as a second felony offender, to an aggregate term of 2 to 4 years, unanimously reversed, on the law, and the indictment dismissed, with leave to the People to apply for an order permitting resubmission of the charges to another grand jury.

The People sought an indictment for grand larceny in the fourth degree (four counts) and jostling (five counts), following which they filed a certificate of affirmative grand jury action with respect to the three counts of jostling and informed the court that the grand jury had taken no action on the grand larceny counts. Without obtaining leave of court, the prosecutor presented the case to a second grand jury, which returned an indictment on the four grand larceny counts, together with a

superseding indictment on the three jostling counts. Defendant then moved to dismiss the indictment on the ground that it had been obtained by utilizing "improper procedure."

The failure to obtain court authorization to re-present the charges to a second grand jury implicates the power to prosecute (*People v Smith*, 103 AD3d 430 [1st Dept 2013]; *People v Jackson*, 212 AD2d 732 [2d Dept 1995], *affd* 87 NY2d 782 [1996]); thus, defendant was not required to alert the court to the authorization requirement of CPL 190.75(3), or otherwise object, in order to preserve the issue for appellate review. Where, as here, the prosecutor presented charges and the grand jury failed to vote to either dismiss them or indict the defendant, a situation arose "in which the court, and not the prosecutor, should have decided whether re-presentation to a second grand jury was appropriate" (*People v Credle*, 17 NY3d 556, 561-562 [2011]; *People v Wilkins*, 68 NY2d 269, 273-274 [1986]). In the absence of court authorization, dismissal of the indictment is required (17 NY3d at 562).

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

ENTERED: MAY 30, 2013

CLERK

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

9539 Whitney Group, LLC, Index 602775/08
Plaintiff-Respondent-Appellant,

-against-

Hunt-Scanlon Corporation, et al.,
Defendants,

Jaspan Schlesinger Hoffman LLP, et al.,
Defendants-Appellants-Respondents.

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Lewis Brisbois Bisgaard & Smith, LLP, New York (Mark K. Anesh, Cristina Yannucci and Paula R. Gilbert of counsel), for appellants-respondents.

Rottenberg Lipman Rich, P.C., New York (Harry W. Lipman of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered July 24, 2012, which, to the extent appealed from as limited by the briefs, denied defendants Jaspan Schlesinger Hoffman LLP, Robert Londin, and David Paseltiner's (the Jaspan defendants) motion for summary judgment dismissing the legal malpractice causes of action, granted plaintiff's motion for summary judgment declaring that, if liable, the Jaspan defendants are jointly and severally liable with their co-defendants, and dismissing the affirmative defense based on the doctrine of in pari delicto, and denied the motion as to the second, third and seventh affirmative defenses (based on comparative fault), unanimously modified, on the law, to deny plaintiff's motion as to the affirmative defense of in pari delicto, to grant plaintiff's motion as to the affirmative defenses based on

comparative fault, and to vacate the declaration that the Jaspan defendants may be held jointly and severally liable, and otherwise affirmed, without costs.

In 2004, defendant Jeffrey Sussman, plaintiff's chief financial officer, began causing plaintiff, without any other officer or director's authorization or approval, to advance monies to defendant Hunt-Scanlon Corporation. In January 2006, and again in February 2007, in connection with plaintiff's then outstanding loans to Hunt-Scanlon, Sussman sought legal advice from lawyers at defendant Jaspan Schlesinger, outside corporate counsel for plaintiff. Upon learning that the loan relationship was improper, the Jaspan defendants advised Sussman to inform plaintiff's chief executive officer and board of directors of the unauthorized loans, but they neither contacted plaintiff themselves nor confirmed that Sussman had done so.

The record presents an issue of fact whether, as the Jaspan defendants contend, plaintiff knew as of January 2006 that loans had been extended to Hunt-Scanlon and did nothing to prevent Sussman from issuing additional loans, and therefore whether the Jaspan defendants' failure to notify plaintiff of the loans in February 2007 was a proximate cause of plaintiff's losses (*see e.g. AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 435-436 [2007]; *GUS Consulting GmbH v Chadbourne & Parke LLP*, 74 AD3d 677, 679 [1st Dept 2010], *lv denied* 16 NY3d 702 [2011]). Thus, the motion court properly denied the Jaspan defendants' motion

for summary dismissal of the plaintiff's malpractice claim. It also correctly held that "[t]he apportionment of liability among alleged tortfeasors is a matter for trial" (*Greenidge v HRH Constr. Corp.*, 279 AD2d 400 [1st Dept 2001]).

Turning to the Jaspan defendants' affirmative defenses, we find that there is a question of fact as to whether the Jaspan defendants have established that the doctrine of in pari delicto defeats plaintiff's claims (*see Kirschner v KPMG LLP*, 15 NY3d 446, 466 [2010]). As already noted, whether plaintiff knew of Sussman's conduct and allowed him to continue loaning monies for several years remains a question of fact. Further, the Jaspan defendants allege that plaintiff received allegedly significant and substantial benefits during the time that Sussman made the unauthorized loans. Plaintiff disputes this claim, but failed to establish as a matter of law, that Sussman acted solely for his own or Hunt-Scanlon's purposes, totally abandoning plaintiff's interests. Plaintiff therefore failed to demonstrate that the adverse interest exception to the doctrine of in pari delicto applies (*Center v Hampton Affiliates, Inc.*, 66 NY2d 782, 784-785 [1985] [insufficient to allege only that agent had a conflict of interest or was not acting primarily for the principal]; *Concord Capital Mgt., LLC v Bank of Am., N.A.*, 102 AD3d 406, 406 [1st Dept 2013] [quoting *Kirschner, supra* at 468 ("'So long as the corporate wrongdoer's fraudulent conduct enables the business to survive — to attract investors and customers and raise funds for

corporate purposes, – ’ the adverse interest exception does not apply”)]).

However, the Jaspan defendants’ affirmative defenses seeking to bar or reduce plaintiff’s damages based on plaintiff’s alleged comparative fault must be dismissed because plaintiff’s alleged failure to discover or prevent ongoing fraud by its fiduciary, Sussman, did not prevent or interfere with the Jaspan defendants’ performance of their own professional duties to plaintiff (*see National Sur. Corp. v Lybrand*, 256 AD 226, 235-236 [1st Dept 1939]; *see also Collins v Esserman & Pelter*, 256 AD2d 754, 757 [3d Dept 1998] [although the record was “replete with evidence” that the company’s bookkeeper was able to exploit the lack of internal controls to embezzle from the company, none of this interfered with the defendant accounting firm’s ability to complete the review for which it had been hired to perform; comparative fault was not applicable]).

To permit an affirmative defense of comparative negligence in a legal malpractice case, there must be a showing that the client did or did not do something that hindered the law firm from performing its duties toward its client. The Jaspan defendants’ reliance on cases addressing the application of comparative negligence in the context of alleged accountant malpractice, or breach of fiduciary duty, are not squarely on

point (*see e.g. Hall & Co. v Steiner & Mondore*, 147 AD2d 225, 227-228 [3d Dept 1989]; *Lippes v Atlantic Bank of N.Y.*, 69 AD2d 127 [1st Dept 1979]). Here, none of the examples of plaintiff's alleged internal weaknesses could rationally lead a factfinder to conclude that plaintiff interfered with the Jaspan defendants' ability to carry out their fiduciary duties toward plaintiff. Thus, on the extant record, there is no valid line of reasoning that could lead rational people to conclude plaintiff was negligent, and that such negligence was a substantial factor in causing the losses attributed to the Jaspan defendants' negligence.

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

ENTERED: MAY 30, 2013

CLERK

Andrias, J.P., Acosta, Freedman, Richter, Gische, JJ.

9854 The People of the State of New York, Respondent, Ind. 3613/09

-against-

Everett Reed, Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Ronald Zweibel, J.), rendered September 16, 2010, convicting defendant, after a jury trial, of two counts of criminal possession of a weapon in the second degree, and sentencing him to concurrent terms of 12 years, unanimously affirmed.

The hearing court properly concluded that the police had reasonable suspicion to stop defendant based on the similarity between his appearance and a wanted poster that was in the patrol car, and then properly frisked defendant for a weapon because he was a suspect in a series of armed robberies. Here, Officer Perez, who testified at the suppression hearing, explained that in the early morning hours of July 17, 2009, he was on anti-crime patrol in an unmarked car with a sergeant and another officer. Officer Perez had been in the Anti-Crime Unit for several years and had made numerous gun-related arrests. He was involved in an investigation of pattern robberies that had occurred within

Manhattan North. Perez testified that he had in his patrol car a wanted poster that contained a photograph of an individual involved in a robbery pattern that was identified as number 69. Those robberies occurred from July 10, 2009 through July 15, 2009 in the 30th and 32nd precincts. The poster, which was introduced in evidence at the suppression hearing, contained a description in addition to an actual photograph of the suspect. The description was of a male, black, 40 to 50 years old, 5'7"-5"9" tall, slender build, unshaven beard, and wearing a white cap and white shirt. The suspect is pictured holding a gun and the description of the robberies notes that the suspect brandished a firearm during the crimes.

Perez further explained that at some time prior to his patrol that morning, he also had seen an artist's sketch contained in another wanted poster relating to a gunpoint robbery in the 24th precinct on July 3, 2009 in the early morning hours. The suspect in that crime was described as a male black, late 40s or early 50s, wearing a dirty white baseball cap and an off-white t-shirt with gray tip sleeves.

Perez saw defendant walking northbound on Lenox Avenue, around West 137 Street, at about 1:25 a.m. Defendant appeared to match the description of the suspect in pattern robbery 69. Defendant also matched the age group and general clothing description of the suspect in the artist's sketch arising out of the 24th precinct crime.

When Perez first saw defendant, he was a few feet away from him. Nothing was obstructing his view and Lenox Avenue was well lit. Perez, who was in the rear passenger seat, had the driver of the police car pull the vehicle up close to defendant and was able to "get a good look at him." Perez, the sergeant and the other officer got out of their vehicle, without their guns out, identified themselves as police officers and positioned themselves around defendant. Perez frisked defendant in his waistband area and, when he felt a firearm, he pulled the weapon out of the waistband. Defendant was then arrested. Perez explained that he frisked defendant because the wanted posted was for a violent crime and the frisk was for the officers' safety.

The People correctly argue that the similarity between defendant's appearance and that of the suspect in the wanted poster provide reasonable suspicion for the stop (*see People v Medina*, 66 AD3d 555 [1st Dept 2009] [officer was carrying surveillance photographs and the defendant matched description provided by crime victims], *lv denied* 13 NY3d 908 [2009]; *People v Joseph*, 10 AD3d 580 [1st Dept 2004] [passenger's resemblance to suspect in a wanted poster furnished reasonable suspicion to stop the vehicle], *lv denied* 3 NY3d 740 [2004]). Moreover, the stop only was two days after the last of the pattern robberies in the wanted poster and defendant's clothing was similar to that of the suspect in both the poster and the sketch. Also, as Perez noted, the stop was in the early morning hours in Northern Manhattan,

which was consistent with the information the police had on the pattern crimes. The wanted poster photograph also shows someone with a beard, and Perez specifically noted defendant had a beard. These factors all support a finding of reasonable suspicion (*see People v Johnson*, 22 AD3d 371 [lst Dept 2005], *lv denied* 6 NY3d 754 [2005]).

On appeal, defendant does not offer any reason to disturb the court's credibility findings, in which the court accepted Perez's version of the events.[1] Rather, defendant focuses on the differences between the wanted poster and the artist's sketch. No question exists that the artist's sketch poster describes the suspect as having a scar on the left jaw and reddish hair, and these details are not mentioned in the wanted poster. These differences are of no consequence, however, because the wanted poster, which is what the police had in the car, has an actual photograph of the suspect. Similarly, the fact that the wanted poster describes the suspect as 5'7"-5'9" and the artist's sketch poster says the suspect is approximately 6'0" is hardly a major inconsistency and also is insignificant because Perez admitted he did not know defendant's specific height when he observed him. Perez explained that defendant's actual height fell more in the 5'7"-5'9" range, which would be consistent with the wanted poster

[1] Defendant had testified at the hearing that the police never announced that they were officers and had their weapons drawn.

in the car.

Defendant also mischaracterizes the evidence here by suggesting that Perez's testimony would support the stop of any male black in the general age group with a beard wearing similar clothing. Although Perez acknowledges that his attention was drawn to defendant because of these factors, his testimony shows that the vehicle pulled up close to defendant and Perez got a good look at defendant on a well-lit street. The cases relied on by defendant (*see e.g. People v Dubinsky*, 289 AD2d 415 [2d Dept 2001]; *People v Yiu C. Choy*, 173 AD2d 883 [2d Dept 1991]), do not involve situations where the police actually had a photograph of the suspect in the car prior to the stop. Furthermore, the description in *Choy* was far less specific than the one here and did not contain any age information nor detail such as a beard. In addition, Perez explained at the hearing that defendant's height was the same as the suspect in the wanted poster and that he was wearing a baseball cap and shirt that matched both posters.

Finally, there is no question that given the violent nature of the crimes involved here, the officers, who had reasonable suspicion for the stop, had a right to frisk defendant for their safety (*see People v Moore*, 32 NY2d 67, 71 [1973], *cert denied* 414 US 1011 [1973]; *Medina,* 66 AD3d at 556). Moreover, we note that the officers acted reasonably in identifying themselves as police and not having their weapons drawn as they approached.

The court did not err in declining to appoint new counsel for defendant on the day the suppression hearing commenced. This was defendant's second attorney, and counsel advised the court that he was ready to proceed with the hearing. Moreover, the hearing court offered counsel additional time to speak with defendant, but defendant refused to meet with the attorney. The court was not obligated to remove counsel mid-trial when defendant again objected to his lawyer merely because defendant disagreed with the attorney's handling of an evidentiary issue. Nothing in the record shows that counsel was ineffective, and conflicts over trial strategy are not a basis for removing an attorney (*see People v Smith*, 18 NY3d 588, 593 [2012]). Moreover, based on the record, counsel had a legitimate reason for not wanting the wanted poster to be shown to the jury since counsel noted that the man portrayed on the poster significantly resembled defendant. Any problems in communication during these proceedings were caused, in large part, by defendant, and the court already had changed counsel once in this case.

The *Sandoval* ruling which permitted inquiry into some of defendant's convictions, but not others, was a proper exercise of the court's discretion. Here, the court further limited the potential prejudice by precluding the prosecution from inquiry into the underlying facts of the crimes (*see People v John*, 89 AD3d 552, 553 [1st Dept 2011], *lv denied* 18 NY3d 927 [2012]).

Defendant's sentence, which was less than the maximum, was not excessive in light of his significant record. The fact that he is in his late 50s provides no reason for reduction of the sentence.

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

ENTERED: MAY 30, 2013

CLERK

Tom, J.P., Andrias, Renwick, DeGrasse, JJ.

10100-
10101 Juan Pablo Rey,
Plaintiff,

-against-

W2001 Metropolitan Hotel Realty,
L.L.C., et al.,
Defendants-Appellants.

- - - - -

Omnibuild LLC,
Third-Party Plaintiff-Appellant,

-against-

T.F. Nugent, Inc.,
Third-Party Defendant-Respondent.

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Appeals having been taken to this Court by the above-named appellant from orders of the Supreme Court, New York County (Louis B. York, J.), entered on or about December 22, 2011 and August 30, 2012,

And said appeals having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated May 1, 2013,

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

ENTERED: MAY 30, 2013

CLERK

Sweeny, J.P., Saxe, Moskowitz, Gische, Clark, JJ.

10235-
10236 The People of the State of New York, Ind. 1795/09
Respondent,

-against-

Garreth Malave,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Marisa K. Cabrera of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered October 7, 2010, convicting defendant, after a jury trial, of sexual abuse of first degree, and sentencing him, as a second felony offender, to a term of 3½ years, unanimously affirmed. Order, same court and Justice, entered on or about March 22, 2012, which adjudicated defendant a level two sexual offender pursuant to the Sexual Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly denied defendant's application made pursuant to *Batson v Kentucky* (476 US 79 [1986]). Defendant did not produce "evidence sufficient to permit the trial judge to draw an inference that discrimination ha[d] occurred" (*Johnson v California*, 545 US 162, 170 [2005]), and thus failed to make a prima facie showing of gender discrimination in the People's exercise of their peremptory challenges. The record does not

establish that the People excluded a disproportionate number of men from the panel, or that there was such a significant disparity between the rate at which the People challenged male panelists and the percentage of men in the available panel as to support a statistical inference of discrimination (*see People v Steele*, 79 NY2d 317, 325 [1992]). Given the court's thorough voir dire of the prospective jurors, the prosecutor's failure to ask questions of many of the stricken male jurors was not indicative of discriminatory intent. Defendant's argument that the prosecutor's strike of a male juror with ties to law enforcement was evidence of discriminatory intent is unpreserved, and, as a result of defendant's failure to make this claim before the trial court, the record is insufficiently developed on this point.

The court was not obligated to appoint new counsel, sua sponte, in connection with defendant's pro se motion to set aside the verdict. There was no violation of defendant's right to conflict-free counsel. When defendant's trial attorney generally adopted the motion, but conceded that there was no merit to the part of the motion that claimed the court should have submitted third-degree sexual abuse as a lesser included offense, defendant was not prejudiced in any way, and he would not have gained anything from a change of attorneys. Regardless of whether counsel advocated in support of the entire motion, the court would have had no authority to set aside the verdict on the

ground at issue. Since counsel did not request submission of a lesser included offense prior to jury deliberations, "the court's failure to submit such offense does not constitute error" (CPL 300.50[2]). Moreover, an unpreserved error may not be raised by way of a CPL 330.30(1) motion to set aside a verdict (*People v Everson*, 100 NY2d 609 [2003]). Even if defendant's claim could be broadly read to encompass an implied attack on his attorney's effectiveness in failing to request the lesser included offense, that still would not be cognizable on a CPL 330.30(1) motion because it would involve matters of strategy outside the record (*see People v Wolf*, 98 NY2d 105, 119 [2002]). In any event, there was no reasonable view of the evidence to support submission of third-degree sexual abuse.

The People met their burden of establishing, by clear and convincing evidence, risk factors bearing a sufficient total points to support a level two sex offender adjudication. The court properly assessed 10 points under the risk factor for acceptance of responsibility. Defendant's trial testimony and statements in a posttrial probation interview, when viewed in the full context of the case, constituted denials of the conduct that formed the basis of his sexual abuse conviction. Thus, although he participated in a sex offender treatment program while incarcerated, he did not genuinely accept responsibility under the risk assessment guidelines (*see People v Chilson*, 286 AD2d 828 [3d Dept 2001], *lv denied* 97 NY2d 655 [2001]). The court

providently exercised its discretion in declining to grant a downward departure to level one (*see People v Cintron*, 12 NY3d 60, 70 [2009], *cert denied sub nom. Knox v New York*, 558 US 1011 [2009]; *People v Johnson*, 11 NY3d 416, 418, 421 [2008]).

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

ENTERED: MAY 30, 2013

CLERK

Sweeny, J.P., Saxe, Moskowitz, Gische, Clark, JJ.

10237-
10237A In re Ashley M. V., and Others,

Children under the Age
of Eighteen Years, etc.,

Victor V.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

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

Michael A. Cardozo, Corporation Counsel, New York (Victoria Scalzo of counsel), for respondent.

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

Karen Freedman, Lawyers for Children, Inc., New York (Brenda Soloff of counsel), attorney for the children Victor V., Jr. and Isaiah V.

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Order of fact-finding, Family Court, New York County (Douglas E. Hoffman, J.), entered on or about July 22, 2010, which, inter alia, after a hearing, found that respondent father had sexually abused his daughter Ashley V. and derivatively abused his sons Victor V. and Isaiah V., unanimously affirmed, without costs. Appeal from order of disposition, same court and Judge, entered on or about October 27, 2010, which placed Ashley V. in the custody of the Commissioner of Social Services until the completion of the next permanency hearing, unanimously dismissed, without costs, as moot.

The testimony of respondent's daughter at the fact-finding hearing was competent evidence that respondent sexually abused her and the absence of physical injury or other corroboration does not require a different result (*see Matter of Christina G. [Vladimir G.]*, 100 AD3d 454 [1st Dept 2012], *lv denied* 20 NY3d 859 [2013]; *Matter of Jonathan F.*, 294 AD2d 121 [1st Dept 2002]). The court properly credited the daughter's testimony and any inconsistencies in the testimony were peripheral (*see Matter of Kylani R. [Kyreem B.]*, 93 AD3d 556 [1st Dept 2012]). Moreover, the caseworker testified that both of the child's brothers told her that during the relevant time period, respondent would send them to the park but would keep his daughter in the apartment. Such testimony supports the daughter's testimony that respondent would arrange to be alone with her before he would abuse her (*see Matter of Nicole V.*, 71 NY2d 112, 124 [1987]).

Petitioner's establishment of its prima facie case resulted in the burden shifting to respondent to explain his conduct and rebut the evidence of his culpability. However, upon his failure to testify, the court properly drew a negative inference against him (*see Matter of Nicole H.*, 12 AD3d 182, 183 [1st Dept 2004]).

The determination that respondent, by sexually abusing his daughter, derivatively abused his two sons was supported by a preponderance of the evidence. Respondent's actions showed a

fundamental defect in understanding his parental obligations (*see Matter of Marino S.*, 100 NY2d 361, 374-375 [2003], *cert denied* 540 US 1059 [2003]).

Respondent advances no argument with respect to his daughter's placement on appeal and in any event, the dispositional order from which he appeals has expired (*see Matter of Kaila A. [Reginald A.-Lovely A.]*, 95 AD3d 421 [1st Dept 2012]).

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

ENTERED: MAY 30, 2013

CLERK

Sweeny, J.P., Saxe, Moskowitz, Gische, Clark, JJ.

10238 In re Michael Barrett, Index 401937/10
Petitioner-Respondent,

-against-

New York City Housing Authority,
Respondent-Appellant.

_____

Kelly D. MacNeal, New York (Seth E. Kramer of counsel), for appellant.

Michael Barrett, respondent pro se.

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Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered February 15, 2011, which denied respondent's cross motion to dismiss the petition, unanimously reversed, on the law, without costs, the cross motion granted, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed.

The proceeding is barred by the statute of limitations since petitioner failed to file his petition within the time required by CPLR 217(1), namely, four months after respondent issued its final determination on December 16, 2009 (*see Matter of Thornton v New York City Hous. Auth.*, 100 AD3d 556, 557 [1st Dept 2012]).

This Court cannot extend the statute of limitations (see CPLR 201), nor does it have discretion to address the merits of petitioner's other arguments (*Thornton* at 557).

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

ENTERED: MAY 30, 2013

CLERK

Sweeny, J.P., Saxe, Moskowitz, Gische, Clark, JJ.

10239-
10239A Leonardi International Corporation,
Plaintiff-Appellant,

-against-

Altamar Brands, LLC, etc.,
Defendant-Respondent.

Index 104796/09

_____

Maurice A. Reichman, New York, for appellant.

Tarter Krinsky & Drogin, LLP, New York (Linda S. Roth of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered October 12, 2012, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for summary judgment on its first cause of action, unanimously affirmed, without costs. Order, same court and Justice, entered October 12, 2012, which, insofar as appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the first cause of action, and denied plaintiff's motion for summary judgment dismissing the first counterclaim, unanimously modified, on the law, to grant plaintiff's motion, and otherwise affirmed, without costs.

The parties' lease provides that neither party can institute legal action with respect to an act of default under any provision of the lease without first giving the other a notice of default that complies with certain specified conditions. Plaintiff never gave defendant notice of the default on which its

first cause of action is predicated (*see MHR Capital Partners LP v Presstek, Inc.*, 12 NY3d 640, 645 [2009]). Defendant provided a notice of default to plaintiff with respect to its first counterclaim, but the notice did not satisfy all the stated conditions. Among other things, it did not describe "the action to be taken or performed by [plaintiff] in order to cure the alleged default."

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

ENTERED: MAY 30, 2013

CLERK

Sweeny, J.P., Saxe, Moskowitz, Gische, Clark, JJ.

10242 In re Kenneth V. Kosar, Petitioner, Index 401519/11

-against-

The New York State Department of Motor Vehicles Appeals Board, et al., Respondents.

_____

Sciretta & Venterina, LLP, Staten Island (Marilyn Venterina of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, New York (Valerie Figueredo of counsel), for respondents.

_____

Determination of respondent New York State Department of Motor Vehicles (DMV) Appeals Board, dated March 29, 2011, affirming the determination of an administrative law judge, after a hearing, that petitioner failed to exercise due care to avoid hitting a pedestrian, in violation of New York City Traffic Rules and Regulations (34 RCNY) § 4-04(d), and that petitioner's drivers license should be suspended for a period of 45 days, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Carol E. Huff, J.], entered August 3, 2011), dismissed, without costs.

Respondent's determination is supported by substantial evidence, including a DMV report indicating the location and distance of the truck and the pedestrian following the accident

(*see Matter of Nelke v Department of Motor Vehs. of the State of N.Y.*, 79 AD3d 433, 434 [1st Dept 2010]). Based on the evidence, it is reasonable to infer that the truck, equipped with a snow plow, hit the 70-year-old pedestrian, crossing the street with the crossing signal, near the middle of the crosswalk and therefore that petitioner driver failed to exercise due care to avoid colliding with her (*see* 34 RCNY 4-04[d]; *see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181 [1978]).

The penalty imposed does not shock one's sense of fairness, especially since the pedestrian died from her injuries (*see Matter of Kreisler v New York City Tr. Auth.*, 2 NY3d 775, 776 [2004]).

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

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

ENTERED: MAY 30, 2013

CLERK

Sweeny, J.P., Saxe, Moskowitz, Gische, Clark, JJ.

10243 Ying Jing Yan, Index 311607/08
Plaintiff-Respondent,

-against-

Ke-En Wang,
Defendant-Appellant.

_____

Ke-En Wang, appellant pro se.

_____

Judgment, Supreme Court, New York County (Saralee Evans, J.), entered August 16, 2011, inter alia, dissolving the parties' marriage on the ground of cruel and inhuman treatment of plaintiff by defendant (Domestic Relations Law § 170[a]), and ordering defendant to pay plaintiff counsel fees, unanimously affirmed, without costs.

Defendant's present appellate arguments with respect to the dissolution of the marriage were resolved by this Court on a prior appeal (85 AD3d 448 [1st Dept 2011], *appeal dismissed* 17 NY3d 950 [2011]) (*see Eastside Exhibition Corp. v 210 E. 86th St. Corp.*, 79 AD3d 417, 418 [1st Dept 2010], *affd on other grounds* 18 NY3d 617 [2012], *cert denied* __ US __, 133 S Ct 654 [2012]). There is no new evidence warranting additional consideration (*see Clark Constr. Corp. v BLF Realty Holding Corp.*, 54 AD3d 604 [1st Dept 2008]).

Contrary to defendant's contention, the court reviewed the financial circumstances of both parties, together with all the

other circumstances of the case, and properly awarded interim counsel fees to plaintiff, "the less-monied spouse" (*see* Domestic Relations Law § 237[a]; *DeCabrera v DeCabrera-Rosete*, 70 NY2d 879, 881 [1987]).

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

ENTERED: MAY 30, 2013

CLERK

Sweeny, J.P., Saxe, Moskowitz, Gische, Clark, JJ.

10246-
10247 The Learning Annex, L.P.,
Plaintiff-Appellant,

-against-

Blank Rome LLP, et al.,
Defendants-Respondents.

Index 104225/11

_____

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for appellant.

Hinshaw & Culbertson, LLP, New York (Philip Touitou of counsel), and Harkins Cunningham LLP, Philadelphia, PA (Eleanor Morris Illoway of the bar of the State of Pennsylvania, admitted pro vice, of counsel), for respondents.

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Judgment, Supreme Court, New York County (Richard F. Braun, J.), entered December 7, 2012, dismissing the amended complaint, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered November 21, 2012, which granted defendants' motion to dismiss the amended complaint, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff failed to state a cause of action for aiding and abetting fraud against defendant law firm and the individual defendant, plaintiff's former attorney. The alleged conduct, defendants' failure to disclose a voting agreement entered into between non-parties at a time when defendants did not represent plaintiff and to subsequently highlight the voting agreement's existence, does not constitute "substantial assistance" in the

commission of the alleged underlying fraud (*see Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472, 476 [1st Dept 2009], *lv denied* 13 NY3d 709 [2009]; *Liquidation of Union Indem. Ins. Co. of New York v Spira*, 289 AD2d 173 [1st Dept 2001], *lv dismissed* 98 NY2d 672 [2002]). The claim that defendants provided routine legal services to the alleged fraudsters is likewise insufficient to establish a claim for aiding and abetting fraud (*see CRT Investments, Ltd. v BDO Seidman, LLP*, 85 AD3d 470, 472 [1st Dept 2011][citing *Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1 [1st Dept 2008]).

The amended complaint does not allege a claim for legal malpractice in connection with defendants' representation of the alleged fraudsters in a merger transaction. Even if such a claim were alleged, it would fail to state a cause of action in the absence of an attorney-client relationship (*see Federal Ins. Co. v North Am. Specialty Ins. Co.*, 47 AD3d 52 [1st Dept 2007]; *Linden v Moskowitz*, 294 AD2d 114, 115 [1st Dept 2002], *lv denied* 99 NY2d 505 [2003]) or a relationship approaching privity or other special circumstance (*see Good Old Days Tavern, Inc. v Zwirn*, 259 AD2d 300 [1st Dept 1999]). The legal malpractice claim arising out of a subsequent transaction fails as speculation as to what plaintiff would have done, had it been aware of the voting agreement, and the possibility that another party may pursue a claim against plaintiff in the future, does

not support a claim for causally related damages (*see Brooks v Lewin*, 21 AD3d 731 [1st Dept 2005], *lv denied* 6 NY3d 713 [2006]).

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: MAY 30, 2013

CLERK

Sweeny, J.P., Saxe, Moskowitz, Gische, Clark, JJ.

10248 Luther Johnson, Index 23845/04
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Appellant,

New York City Housing Authority,
Defendant-Respondent.

_____

Michael A. Cardozo, Corporation Counsel, New York (Avshalom Yotam of counsel), for appellant.

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for Luther Johnson, respondent.

Herzfeld & Rubin, P.C., New York (Linda M. Brown of counsel), for New York City Housing Authority, respondent.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered January 27, 2012, which, to the extent appealed from, granted plaintiff's motion to restore his case against the City of New York to the trial calendar and denied the City's cross motion to dismiss the complaint and all cross claims against it, unanimously reversed, on the law, without costs, the motion denied, and the cross motion granted. The Clerk is directed to enter judgment accordingly in favor of the City.

In January 2004, plaintiff allegedly slipped and fell. In his notice of claim, complaint and bill of particulars, plaintiff alleged that his fall occurred on the sidewalk or walkway in front of 1040 Soundview Avenue, in the Bronx, which is owned by defendant Housing Authority. The City is not liable for

defective conditions in such a sidewalk (*see* Administrative Code of the City of New York § 7-210). The Housing Authority's contention that plaintiff fell on the street, instead of the sidewalk, was raised in opposition to the City's cross motion to dismiss, some seven years after plaintiff's accident, based on deposition testimony given by the Housing Authority's witness three years after the accident. Until the Housing Authority raised this issue, plaintiff had not asserted that he fell anywhere but on the sidewalk, and plaintiff would now have to amend his notice of claim to assert this new theory. At this juncture, it is too late to do so (*see Scott v City of New York*, 40 AD3d 408 [1st Dept 2007]; *Lopez v City of New York*, 287 AD2d 694 [2nd Dept 2001]). Accordingly, the City's motion to dismiss the complaint as to it should have been granted.

Dismissal of the Housing Authority's cross claims is also warranted because there is no scenario in which it will be entitled to contribution or indemnification from the City in connection with plaintiff's accident; plaintiff either fell on the sidewalk, in which case the Housing Authority may be found liable for negligence, or he fell in the street, in which case the Housing Authority will not be liable (*see* Administrative Code of the City of New York § 7-210).

Similarly, plaintiff's motion to restore his action to the trial calendar with respect to the City was incorrectly granted, since his affidavit of merits, asserting that he fell on the

sidewalk abutting the defendant Housing Authority's building, failed to demonstrate a potentially meritorious claim against the City (*see Padded Wagon, Inc. v Associates Commercial Corp.*, 92 AD3d 430 [1st Dept 2012]; *Campbell v Crystal Realty Assoc. Ltd. Partnership*, 276 AD2d 328, 328 [1st Dept 2000]).

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

ENTERED: MAY 30, 2013

CLERK

Sweeny, J.P., Saxe, Moskowitz, Gische, Clark, JJ.

10249 In re Beautiful B., and Another,

Children Under the Age
of Eighteen Years, etc.,

Damion R.,
Respondent-Appellant,

Administration for Children's
Services,
Petitioner-Respondent.

_____

Kenneth M. Tuccillo, Hastings on Hudson, for appellant

Michael A. Cardozo, Corporation Counsel, New York (Pamela Seider Dolgow of counsel), for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the children.

_____

Order, Family Court, New York County (Jody Adams, J.), entered on or about February 22, 2012, which, after a fact-finding determination that respondent father neglected his children, placed them in the custody of petitioner Administration for Children's Services ("ACS") until the next permanency hearing, unanimously affirmed, without costs.

It is undisputed that respondent violated an order of protection limiting the mother's contact with one of the children to supervised visitation by cohabiting with her and the child. The order was clear on its face, despite the caseworker's admitted misunderstanding as to whether cohabitation was permitted. Although ACS was required to supervise the child's placement with respondent, he was responsible for ensuring the

safety of his child *(see In re Ashante M,* 19 AD3d 249 [1st Dept 2005]; *Matter of Stephanie S [Ruben S]*, 70 AD3d 519, 520 [1st Dept 2010]). Accordingly, the court properly removed the children from the father's care pending the next permanency hearing based on the violation of the order of protection and to permit ACS to evaluate his residence.

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

ENTERED: MAY 30, 2013

CLERK

Sweeney, J.P., Saxe, Moskowitz, Gische, Clarke, JJ.

10250 In re Fritz S. Bonaventure, Index 103171/12
Petitioner,

-against-

Cesare A. Perales, etc.,
Respondent.

_____

Arnold & Porter LLP, New York (Alexandra L. Mitter of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, New York (Won S. Shin of counsel), for respondent.

_____

Determination of respondent, dated March 1, 2012, which reversed the determination of an Administrative Law Judge (ALJ), granting petitioner's application for a security guard license, and denied the application, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Donna M. Mills, J.], entered November 30, 2012), dismissed, without costs.

The record shows that in granting petitioner's application for a security guard license, the ALJ credited petitioner's testimony that his criminal activity was in his past, and that he had the requisite good character, integrity and trustworthiness for such a license. However, the ALJ's findings were not final and were subject to being superceded by respondent where, as here, respondent's decision was supported by substantial evidence

(*see* 19 NYCRR 400.2[k]; *Matter of Simpson v Wolansky*, 38 NY2d 391, 394 [1975]; *Matter of Bruce v New York City Hous. Auth.*, 78 AD3d 414 [1st Dept 2010]).

Respondent's determination to deny petitioner's application is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). Respondent properly considered and weighed the enumerated factors set forth in Correction Law § 753(1), finding that a "direct relationship" (Correction Law § 752[1]) existed between petitioner's crimes, which included convictions for assault and larceny, and his employment as a security guard, whose duties consist primarily of the protection of persons and property (*see e.g. Matter of Bonacorsa v Van Lindt*, 71 NY2d 605, 612 [1988]). The crimes committed by petitioner occurred over an extended period of time while he was an adult, with the last crime committed approximately four years before the date of his application. Petitioner also made material misrepresentations on his application, stating that he had never been convicted of any crime, and failing to list his employment history.

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

ENTERED: MAY 30, 2013

CLERK

Sweeny, J.P., Saxe, Moskowitz, Gische, Clark, JJ.

10251 Sallie M. Herman, Index 301234/09
Plaintiff-Respondent,

-against-

Gerald J. Moore, et al.,
Defendants-Appellants.

_____

Morris Duffy Alonso & Faley, New York (Anna J. Ervolina and Andrea M. Alonso of counsel), for appellants.

Pirrotti & Glatt Law Firm PLLC, Scarsdale (Anthony Pirrotti, Jr. of counsel), for respondent.

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Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered October 17, 2012, which, in this action for personal injuries sustained in a motor vehicle accident, denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The court providently exercised its discretion in considering defendants' medical reports. Although they were first disclosed after the filing of the note of issue and certificate of readiness, plaintiff cannot claim prejudice where defendants' summary judgment motion had been adjourned, at plaintiff's request, to provide her with the opportunity to obtain medical evidence to formulate her opposition (*see Serbia v Mudge*, 95 AD3d 786, 786-787 [1st Dept 2012]). Nor does defendants' failure to timely submit the report of their neurologist in compliance with the compliance conference order mandate preclusion, since defendants had adequately demonstrated

that the late submission was neither wilful nor prejudicial to plaintiff (*see Nathel v Nathel*, 55 AD3d 434 [1st Dept 2008]).

Nevertheless, defendants failed to meet their burden of establishing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). Defendants submitted the reports of their expert neurologist, Dr. Elkin, who examined plaintiff in 2010, and of a neurologist and orthopedist who examined her in 2008. While all three diagnosed plaintiff with resolved cervical and lumbar sprain/strain, Dr. Elkin and one of the other doctors found significant limitations in range of motion of the cervical spine (*see Bernardez v Babou*, 83 AD3d 499 [1st Dept 2011]; *Feaster v Boulabat*, 77 AD3d 440 [1st Dept 2010]). Dr. Elkin opined that the continuing limitations were likely due to degenerative conditions shown in plaintiff's MRI reports. However, the other two doctors concluded, upon examinations of plaintiff and review of her medical records, that her injuries were caused by the accident. Such conflicts among the medical reports submitted by defendants preclude summary judgment (*see Feaster*, 77 AD3d at 440).

In view of defendants' failure to meet their burden with respect to the cervical spine injury, we need not consider the

sufficiency of plaintiff's opposition (*see Santos v New York City Tr. Auth.*, 99 AD3d 550 [1st Dept 2012]), or determine whether she raised an issue of fact as to any other claimed injury (*see Linton v Nawaz*, 14 NY3d 821, 822 [2010]).

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

ENTERED: MAY 30, 2013

CLERK

Sweeny, J.P., Saxe, Moskowitz, Gische, Clark, JJ.

10255N-
10256N Index 602297/09

Mariner Pacific, Ltd.,
Plaintiff-Appellant,

-against-

Sterling Biotech Limited,
Defendant-Respondent.

_____

Nimkoff Rosenfeld & Schechter, LLP, Syosset (Ronald A. Nimkoff of counsel), for appellant.

McGuireWoods LLP, New York (Marshal Beil of counsel), for respondent.

_____

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered March 10, 2011, which, insofar as appealed from, denied plaintiff's request for jurisdictional discovery, unanimously affirmed, without costs. Order, same court (Shirley Werner Kornreich, J.), entered March 15, 2011, which, insofar as appealed from, denied plaintiff's application for jurisdictional discovery, unanimously reversed, on the law and in the exercise of discretion, without costs, plaintiff's application to stay the hearing before the special referee pending disclosure granted, without prejudice to defendant applying for a protective order limiting disclosure.

The first order appealed from arose out of defendant's motion to dismiss for lack of personal jurisdiction; plaintiff argued that the action should not be *dismissed* until plaintiff had the opportunity to conduct discovery. The first order did

not dismiss the action; instead, it properly ordered a hearing to determine if New York had jurisdiction over defendant (*see Matter of Preferred Mut. Ins. Co. [Fu Guan Chan]*, 267 AD2d 181, 182 [1st Dept 1999]). Also, at the time of the first order, plaintiff had not yet propounded any discovery requests and that order neither permitted nor prohibited discovery.

By the time of the second order, plaintiff *had* propounded discovery requests. We believe that jurisdictional discovery in addition to what was already ordered by the motion court is appropriate in this case. It is true that some of the discovery requests are overbroad. Therefore, our decision is "without prejudice to defendant []applying, if so advised, . . . for a protective order appropriately limiting disclosure to that which is reasonably related to the jurisdictional issue" (*Peterson v Spartan Indus.*, 33 NY2d 463, 467-468 [1974]).

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

ENTERED: MAY 30, 2013

CLERK

Sweeny, J.P., Saxe, Moskowitz, Gische, Clark, JJ.

10257N Harry Weiss, Inc., Index 109435/09
Plaintiff-Appellant,

E.W. International Diamonds, Inc.,
Plaintiff,

-against-

Mendez Moskowitz, et al.,
Defendants-Respondents,

Saul Bawabah, doing business as
B.B. Jewelry, et al.,
Defendants.

[And a Third-Party Action]

Lester Schwab Katz & Dwyer, LLP, New York (Steven B. Prystowsky of counsel), for appellant.

Paul J. Solda, New York, for respondents.

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered September 17, 2012, which granted defendants-respondents' motion for spoliation sanctions to the extent of precluding plaintiff from offering any evidence and/or testimony at trial in opposition to defendants' defenses and counterclaims, unanimously affirmed, with costs.

In this action, plaintiff diamond dealer alleges, among other things, that its broker, defendant Mendez Moskowitz and his company defendant BMW Diamonds, Inc., never intended to pay for diamonds it acquired from plaintiff. Defendants counterclaimed, alleging, among other things, that plaintiff failed to pay commissions to defendants.

More than two years into this litigation, plaintiff's bookkeeper revealed at his deposition for the first time that certain electronic files that were created to track defendants' commissions were either "lost" or "deleted" at the end of 2007 and 2008, after a copy of the file had been printed. The bookkeeper further testified that he created and kept all of plaintiff's records on one computer, which had been in use for the last ten years. A month later, when defendants' attorney sought to forensically examine the computer to determine if any of the deleted files could be restored, plaintiff's bookkeeper claimed, for the first time, that the computer was "broken" and had been thrown away in late 2009 or early 2010, after the commencement of this action. Thereafter, the bookkeeper testified that numerous documents supporting plaintiff's claim that defendants were not entitled to commissions could not be produced because they were stored only on the discarded computer.

Spoliation sanctions were appropriate based on plaintiff's disposal of the computer. Plaintiff was put on notice of its obligation to "preserve all relevant records, electronic or otherwise," at the very latest, in July 2009, when it received defendants' answer asserting counterclaims for commissions (*Voom HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 41 [1st Dept 2012]).

Plaintiff's conduct evinces a higher degree of culpability

than mere negligence (*see Ahroner v Israel Discount Bank of N.Y.*, 79 AD3d 481, 482 [1st Dept 2010]). Indeed, the record shows that, despite numerous court orders and the court's assignment of a special referee to supervise discovery, plaintiff delayed discovery and did not disclose to defendants that it had discarded the subject computer for almost two years, notwithstanding that such disclosure was specifically requested by defendants. Further, the testimony of plaintiff's bookkeeper that a litigation hold, either written or oral, was never issued directing him to preserve electronic data, supports a finding that plaintiff's disposal of the subject computer was, at the very least, grossly negligent (*see Voom*, 93 AD3d at 45).

Defendants established that plaintiff's spoliation of critical evidence compromised defendants' ability to prosecute their counterclaims (*Baldwin v Gerard Ave., LLC*, 58 AD3d 484, 485 [1st Dept 2009]). Accordingly, the court did not abuse its discretion in determining that preclusion was an appropriate spoliation sanction.

Plaintiff's contention that its disposal of the subject computer did not cause defendants any prejudice because many of the files were printed prior to its disposal and had subsequently been produced to defendants is contradicted by the deposition testimony of its own bookkeeper. Moreover, converting the files from their native format to hard-copy form would have resulted in

the loss of discoverable metadata (*see Matter of Irwin v Onondaga* County Resource Recovery Agency, 72 AD3d 314, 321-322 [4th Dept 2010]; *see also Tener v Cremer*, 89 AD3d 75, 81 [1st Dept 2011]). In addition, by discarding the computer after its duty to preserve had attached without giving notice to defendants, plaintiff deprived defendants of the opportunity to have their own expert examine the computer to determine if the deleted files could be restored (*see Tener*, 89 AD3d at 79).

Plaintiff never requested an evidentiary hearing before the motion court; therefore, its current claim that it is entitled to a hearing is not preserved for our review (*see e.g. DaSilva v C & E Ventures, Inc.*, 83 AD3d 551 [1st Dept 2011]).

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

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

ENTERED: MAY 30, 2013

CLERK

Tom, J.P., Andrias, Saxe, Gische, JJ.

9708 The People of the State of New York, Ind. 1706/03
Respondent,

-against-

Scott Parilla,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Lorca Morello of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Ravi Kantha of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Steven Lloyd Barrett, J.), entered on or about April 1, 2010, affirmed, without costs.

Opinion by Andrias, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Richard T. Andrias
David B. Saxe
Judith J. Gische, JJ.

9708
Ind. 1706/03

_____x

The People of the State of New York,
Respondent

-against-

Scott Parilla,
Defendant-Appellant.

_____x

Defendant appeals from the order of the Supreme Court, Bronx County (Steven Lloyd Barrett, J.), entered on or about April 1, 2010, which adjudicated him a level three sexually violent offender pursuant to the Sex Offender Registration Act.

Steven Banks, The Legal Aid Society, New York (Lorca Morello of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Ravi Kantha and Joseph N. Ferdenzi of counsel), for respondent.

ANDRIAS, J.

In this appeal, we consider whether amendments made to the Sex Offender Registration Act (SORA) (Correction Law art 6-C) since 1996, that, among other things, impose more stringent registration and notice requirements for convicted sex offenders, have rendered the act a punitive statute, so that its retroactive application to defendant violates the Ex Post Facto Clause or the state and federal constitutional prohibition against double jeopardy. For the reasons that follow, we find that SORA, as amended, does not constitute an impermissible ex post facto law or subject defendant to double jeopardy and that the record supports defendant's adjudication as a level three sexually violent offender.

On June 11, 1996, defendant pleaded guilty to attempted murder in the second degree, admitting that on September 11, 1993 he raped a woman and repeatedly stabbed her in the chest. While defendant was incarcerated, his DNA was found to match the DNA developed from a semen sample collected from another rape victim on August 29, 1993, and defendant was indicted for that crime, which was committed while he was on parole after a 1990 conviction for robbery in the second degree. On June 25, 2003, defendant pleaded guilty to rape in the first degree and sodomy in the first degree. On September 16, 2003, he was sentenced, as

a second violent felony offender (based on the robbery conviction), to 7 to 14 years, to run concurrently with the sentence on the attempted murder conviction.[1]

Before his conditional release date, the Board of Examiners of Sex Offenders (Board) prepared a case summary and risk assessment instrument (RAI) that assessed a total score of 170 points for various risk factors, which placed defendant presumptively in risk level three under SORA. The Board also recommended that defendant be designated a sexually violent offender based on his first-degree rape and sodomy convictions (*see* Correction Law § 168-a[3]). Defendant then moved to be classified at a lower risk level and to find SORA unconstitutional on its face and as applied to him. On April 1, 2010, after a hearing, defendant was designated a level three sexually violent offender under SORA.

SORA, effective January 21, 1996 (*see* L 1995, ch 192, § 3), imposes registration requirements on "'[s]ex offender[s],'" i.e., "any person who is convicted of" certain sex offenses enumerated in the statute (Correction Law § 168-a[1]). The act "applies to sex offenders incarcerated or on parole or probation on its

[1]The rape and sodomy convictions were affirmed by this Court and the Court of Appeals (33 AD3d 363 [1st Dept 2006], *affd* 8 NY3d 654 [2007]).

effective date, as well as to those sentenced thereafter, thereby imposing its obligations on many persons whose crimes were committed prior to the effective date" (*Doe v Pataki*, 120 F3d 1263, 1266 [2d Cir 1997], *cert denied* 522 US 1122 [1998]; *see* Correction Law § 168-g).

In *Doe v Pataki*, the Second Circuit held that the retroactive application of SORA did not violate the Ex Post Facto Clause because the statute was intended to further the nonpunitive goals of protecting the public and enhancing law enforcement authorities' ability to investigate and prosecute future sex crimes, and neither SORA's public notification requirements nor its registration requirements were so punitive in form and effect as to negate the Legislature's nonpunitive intent (120 F3d at 1277, 1284, 1285; *see also* Correction Law § 168). Defendant argues that SORA has been amended so significantly since *Doe* that it is now a punitive statute, and that its retroactive application to him violates the Ex Post Facto Clause and the state and federal constitutional prohibition against double jeopardy.

States are prohibited from enacting an ex post facto law (US Const, art. I, § 10[1]), i.e., a law that "retroactively alter[s] the definition of crimes or increase[s] the punishment for criminal acts" (*Collins v Youngblood*, 497 US 37, 43 [1990]).

> "A statute will be considered an ex post facto law if it 'punishes as a crime an act previously committed, which was innocent when done,' 'makes more burdensome the punishment for a crime, after its commission,' or 'deprives one charged with crime of any defense available according to law at the time when the act was committed'"

(*People v Foster*, 87 AD3d 299, 306 [2d Dept 2011] quoting *Beazell v Ohio*, 269 US 167, 169 [1925], *lv denied* 18 NY3d 858 [2011]).

In determining whether a statute renders the punishment for a crime more burdensome for purposes of the Ex Post Facto Clause, the United States Supreme Court has implemented an intent-effects test (*see Smith v Doe*, 538 US 84, 92 [2003]). Under the first prong of this test, the court determines whether the Legislature intended the statute to be punitive or civil in nature. If the court finds that the Legislature intended the statute to be punitive, then its retroactive application violates the Ex Post Facto Clause.

Notwithstanding numerous amendments to the statute since *Doe v Pataki*, the Court of Appeals has consistently held that SORA, "'is not a penal statute and the registration requirement is not a criminal sentence. Rather than imposing punishment for a past crime, SORA is a remedial statute intended to prevent future

crime'" (*People v Gravino*, 14 NY3d 546, 556-558 [2010], quoting *Matter of North v Board of Examiners of Sex Offenders of State of N.Y.*, 8 NY3d 745, 752 [2007] [emphasis deleted]; *see also People v Windham*, 10 NY3d 801, 802 [2008] [a SORA risk-level determination is a "collateral consequence of a conviction for a sex offense designed not to punish, but rather to protect the public"]).[2] Accordingly, because the Legislature intended the statute to be regulatory (*see People v Pettigrew*, 14 NY3d 406, 408 [2010]; *People v Mingo*, 12 NY3d 563, 571 [2009]; *People v Stevens*, 91 NY2d 270, 277 [1998]), we proceed to the second prong of the intents-effects test and consider whether SORA is now "so punitive either in purpose or effect as to negate [the State's] intention to deem it civil" (*Smith v Doe*, 538 US at 92 [internal quotation marks omitted]). Because deference is due to a legislature's stated intent, "only the clearest proof will

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[2]Many of the amendments cited by defendant pre-date *Gravino* and *North*. These include registration duration, amended in January 2006 (Correction Law § 168-h); the creation of additional categories – "sexually violent offender," "predicate sex offender," and "sexual predator," added in March 2002 (Correction Law § 168-a[7]); the ability to petition for relief, amended in January 2006 (Correction Law § 168-o); the requirement to have photographs taken, amended in April 2006 (Correction Law § 168-f); Internet availability of the subdirectory added in January 2001 (Correction Law § 168-q); the role of the People and the sentencing court in SORA proceedings, effective January 2000 (Correction Law § 168-d[3]); and the penalties for failing to report, amended in August 2007 (Correction Law § 168-t).

suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty" (*id.*).

In performing the effects analysis, we consider the seven factors articulated in *Kennedy v Mendoza-Martinez* (372 US 144, 168-169 [1963]): (1) does the sanction involve an affirmative disability or restraint?, (2) has the sanction been historically regarded as punishment?, (3) is the sanction imposed only upon a finding of scienter?, (4) does the operation of the sanction promote retribution and deterrence?, (5) is the behavior to which it applies already a crime?, (6) is there an alternative purpose to which the sanction may rationally be connected?, and (7) is the sanction excessive in relation to the alternative purpose? The United States Supreme Court has not allocated a specific weight to each factor, but has observed that the factors "often point in differing directions" (*see id.* at 169) and that no one factor is determinative (*see Hudson v United States*, 522 US 93, 101 [1997]).

As applied to SORA, our evaluation of these factors leads to the conclusion that the post-*Doe v Pataki* amendments on which defendant relies were aimed at improving the strength, efficiency and effectiveness of SORA as a civil statute, not at punishing sex offenders, and are not so punitive in effect as to negate the Legislature's intent.

Defendant argues that the effect of SORA is now punitive because the amended registration and notification requirements are significantly broader than those upheld in *Doe v Pataki*, and the right to petition for relief has been drastically limited. Particularly, whereas most offenders were originally required to register for 10 years, those designated level one must now register for 20 years and those designated level two and level three must now register for life (Correction Law § 168-h). Lifetime registration is also imposed on "sexual predators," "sexually violent offenders," and "predicate sex offenders," regardless of their risk level (*see* Correction Law §§ 168-a[7][a],[b],[c]); 168-h[2]). Only a level two offender who is not a sexual predator, sexually violent offender or predicate sex offender may apply for relief from lifetime registration (after 30 years) (Correction Law §§ 168-h[2]; 168-o[1]).

Level one and two offenders may still register by mail in general, but every three years they must appear in person at the local police station to have a new photo taken; level three offenders and sexual predators are required to update their photographs annually and to personally verify their addresses with the law enforcement agency having jurisdiction every 90 days (Correction Law §§ 168-f[2][b-2]; 168-h[3]). The identity and other information regarding all level two and three offenders

must be made available on the Internet (Correction Law § 168-q[1]). The first failure to report is an E felony, and any subsequent failure a D felony (Corrections Law § 168-t).

These increased registration and reporting requirements are not excessive in relation to the public safety purpose of the statute and do not transform SORA into an additional statutory penalty. Although lifetime registration and Internet notification may have deterrent effects and promote community condemnation of offenders, they serve a valid regulatory function by providing the public with information related to community safety.

The Alaska statute at issue in *Smith* v *Doe*, *supra*, required sex offenders who had aggravated or multiple offenses to register for life and verify the information quarterly (538 US at 90). In rejecting Smith's argument that these requirements subjected him to "affirmative disability or restraint," the Supreme Court found that "[t]he Act imposes no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint" (*id.* at 99-100). Sex offenders were not subject to "a series of mandatory conditions," and were "free to move where they wish[ed] and live and work as other citizens, with no supervision" (*id.* at 101). The same is true of SORA. While the failure to comply with the

reporting requirements would subject the offender to criminal prosecution, "any prosecution is a proceeding separate from the individual's original offense" (*id.* at 102).

In *Doe v Pataki*, the Second Circuit rejected the ex post facto challenge to SORA's 90-day in-person reporting requirement for certain high risk offenders, stating, "We agree with the district court that the registration requirements of the SORA do not impose punishment upon the plaintiffs" (120 F3d at 1285; *see also Manzullo v New York,* 2010 WL 129302, *8, 2010 US Dist LEXIS 32089, *22 [ED NY 2010] [denying habeas relief to petitioner on the ground that "both the registration and notification provisions of (Megan's Law) (do) not constitute punishment for the purposes of the Ex Post Facto clause"] [internal quotation marks omitted]). The court also rejected the argument that notification was analogous to historical punishments such as branding because of its stigmatizing effects or banishment, since notification is not imposed in lieu of incarceration or fines or as part of the offender's sentence, and is imposed only after sentencing (*id.* at 1283-1284). In addition, banishment involved state action in removing the offender from a locality, rather than the eviction by a landlord or community pressure to move faced by sex offenders; the latter are "private actions, however unfortunate, [and] are not intended consequences of the SORA"

(*id.* at 1284). In addition, the duration, form and frequency of registration are tied to the risk of reoffense (*id.* at 1285).

In *Doe v Raemisch* (895 F Supp2d 897 [ED Wis 2012]), the district court rejected the plaintiff argument that Wisconsin's sex offender registration law had become punitive. The court observed that in *Doe v Smith* "the [Supreme] Court held that lengthier reporting requirements for those convicted of multiple or violent offenses is reasonable because the distinction is 'reasonably related to the danger of recidivism, and this is consistent with the regulatory objective" (quoting *Smith*, 538 US at 102)" and that "[t]he State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determinations of their dangerousness, does not make this statute a punishment under the *Ex Post Facto* clause" (quoting *Smith* at 104; *see also People v Ortiz*, 19 Misc 3d 1137[A] [Suffolk County 2008] ["[T]he statutory increase in the defendant's registration period as a Level III sex offender from ten years to lifetime does not constitute a due process or ex post facto violation and is not a ground for modifying his previously assessed risk level"]).

In *Nolan v Cuomo* (2013 WL 168674, *1, 2013 US Dist LEXIS 6680, *1 [ED NY 2013]), the plaintiff alleged that defendants violated his constitutional rights by denying him the opportunity

to be "declassified" as a registered sex offender under SORA. The court noted that while the plaintiff had not raised an ex post facto challenge to the increased duration of the registration periods that resulted from the SORA amendments, "[a]ny such challenge would likely be foreclosed by the Second Circuit's decision that SORA's notification requirements and registration provisions 'do not constitute punishment for purposes of the Ex Post Facto Clause'" (2013 WL 168674 at *2 n5, 2013 US Dist LEXIS 6680, *7 n 5, quoting *Doe v Pataki*, 120 F3d at 1285). The court further observed that even after the 2006 amendments, which severely restricted the ability of a sex offender to petition for relief from the duty to register (Corrections Law § 168-o[1]), SORA still allowed a sex offender to petition the court for an order modifying the level of notification (2013 WL 168674, *2, 2013 US Dist LEXIS 6680, *6-7; *see also* Corrections Law § 168-o[2]).

Defendant contends that Correction Law §168-q(1), which requires that a subdirectory of all level two and level three offenders that includes their name, age, photo, home address, work address, crime, modus of operation, type of victim targeted, and any college or university in which they are enrolled "be made available at all times on the internet via the [DCJS] homepage," is now punitive because the information is unrestrictedly

available to anyone with computer access. However, in *Smith v Doe*, the Supreme Court found that the dissemination to the public of the sex offender's personal information via the Internet is not punitive because "[t]he purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender" (538 US at 99). The Court explained that "[t]he stigma . . . results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public. [The US Constitution] does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment" (*id.* at 98). "To hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' . . . would severely undermine the Government's ability to engage in effective regulation" (*id.* at 102 [internal quotation marks omitted]).

Moreover, while this aspect of SORA notification has changed significantly, even in *Doe v Pataki*, the court distinguished between "access" and "dissemination" of information (120 F3d at 1278). SORA's Internet notification method is still "passive," as the community must seek access to the information, rather than being notified of the offender's presence by the Division of Criminal Justice Services (DCJS). In addition, Internet

notification is still limited to the higher risk categories of level two and level three offenders, and SORA prohibits the misuse of the information, subjecting anyone who misuses it to a fine of $500 to $1,000 (Correction Law § 168-q[2]).

Defendant also relies on the fact that in 1996, the number of "sex offenses," including attempts, was about 30, whereas the current list is over 100 (Correction Law § 168-a[2][3]). However, even the original list of 36 included misdemeanors and offenses that required no proof of sexual contact, and the addition of more offenses does not, standing alone, render the statute punitive.

Defendant also argues that SORA is more punitive because it directs DCJS to provide the registry to the Department of Health and Department of Financial Services to make registrants ineligible to receive reimbursement or coverage for certain drugs, procedures or supplies (Correction Law § 168-b[2][b]), to release the registry to Internet providers, who may restrict or remove them from their services (Correction Law §§ 168-b[10]), and to inform the housing authorities "at least monthly" of the home address of any level two or three offender "within the corresponding municipality" (Correction Law §§ 168-b(12)). However, SORA merely requires that information about sex offenders be provided to other agencies, so that they may comply

with certain provisions of the Public Health Law, Social Services Law, Elder Law, and Insurance Law. This may be a disability (*see Mendoza-Martinez*, 372 US at 168-169), but it remains connected to protecting the public rather than punishing the offender.

Defendant points to the fact that the District Attorney, rather than the Board, makes the risk determination in non-incarceratory cases (Correction Law §168-d[3]) and that SORA now mandates a proceeding prosecuted by the District Attorney's Office and adjudicated by the sentencing court (*see* Correction Law §§ 168-d(3); 168-n[3]). Defendant contends that even in incarceratory cases, the Board is involved only to the extent of preparing the RAI and case summary (Correction Law §§ 168-1[6]). However, this scheme is not significantly different from the one addressed in *Doe*, since the sentencing court still makes the ultimate recommendation.

Defendant argues that the Board is not a purely civil agency, but is "essentially a specialized parole board, composed entirely of parole and probation employees." He contends that while the statute requires the Board Members to be "experts in the field of the behavior and treatment of sex offenders" (Correction Law § 168-l[1]), it does not define expertise and, in fact, the Board is not comprised of mental health professionals but of criminal justice personnel. This, however, was the case

in *Doe v Pataki*.

It may be true that subjecting sex offenders to lifetime registration and notification requirements, with their attendant obligations and restrictions, increases the difficulties and embarrassment a sex offender may endure, even where he has led a law-abiding life since his conviction. However, in assessing the constitutionality of a statute, this Court does not review the merits or wisdom of the Legislature's decisions on matters of public policy (*Matter of New York County Lawyers' Assn. v Bloomberg*, 95 AD3d 92, 108 [1st Dept 2012], *affd* 19 NY3d 712 [2012]), and the fact that the restrictions are difficult and cumbersome is not enough to make them unconstitutional. Although "one can argue that such laws are too extreme or represent an over-reaction to the fear of sexual abuse of children, . . . they do not violate the ex post facto clause . . . . These provisions created new crimes; they did not increase the punishment for Plaintiffs' previous offenses" (*Doe v Raemisch*, 895 F.Supp2d at 908]; *see also People v McFarland*, 29 Misc 3d 1206(A) [Sup Ct, NY County 2010]).

Accordingly, SORA, which is not punitive in nature, does not violate the Ex Post Facto Clause of the Federal Constitution (*see Matter of Bush v New York State Bd of Examiners of Sex Offenders*, 72 AD3d 1078 [2d Dept 2010]; *People v Bove*, 52 AD3d 1124 [3d Dept

2008]; *People v Frank*, 37 AD3d 1043 [4th Dept 2007], *lv denied* 9 NY3d 803 [2007]).

The Double Jeopardy Clause of the Fifth Amendment of the US Constitution and Article I of the New York State Constitution protect persons against being punished more than once for the same crime (*People v Williams*, 14 NY3d 198, 214 [2010]). The claim that SORA is penal in nature and violates the prohibition against double jeopardy was raised and rejected by the Third and Fourth Departments after numerous amendments to SORA went into effect (*see People v Miller*, 77 AD3d 1386 [4th Dept 2010], *lv denied* 16 NY2d 701 [2011]; *People v Szwalla*, 61 AD3d 1289, 1290 [3d Dept 2009]). We too reject it.

In the instant case, the court sufficiently "weighed the RAI against the defense evidence and arguments" and correctly adjudicated defendant a level three offender (*see People v Ferrer*, 69 AD3d 513, 514 [1st Dept 2010], *lv denied* 14 NY3d 709 [2010]). The court opted to rely on the RAI only as a starting point and only after hearing oral argument from defendant at a separate hearing regarding the reliability of the Static 99-R versus the RAI. Defendant was given ample opportunity to argue his case both at that hearing and at the SORA hearing, and the court reviewed his extensive submissions.

Although our analysis differs somewhat from that of the

court (*see People v Larkin*, 66 AD3d 592 [1st Dept 2009], *lv denied* 14 NY3d 704 [2010]), we find that the People met their burden of establishing, by clear and convincing evidence, risk factors bearing a total score of 140 points, which supports a level three adjudication. The court should not have assessed 10 points on the RAI for the victim involved in the earlier offense (*see People v Hoffman*, 62 AD3d 976 [2d Dept 2009]). The Guidelines provide a category to assess the "number and nature of prior crimes," and defendant was assessed 30 points on the RAI for a prior violent sex crime, which sufficiently takes into account the victim of the earlier crime (Guidelines at 13)(*People v Mantilla*, 70 AD3d 477, 478 [1st Dept 2010], *lv denied* 15 NY3d 706 [2010] [internal quotation marks omitted]).

It was also error to assess 20 points for the age of one victim. While sworn grand jury testimony is generally reliable (*see e.g. People v Bailey* 52 AD3d 336 [1st Dept 2008], *lv denied* 11 NY3d 707 [2008]), in this case, the testifying victim not only failed to state the basis of her knowledge of the other victim's age, but stated equivocally, 10 years after the offense, that she was "about 16." As this does not amount to clear and convincing evidence of the victim's age, 20 points should not have been assessed.

Regarding drug abuse, defendant argues that he had refrained

from drug abuse and had completed a six month program, and that various prison disciplinary records showed no tickets for drugs. Defendant contends that this Court has not distinguished between time spent drug-free while incarcerated and time spent drug-free in the community. In fact, this Court has rejected arguments of remoteness where defendant was at liberty for only a short period of time, as a "[d]efendant's abstinence and participation in treatment while he was incarcerated are not necessarily predictive of his behavior when no longer under such supervision" (*People v Gonzalez*, 48 AD3d 284 [1st Dept 2008] [internal quotation marks omitted], *lv denied* 10 NY3d 711 [2008]). In addition to the Board's Case Summary, a 2001 Inmate Status Report confirmed that defendant admitted to abusing LSD and alcohol in the past; this amounts to clear and convincing evidence of his drug use. The select disciplinary records on which defendant relies do not conclusively establish that he was no longer abusing drugs.

Thus, while the court should not have assessed 30 of the 170 points and defendant should have been scored 140, he was still correctly designated a level three sex offender.

Accordingly, the order of the Supreme Court, Bronx County (Steven Lloyd Barrett, J.), entered on or about April 1, 2010,

which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (SORA)(Correction Law art 6-C), should be affirmed, without costs.

All concur.

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

ENTERED: MAY 30, 2013

CLERK