SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 26, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Renwick, Moskowitz, Richter, Kapnick, JJ.

13260-
13261 The People of the State of New York, Respondent,

Ind. 5350/11
SCI 3439/12

-against-

Herbie Brown,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Rachel T. Goldberg of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (David E. A. Crowley of counsel), for respondent.

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Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered September 6, 2012, as amended October 2, 2012, convicting defendant, upon his plea of guilty, of identity theft in the first degree (two counts), grand larceny in the third degree (two counts), criminal possession of stolen property in the third degree (two counts), computer trespass and unlawful possession of personal identification information in the third degree (two counts), and sentencing him, as a second felony offender, to an aggregate term of 3½ to 7 years, unanimously affirmed.

Defendant's claim that his out-of-state conviction was not the equivalent of a New York felony is unpreserved because there was neither a timely objection before the sentencing court nor was the issue raised by a CPL 440.20 motion *(see People v Jurgins*, __ NY3d __, 2015 NY Slip Op 09311 [2015]). We decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. The foreign statute at issue is equivalent to a New York felony (*see* Penal Law § 155.00[3]; *Matter of Reinaldo O.*, 250 AD2d 502 [1st Dept 1998], *lv denied* 92 NY2d 809 [1998]; *People v Kirnon*, 39 AD2d 666, 667 [1972], *affd* 31 NY2d 877 [1972]; *see also People v Barden*, 117 AD3d 216, 232-235 [1st Dept 2014], *lv granted* 24 NY2d 959 [2014]).

The sentence was properly enhanced for defendant's failure to comply with a condition unambiguously set forth by the court (*see People v Cataldo*, 39 NY2d 578, 580 [1976]; *People v*

Baptiste, 116 AD3d 588 [1st Dept 2014], *lv denied* 24 NY3d 1081 [2014]), and we perceive no basis for reducing the sentence.

We have considered and rejected defendant's remaining claims.

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

ENTERED: JANUARY 26, 2016

CLERK

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

16142 The People of the State of New York, Respondent, Ind. 3817/09

-against-

Darrell Spencer, Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Susan H. Salomon of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Eric C. Washer of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (William I. Mogulescu, J.), rendered July 18, 2013, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him to a term of 25 years, affirmed.

The court properly denied defendant's motion to suppress his statements as fruits of a warrantless home arrest based upon its finding that defendant voluntarily came out of his apartment. There is no basis for disturbing the court's credibility determinations. The hearing evidence established that there was no violation of *Payton v New York* (445 US 573 [1980]) because defendant knowingly and voluntarily presented himself for public view (*People v Ashcroft*, 33 AD3d 429, 429 [1st Dept 2006], *lv denied* 8 NY3d 843 [2007], *cert denied* 552 US 829 [2007]).

The court properly denied defendant's request for a jury

instruction regarding intoxication. At trial, defendant maintained he had stabbed the victim out of self-defense. In the aftermath of the stabbing, he carried the victim to the tub, ran the shower to wash away the blood, tried to clean up the living room floor and walls, and sent his friend a text message, asking her to bring over plastic bags and cleaning supplies. Viewed as a whole and in a light most favorable to defendant, the evidence, which included, among other things, defendant's entirely purposeful behavior, provided no reasonable view that he was so intoxicated as to be unable to form the requisite intent (*see People v Beaty*, 22 NY3d 918, 921 [2013]).

The court properly denied defendant's application for a mistrial. On the fourth day of the deliberation, after counsel had agreed to excuse the alternate jurors, the court was notified that juror number one, the foreperson, had concerns. In the presence of both attorneys, the court conducted an in camera, individualized inquiry of the juror (*see People Rodriguez,* 71 NY2d 214 [1988]). The juror said she could not "separate [her] emotions from the case" and although she had originally thought she could do that, was now unable to do so. The court reminded her that she had a duty to decide the case "on the evidence and the law as you find it to be" adding, that "I know it's difficult to be a juror but . . . we've all put [in] a lot of time, a lot

of effort, and there's no way that we can go forward without you." When the juror asked the court, "So is it just that I make a decision based on my emotions, just to get it out of the way?" the court replied, "No, no I wouldn't ask you to make a decision based upon your emotions. . . " and urged her to "put aside, to the extent that you can, your emotion and make a decision. Speak to your fellow jurors; discuss with your fellow jurors; listen to your fellow jurors; express your own views to your fellow jurors; and then, eventually, come to a decision as to the one issue here . . . whether or not the People have proven Mr. Spencer's guilt beyond a reasonable doubt. I'm going to have to ask you to really try very hard to do that." When the juror told the court "I don't have it in me," the court reassured her "there is no new jury that's going to be any better doing this than you are" and stated:

> "THE COURT: Look if you think of the position that we're in now . . . I mean this is a significant case and everybody here has a real interest in it being resolved. Your fellow jurors have an interest in it being resolved; the People of the State have an interest of it being resolved, everybody does. And so I'm going to ask you to really do, you know, to decide the case. Figure out what you believe the facts are. And without fear or favor or bias or sympathy, once you decide the facts and apply the law, then you will decide whether or not Mr. Spencer is even [sic] guilty or not guilty."

The court then asked the juror whether she could decide what the facts are and she responded "yes." The court then asked whether she would apply the law as "I give it to you" and the juror replied that she would. The court then made the following statement and sent the juror back to join the other jurors:

> "THE COURT: I understand what you're saying. But you're capable of deciding, on your own, what the facts are. And once you do that, once you do that, then its your job to apply the law to the facts. And come to a decision based on the law and the facts and that's what you promised to do. So I'm going to ask you to try to do that . . ."

After juror number one had left the courtroom, defense counsel immediately moved for a mistrial, claiming that juror number one was grossly unqualified (CPL § 270.35[1]). The court, stating that it was "not prepared, at this time to grant a mistrial" denied the motion, but asked defense counsel, "[I]s there anything you feel I should ask her further?" to which defense counsel answered, "No." The trial court then offered to give the jurors an *Allen* charge, but both attorneys objected. The People's objection was on the basis that they had not asked for it, and defense counsel's objection was "You already said it." The court had all the jurors brought in and gave them the following additional instruction:

> "THE COURT: What I'm going to ask you to do is I'm going to ask you to continue to apply

> the law to the facts as you find the facts without fear or favor or bias or sympathy of any kind that's your job. An I'm going to ask you to do that. So I'm going to ask you to return to the jury room and resume your deliberations. And if something occurs to you that you think will be helpful, because that's what you promised to do and I'm going to really hold you to that promise. That you will decide this case on the facts as you find them; the law as I've told you; without fear or favor or sympathy or bias, okay."

Without prompting, juror number one responded, "I have no choice," and the court agreed: "That's true, okay, thank you very much." The jurors were sent back to deliberate. Outside the presence of the jurors, the court encouraged both sides to discuss the possibility of resolving the case with a plea. Later that afternoon, however, the jury notified the court it had reached a verdict.

After a juror is sworn in, the juror should be disqualified only "when it becomes obvious that [the] juror possesses a state of mind which would prevent the rendering of an impartial verdict" (CPL § 270.35[1]; *People v Buford*, 69 NY2d 290, 298 [1987]; *People v Watson*, 243 AD2d 426 [1st Dept 1997], *lv denied* 92 NY2d 863 [1998]). The trial court properly concluded, based upon its observations of the juror and its interactions with her, that she was not grossly unqualified from continuing to serve (CPL § 270.35[1]; *Buford*, 69 NY2d at 298). Contrary to how the

dissent characterizes the trial court's interactions with the juror, the colloquy, consisting of some 10 transcribed pages, shows that the court patiently listened to the juror and tactfully asked her probing questions to determine whether, for some reason, she could not be impartial (*see People v Sanchez*, 99 NY2d 622 [2003]). She was candid in her responses and forthright about her concerns. None of her concerns had to do with fear about her personal safety (*see People v Ward*, 129 AD3d 492, 493-494 [1st Dept 2015] [juror afraid of reprisal from defendant's accomplices], *lv denied* 26 ny3d 936 [2015]), nor did she express any concerns about feeling coerced by her fellow jurors to vote in any particular way (*see People v Alvarez*, 86 NY2d 761, 763 [1995]). The juror never expressed an inability to deliberate fairly and render an impartial verdict, nor did she make any statements that could be taken as evidence of bias or sympathy either towards the deceased or the defendant that would have prevented her from deciding defendant's guilt or innocence. The juror only said that she was having difficulty separating her emotions, not that she was incapable of deciding the facts or applying the law, or that she would disobey the court's instructions.

After the court listened to her concerns, and reassured her that she could do the job that she had taken an oath to do, the

juror told the court that she could and would decide the facts and follow the court's instructions to reach a verdict (*see People v Parilla*, 112 AD3d 517, 518 [1st Dept 2013, *lv denied* 26 NY3d 933 [2015]). Her comment that she had "no choice," in the overall context of the reassurances she gave to the trial court that she could decide the facts and would apply the law, was not a basis to disqualify her. Since the trial court personally observed her demeanor and gauged her responses to its inquiries, it was in the best position to ascertain her impartiality (*see People v Bamfield*, 208 AD2d 853, 854 [2d Dept 1994], *lv denied* 84 NY2d 1009 [1994]). That finding is accorded deference and we decline to disturb it.

Although the dissent notes that the trial court, in its individual inquiry, did not stress the importance of the juror reaching a verdict without surrendering her conscientious belief (*see People v Nunez*, 256 AD2d 192, 193 [1st Dept 1998], *lv denied* 93 NY2d 975 [1999], citing *People v Ali*, 65 AD2d 513 [1st Dept 1978], *affd* 47 NY2d 920 [1979]), that instruction had already been given to all the jurors when they were originally charged. Both attorneys objected to the court giving the jury an *Allen* charge, which would have, once again, stressed the importance of reaching a verdict without forcing any juror to surrender a conscientiously held belief (*Allen v United States*, 164 US 492

[1896]). When asked by the court whether he had any further questions for the juror, defense counsel responded he had none. Defense counsel did not object to any of the statements the trial court made to the juror during its inquiry of her. The court's statements to the juror, urging her to continue deliberations with her fellow jurors, and to decide the facts and apply the law, as it was given to her, did not amount to coercion of a particular verdict (*see People v Pagan*, 45 NY2d 725 [1978]). The court properly exercised its discretion in declining to discharge the juror, a remedy that would have necessitated a mistrial since the alternative jurors had already been excused (*see* CPL 270.35[1]; *Buford*, 69 NY2d at 299-300). The colloquy supports the conclusion that the juror could reach a fair and impartial verdict.

We perceive no basis for reducing the sentence.

All concur except Tom, J.P. who dissents in a memorandum as follows:

TOM, J.P. (dissenting)

Because the trial court failed to conduct a tactful and probing inquiry to ascertain whether a juror was capable of rendering an impartial verdict and because the court, in further instructing the jury, failed to emphasize the need to arrive at a verdict without requiring any single juror to surrender her conscientious belief, the record does not afford an adequate basis for this Court to conclude that the verdict was not the result of coercion, and a new trial is required.

On the morning of the fourth day of deliberations, after the alternate jurors had been discharged, the court received a message from juror number 1 stating that she wanted to be excused. The court conducted an inquiry into the juror's concerns in the courtroom in the presence of counsel and defendant (*see People v Buford*, 69 NY2d 290, 299 [1987]). The juror was able to say only, "I'm not sure that I'm able to separate my emotions from the case so I just wanted to --," when the court cut her off:

> "THE COURT: Well, I mean, you have to do that. You have to separate your emotions. You're a member of a jury of 12 people. As I said, this has to be decided. And you promised you will be able to do so. It has to be decided on the evidence and the law as you find it to be. And I know it's difficult to be a juror but that's you know -- I mean we've all put a lot of time, a lot of effort,

> and there's no way we can go forward without you.
>
> "THE JUROR: Well, I do understand. I feel -- I thought I would be able to but it is my duty to let you know that I haven't been able to.
>
> "THE COURT: Well, I mean, it's something. We can't go forward and there's no way we can excuse you. We can't go forward without you, we just can't.
>
> "THE JUROR: So is it just that I make a decision based on my emotions just to get it out of the way?"

The court responded that it would not ask the juror to make a decision based on her emotions, but asked that she attempt to put aside her emotions and make a decision. The juror responded, "I don't feel like I'm able to. I mean I've been trying extremely hard and I don't feel that I can without -- I can't separate it I thought that I could." The court again directed the juror "to decide the facts [ ] and apply the law as I have said it to you." To which the juror replied, "But that's what I have been trying to do and that's why I've come to [the] conclusion that I can't. I don't have it in me." The court again asked the juror to "try very hard" to continue engaging in deliberations with her fellow jurors. Again the juror responded, "I can't, I can't separate it anymore. Don't know, I don't know. I don't have the capabilities to. I've been trying and I can't.

That's what I'm trying to tell you." Ignoring the juror's plea, the court once again told the juror to "go back over it with your fellow jurors and to try because that's your job," the following colloquy ensued:

> "THE JUROR: I feel like I am. And I don't feel like I can do that that's what I feel. Like it's not like I came to this conclusion, I stepped in one minute and I came right back out. I feel like I've come and giving [sic] up my conscience. I did take an oath to do a certain job that I can't do it I can't.
>
> "THE COURT: But you can decide what the facts are can't you?
>
> "THE JUROR: Yes.
>
> "THE COURT: And once you've done that, once you've decided the facts, then you have to apply the law as I [gave] it to you that you have to do."

When the juror said, "[A]ll right, I mean I'm telling" - the court abruptly cut short the juror's further attempt to explain her feelings with another instruction to "come to a decision based on the law and the facts," at which point defense counsel moved for a mistrial on the ground that "this juror is no longer qualified to be a juror in this case." The court immediately denied the application. When the jury returned to the courtroom, the court asked them collectively to apply the law to the facts and to continue deliberations "without fear or favor or sympathy or bias, okay." Juror number 1 responded, "I have no choice,"

and the court stated, "That's true, okay. Thank you very much."

After the jury left the courtroom to resume deliberations, the court expressed its belief to counsel that "the juror, at this stage, is the sole hold on [sic] in this case . . . but for whatever reason up to now feels, notwithstanding what she had sworn to do, that she can't say guilty." The court urged defendant to accept an offer to enter a plea to manslaughter in the first degree and recessed the case for lunch to allow him to consider it. But when the jurors returned only a short while later at 2:30 p.m., they announced that they had reached a verdict, finding defendant guilty of first-degree manslaughter.

A defendant has the right to removal of a juror who is "grossly unqualified" to continue serving (CPL 270.35 [1]; *People v Rodriguez*, 71 NY2d 214, 218-219 [1988]). Disqualification requires a "tactful and probing inquiry" that convinces the court, based on the juror's unequivocal responses, of the "gross disqualification to serve impartially" (*People v Anderson*, 70 NY2d 729, 730 [1987]).

In the matter before us, the trial court's inquiry was neither particularly tactful nor probing. By cutting off the juror's attempt to explain the nature of her emotional conflict, the court neglected to investigate how her emotions might – or might not – interfere with her ability to render an impartial

verdict (*id.*). Having rendered equivocal, by its interruptions, the juror's responses, there was little for the trial court to assess, resulting in an inadequate record for this Court to review. Like a trial court, we "may not speculate as to the possible partiality of a sworn juror based on equivocal responses" (*id.*). Furthermore, it is clear that the trial court failed to ascertain that the juror would not render a determination "based on my emotions just to get it out of the way" or by "giving up my conscience" or because "I have no choice." Finally, the court failed "to stress the importance of reaching a verdict without requiring that any juror surrender a conscientious belief" (*People v Nunez*, 256 AD2d 192, 193 [1st Dept 1998], *lv denied* 93 NY2d 975 [1999], citing *People v Ali*, 65 AD2d 513 [1st Dept 1978], *affd* 47 NY2d 920 [1979]).

Moreover, a review of the record makes clear that, like the court in *Rodriguez*, the trial court's predominant concern was not determining whether the juror was "grossly unqualified" but was to avoid declaring a mistrial at all costs. In *Rodriguez*, the trial court expressly informed the juror that her discharge would result in a mistrial, that there were no more alternates, and remarked that "after almost two days of deliberating all this goes down the drain" (71 NY2d at 217). Here, the court, faced with the same concern, repeatedly pressured the juror and ignored

her concerns, stating that she had to continue, that "there's no way we can excuse you," confirming that she had "no choice," and noting the time and effort put into the case and how the defendant, the prosecution, and the other jurors had a "real interest in [the case] being resolved."

In addition, unlike the jurors in *People v Buford* (*supra*) and its companion case, *People v Smitherman*, who were concerned about relatively insignificant matters "unlikely to affect their deliberations" (*Rodriguez*, 71 NY2d at 219), the record here does not allow for such a conclusion. Indeed, while the trial court did not sufficiently probe the juror's emotional conflict, it is clear that, although the juror tried to separate her emotions for three days of deliberations, she felt compelled to advise the court that she was unable "to separate her emotions from the case" and could not do the job she took an oath to do without "giving up [her] conscience."

Nor did the juror here claim an ability to render an impartial verdict or state that she "could separate her own emotions and experience from the facts and the evidence in this case" (*cf. People v Dacus*, 215 AD2d 578, 579 [2d Dept 1995], *appellant denied* 86 NY2d 793 [1995]).

Contrary to the majority's implication, it is not necessary for the juror to express concern for her personal safety or about

feeling coerced by her fellow jurors in order for her to be found "grossly unqualified." Significantly, the juror stated that she could not render an impartial verdict, could not separate her emotions despite her best efforts, and did not want to make a decision "based on my emotions just to get it out of the way."

While defense counsel may not have objected to any of the statements the trial court made to the juror and did not propose further questions for the juror, it is ultimately the trial court's responsibility to conduct a sufficient inquiry to ensure the juror can serve impartially and without surrendering her conscientious belief. Nonetheless, after the court ended the colloquy with the jurors, counsel immediately moved for a mistrial on the ground she was no longer qualified to be a juror in this case.

The court's failure to conduct a sufficient inquiry is no better than a refusal to make any inquiry whatsoever. Indeed, in either case, the issue is "not whether the juror ultimately would or should have been discharged" (*People v McClenton*, 213 AD2d 1, 7 [1st Dept 1995], *appeal granted* 86 NY2d 848 [1995], *appeal dismissed* 88 NY2d 872 [1996]). Rather, it is the failure of the court to fully explore whether the juror was unwilling or unable to separate her emotions from her task as a juror, and whether she would render a decision based on her emotions for expedience

sake. Ultimately, this failure means we can not be certain that defendant was fairly convicted because it will never be known whether the conviction was obtained under "questionable circumstances which could have been easily clarified had appropriate inquiry been timely made" (*id.* at 6; *see also People v Ventura*, 113 AD3d 443, 446 [1st Dept 2014], *lv denied* 22 NY3d 1203 [2014]).

The improper discharge of a sworn juror violates the right of a defendant to be judged by a jury in whose selection he has participated (*Rodriguez*, 71 NY2d at 218). By the same token, it is equally improper and prejudicial for a court to "'attempt to coerce or compel the jury to agree on a particular verdict or any verdict'" (*People v Pagan*, 45 NY2d 725, 726 [1978], quoting *People v Faber*, 199 NY 256, 259 [1910]). The record here clearly supports the fact that the court coerced the juror, who may have surrendered her conscientious belief, to render a verdict. "The verdict of a juror should be free and untrammeled" (*Faber*, 199 NY at 259) and here, as in *Faber*, the court's instructions "may have resulted in an agreement by the jury where an agreement would not have been obtained if each juryman in obedience to his right and

duty had decided the case upon his own opinion of the evidence and upon his own judgment" (*id.*).

Accordingly, the judgment of conviction should be reversed and the matter remanded for a new trial.

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

ENTERED: JANUARY 26, 2016

CLERK

Tom, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

16389 Estate of Valentin Mirjani, deceased, by its Administratrix Haleh Kerendian, et al.,
Plaintiffs-Appellants,

-against-

Carlene DeVito, et al.,
Defendants-Respondents,

Behrouz Benyaminpour, et al.,
Defendants.

Index 400437/13

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

Bruno, Gerbino & Soriano, LLP, Melville (Mitchell L. Kaufman of counsel), for Carlene DeVito, respondent.

Picciano & Scahill, P.C., Westbury (Andrea E. Ferrucci of counsel), for Courtney Riso and Francis Riso, respondents.

Russo, Apoznanski & Tambasco, Melville (Gerard Ferrara of counsel), for Joseph Fulcoly and Therese Fulcoly, respondents.

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Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered August 13, 2014, which granted the Riso and the Fulcoly defendants' motions for summary judgment dismissing the complaint and all cross claims against them, unanimously modified, on the law, to grant defendant DeVito, upon a search of the record, summary judgment dismissing the complaint and all cross claims against her, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Defendants Carlene DeVito, Courtney Riso, and Joseph Fulcoly all told the police at the scene and later testified at their depositions that the vehicle driven by defendant Behrouz Benyaminpour, in which plaintiffs were passengers, crossed the double yellow line and entered the westbound lane of traffic, even though the Benyaminpour vehicle was traveling in the eastbound lane. Behrouz told police at the scene that he had no memory of how the accident happened. All of these statements were memorialized in the MV-104 accident report prepared by the police officer investigating the accident. Behrouz now contends that two or three months after the accident, his memory returned, wherein at his deposition, Behrouz testified that the vehicles driven by DeVito, Riso and Fulcoly crossed the yellow line into his lane, causing the accident. This, plaintiffs argue, creates a material issue of fact and defendants' motions for summary judgment should have been denied.

It is axiomatic that statements made by a party in an affidavit, a police report, or a deposition that are not denied by the party constitute an admission, and that later, conflicting statements containing a different version of the facts are insufficient to defeat summary judgment, as the later version presents only a feigned issue of fact (*see Garzon-Victoria v Okolo*, 116 AD3d 558 [1st Dept 2014]; *Garcia-Martinez v City of*

New York, 68 AD3d 428, 429 [1st Dept 2009]).

Here, the certified police report and the officer's deposition testimony unequivocally state Behrouz did not remember how the accident happened. Indeed, Behrouz, at his deposition, acknowledged telling this to the police but went on to testify that he regained his memory several months later when he visited the scene. His testimony regarding how the accident occurred was flatly contradicted by that of DeVito, Riso and Fulcoly, as well as by plaintiff Kerendian, who was a passenger in Behrouz's vehicle. Behrouz's testimony therefore "appears to have been submitted to avoid the consequences of his prior admission to the police officer, and, thus, is insufficient to defeat [defendants'] motion for . . . partial summary judgment" (*Garzon-Victoria v Okolo*, 116 AD3d at 558; *see also Buchinger v Jazz Leasing Corp.*, 95 AD3d 1053 [2d Dept 2012]; *Nieves v JHH Transp., LLC,*, 40 AD3d 1060 [2d Dept 2007]). The motion court properly rejected this testimony since the totality of [Behrouz's] submissions create only a feigned issue of fact, and they are therefore insufficient to defeat defendants' motions (*Harty v Lenci*, 294 AD2d 296 [1st Dept 2002]).

The motion court correctly found that plaintiffs failed to present evidence sufficient to raise a triable issue of fact as to the negligence of Riso and Fulcoly. Whether either could have

taken actions to have avoided the accident is insufficient to defeat their motions for summary judgment, as the evidence established that they faced an emergency situation and were not required to anticipate that Behrouz's vehicle would cross over into their lane of traffic (*Williams v Simpson*, 36 AD3d 507, 508 [1st Dept 2007]; *Caban v Vega*, 226 AD2d 109, 111 [1st Dept 1996]).

Upon a search of the record (*see Dunham v Hilco Constr. Co.*, 89 NY2d 425, 429-430 [1996]), we grant DeVito summary judgment, since the evidence establishes that Behrouz's negligence was the sole proximate cause of the accident.

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

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

ENTERED: JANUARY 26, 2016

CLERK

Friedman, J.P., Renwick, Saxe, Moskowitz, JJ.

2 Francesca Appleby, et al., Index 13400/07
Plaintiffs-Respondents,

-against-

William Duffy Suggs, M.D., et al.,
Defendants-Appellants,

Angela Diamond, M.D.,
Defendant.

_____

Kaufman Borgeest & Ryan LLP, Valhalla (Jacqueline Mandell of counsel), for appellants.

Coiro, Wardi, Chinitz & Silverstein, Bronx (Michael A. Chinitz of counsel), for respondents.

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Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered October 15, 2014, which, to the extent appealed from as limited by the briefs, granted plaintiffs' motion to substitute the executrix, Joanne Appleby, in place of deceased plaintiff Francesca Appleby, and denied defendants-appellants' cross motion to dismiss the complaint, unanimously affirmed, without costs.

The motion court providently exercised its discretion in granting plaintiffs' motion and denying defendants' cross motion, despite plaintiffs' delay in moving for substitution (*see Hedaya v Hedaya*, 160 AD2d 625, 626 [1st Dept 1990]). Defendants do not dispute that plaintiffs, before moving for substitution, attempted to resolve the issue with defendants, with the motion

court's continued knowledge. Defendants' bare allegation of prejudice based upon the passing of time is insufficient to defeat plaintiffs' motion, especially since the case is likely to turn mainly on medical records rather than the memories of witnesses (*see Peters v City of N.Y. Health & Hosps. Corp.*, 48 AD3d 329, 329 [1st Dept 2008]; *Wynter v Our Lady of Mercy Med. Ctr.*, 3 AD3d 376, 378 [1st Dept 2004]). Although defendants claim they will be unable to obtain the medical records of decedent Francesca Appleby because it has been six years since the alleged medical malpractice, defendants failed to submit an affidavit from someone with knowledge averring that they attempted to obtain the records, but were unable to do so.

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

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

ENTERED: JANUARY 26, 2016

CLERK

Friedman, J.P., Renwick, Saxe, Moskowitz, JJ.

3 In re Nina M.,

A Child Under Eighteen Years
of Age, etc.,

Naquwan T.,
Petitioner-Appellant,

Edwin Gould Services for Children
and Families,
Respondent-Respondent.

_____

Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for appellant.

John R. Eyerman, New York, for respondent.

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Order, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about January 13, 2014, which denied petitioner's motion to reopen and set aside the adoption of the subject child, unanimously affirmed, without costs.

Family Court correctly found that petitioner failed to demonstrate that he was a person entitled to notice of the adoption and termination of parental rights proceedings (*see* Domestic Relations Law § 111-a[2][a]-[h]; Social Services Law § 384-c[2][a]-[h]). Although he claimed to have lived with the child's mother at the time of the child's birth, he did not claim to have ever lived with the child, who was placed into foster care from the hospital shortly after her birth (*see* Domestic

Relations Law § 111-a[2][e]; Social Services Law § 384-c[2][e]).

Moreover, petitioner failed to demonstrate that the adoption of the child by her kinship foster mother, who cared for her since her birth, was not in the child's best interests (*see Matter of Asia Sonia J.* [*Lawrence J.*], 74 AD3d 437, 438 [1st Dept 2010]).

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

ENTERED: JANUARY 26, 2016

CLERK

Friedman, J.P., Renwick, Saxe, Moskowitz, JJ.

5 The People of the State of New York, Respondent, Ind. 3806/10

-against-

Brian Hunt, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered April 27, 2011, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him to a term of 2½ years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no reason to disturb the jury's credibility determinations. The evidence established that at least two men, one of whom was defendant, attacked the victim. The evidence also supports findings that defendant was the assailant who stomped on the fallen victim's eye, causing multiple fractures to his eye socket by means of defendant's sneaker, which qualified as a dangerous instrument under the circumstances (*see People v Carter*, 53 NY2d 113, 116 [1981];

People v Lev, 33 AD3d 362 [1st Dept 2006]). The jury's factually mixed verdict does not undermine the sufficiency of the evidence (*see People v Abraham*, 22 NY3d 140, 146-147 [2013]), and while we may consider it in performing our weight of the evidence review (*see People v Rayam*, 94 NY2d 557, 563 n [2000]), we find it "imprudent to speculate concerning the factual determinations that underlay the verdict" (*People v Horne*, 97 NY2d 404, 413 [2002]; *see also People v Hemmings*, 2 NY3d 1, 5 n [2004]).

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

ENTERED: JANUARY 26, 2016

CLERK

Friedman, J.P., Renwick, Saxe, Moskowitz, JJ.

6-
7 Index 154064/12

Lynn Mayo,
Plaintiff-Appellant,

-against-

Joshua Kim,
Defendant-Respondent.

_____

Mark A. Varrichio, Bronx, for appellant.

Adams, Hanson, Rego & Kaplan, Yonkers (Sean M. Broderick of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered on or about August 7, 2014, which, insofar as appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the complaint based on plaintiff's inability to establish that she suffered a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about May 1, 2015, which, upon reargument, adhered to the prior determination, unanimously dismissed, without costs.

Plaintiff alleges that she suffered serious injury to her cervical and lumbar spine as the result of a motor vehicle accident in October 2010. About a year before the accident, plaintiff was diagnosed with "severe arthritis" in the lumbar spine, and underwent a lumbar discectomy and fusion for which she

was still being treated at the time of the accident.

Defendant made a prima facie showing that plaintiff did not suffer a serious injury to her lumbar spine as a result of the accident by submitting the expert report of a neurologist, who noted that MRIs taken before and after the accident revealed no changes causally related to the accident and found no limitations in range of motion (*see Chaston v Doucoure*, 125 AD3d 500, 500 [1st Dept 2015]). Defendant's neurologist also found full range of motion in plaintiff's cervical spine, and noted that there was no medical history of treatment of plaintiff's left knee in the period following the accident (*see Kang v Almanzar*, 116 AD3d 540, 540 [1st Dept 2014]).

In opposition, plaintiff failed to raise an issue of fact. Plaintiff's rehabilitation physician provided only a conclusory opinion that the lumbar spine condition was caused or aggravated by the accident, without addressing the preexisting degenerative conditions documented in plaintiff's own medical records or explaining why her current reported symptoms were not related to the preexisting condition (*see Rivera v Fernandez & Ulloa Auto Group*, 123 AD3d 509, 510 [1st Dept 2014], *affd* 25 NY3d 1222 [2015]; *Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043, 1044 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]). Plaintiff presented no objective evidence of injury to her cervical spine or of any

limitation in use of her cervical spine following the accident. To the extent plaintiff now claims an injury to her left knee, which was not pleaded in her bill of particulars, she presented only an unaffirmed MRI report of a test performed over two years after the accident that showed an arthritic condition, and provided no evidence of any limitations in use of the knee.

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

ENTERED: JANUARY 26, 2016

CLERK

Friedman, J.P., Renwick, Saxe, Moskowitz, JJ.

8 WeiserMazars Wealth Advisors, LLC formerly known as Weiser Capital Management, LLC, Plaintiff-Appellant, Index 650877/14

-against-

Debra Schatzki, Defendant-Respondent.

_____

Locke Lord LLP, New York (Ira G. Greenberg of counsel), for appellant.

Lawler, Mahon & Rooney LLP, New York (James J. Mahon of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jeffery K. Oing, J.), entered December 10, 2014, which, to the extent appealed from as limited by the briefs, granted defendant's motion to dismiss the complaint on res judicata grounds, unanimously modified, on the law, to base the dismissal on the grounds of a prior action pending, and otherwise affirmed, without costs.

At oral argument the parties agreed that dismissal should be premised on the ground that there is a prior Federal action pending.

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

ENTERED: JANUARY 26, 2016

CLERK

Friedman, J.P., Renwick, Saxe, Moskowitz, JJ.

9- Ind. 865/12
10- 3908/12
11 The People of the State of New York, 3338/13
Respondent,

-against-

Sean Brown, also known as Leon Sean Brown,
Defendant-Appellant.

_____

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

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

_____

Judgments, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered September 16, 2013, as amended September 20, 2013, convicting defendant, after a jury trial, of sex trafficking (three counts), promoting prostitution in the third degree (two counts) and criminal contempt in the first degree, and sentencing him, as a second felony offender, to an aggregate term of 10 to 20 years, unanimously affirmed.

When defense counsel's cross-examination of the victim created the misleading impression that the victim's prostitution convictions were vacated as a reward for her cooperation with the People, the court properly exercised its discretion in instructing the jury that the convictions were actually vacated pursuant to a statute permitting sex trafficking victims to

obtain such relief (*see* CPL 440.10[1][i]). The cross-examination created the necessity for such a clarifying instruction (*see e.g. People v Hesterbay*, 60 AD3d 564, 566 [1st Dept 2009], *lv denied* 12 NY3d 916 [2009]). To the extent that defendant argues that a clarifying instruction should have been given, but in different language, that claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that the language employed by the court did not deprive defendant of a fair trial.

We reject defendant's arguments concerning to the sufficiency and weight of the evidence supporting his contempt conviction (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence supports an inference that defendant knew that the order of protection against him barred contact with the specific person who was the alleged victim in this case.

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

ENTERED: JANUARY 26, 2016

CLERK

Friedman, J.P., Renwick, Saxe, Moskowitz, JJ.

13 In re Sanjoyt Dunung,
Petitioner-Respondent,

-against-

Deepak Singh,
Respondent-Appellant.

_____

Corey M. Shapiro, New York, for appellant.

Sanjoyt P. Dunung, respondent pro se.

_____

Order, Family Court, New York County (Susan K. Knipps, J.), entered on or about March 18, 2015, which, to the extent appealed from, denied respondent father's objection to a support magistrate's order that he pay half of the private school expenses at the United Nations International School (UNIS) for two of his children, unanimously affirmed, without costs.

Family Court properly accorded due deference to the Support Magistrate's credibility determinations (*see Coggeshall Painting & Restoration Co. v Zetlin*, 282 AD2d 364, 365 [1st Dept 2001]), including its finding that the father did not previously object to his children attending private school at UNIS. Further, Family Court properly adopted the Support Magistrate's conclusion that the father has the financial ability to contribute to the children's private school expenses, as that determination is supported by the record, including the terms of the parties'

settlement agreement (*see Banco Espírito Santo, S.A. v Concessionária Do Rodoanel Oeste S.A.*, 100 AD3d 100, 106 [1st Dept 2012]).

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

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

ENTERED: JANUARY 26, 2016

CLERK

Friedman, J.P., Renwick, Saxe, Moskowitz, JJ.

14 Yahaira Orellana, Index 308832/10
Plaintiff-Appellant,

-against-

Roboris Cab Corp., et al.,
Defendants-Respondents.

_____

Law Offices of Mary Ann Candelario, PLLC, Westbury (Mary Ann Candelario of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Robert D. Grace of counsel), for respondents.

_____

Judgment, Supreme Court, Bronx County (Howard H. Sherman, J.), entered August 20, 2014, dismissing the complaint, and bringing up for review an order, same court and Justice, entered July 10, 2014, which, upon reargument of defendants' motion for summary judgment, adhered to the prior determination, inter alia, that plaintiff did not sustain a serious injury to her cervical or lumbar spine within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Plaintiff contends that defendants failed to establish prima facie that she did not suffer a serious injury to her cervical or lumbar spine and that the motion court erroneously overlooked inconsistencies in defendants' evidence that, regardless of the sufficiency of her opposition papers, precluded summary judgment in their favor. Defendants submitted affirmed reports by a

radiologist, a neurologist and an orthopedic surgeon, who opined that plaintiff had full range of motion in those body parts, and that, as to causation, any injuries were the result of degenerative and atraumatic changes (*see Rickert v Diaz*, 112 AD3d 451 [1st Dept 2013]; *Rosa v Mejia*, 95 AD3d 402 [1st Dept 2012]; *Riviello v Kambasi*, 82 AD3d 543, 543 [1st Dept 2011]). Contrary to plaintiff's contention, the discrepancies in the experts' findings on her straight leg raising test are of no significance, since both experts opined that the results were normal (*see Colon v Torres*, 106 AD3d 458 [1st Dept 2013]).

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

ENTERED: JANUARY 26, 2016

CLERK

Friedman, J.P., Renwick, Saxe, Moskowitz, JJ.

16-
17-
18 Index 654378/13

CPS 227 LLC,
Plaintiff-Respondent,

-against-

Martin Brody, etc.,
Defendant-Appellant.

_____

Wenig Saltiel LLP, Brooklyn (Charles L. Mester of counsel), for appellant.

Schlam Stone & Dolan, LLP, New York (Richard H. Dolan of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Eileen Bransten, J.), entered June 9, 2015, in plaintiff's favor against defendant, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered June 4, 2015, which granted plaintiff's motion to enforce a conditional discovery order by striking defendant's answer and to award him a default judgment against defendant, and for attorneys' fees and costs, and denied as moot defendant's cross motion for summary judgment dismissing the complaint, unanimously dismissed, without costs, as subsumed in the appeal from the aforesaid judgment.

Supreme Court properly struck defendant's answer based on its finding that he failed to comply with a conditional order requiring compliance with discovery demands, and his pattern of

disobeying discovery orders (*see Fish & Richardson, P.C. v Schindler*, 75 AD3d 219 [1st Dept 2010]). It also properly awarded plaintiff its attorneys' fees and costs as a result of defendant's discovery abuses. As plaintiff was entitled to have the answer struck and a default judgment entered on the complaint, the court properly awarded the sum alleged in the complaint without ordering an inquest, and correctly declined to consider the merits of defendant's cross motion for summary judgment (*see AWL Indus., Inc. v QBE Ins. Corp.*, 65 AD3d 904 [1st Dept 2009]).

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

ENTERED: JANUARY 26, 2016

CLERK

Friedman, J.P., Renwick, Saxe, Moskowitz, JJ.

19 Georgette Gonzalez, Index 307097/11
Plaintiff-Appellant,

-against-

Mount Vernon Neighborhood
Health Center, Inc.,
Defendant-Respondent.

_____

Robert Dembia, P.C., New York (Robert Dembia of counsel), for appellant.

Kaufman Borgeest & Ryan LLP, Valhalla (Jacqueline Mandell of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Mark Friedlander, J.), entered September 2, 2014, granting defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Dismissal of the complaint was proper in this action where plaintiff was injured when she tripped and fell over the base of a stanchion that was being used to create a pathway to a service window. The record establishes that the condition complained of was open, obvious and not inherently dangerous (*see Villanti v BJ's Wholesale Club, Inc.*, 106 AD3d 556 [1st Dept 2013]; *Broodie v Gibco Enters., Ltd.*, 67 AD3d 418 [1st Dept 2009]).

Supreme Court properly refused to consider the statutes and administrative regulations that were purportedly violated since

they were raised by plaintiff for the first time in opposition to the summary judgment motion (*see e.g. Jean-Baptiste v 153 Manhattan Ave. Hous. Dev. Fund Corp.*, 124 AD3d 476 [1st Dept 2015]). In any event, as found by the court, the cited statutes and regulations are not applicable to the facts of this matter.

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

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

ENTERED: JANUARY 26, 2016

CLERK

Friedman, J.P., Renwick, Saxe, Moskowitz, JJ.

20 The People of the State of New York, Ind. 361N/13
Respondent,

-against-

Carlton Goodwin,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (James M. Burke, J.), rendered on or about April 2, 2014,

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

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

ENTERED: JANUARY 26, 2016

CLERK

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

Friedman, J.P., Renwick, Saxe, Moskowitz, JJ.

21 Hector Mercado, Index 301301/10
Plaintiff-Appellant,

-against-

New York City Transit Authority,
et al.,
Defendants-Respondents.

_____

The Law Office of Samuel Katz, New York (Samuel Katz of counsel), for appellant.

Lawrence Heisler, Brooklyn, for respondents.

_____

Order, Supreme Court, Bronx County (Barry Salman, J.), entered September 4, 2014, which, upon vacatur and reargument, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Considered in the light most favorable to plaintiff, the evidence demonstrates that plaintiff's startled throwing up of his hands, extending the left hand into the space above the subway track, in reaction to the standard train horn sounded to alert platform occupants of the train's arrival, was an extraordinary, unforeseeable superseding act that broke the causal connection between the injury to plaintiff's wrist and any alleged negligence of defendants for not sounding the horn more

frequently in accordance with procedure (*see generally Derdiarian v Felix Contr. Corp.*, 51 NY2d 308 [1980]).

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: JANUARY 26, 2016

CLERK

Friedman, J.P., Renwick, Saxe, Moskowitz, JJ.

22-
23 Index 158028/13

Sassan Naderi, M.D.,
Plaintiff-Appellant,

-against-

North Shore-Long Island Jewish
Health System, et al.,
Defendants-Respondents.

- - - - -

The American Academy of
Emergency Medicine,
Amicus Curiae.

_____

Law Offices of Michael G. Berger, New York (Michael G. Berger of counsel), for appellant.

Nixon Peabody LLP, Jericho (Christopher G. Gegwich of counsel), for respondents.

Law offices of Steven Mitchell Sack, New York (Steven Mitchell Sack of counsel), for amicus curiae.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered March 3, 2014, which, to the extent appealed from as limited by the briefs, granted defendants North Shore-Long Island Jewish Health System and Long Island Jewish Medical Center's (together, the LIJ defendants) motion to dismiss, and denied plaintiff doctor's cross motion for additional discovery, and order, same court and Justice, entered January 21, 2015, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for leave to renew his cross motion and the

LIJ defendants' motion to dismiss plaintiff's defamation and tortious interference causes of action, unanimously affirmed, without costs.

The motion court correctly dismissed those aspects of the breach of contract cause of action that pertain to the second employment agreement between plaintiff and the LIJ defendants (the second contract) and the notice and cure provisions of the parties' first employment agreement (the first contract). The second contract explicitly required the parties' signature to become effective, and plaintiff admits that the LIJ defendants did not sign the second contract. Thus, it failed to become a binding agreement, and was unenforceable against the LIJ defendants (*see Jordan Panel Sys. Corp. v Turner Constr. Co.*, 45 AD3d 165, 169 [1st Dept 2007]). To the extent that plaintiff's breach of contract claims are premised on the denial of his purported procedural due process rights under the first contract, those claims are contrary to the contract's express provisions barring procedural rights (*150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 5-6 [1st Dept 2004]).

The motion court correctly dismissed plaintiff's cause of action for breach of the implied covenant of good faith and fair dealing as duplicative of the breach of contract claims that are

still pending before the court (*MBIA Ins. Corp. v Merrill Lynch*, 81 AD3d 419, 419-420 [1st Dept 2011]).

Plaintiff's defamation claims allege nothing more than nonspecific defamatory rumors, which do not amount to actionable defamation (*see generally Frechtman v Gutterman*, 115 AD3d 102, 104 [1st Dept 2014]). Nowhere in the complaint does plaintiff allege the particular defamatory words or statements, who made the alleged statements, or to whom the alleged statements were made (*Murphy v City of New York*, 59 AD3d 301, 301 [1st Dept 2009]).

Plaintiff's reliance on an alleged comment made to him at the termination meeting by an employee of the LIJ defendants, to the effect that she doubted that he would be able to maintain his academic appointment at Hofstra Medical School, is not actionable defamation, and is also insufficient to sustain his tortious interference claim (*Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 [1st Dept 2009], *lv dismissed in part, denied in part* 14 NY3d 736 [2010]).

Plaintiff fails to state a valid Labor Law claim, because professionals like plaintiff who earn more than $900 a week are not entitled to paid time off, or any other benefit or wage supplement, under the Labor Law (*see* Labor Law § 198-c[3]; *see also Pachter v Bernard Hodes Group, Inc.*, 10 NY3d 609, 615

[2008]).

Plaintiff's cross motion for discovery pursuant to CPLR 3211(d) was correctly denied, as "he may not use discovery . . . to remedy the defects in his pleading" (*Weinstein v City of New York*, 103 AD3d 517, 517-518 [1st Dept 2013]).

The motion court correctly denied plaintiff's motion for leave to renew, because the emails he submitted do not contain any defamatory statements or have any connection to plaintiff's defamation and tortious interference claims and thus would not change the court's original determination (*see* CPLR 2221[e][2]).

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: JANUARY 26, 2016

CLERK

Friedman, J.P., Renwick, Saxe, Moskowitz, JJ.

25 The People of the State of New York, Respondent,

-against-

Andrea Lewis,
Defendant-Appellant.

Ind. 5720/04

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

Judgment, Supreme Court, New York County (Cassandra M. Mullen, J.), rendered on or about July 30, 2012, unanimously affirmed.

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

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

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

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

ENTERED: JANUARY 26, 2016

CLERK

Friedman, J.P., Renwick, Saxe, Moskowitz, JJ.

26N-
26NA Index 304455/13

Shafi Rivera,
Plaintiff-Appellant,

-against-

Corrections Officer L. Banks,
etc., et al.,
Defendants-Respondents.

_____

Rubert & Gross, P.C., New York (Soledad Rubert of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about March 20, 2014, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion to renew his motion for a default judgment against defendants or for leave to make substituted service on them, unanimously reversed, on the law, plaintiff's motion to renew granted, and, upon renewal, defendants are directed to serve an answer within 30 days of service of a copy of this order with notice of entry. Appeal from order, same court and Justice, entered January 6, 2014, which denied plaintiff's motion for a default judgment, unanimously dismissed, without costs, as superseded by the appeal from the order entered on or about March 20, 2014.

The motion court erred in denying plaintiff's motion to renew. Plaintiff reasonably believed that it was unnecessary to submit on his original motion the affidavits of the process server and his counsel's paralegal (*see Segall v Heyer*, 161 AD2d 471, 473 [1st Dept 1990]; CPLR 2221[e][3]). Plaintiff complied with the procedural requirements of 3215(f) by submitting affidavits of service on the original motion, and given defendants' failure to oppose that motion, there was no reason for plaintiff to provide further proof of service.

The affidavits of service constitute prima facie evidence of proper service upon defendants at their actual place of business pursuant to CPLR 308(2) (*see Grinshpun v Borokhovich*, 100 AD3d 551, 552 [1st Dept 2012], *lv denied* 21 NY3d 857 [2013]). Further, the affidavits of the paralegal and process server demonstrate that, pursuant to the directions provided by personnel at Rikers Island, plaintiff properly served defendant correction officers by leaving the summons and complaints with a person of suitable age and discretion, who identified himself as a "colleague," at Department of Correction headquarters (*compare Jiminez v City of New York*, 5 AD3d 182, 183 [1st Dept 2004] [substituted service at Department of Correction headquarters was improper, where the individually named correction officers worked at Rikers Island], *with Criscitiello v Alcala*, 20 Misc 3d 589, 593 [Sup Ct, Richmond

County 2008] [process server acted reasonably in serving the person she was directed to serve by the defendant doctor's office staff]). In opposition, defendants offered no evidence that their actual place of business was elsewhere. Defendants' submission of a warden's affidavit concerning the general procedures for service of process at Rikers Island was insufficient to raise an issue of fact concerning the propriety of service on defendants.

The record, viewed as whole and in light of the judicial preference for resolving disputes on the merits, demonstrates that defendants were unaware of the complaint or plaintiff's original motion and therefore had a reasonable excuse for their failure to respond to the complaint and the original motion. The record also demonstrates a potentially meritorious defense to the complaint, namely, that none of the defendants assaulted plaintiff. Accordingly, plaintiff is not entitled to a default judgment (*see Fried v Jacob Holding, Inc.*, 110 AD3d 56, 59-61 [2d

Dept 2013]; *see also Guzetti v City of New York*, 32 AD3d 234, 234 [1st Dept 2006]), and we direct defendants to serve an answer (*see Fried*, 110 AD3d at 66).

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

ENTERED: JANUARY 26, 2016

CLERK