SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 20, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Andrias, Moskowitz, Kahn, JJ.

2358 Brooke Biondi, Index 800207/11
Plaintiff-Respondent,

-against-

David Behrman, D.M.D., et al.,
Defendants-Appellants,

David Yang, D.D.S., et al.,
Defendants.

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Heidell, Pittoni, Murphy & Bach, LLP, New York (Daniel S. Ratner of counsel), for appellants.

Law Offices of Lawrence P. Biondi, Garden City (Lisa M. Comeau of counsel), for respondent.

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Order, Supreme Court, New York County (Douglas E. McKeon, J.), entered on or about October 15, 2015, which denied defendant-appellants' motion for summary judgment dismissing the complaint, and granted plaintiff's cross motion to amend the bill of particulars, reversed, on the law, without costs, the motion granted, and the cross motion denied as academic. The Clerk is directed to enter judgment in favor of defendants-appellants.

Plaintiff was born with a congenital condition, CHARGE

syndrome, that involves a constellation of symptoms, including ear abnormality. She had preexisting bilateral hearing loss and a significant underbite with an underdeveloped and asymmetric jaw, resulting in the nonalignment of her teeth with the midline of her face. Plaintiff and her family consulted with Dr. Behrman, an oral and maxillofacial surgeon, concerning a plan to correct the skeletal deformity, and plaintiff consented to the elective double-jaw orthognathic surgery. In her complaint and bill of particulars, plaintiff alleges that, as a result of the surgery, she suffered further hearing loss, numbness of lips, chin and lower facial areas, as well as problems with her midline bite and posterior occlusion.

Defendants met their prima facie burden in their summary judgment motion with plaintiff's medical records, and the opinions of Dr. Behrman and two experts, who addressed all theories of negligence alleged in the bill of particulars. In particular, their orthodontic expert opined that any problems with plaintiff's midline misalignment and posterior occlusion did not result from the surgery and, in any event, the 1 mm mandible slide was de minimis and within the standard of care. Defendants' expert otolaryngologist opined that, while plaintiff may have suffered additional hearing loss, there was no medical explanation therefor and that loss of hearing was not a risk of

orthognathic surgery. Dr. Behrman opined that his presurgical disclosure of the risks and benefits of the procedure, including the possibility of sensory deficits, comported with the standard of care and that hearing loss was not a foreseeable consequence of the procedure, and that the infection that led to removal of hardware had no functional consequence.

Once the defendants met their burden for summary judgment, plaintiff was obligated to rebut defendant's prima facie showing with medical evidence demonstrating that the defendants departed from accepted medical practice (*Scalisi v Oberlander*, 96 AD3d 106, 120 [1st Dept 2012]). Here, plaintiff failed to address the opinions of defendants' experts or defendants' prima facie showing that the result from the complicated, extensive double jaw surgery was anything but a reasonable result. Thus, there was no basis to preclude a grant of summary judgment in favor of defendants (*see Fernandez v Moskowitz*, 85 AD3d 566, 567-568 [1st Dept 2011]). Instead, plaintiff proffered a new theory, based on the report of an expert otolaryngologist, who opined that Dr. Behrman had failed to take into account plaintiff's primary immune deficiency in planning the surgery, that he should have initially consulted with an immunologist who would have performed testing before surgery, and that he failed to refer plaintiff after surgery to an ENT doctor, who would have consulted with an

immunologist. Plaintiff's expert asserted that these failures led to the development of an infection, which caused plaintiff's hearing loss, numbness, and teeth misalignment.

It is axiomatic that a plaintiff cannot defeat a summary judgment motion that made out a prima facie case by merely asserting, without more, a new theory of liability for the first time in the opposition papers (*see Abalola v Flower Hosp.*, 44 AD3d 522, 522 [1st Dept 2007]). Since plaintiff's opposition papers were insufficient absent this new theory of recovery, defendants' summary judgment motion should have been granted (*see Ostrov v Rozbruch*, 91 AD3d 147, 154 [1st Dept 2012]).

Furthermore, plaintiff's cross motion for leave to amend should have been denied since defendants had no notice of plaintiff's new claims, which were never mentioned in the pleadings or at depositions (*see e.g. Farris v Dupret*, 138 AD3d 565, 566 [1st Dept 2016], *lv denied* 27 NY3d 912 [2016]). Plaintiff's new theory of malpractice is not related to the claims in the pleadings. Rather, plaintiff's theory of malpractice in the complaint and bill of particulars is directed only to the surgical procedure performed by Dr. Behrman and lack of informed consent. There was no mention of any presurgical consultation with an immunologist which Dr. Behrman failed to have. Nor did plaintiff question Dr. Behrman at his deposition

regarding his treatment of her and planning for the surgery concerning her underlying primary immune deficiency condition. The isolated entry of "Primary Immune Deficiency" made in the voluminous pages of medical records did not place defendants on notice that they would be defending against any claim based on this condition. The dissent also overlooks that permitting the cross motion would prejudice the defendants, who expended large sums of money defending the action as pleaded, and planning their defense accordingly. Nor does the dissent explain how we could ignore the well settled law of this Department on this issue.

Contrary to the dissent's claim, the fact that a trial date had not been set for this matter does not mean that granting the cross motion would not significantly prejudice defendants. From the inception of the case through the summary judgment motion plaintiff never proceeded on her new immune deficiency theory, and thus all of defendants' efforts in discovery and motion practice did not consider this theory. To allow plaintiff a chance to start over at this late stage of the action, and in response to a summary judgment motion, would be highly prejudicial. Further, plaintiff failed to oppose the merits of defendants' prima facie showing on their summary judgment motion, requiring the granting of the motion, and the denial of plaintiff's cross motion.

Although this Court may search the record to find an issue of fact to preclude summary judgment, we cannot search the record to support a new theory of recovery that was never remotely put forth by the plaintiff. Thus, contrary to the dissent's position, the fact that plaintiff's primary immune deficiency is generally mentioned in her medical records does not permit her to raise this completely new theory - that Dr. Behrman should have consulted with an immunologist - for the first time in opposition to a summary judgment motion. While the merits of plaintiff's new theory of recovery should not be considered under these circumstances (*see Keilany B. v City of New York*, 122 AD3d 424, 425 [1st Dept 2014]), we also find the proposed amendment lacks merit (*see Katechis v Our Lady of Mercy Med. Ctr.*, 36 AD3d 514, 516-517 [1st Dept 2007]), since the theory based on primary immune deficiency is speculative and without record support. Plaintiff's expert did not explain how presurgical testing would have changed the result, and advanced only conclusory opinions that a specific infection, which occurred during her jaw surgery, was somehow the cause of her hearing loss, neurological facial sensory deficits, and teeth misalignment (*see Foster-Sturrup v Long*, 95 AD3d 726, 727-728 [1st Dept 2012]; *Roques v Noble*, 73 AD3d 204, 207 [1st Dept 2010]).

Further, the claim that defendant Behrman should have

referred plaintiff to an ENT after surgery is belied by the record evidence showing that plaintiff was so referred. The expert's opinion that risks related to primary immune deficiency should have been disclosed is similarly deficient, and unsupported by any opinion that a reasonable person so informed would not have undergone the procedure (*see* Public Health Law § 2805-d [3]).

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

MOSKOWITZ, J. (dissenting)

I agree with the majority that plaintiff failed to address defendants' prima facie showing that there was no departure from good and accepted medical practice. I also agree with the majority that the IAS court should have granted the branch of defendants' motion that sought to dismiss the informed consent cause of action. I disagree with the majority, however, on the issues of whether the IAS court properly granted plaintiff's motion to amend the bill of particulars and denied defendants' motion for summary judgment on the medical malpractice claim. Accordingly, because I agree with the IAS court's decision in that regard, I respectfully dissent.

As the majority notes, defendants met their prima facie burden with plaintiff's medical records, and the opinions of Dr. Behrman and two experts, who addressed all theories of negligence alleged in the bill of particulars. In opposition, plaintiff failed to address defendants' prima facie showing that the result from the double jaw surgery was anything but a reasonable result.

In general, a plaintiff cannot defeat a summary judgment motion by asserting a new theory of liability for the first time in opposition papers (*see Abalola v Flower Hosp.*, 44 AD3d 522, 522 [1st Dept 2007]). However, plaintiff cross-moved for leave to amend the bill of particulars to encompass this additional

theory of departure and causation, and the IAS court properly granted the motion, accurately noting that the allegations of malpractice in the expert affidavit fell within the scope of plaintiff's original allegations. Indeed, defendants had notice in their own records of plaintiff's condition, even though no deposition testimony referred to that condition (*cf. Farris v Dupret*, 138 AD3d 565, 566 [1st Dept 2016], *lv denied* 27 NY3d 912 [2016]).

Furthermore, although plaintiff filed a note of issue, the IAS court had not yet set a date for trial. As a result, I do not believe that there would be significant prejudice to defendants as a result of the delay in amending the bill of particulars (*see Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [1st Dept 2007]; *see also Lara v New York City Health & Hosps. Corp.*, 2000 NY Slip Op 50887(U) [Sup Ct Sept. 26, 2000], *affd Lara v New York City Health and Hosps. Corp.*, 305 AD2d 106 [1st Dept 2003] [*Frye* hearing held where new theory was introduced during opening statements to the jury]). Of course, were we to permit plaintiff to amend her bill of particulars, as I believe we should, defendants would be allowed further reasonable discovery on the new theory of liability (*see Cherebin*, 43 AD3d at 365; *see also Abdelnabi v New York City Tr. Auth.*, 273 AD2d 114, 115 [1st Dept 2000]). So that further

discovery could proceed, I would also strike the note of issue.

Contrary to the majority's assertion otherwise, there is nothing unduly speculative about the affidavit of plaintiff's expert otolaryngologist. The expert noted that plaintiff's medical chart clearly called attention to her primary immune deficiency, and that the condition would make plaintiff susceptible to perioperative infection, especially with surgery involving hardware and the oral cavity.

Thus, the expert concluded, it was a departure for Dr. Behrman to have failed to account for plaintiff's condition in the surgical planning and to discuss the surgery with plaintiff's immunologist. The expert further opined that plaintiff's infection resulted directly from Dr. Behrman's failure to incorporate plaintiff's suppressed immune condition into his surgical planning. Specifically, the expert noted that the infection had likely spread to the mastoid cavity and inner ear, and that acute infection and inflammation is known to adversely affect the inner ear. Thus, the expert concluded, the infection had caused sensory deficit. Similarly, the expert noted that the infection and associated inflammation caused direct injury to neurologic anatomy, thus causing the numbness of plaintiff's lip, chin, and lower facial area. The expert therefore drew a direct causal connection between the infection and plaintiff's injuries.

These assertions by plaintiff's expert are sufficient, at this stage of the litigation, to support an amended bill of particulars (*see Carnovali v Sher*, 121 AD3d 552 [1st Dept 2014]; *cf. Katechis v Our Lady of Mercy Med. Ctr.*, 36 AD3d 514, 516 [1st Dept 2007]).

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

ENTERED: APRIL 20, 2017

CLERK

Acosta, J.P., Manzanet-Daniels, Webber, Gesmer, JJ.

2766 Ranee Bartolacci-Meir, et al., Index 800415/11
Plaintiffs-Respondents,

-against-

Robert Sassoon, M.D.,
Defendant,

Ellen Scherl, M.D., et al.,
Defendants-Appellants.

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Heidell, Pittoni, Murphy & Bach, LLP, New York (Daniel S. Ratner of counsel), for appellants.

Koss & Schonfeld, LLP, New York (Jacob J. Schindelheim of counsel), for respondents.

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Order, Supreme Court, New York County (Douglas E. McKeon, J.), entered June 24, 2016, which denied defendants-appellants' motion for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

On September 10, 2010, four months after undergoing a cesarean section, plaintiff Raneee Bartolacci-Meir was diagnosed, via laparoscopic surgery, with a fistula. Defendant Dr. Ellen Scherl, a gastroenterologist, treated plaintiff both before and after her cesarean. Defendant Dr. Rasa Zarnegar, a surgeon, first treated plaintiff on July 15, 2010, on referral from an

associate of Dr. Scherl. Dr. Scherl and Dr. Zarnegar are employees at defendant New York-Presbyterian/Weill Cornell Medical Center (Presbyterian). Dr. Robert Sassoon, plaintiff's obstetrician, is also a defendant, but not a party to this appeal. The gravamen of plaintiff's claim is that her doctors failed to diagnose the fistula, and that the delay in diagnosis led to the need for extensive resection of her cecum, appendix and intestines.

Dr. Scherl, Dr. Zarnegar, and Presbyterian moved for summary judgment, arguing that neither doctor deviated from the standard of care for their respective professions, gastroenterology and surgery.

In support of their motion, defendants submitted an affidavit of Dr. Randolph Steinhagen, a colorectal surgeon, who opined that Dr. Zarnegar's treatment of plaintiff was within good and accepted practice. Specifically, Dr. Steinhagen stated that when Dr. Zarnegar saw plaintiff for the first time on July 15, 2010, he correctly diagnosed her with a surgical site infection, and treated it appropriately, with drainage and antibiotics. According to Dr. Steinhagen, the fluid drained by Dr. Zarnegar was the same fluid shown on the CT scan taken July 15, 2010, a collection in the anterior pelvic wall that tracked the cesarean incision and was not in the pelvic cavity. Dr. Steinhagen

further opined that Dr. Zarnegar's treatment on July 20, 2010, i.e., examining the wound, repacking it, and arranging for a visiting nurse to apply VAC (vacuum-assisted closure) dressing therapy, was appropriate. And it was appropriate for the doctor to close the wound on August 2, 2010, after blood and culture testing confirmed that the infection had resolved. When plaintiff appeared on August 3, experiencing swelling, redness and pain at the wound site, she denied fever and was having normal bowel movements. These complaints were consistent with an infection, and it was thus appropriate to treat the wound through August and early September with antibiotics, further drainage, and regular dressing changes with VAC therapy. Dr. Steinhagen averred that nothing in plaintiff's clinical presentation warranted more aggressive intervention until the emergence of brown discharge on September 8, 2010. The July CT scan showed no evidence of fluid in the pelvic cavity or anything suggestive of a fistula; even the September CT scan did not definitely show a fistula. And upon the emergence of discharge containing E. coli bacteria, timely and appropriate follow-up was performed in the form of a CT scan, and scheduling of infectious disease and surgical consultations. With regard to Dr. Scherl, Dr. Steinhagen opined that while a gastroenterologist may be involved in the diagnosis of a fistula in the digestive track, a patient

must be referred to a surgeon once the fistula is identified. Thus, it was appropriate for the doctor to defer to Dr. Zarnegar and Dr. Sassoon for the treatment of plaintiff's wound.

Defendants also submitted an affidavit by Dr. Vijay Yajnik, a gastroenterologist. Dr. Yajnik opined that Dr. Scherl correctly concluded that plaintiff's June 2010 complaints were related to her irritable bowel syndrome (IBS), and there was no evidence of an inflammatory or autoimmune condition. Thus, by prescribing Miralax and Xifax, Dr. Scherl's treatment of plaintiff was within the standard of care for a gastroenterologist. Moreover, nothing in plaintiff's complaints or testing from June to September indicated that Dr. Scherl should revisit her diagnosis. Nor was it outside the standard of care for Dr. Scherl to refer plaintiff to surgeons and defer to those surgeons with regard to treatment of the wound, since gastroenterologists do not treat fistulas. Regarding causation, Dr. Yajnik opined that biopsy results of the colon and ileum confirmed that the fistula did not develop from either IBS or an undiagnosed bowel disorder. Thus, the care rendered by Dr. Scherl had no relationship to the fistula.

In opposition, plaintiffs argued that Dr. Scherl did not investigate a possible bowel injury "when every indication was that she had experienced a bowel injury," including that "the CT

scan ordered by Dr. Sassoon identified multiple pelvic adhesions." Plaintiffs also argued that Dr. Zarneger should have recognized that plaintiff was not improving and looked beyond the possibility of a superficial infection.

Plaintiffs submitted an affidavit by Dr. David Befeler, a general surgeon. Dr. Befeler stated that the fistula was caused by operative injury during plaintiff's cesarean section surgery. According to Dr. Befeler, plaintiff "was noted to have had continuous and persistent malodorous discharge which is clearly a surgical problem since the fistula which developed was not managed." Dr. Befeler also stated that the July 14, 2010 CT scan of the pelvis ordered by Dr. Sassoon showed "multiple pelvic adhesions," and this CT scan was shared with Dr. Scherl. According to Dr. Befeler, Dr. Zarnegar treated plaintiff with "drainage of the fecal leakage at the wound site," instead of reviewing the CT-Scan, which would have led Dr. Zarnegar to treat plaintiff "more aggressively," "diagnos[ing] the patient's abscess and sepsis and treat[ing] her fistula surgically." Thus, Dr. Befeler opined, both doctors failed to follow accepted medical practice by requesting "recommendations and guidance regarding either further diagnostic testing or treatment or both." He concluded that if the fistula had been diagnosed two months earlier, a minimally invasive procedure could have been

used and resection of the bowels avoided.

In reply, defendants submitted additional affidavits by Dr. Randolph Steinhagen and Dr. Yajnik. As an initial matter, Dr. Steinhagen opined that plaintiffs' expert's opinion was fatally flawed as to Dr. Scherl, since, as a general surgeon, Dr. Befeler was unqualified to render an opinion on the standard of care for gastroenterologists. He pointed out that when Dr. Scherl first learned of plaintiff's wound issue, plaintiff was already being followed by a surgeon. Dr. Steinhagen also opined that Dr. Befeler mis-characterized the medical records. For example, while Dr. Befeler stated that the July 14, 2010 CT scan showed a bowel injury, the scan showed only a collection of fluid "'anterior to the musculature'" of the pelvis, a location outside the pelvic cavity, and thus outside the bowels. According to Dr. Steinhagen, the superficial wound infection depicted in the July CT scan was unrelated to the abscessed cavity between the uterus and bladder identified by a Dr. Milsom in September. Dr. Steinhagen also pointed to the fact that while Dr. Befeler referred to "malodorous discharge" and drainage of fecal matter by Dr. Zarnegar, the medical records showed the fluid was clear and consistently negative for bacteria. Dr. Steinhagen also disagreed with Dr. Befeler's conclusions. For example, Dr. Befeler opined that the left-quadrant pain should have caused Dr.

Zarnegar to investigate further, but Dr. Steinhagen observed that such pain is common with both IBS and cesarean section incisions. Regarding Dr. Scherl, Dr. Steinhagen noted that Dr. Befeler did not indicate what steps she should have taken other than those she took, such as referring plaintiff to a surgeon. And on the issue of causation, Dr. Steinhagen disagreed with Dr. Befeler's conclusion that plaintiff suffered an injury to her bowels during the cesarean. According to Dr. Steinhagen, "[T]his conclusion is not at all supported in the medical records and represents pure speculation."

The court denied defendants' motion. In discussing plaintiff's expert, the court observed that plaintiff "was noted to have continuous and persistent malodorous discharge," a fact that her expert pointed to as evidence that a fistula had developed but was not being managed.

Defendants correctly argue on appeal that their experts showed in detail that there was no departure from the standard of care in treating plaintiff and that plaintiffs failed to rebut that showing with a qualified expert who opined based upon facts in the record.

Where a defendant makes a prima facie case of entitlement to summary judgment dismissing a medical malpractice action by submitting an affirmation from a medical expert establishing that

the treatment provided to the injured plaintiff comported with good and accepted practice, the burden shifts to the plaintiff to present evidence in admissible form that demonstrates the existence of a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Here, defendants met that burden.

Defendants' expert, Dr. Steinhagen, opined that there was no evidence supporting plaintiff's claim that a fistula should have been included within defendant doctors' differential diagnoses before the wound leaked fluid containing fecal matter. The expert's opinion relied on the fact that the July CT scan showed only a superficial collection of fluid, without any fluid or abscess observed within the pelvic cavity. Indeed, Dr. Steinhagen observed that even the report of the CT scan taken in September stated that there was no evidence of fistula, although an abscess within the pelvic cavity had been identified for the first time. Further, defendants' expert pointed to the fact that multiple wound cultures taken between June and August were negative, the first bacterial gram-positive result occurring with the September culture taken at Southampton Hospital. Thus, Dr. Steinhagen opined, there was no reason for the doctors to attempt more aggressive treatment until they had a positive culture, and the care they provided was within the accepted standard.

Defendants' gastroenterology expert, Dr. Yajnik, opined that Dr. Scherl did not deviate from the standard of care as a gastroenterologist, appropriately diagnosing plaintiff with IBS, ruling out any other issues such as Crohn's disease, and referring her to a surgeon and her obstetrician for wound care. Dr. Yajnik observed that gastroenterologists may diagnose fistulas, but they do not treat them; they refer their fistula patients to surgeons. Thus, it was within the standard of care for Dr. Scherl to rely on the surgeons to manage wound care. Further, as opined by Dr. Yajnik, nothing in the testing pointed to the presence of a fistula, particularly the July CT scan, so there was nothing for Dr. Scherl to diagnose.

The nonconclusory opinion of a qualified expert based on competent evidence that a defendant departed from accepted medical practice and that that departure was a proximate cause of plaintiff's injury precludes a grant of summary judgment in favor of the defendants (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542 [2002]; *Cregan v Sachs*, 65 AD3d 101, 108 [1st Dept 2009]). However, the affidavit must be by a qualified expert who "profess[es] personal knowledge of the standard of care in the field of [] medicine [at issue], whether acquired through his practice or studies or in some other way" (*Nguyen v Dorce*, 125 AD3d 571, 572 [1st Dept 2015] [pathologist not qualified to

render opinion as to whether defendant deviated from the standard of care in the field of emergency medicine]; *see also Atkins v Beth Abraham Health Servs.*, 133 AD3d 491 [1st Dept 2015] [osteopath not qualified to render opinion on treatment of a geriatric patient with diabetes and other conditions]; *Udoye v Westchester-Bronx OB/GYN, P.C.*, 126 AD3d 653 [1st Dept 2015] [pathologist not qualified to render an opinion as to the standard of care in obstetrics or cardiology]; *Mustello v Berg*, 44 AD3d 1018 [2d Dept 2007] [general surgeon not qualified to render opinion as to gastroenterological treatment], *lv denied* 10 NY3d 711 [2008]).

Here, there is no indication that Dr. Befeler possessed the requisite background and knowledge to furnish a reliable opinion concerning the practice of gastroenterology (*see Browder v New York City Health & Hosps. Corp.*, 37 AD3d 375 [1st Dept 2007]). While a gastroenterologist may well be qualified to render an opinion on a surgical procedure involving the gastrointestinal system, it cannot be said that a general surgeon is qualified to opine on any specialty simply because the specialist may eventually refer the patient for surgery. Indeed, Dr. Befeler averred only that his conclusion that both doctors "were negligent in failing to follow standard and accepted medical procedures" was based upon his "review of the above records,

[his] education, years of training, and [his] forty year experience in the field of General Surgery." Nowhere did the doctor set forth any experience in gastroenterology or detail the standard of care for that specialty. Moreover, the expert did not provide any detail as to what Dr. Scherl should have done other than refer plaintiff to a surgeon, which she did. While he referred to "further diagnostic testing," he did not say what those tests would be.

Although plaintiffs correctly argue that a doctor may have the requisite knowledge to opine on a specialty outside his particular field (*Joswick v Lenox Hill Hosp.*, 161 AD2d 352, 355 [1st Dept 1990]), here, their expert failed to say that he possessed such knowledge and to explain how he came to it. Further, he failed to set forth the standard of care allegedly violated. Thus, plaintiffs did not adduce the opinion of a qualified expert so as to rebut Dr. Scherl's showing of her entitlement to summary judgment.

Dr. Befeler's opinion was also insufficient to rebut defendants' showing. "[G]eneral allegations of medical malpractice that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat a malpractice defendant's [summary judgment motion]" (*Melendez v Parkchester Med. Servs.*,

P.C., 76 AD3d 927, 927 [1st Dept 2010]; *see also Coronel v New York City Health & Hosps. Corp.*, 47 AD3d 456 [1st Dept 2008]). An expert opinion that is contradicted by the record cannot defeat summary judgment (*see Browder*, 37 AD3d at 376; *Wong v Goldbaum*, 23 AD3d 277 [1st Dept 2005]). Based upon these principles of law, plaintiffs' expert opinion was insufficient to contradict defendants' expert opinion that plaintiff was appropriately treated and that there was no evidence that plaintiff was suffering from a fistula until September of 2010.

Dr. Befeler's claims all rest on the assumption that plaintiff had a diagnosable fistula in July, when he claims that the CT scan showed bowel injury and plaintiff's wound was leaking fecal matter. But those statements are not only unsupported by the record; they are also contradicted by it. While Dr. Befeler stated in his affidavit that the July CT scan showed "multiple pelvic adhesions," the scan showed only an abscess anterior to the pelvic wall, i.e., not within the pelvis. The scan also showed no evidence of fistula or bowel injury. Indeed, the scan report states that other than the anterior fluid, "[n]o other mass lesions or lymphadenopathy are identified within the pelvis." And while the September CT scan showed collections of fluid within the pelvic cavity requiring further investigation, even that scan did not show a fistula. Regarding Dr. Befeler's

statement that plaintiff's wound site had drained malodorous "fecal leakage" since July, plaintiff testified at her deposition that she had no recollection of fluid in the wound having an odor until she went to Southampton Hospital in September. And the medical records demonstrate that the fluid was always odorless, with multiple wound swabs revealing no bacteria.

Dr. Befeler's statement that plaintiff had continued unexplained pain is also unsupported by the record. The only noted episode of pain came on August 2, 2010, after Dr. Zarneger closed the wound and it filled with fluid. And Dr. Befeler's supposition that plaintiff's pain was masked by painkillers is speculation. Lastly, and as with Dr. Scherl, Dr. Befeler did not identify a specific standard of care that was violated or what test or procedure that should have been performed. He merely stated that the fistula should have been discovered, with no indication as to how that discovery could or should have been made, other than by laboratory or image testing. In light of his reliance on inaccurate facts and his speculation that the fistula should have been found, without any specificity as to how that

could have been accomplished, Dr. Befeler's opinion does not create a question of fact warranting denial of defendants' motion.

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: APRIL 20, 2017

CLERK

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

3443 In re A. H.,

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

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Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Qian Julie Wang of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about January 14, 2016, which adjudicated appellant a juvenile delinquent upon her admission that she committed an act that, if committed by an adult, would constitute the crime of resisting arrest, and placed her on probation for a period of 12 months, unanimously affirmed, without costs.

The court providently exercised its discretion in adjudicating appellant a juvenile delinquent, rather than a person in need of supervision, and placing her on probation for 12 months with the requirement that she participate in services. This was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). An

adjudication as a juvenile delinquent requires two findings. First, based on appellant's plea, the court found that she had committed acts that, if committed by an adult, would be a crime (Family Court Act § 342.2). Second, based on appellant's reported history of attacks on her mother and others, violation of curfew, running away from home, truancy, gang involvement, and drug use, among other things, the court found that appellant was in need of a treatment program (Family Court Act § 352.1). The court also noted that the statutory enforcement mechanisms available under a PINS adjudication are inadequate to ensure compliance with such a program (*Matter of Edwin G.*, 296 AD2d 7, 11 [1st Dept 2002]). Accordingly, the court's determination was a proper exercise of its discretion.

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

ENTERED: APRIL 20, 2017

CLERK

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

3449 In re 18 St. Marks Place Trident LLC, Petitioner-Appellant, Index 153137/16

-against-

State of New York Division of Housing and Community Renewal, Office of Rent Administration, Respondent-Respondent.

_____

Barry S. Schwartz, New York, for appellant.

Mark F. Palomino, New York (Dawn Ivy Schindelman of counsel), for respondent.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered August 19, 2016, which denied the CPLR article 78 petition seeking to, among other things, vacate respondent's determination dated March 14, 2016, which affirmed a rent administrator's order finding that an apartment owned by petitioner was not eligible for deregulation and awarding the tenant an overcharge, unanimously reversed, on the law and the facts, without costs, the petition granted, the rent administrator's order reversed, the overcharge annulled, and it is declared that the legal regulated rent for the apartment is $2,035.13 per month and that the apartment is not subject to rent stabilization.

Respondent's determination allowing charges for installation

of new drywall and flooring, but disallowing expenses related to finishing the new surfaces, was irrational (*see Matter of West Vil. Assoc. v Division of Hous. & Community Renewal*, 277 AD2d 111, 112 [1st Dept 2000]). Here, the invoice listed the costs for painting and floor finishing of the entire apartment relative to the installation of the new floors and new walls in an easily discernible manner. The invoice submitted by petitioner reflected a charge of $1,680 for painting 1,750 square feet of interior surfaces. It also showed that 1,200 square feet of new drywall was installed. Thus, 68.57% of the total painting charge, or $1,151.98, was attributable to the new drywall, and that charge should have been allowed.

Similarly, respondent allowed charges for 144 square feet of new, unfinished wood flooring. Since the charge for finishing 675 square feet of wood flooring was $1,809, 21.33% of the total cost was attributable to the new flooring, or $385.92, which should have been allowed.

Thus, the total costs of improving the apartment after the 2008 vacancy should have been $22,733.50, 1/40th of which petitioner was allowed to pass on to the tenant (*see* 9 NYCRR 2522.4[a][4]). Accordingly, based on the formula used by respondent, the legal regulated rent for the apartment is $2,035.13 per month ($1,264.48 for rent prior to the vacancy,

plus $202.31 for the vacancy increase, plus 568.34 for improvements), which is above the $2,000 threshold for deregulation (*see* Rent Stabilization Law [Administrative Code of City of NY] § 26-504.2[a]).

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

ENTERED: APRIL 20, 2017

CLERK

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

3587 The People of the State of New York, Respondent, Ind. 3776/10

-against-

Marvis Rivers, Defendant-Appellant.

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Stanley Neustadter, Cardozo Criminal Appeals Clinic, New York (Michael Rivkin of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (James J. Wen of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Margaret L. Clancy, J.), rendered January 18, 2013, convicting defendant, after a jury trial, of robbery in the first degree, robbery in the second degree (two counts), burglary in the first degree and burglary in the second degree (two counts), and sentencing him, as a second felony offender, to an aggregate term of 17 years, unanimously affirmed.

Defendant's challenges to the prosecutor's summation are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits. The prosecutor never suggested that certain DNA evidence, which was unidentifiable, linked defendant to the crime, and defendant's assertion that the prosecutor made the kind of misrepresentations described in *People v Wright* (25 NY3d

769 [2015]]) is meritless. The other remarks challenged by defendant, either directly or as part of his ineffective assistance claim, were fair responses to the defense summation, and they did not shift the burden of proof or improperly appeal to the jurors' sympathies (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1992]).

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that any of counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected

the outcome of the case. Regardless of whether defendant's attorney should have raised the issues presently suggested by defendant, his failure to do so did not cause him any prejudice. Furthermore, we do not find that any lack of preservation may be excused on the ground of ineffective assistance.

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

ENTERED: APRIL 20, 2017

CLERK

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

3588 Leslie Ann Brody, Index 114480/09
Plaintiff-Respondent,

-against-

Propark America,
Defendant-Appellant,

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

_____

The Law Offices of Charles J. Siegel, New York (Heather M. Palmore of counsel), for appellant.

Joseph T. Mullen, Jr. & Associates, New York (Neil A. Zirlin of counsel), for Leslie Ann Brody, respondent.

Zachary W. Carter, Corporation Counsel, New York (Victoria Scalzo of counsel), for the City of New York, respondent.

Eustace, Marquez, Epstein, Prezioso & Yapchanyk, New York (Kimberly Brown of counsel), for Apple Industrial Development Corp. and New York City Economic Development Corp., respondents.

_____

Order, Supreme Court, New York County (James E. d'Auguste, J.), entered December 1, 2005, which denied defendant Propark America's motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Propark's motion for summary judgment was untimely, and Propark failed to offer "good cause," or any explanation at all, for the delay in making it (*see* CPLR 3212[a]; *Brill v City of New York*, 2 NY3d 648, 652 [2004]).

Propark's argument that the court erred in granting defendant City's motion for summary judgment is not properly before this Court since Propark did not take an appeal from the order that granted the City's motion.

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

ENTERED: APRIL 20, 2017

CLERK

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

3589 In re Carmen P.,
Petitioner-Appellant,

-against-

Administration for Children's Services,
Respondent-Respondent.

_____

Geoffrey P. Berman, Larchmont, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jonathan A. Popolow of counsel), for respondent.

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

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Appeal from order, Family Court, New York County (Susan K. Knipps, J.), entered on or about March 29, 2016, which granted the attorney for the children's motion to dismiss with prejudice the petition for custody of the subject children brought pursuant to article 6 of the Family Court Act, unanimously dismissed, without costs, as moot.

Petitioner's request for custody of the subject children is now moot as the children's adoption by their foster parent was finalized in May 2016 (*see Matter of Alexis C. [Jacqueline A.]*, 99 AD3d 542, 543 [1st Dept 2012], *lv denied* 20 NY3d 856 [2013]; *Matter of Iyanna KK. [Edward KK.]*, 141 AD3d 885, 886 [3d Dept 2016]). In any event, the Family Court properly dismissed the petition for lack of standing, as the children had already been

freed for adoption (*see Matter of Arnetta S. v Commissioner of Social Servs. of City of N.Y.*, 186 AD2d 519 [1st Dept 1992]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: APRIL 20, 2017

CLERK

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

3592-		Index 18098/98
3592A	Yukon Shoulars,	7826/00
	Plaintiff-Appellant,	8633/00
		20185/00
	-against-	20186/00
		20187/00
	St. Barnabas Hospital,	
	Defendant-Respondent.	
	- - - - -	
	[And Other Actions]	

_____

Brian M. Hussey, Wantagh, for appellants.

Zachary W. Carter, Corporation Counsel, New York (MacKenzie Fillow of counsel), for respondent.

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Appeals from order, Supreme Court, Bronx County (Stanley Green, J.), entered March 17, 2015, which granted defendant's motions for summary judgment dismissing the medical malpractice claims of plaintiffs Shoulars, Ancrum, Kennedy, Sterlin, and Rice, and from order, same court and Justice, entered April 2, 2015, which granted defendant's motions for summary judgment dismissing the civil rights claims of all plaintiffs, unanimously dismissed, without costs.

Plaintiffs' failure to comply with the rules of practice of this Court makes meaningful review of the orders appealed from impossible and leaves us no option but to dismiss these consolidated appeals. As far as we can discern from the notices of appeal in plaintiffs' appendix, the appendix should contain 11

orders and two transcripts. However, there are only two orders, as indicated above (*see* 22 NYCRR 600.10[c][2][i]). Moreover, while the April 2, 2015 order incorporates by reference the transcript of the oral argument on defendants' motions, the complete transcript is not contained in the appendix; the portion of the argument in which the court set forth its rulings is not included. Nor does plaintiffs' appendix contain the pleadings or medical records in connection with defendant's motions, which sought summary dismissal of medical malpractice claims (22 NYCRR 600.10[c][2][ii]; *see also* CPLR 5528[a][5]).

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

ENTERED: APRIL 20, 2017

CLERK

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

3593 Cash and Carry Filing Service, LLC, Index 154341/15
Plaintiff-Respondent,

-against-

Rehan Perveez, et al.,
Defendants-Appellants.

_____

Lawrence G. Nusbaum, Jr., New Rochelle, for appellants.

Newman Law, P.C., Cedarhurst (Evan M. Newman of counsel), for respondent.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about November 6, 2015, which, to the extent appealed from as limited by the briefs, denied defendants' motion to vacate a judgment by confession entered May 1, 2015, or to schedule a plenary hearing to determine whether the underlying agreement leading to the judgment by confession is enforceable, unanimously affirmed, with costs.

Defendants may challenge the judgment by confession only by trial in a plenary action, and not by motion (*see Scheckter v Ryan*, 161 AD2d 344, 345 [1st Dept 1990]). Moreover, defendants lack standing to challenge the affidavit of confession of judgment. An affidavit of confession of judgment pursuant to CPLR 3218 "is intended to protect creditors of a defendant," not the defendant itself (*Giryluk v Giryluk*, 30 AD2d 22, 25 [1st Dept

1968], *affd* 23 NY2d 894 [1969]; *County Natl. Bank v Vogt*, 28 AD2d 793, 794 [3d Dept 1967], *affd* 21 NY2d 800 [1968]; *Regency Club at Wallkill, LLC v Bienish*, 95 AD3d 879, 879 [2d Dept 2012]). In any event, the affidavit in this case is sufficient (*Giryluk*, 30 AD2d at 25).

Defendants' assertions of duress in executing the June 10, 2014 agreement leading to the judgment by confession are unavailing. In order to claim duress defendants had to show that plaintiff used a "wrongful threat" to force defendants to enter into the agreement, and defendants failed to make that showing (*Madey v Carman*, 51 AD3d 985, 987 [2d Dept 2008], *lv denied* 11 NY3d 708 [2008]; *see Foundry Capital Sarl v International Value Advisers, LLC*, 96 AD3d 620 [1st Dept 2012]). "Financial pressures, even in the context of unequal bargaining power, do not constitute economic duress" (*Grubel v Union Mut. Life Ins. Co.*, 54 AD2d 686, 686 [2d Dept 1976], *lv denied* 41 NY2d 807

[1977]; *see also Liberty Marble v Elite Stone Setting Corp.*, 248 AD2d 302, 304 [1st Dept 1998]).

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: APRIL 20, 2017

CLERK

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

3594 The People of the State of New York, Ind. 4031N/14
Respondent,

-against-

Michael Morelli,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Luis Morales 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 (Neil Ross, J.), rendered March 30, 2015,

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

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

ENTERED: APRIL 20, 2017

CLERK

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

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

3597 In re Timothy Braddock, Petitioner, Index 100123/15

-against-

New York City Housing Authority, Respondent.

_____

Thomas A. Bucaro, New York, for petitioner.

David I. Farber, New York (Laura R. Bellrose of counsel), for respondent.

_____

Determination of respondent New York City Housing Authority (NYCHA), dated September 15, 2014, which terminated petitioner's tenancy on the grounds of nondesirability and breach of rules and regulations, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Alice Schlesinger, J.], entered November 12, 2015), dismissed, without costs.

Petitioner raised an issue of substantial evidence requiring transfer to this Court (*see* CPLR 7804[g]), since he challenged the weight of the evidence and certain factual findings made by the hearing officer. The hearing officer's determination is supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182 [1978]; *see also*

Matter of Hill v New York City Hous. Auth., 111 AD3d 462, 462-463 [1st Dept 2013]).

The termination of petitioner's tenancy is consistent with the law and proportionate to the offenses (*see Matter of Hill*, 111 AD3d at 463; *see also Matter of Johnson v New York City Hous. Auth.*, 111 AD3d 515, 516 [1st Dept 2013]). The hearing officer considered petitioner's assertions regarding purported mitigating circumstances, but found them to be insufficient (*see Matter of Hairston v New York City Hous. Auth.*, 144 AD3d 416, 417 [1st Dept 2016]). The hearing officer's findings are supported by the record. By pleading guilty to criminal possession of a weapon in the fourth degree, petitioner waived his right to have the hearing officer consider his motive for entering the plea (*see People v Taylor*, 65 NY2d 1, 5 [1985]). Moreover, there is no evidence to support petitioner's claim that the defaced revolver and ammunition recovered from his apartment belonged to his late uncle. Even if petitioner was unaware that the items were present in the apartment, he was, nonetheless, responsible for any criminal activity in the apartment (*see Matter of Grant v New York City Hous. Auth.*, 116 AD3d 531, 531, 533 [1st Dept 2014]).

Petitioner failed to preserve his arguments regarding NYCHA's termination procedures, because he never raised them at

the administrative level (*see Matter of Hairston*, 144 AD3d at 417).

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

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

ENTERED: APRIL 20, 2017

CLERK

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

3598 The People of the State of New York, Ind. 2894/13
Respondent,

-against-

Charles Braswell,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered April 28, 2014, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree, and sentencing him to a term of two years, unanimously affirmed.

Defendant did not preserve his argument that the court failed to follow the proper procedures in denying his request for youthful offender treatment (*see People v Samms*, 95 NY2d 52, 57 [2000]), and we decline to review these claims in the interest of justice. As an alternative holding, we find them unavailing.

After making the type of inquiry required by *People v Rudolph* (21 NY3d 497 [2013]), the court properly exercised its discretion in denying YO treatment, in light of the seriousness of the offense.

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

ENTERED: APRIL 20, 2017

CLERK

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

3599 & M-743 Jonathan S. Aaron, et al., Plaintiffs-Appellants, Index 653203/15

-against-

Deloitte Tax LLP, Defendant-Respondent.

_____

Reed Smith LLP, New York (Steven Cooper of counsel), for appellants.

Kirkland & Ellis LLP, New York (Andrew M. Genser, and John F. Hartmann of the bar of the State of Illinois, admitted pro hac vice of counsel), for respondent.

_____

Appeal from order, Supreme Court, New York County (Eileen Bransten, J.), entered August 22, 2016, deemed an appeal from judgment (CPLR 5520[c]), same court and Justice, entered September 26, 2016, to the extent appealed from as limited by the briefs, dismissing plaintiffs' malpractice claim, and so considered, said judgment unanimously affirmed, without costs.

The engagement letter, which stated that it covered a period of seven months, provided that any action brought relating to the engagement must be commenced within one year of the accrual of the cause of action. The accrual of plaintiffs' accounting malpractice claim was on January 21, 2009, the date decedent signed the last document that was part of the estate tax plan formulated by defendant (*see Ackerman v Price Waterhouse,* 84 NY2d

535, 541 [1994]; *Williamson v PricewaterhouseCoopers LLP,* 9 NY3d 1, 7-8 [2007]). This action was not commenced until September 2015, and is untimely.

Plaintiffs may not avail themselves of the continuous representation tolling doctrine because the limitations period was contractual, not statutory, and was reasonable. The engagement letter indicated that decedent, a sophisticated and experienced businessman, and defendant, did not necessarily expect the representation to continue after the plan was in place, since the engagement expressly ended approximately seven months after the agreement was signed (*see Executive Plaza, LLC v Peerless Ins. Co.,* 22 NY3d 511, 518 [2014]).

Equitable estoppel is equally inapplicable because the engagement letter made clear that any estate tax plan defendant formulated was subject to challenge by taxing authorities. Moreover, the complaint alleged that in April 2009, within the limitations period, defendant advised plaintiffs that the estate plan would likely be closely scrutinized by the IRS (*see Putter v*

North Shore Univ. Hosp., 7 NY3d 548, 553 [2006]).

M-743 - ***Jonathan Aaron, et al. v Deloitte Tax LLP***

Motion to take judicial
notice denied.

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

ENTERED: APRIL 20, 2017

CLERK

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

3600 Angel Alvarado also known as Angel Albarado, Plaintiff-Appellant, Index 103813/09

-against-

French Council LLC, et al., Defendants-Respondents.

_____

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellant.

Mischel & Horn, PC, New York (Scott T. Horn of counsel), for French Council LLC, respondent.

Kaufman Borgeest & Ryan LLP, Valhalla (Edward J. Guardaro, Jr. of counsel), for Lowell Hotel Properties, LLC, Lowell Hotel Associates, L.P., and Bruce Caporusso, respondents.

Law Office of James J. Toomey, New York (Evy L. Kazansky of counsel), for Kensico Properties, N.V. Inc., respondent.

_____

Order, Supreme Court, New York County (Robert D. Kalish, J.), entered February 19, 2016, which granted defendants' motions for summary judgment dismissing the complaint, and denied plaintiff's cross motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim, unanimously affirmed, without costs.

Plaintiff was injured when, while doing plastering work during the course of a renovation of a residence, he fell approximately six feet from a makeshift scaffold. The record shows that plaintiff's Labor Law § 200 and common-law negligence

claims, which were premised on the theory that plaintiff's injuries arose from the means and methods of his work, were properly dismissed. Plaintiff testified that his employer instructed him on the tasks that he was to perform, and there is no evidence that defendants exercised any supervision or control over plaintiff's work (*see Howard v Turner Constr. Co.*, 134 AD3d 523, 524-525 [1st Dept 2015]). Furthermore, plaintiff's Labor Law § 240(1) and § 241(6) claims were not viable in light of the homeowner's exemptions set forth in the statutes (*see Bartoo v Buell*, 87 NY2d 362, 368-369 [1996]; *Farias v Simpson*, 122 AD3d 466 [1st Dept 2014].

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

ENTERED: APRIL 20, 2017

CLERK

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

3602 The People of the State of New York, Ind. 1414/14
Respondent,

-against-

Wilfred Doumounian,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Hope Korenstein 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 (Bonnie Wittner, J.), rendered November 26, 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: APRIL 20, 2017

CLERK

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

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

3604-
3605 Index 174150/07

Lisa Del Valle,
Plaintiff-Respondent,

-against-

William Gensert,
Defendant-Appellant.

_____

Maizes & Maizes, LLP, Bronx (Michael H. Maizes of counsel), for appellant.

Sweetbaum & Sweetbaum, Lake Success (Joel Sweetbaum of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (John A. Barone, J.), entered July 11, 2014, which, after a bench trial, granted partition of the subject premises to plaintiff, and dismissed defendant's counterclaim for the imposition of a constructive trust, and order, same court (Kenneth L. Thompson, Jr., J.), entered on or about April 6, 2016, which denied defendant's motion for judgment not withstanding the verdict pursuant to CPLR 4404, unanimously modified, on the law, to remand for a determination of defendant's credit, pursuant to RPAPL 945, for amounts paid by him in association with the premises, and otherwise affirmed, without costs.

By facilitating defendant's refinancing of the premises and becoming solely liable for the mortgage during a period when

defendant was disabled from work, plaintiff provided sufficient consideration for a transfer to her of one half interest in the property (*cf. Forbes v Clarke*, 194 AD2d 393, 393 [1st Dept 1993] ["The continuance of defendant's potential liability on the mortgage in the event of a default is not sufficient to defeat plaintiff's right to the imposition of a constructive trust"]). Even were there no consideration other than defendant's promise to marry plaintiff, we must conclude, based on controlling Court of Appeals precedent, that defendant could not recover his interest in the real property and certain personal property under Civil Rights Law § 80-b (gifts made in contemplation of marriage), because he was married to another person at the time of the transaction at issue (*see Lowe v Quinn*, 27 NY2d 397 [1971]). Because plaintiff was the recipient of the gift, and was not disabled from marriage, the *Witkowski v Blaskiewicz* (162 Misc 2d 66 [Civ Ct, Queens Cty 1994]) fraud exception is inapplicable.

We modify because we are persuaded by defendant's argument the he should receive credit, under RPAPL 945, for the amounts he

paid above his proper proportion of the rents or profits, prior to any partition sale, and the court's decision does not address this point.

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

ENTERED: APRIL 20, 2017

CLERK

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

3606 Jose Delgado, Index 100477/12
Plaintiff-Respondent,

-against-

5008 Broadway Associates, LLC,
Defendant-Appellant,

C&H Hamlet Bar Ltd. doing business as Irish Eyes,
Defendant.

_____

Gannon, Rosenfarb & Drossman, New York (Peter J. Gannon of counsel), for appellant.

Glenn H. Shore, P.C., New York (Bryan Goldstein of counsel), for respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about January 20, 2016, which, to the extent appealed from, denied the motion of defendant 5008 Broadway Associates, LLC (5008 Broadway) for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

The motion court properly found that 5008 Broadway failed to meet its prima facie burden of showing that it bore no liability for plaintiff's fall over a defect in the area of the public sidewalk abutting its property (*see* Administrative Code of City of NY § 7-210). The photographic and testimonial evidence submitted failed to clarify whether the defect lay entirely within the pedestrian ramp, which is the City's responsibility,

or on the sidewalk flag, which is 5008 Broadway's responsibility (*see Puello v Georges Units, LLC*, 146 AD3d 561 [1st Dept 2017]; *Gary v 101 Owners Corp.*, 89 AD3d 627 [1st Dept 2011]). The evidence also did not eliminate the possibility that 5008 Broadway's failure to maintain the sidewalk proximately caused plaintiff's injuries by leaving a tripping hazard between the sidewalk and the pedestrian ramp (*see Sangaray v West Riv. Assoc., LLC*, 26 NY3d 793, 799-800 [2016])).

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

ENTERED: APRIL 20, 2017

CLERK

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

3607- Ind. 982/12
3608 The People of the State of New York, 5130/12
Respondent,

-against-

Lamont Brown,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Maxwell Wiley, J. at speedy trial motion; Bruce Allen, J. at jury trial and sentencing), rendered June 28, 2013, as amended July 18, 2013, convicting defendant of grand larceny in the fourth degree, criminal contempt in the first degree, three counts of criminal contempt in the second degree and two counts of tampering with a witness in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of two to four years, unanimously affirmed.

The court properly denied defendant's speedy trial motion. We find that only 28 of the days disputed by the parties on appeal should be charged to the People, which yields a total of 90 days, well under the applicable six-month period.

Defendant's argument concerning the adjournment from August 1 to September 5, 2012 is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we find that the period is excludable because the case was not on for trial on August 1, given that defendant was still in need of time to complete his trial preparation (*see People v Baumann*, 38 AD3d 452, 453 [1st Dept 2007], *lv denied* 9 NY3d 840 [2007]).

The adjournment from October 3 to 10, 2012 is excludable because defense counsel was trying another case (*see People v Barden*, 27 NY3d 550, 555 [2016]). It would have been a physical impossibility for defense counsel to try both cases simultaneously, and the time is thus excludable notwithstanding the People's own lack of readiness (*see People v Mannino*, 306 AD2d 157, 158 [1st Dept 2003], *lv denied*, 100 NY2d 643 [2003]).

Similarly, the first six days of the adjournment from October 10 to 24, 2012 are excludable because defense counsel was still on trial, and only the remaining eight days are properly chargeable to the People.

All but the first day of the adjournment from October 24 to November 7, 2012 is excludable. On October 24 the People stated that they were not ready, and requested a two-week adjournment to present additional charges against defendant to a grand jury. The next day, however, the People filed a certificate of

readiness. On November 7, the People again stated that they were not ready, explaining that they had been unable to complete the grand jury presentation as a result of conditions caused by Hurricane Sandy. The People thus adequately explained on the record the reasons for the change from readiness on October 25 to unreadiness on November 7 (*see People v Brown*, 28 NY3d 392 [2016]).

The entire adjournment from November 7 to 26, 2012 chargeable to the People, and their arguments to the contrary are unavailing.

The adjournments from December 5, 2012 to February 6, 2013, and from that date to March 20, 2013, are excludable as "reasonable period[s] of delay resulting from other proceedings concerning the defendant, including . . . pre-trial motions" (CPL 30.30[4][a]). These periods of delay included those resulting from the People's motion to consolidate the two indictments involved in this case (*see People v Kelly*, 33 AD3d 461 [1st Dept 2006], *lv denied* 7 NY3d 926 [2006]), from defendant's omnibus motion on the second indictment (*see People v Brown*, 99 NY2d 488, 492 [2003]), and from the People's need for "a reasonable time to prepare after the court's decision on motions" (*People v Davis*, 80 AD3d 494, 494-95 [1st Dept 2011]).

With regard to the defendant's challenges to the

prosecutor's summation, the only one that is even arguably preserved is his claim that the prosecutor improperly asked the jurors to consider the victim's testimony as if it came from a "friend" in a casual conversation. We find that this remark was permissible rhetoric that did not vouch for the witness, and was harmless in any event. By failing to object, by making generalized objections, or by failing to request further relief after the court took curative actions, defendant failed to preserve his other claims and we decline to review them in the interest of justice. As an alternative holding, we find that the prosecutor's summation did not deprive defendant of a fair trial (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]), and that any errors were harmless.

Defendant's legal sufficiency claim regarding his witness tampering convictions is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject

it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]).

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

ENTERED: APRIL 20, 2017

CLERK

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

3609 Alexander A. Benzemann, Index 162066/14
Plaintiff-Appellant,

-against-

Citibank N.A., et al.,
Defendants,

Todd Houslanger, et al.,
Defendants-Respondents.

_____

Tiajoloff & Kelly LLP, New York (Andrew L. Tiajoloff of counsel), for appellant.

Abrams Garfinkel Margolis Bergson, LLP, New York (Eric B. Post of counsel), for Todd Houslanger and Houslanger & Associates PLLC, respondents.

Warshaw Burstein, LLP, New York (Scott E. Wortman and Hilary Felice Korman of counsel), for NCEP, LLC, respondent.

_____

Order, Supreme Court, New York County (Cynthia Kern, J.), entered on or about October 2, 2015, which, to the extent appealed from as limited by the briefs, granted defendants' motions to dismiss the complaint's causes of actions sounding in (1) negligence, (2) wrongful attachment and (3) violation of due process under the New York State Constitution against all defendants other than Citibank N.A. (Citi), unanimously affirmed, without costs.

This case arises from the restraining notices issued by defendants and the resulting restraints placed on plaintiff's

bank accounts in 2008 and in 2011. Plaintiff's negligence claims against Todd Houslanger and Houslanger & Associates PLLC (together, the Houslanger defendants), an attorney and his law firm, fail because they do not owe a duty to plaintiff (*Art Capital Group, LLC v Neuhaus*, 70 AD3d 605, 607 [1st Dept 2010]). There are no allegations of privity or near-privity between the Houslanger defendants and plaintiffs, nor are there any non-conclusory allegations of their "fraud, collusion, malice or bad faith" (*Pecile v Titan Capital Group, LLC*, 96 AD3d 543, 544 [1st Dept 2012], *lv denied* 20 NY3d 856 [2013]). Dismissal of these claims was proper.

Plaintiff's negligence claims against defendants NCEP LLC (NCEP) and New Century Financial Services (New Century), the Houslanger defendants' clients, also fail. The sole allegations with respect to NCEP and New Century are that they were identified as the creditors on the restraining notices and that the Houslanger defendants created, issued and transmitted the notices under their control. These claims are conclusory and fail for the same reason as the negligence claim against the Houslanger defendants, since they too are premised on attorney conduct.

Plaintiff's claim for "wrongful attachment," which alleges that the defendants were collectively responsible for plaintiff's

property being wrongfully restrained, also fails. Plaintiff does not plead that there was an "attachment" governed by article 62 of the CPLR, but rather that there were restraining notices issued pursuant to CPLR 5222. "The mere fact that property has been subjected to some form of restraint does not serve as a basis for the statutory claim of wrongful attachment" (*Salamanca Trust Co. v McHugh*, 156 AD2d 1007, 1008 [4th Dept 1989]). We adopt the Fourth Department's reasoning.

Finally, the dismissal of plaintiff's cause of action for violation of due process under the New York State Constitution is also affirmed. This issue was already decided in a related federal court action, which dismissed the due process claims arising from the US Constitution for a failure to sufficiently allege a "state action" (*Benzemann v Citibank N.A.*, 2014 US Dist LEXIS 88030, *23-25 [SD NY 2014], *affd in part Benzemann v Citibank N.A.*, 806 F3d 98 [2d Cir 2015], *cert denied* __ US __,

196 L Ed 2d 514 [2017]). We are thus barred from revisiting the issue by virtue of the doctrine of collateral estoppel (*D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990]).

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

ENTERED: APRIL 20, 2017

CLERK

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

3613N Heidi Voelker, Index 150335/15
Plaintiff-Respondent,

-against-

Bodum USA, Inc., et al.,
Defendants,

Bodum AG,
Defendant-Appellant.

_____

Harris, King, Fodera & Correia, New York (Kevin J. McGinnis of counsel), for appellant.

Leav & Steinberg, L.L.P., New York (Vincent F. Provenzano of counsel), for respondent.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered May 9, 2016, which granted plaintiff's motion for entry of a default judgment as to liability against defendant Bodum AG, unanimously affirmed, without costs.

In support of her motion for a default judgment, plaintiff demonstrated that she properly served Bodum AG, a foreign corporation not authorized to do business in New York, through the Central Authority established by Switzerland pursuant to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (20 UST 361, TIAS No. 6638 [1969]) (*see Mutual Benefits Offshore Fund v Zeltser*, 140 AD3d 444, 445-446 [1st Dept 2016]). The Central

Authority returned a completed certificate of service, which plaintiff filed in court, and which provides "prima facie evidence that the Central Authority's service on [Bodum AG] was made in compliance with the convention" (*Unite Natl. Retirement Fund v Ariela, Inc.*, 643 F Supp 2d 328, 334 [SD NY 2008]; *see also Kulpa v Jackson*, 3 Misc 3d 227, 233-235 [Sup Ct, Oneida County 2004]). Bodum AG failed to rebut that evidence. Since the Hague Convention applies, Bodum AG's arguments concerning compliance with provisions of New York State law are irrelevant (*see Aspinall's Club v Aryeh*, 86 AD2d 428, 433-434 [2d Dept 1982]).

Plaintiff's verified complaint and affidavit of merits set forth "enough facts to enable [the] court to determine that a viable" strict products liability claim exists against Bodum AG (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]; CPLR 3215[f]), based on allegations that Bodum AG manufactured a

defective French press coffeemaker that exploded when used, causing injury to plaintiff.

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

ENTERED: APRIL 20, 2017

CLERK

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

3614 [M-442] & M-514 — In re Alfonso Amelio, Petitioner, -against- Hon. Douglas E. Hoffman, et al., Respondents. — OP 96/17

Alfonso Amelio, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Alissa S. Wright of counsel), for Hon. Douglas E. Hoffman, respondent.

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

M-514 - Motion for a preliminary injunction denied.

ENTERED: APRIL 20, 2017

CLERK

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Gische, Kahn, JJ.

3776 The People of the State of New York, Respondent, Ind. 3470/10

-against-

Mario Olmedo, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered May 17, 2011, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing him to a term of five years' probation, unanimously affirmed.

While the question of whether a defendant was prejudiced by the lack of advice from the court about the deportation consequences of a guilty plea is generally to be determined by way of a hearing (*see People v Peque* (22 NY3d 168, 200 [2013],

cert denied 574 US __, 135 S Ct 90 [2014]), under the circumstances of this case, viewed as a whole, we find no reasonable possibility that defendant could make the requisite showing of prejudice at a hearing.

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

ENTERED: APRIL 20, 2017

CLERK

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Gische, Kahn, JJ.

3778 Sabre, Inc., et al., Index 652241/12
Plaintiffs-Respondents,

-against-

The Insurance Company of the State of Pennsylvania, et al.,
Defendants-Appellants.

_____

Chaffetz Lindsey LLP, New York (Charles J. Scibetta of counsel), for appellants.

Fish & Richardson, Dallas, TX (Scott C. Thomas of the bar of the State of Texas, admitted pro hac vice, of counsel), and Cohen & Gresser, LLP, New York (Elizabeth F. Bernhardt of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (O. Peter Sherwood, J.), entered December 5, 2016, which, insofar as appealed from, declared that defendants had a duty to defend plaintiffs in the underlying actions and that a conflict of interest precluded them from controlling the defense in those actions, struck the 24th affirmative defense, and denied defendants' motion for summary judgment dismissing the complaint and declaring that they had no duty to defend or indemnify plaintiffs in the underlying actions, unanimously affirmed, with costs.

The pleadings in the underlying actions allege facts within the scope of coverage under the subject insurance policies,

giving rise under Texas law to the duty to defend (*see GuideOne Elite Ins. Co. v Fielder Rd. Baptist Church*, 197 SW3d 305, 308 [Tex 2006]). Because the facts to be adjudicated in the underlying actions were the same facts upon which coverage depended, a conflict of interest existed that precluded defendants from controlling the defense in those actions (*Northern County Mut. Ins. Co. v Davalos*, 140 SW3d 685, 689 [Tex 2004]).

We reject defendants' contention that plaintiffs never notified defendant Insurance Company of the State of Pennsylvania (ICSP) of the underlying claims or requested a defense from it. As conceded by ICSP, plaintiffs did eventually provide it notice of the claim. Because of its conflict of interest with its insured, ICSP could not have participated in the defense of the underlying action prior to its receipt of the notice, and has failed to show that it was prejudiced as required by the contract by Sabre's failure to provide notice on a timely basis.

Given the conflict of interest that precluded defendants from controlling the defense in the underlying actions, the motion court correctly dismissed the 24th affirmative defense insofar as it was based on litigation management guidelines included in the Chartis policy that required the claims handler's involvement in managing the underlying litigation. In addition,

as to the limitations as set forth in Endorsement 4 that fees be charged by council on an hourly basis, there is evidence in the record that, as a matter of practice, the firm selected by plaintiffs to represent them did not bill by the hour, and yet it was included on the schedule of counsel in Endorsement 4, and Chartis specifically approved its representation of plaintiffs.

The court correctly determined that issues of fact exist as to plaintiffs' claims for prompt payment under Texas Insurance Code § 542.058(a), which requires an insurer to pay a claim within 60 days after being provided all items, statements, and forms reasonably requested.

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

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

ENTERED: APRIL 20, 2017

CLERK

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Gische, Kahn, JJ.

3779 Capital One Bank, N.A., Index 110188/09
Plaintiff-Respondent,

-against-

John Faracco,
Defendant-Appellant,

Thomas Marron, et al.,
Defendants.

_____

Law Offices of Charles H. Wallshein, Melville (Charles W. Marino of counsel), for appellant.

Parker Ibrahim & Berg LLC, New York (Anthony W. Vaughn Jr. of counsel), for respondent.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered July 1, 2016, which denied the motion of defendant John Farracco to dismiss the complaint on the ground of lack of personal jurisdiction, unanimously affirmed, without costs.

The filing of a notice of appearance by counsel on defendant's behalf, after the time to answer had expired, and without making any objection to personal jurisdiction, waived defendant's challenge to such jurisdiction. Accordingly, the court properly denied defendant's motion, made four months after such appearance (*see Matter of Nicola v Board of Assessors of Town of N. Elba*, 46 AD3d 1161 [3d Dept 2007]).

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

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

ENTERED: APRIL 20, 2017

CLERK

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Gische, Kahn, JJ.

3782 600 Lexington Owner LLC, Index 159488/13
Plaintiff-Respondent,

-against-

Jay M. Kaplowitz, et al.,
Defendants,

Robert S. Wolf, et al.,
Defendants-Appellants.

_____

Todd & levi, LLP, New York (Jill Levi of counsel), for Robert S. Wolf and Barry Zone, appellants.

Robinson Brog Leinwand Greene Genovese & Gluck P.C., New York (Nicholas Caputo of counsel), for David E. Danovitch, appellant.

Stempel Bennett Claman & Hochberg, P.C., New York (Dennis H. McCoobery of counsel), for respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered June 29, 2016, which, to the extent appealed from, granted plaintiff's motion for partial summary judgment as to liability against defendants Robert S. Wolf, Barry Zone, and David E. Danovitch, and denied Danovitch's cross motion for summary judgment, unanimously modified, on the law, to grant plaintiff partial summary judgment as against Danovitch only to the extent that plaintiff incurred damages after February 15, 2012, and to deny partial summary judgment as against Zone, and otherwise affirmed, without costs.

Plaintiff, the successor in interest to the landlord,

submitted prima facie evidence of Danovitch's liability for damages incurred after February 15, 2012 (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Specifically, it submitted the Lease, the Guaranty, the Third Amendment, and an amended Schedule 11 executed by Danovitch on February 15, 2012. It also submitted the affidavit of the general counsel of plaintiff's managing agent, who attested to the law firm's default on the Lease payments. While the Third Amendment contained ambiguous provisions regarding the "Guarantors" listed on "Schedule 11," Danovitch admitted in his answer and in a separate settlement agreement that he was a guarantor of the Lease (*Impala Partners v Borom*, 133 AD3d 498, 499 [1st Dept 2015]). In opposition to plaintiff's motion, Danovitch failed to raise a triable issue of fact. His argument regarding lack of consideration for the guaranty is unavailing, as the landlord continued to perform under the Lease each month by permitting the law firm to occupy the space, and by doing so provided consideration to Danovitch, a partner at the firm (*see Sun Oil Co. v Heller*, 248 NY 28, 32-33 [1928]; *Columbus Trust Co. v Campolo*, 110 AD2d 616, 617-618 [2d Dept 1985], *affd* 66 NY2d 701 [1985]). In addition, even if Danovitch's guaranty was provided for "past consideration" (i.e., to induce the landlord into extending the Lease), it should not be denied legal effect as a

valid contract, as it was in writing and executed by Danovitch (*see* General Obligations Law § 5-1105; *Samet v Binson*, 122 AD3d 710, 711 [2d Dept 2014]). Danovitch's discovery request does not affect this appeal and primarily concerns his cross claim, which is not the subject of any of the underlying motions.

Plaintiff also submitted prima facie evidence in support of its claims against defendants Wolf and Zone, by providing the Lease, Guaranty, Assumption of Guaranty signed by Wolf, and the Third Amendment Schedule 11 executed by Wolf and Zone. In response, Zone raised triable issues of fact warranting denial of partial summary judgment against him. The Guaranty provides that when a guarantor resigns as a member/partner in the law firm, they "shall thereafter be released" from the Guaranty provided that (1) the Lease is not in default, (2) no more than one member/partner is released during any two year period, and (3) there are no fewer than four member/partners serving as guarantors. Both Zone and Wolf attest that Zone should have been immediately released in June 2011 when he resigned because the lease was not in default, and Danovitch was a guarantor at the time thereby leaving four member/partners as guarantors. Although Danovitch attested that he was not a guarantor at the time, and although Zone submitted an email that creates a question as to when the landlord became aware of Zone's

resignation, these are issues to be decided by the trier of fact.

In contrast, Wolf has not raised a triable issue of fact. For Wolf to be released from the Guaranty, he had to obtain the landlord's explicit consent. There is no evidence or even allegation in this record that the landlord provided such consent. Nor has Wolf shown that further discovery was necessary to oppose plaintiff's motion (*see* CPLR 3212[f]).

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

ENTERED: APRIL 20, 2017

CLERK

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Gische, Kahn, JJ.

3783-
3784 In re Lamar A.,

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

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Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

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

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Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about February 10, 2016, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of sexual abuse in the first and third degrees, forcible touching and attempted criminal obstruction of breathing or blood circulation, and placed him on probation for a period of 24 months, unanimously modified, on the law, to the extent of vacating the finding as to sexual abuse in the third degree and dismissing that count, and otherwise affirmed, without costs.

Order of disposition, same date, court and Judge, which adjudicated appellant a juvenile delinquent upon a fact-finding

determination that he committed acts that, if committed by an adult, would constitute the crimes of sexual abuse in the third degree and forcible touching, and placed him on probation for a concurrent period of 24 months, unanimously affirmed, without costs.

Regarding the incident resulting in a finding of, among other things, first-degree sexual abuse, the court properly denied appellant's motion to suppress the victim's identification of appellant in a photo array. The array was not tainted by the victim's identification, 10 days earlier, of the perpetrator in a surveillance videotape, which, as the victim confirmed, depicted the perpetrator following the victim into her apartment building immediately before the incident occurred in that building. In doing so, the victim "was simply ratifying the events as revealed in the videotape rather than selecting [appellant] as the perpetrator" (*People v Lara*, 130 AD3d 463, 464 [1st Dept 2015], *lv denied* 27 NY3d 1001 [2016]; *see People v Gee*, 99 NY2d 158 [2002]). Appellant's argument that the array was tainted in light of the 17-day gap between the incident and the victim's viewing of the video prior to the array is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find it unavailing.

The record also shows that the photo array was not unduly

suggestive. Appellant and the fillers appeared reasonably similar in the photos, and minor discrepancies involving facial hair and apparent age were limited to two fillers and did not create a substantial likelihood of unfairly singling out appellant (*see People v Chipp*, 75 NY2d 327, 335 [1990], *cert denied* 498 US 833 [1990]). Although not dispositive (*see People v Perkins*, 28 NY3d 432 [2016]), it is notable that the victim's description of the perpetrator did not mention facial hair (*see People v Brown*, 147 AD3d 570 [1st Dept 2017]).

However, as the presentment agency concedes, the count of third-degree sexual abuse pertaining to that incident should be dismissed as a lesser included offense.

Regarding the other incident, the court's finding 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 basis for disturbing the court's credibility determinations. The evidence abundantly established that the 15-year-old appellant acted for the purpose of gratifying his sexual desire, and for the purpose of degrading or abusing the 30-year-

old victim, in that he approached her as she was leaving an elevator and heading toward her apartment, and repeatedly slapped or grabbed her buttocks and breasts (*see Matter of Narvanda S.*, 109 AD3d 710, 711 [1st Dept 2013]).

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

ENTERED: APRIL 20, 2017

CLERK

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Gische, Kahn, JJ.

3785 Lisa Fay, Index 159001/12
Plaintiff-Respondent,

-against-

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

Josephine Zavolakis, et al.,
Defendants-Appellants.

_____

Roe & Associates, Garden City (Patrick B. McKeown of counsel), for appellants.

Jaroslawicz & Jaros PLLC, New York (David Tolchin of counsel), for Lisa Fay, respondent.

Lawrence Heisler, Brooklyn, (Jane Shufer of counsel), for New York City Transit Authority, Metropolitan Transportation Authority, Manhattan and Bronx Surface Transit Operating Authority and Bus Operator McKay, respondents.

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered March 8, 2016, which granted plaintiff's motion for partial summary judgment as against defendants Josephine Zavolakis and John Zavolakis, and granted defendants New York City Transit Authority, Metropolitan Transportation Authority, Manhattan and Bronx Surface Transit Operating Authority and Bus Operator McKay's (the transit authority defendants) motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Plaintiff and the transit authority defendants established prima facie that plaintiff was injured as a result of the negligence of the Zavolakis defendants, who made a sudden U-turn on 34th Street in front of the bus on which plaintiff was riding, causing the bus driver to stop short to avoid a collision (*see Flores v City of New York*, 66 AD3d 599 [1st Dept 2009]; 34 RCNY 4-05[b][1]; 4-07[h][2]; *see also* Vehicle and Traffic Law §§ 1128[a]; 1160[e]). The bus driver made a note of the license plate number of the car that made the U-turn in front of her, and the Zavolakis defendants testified that they made a U-turn every morning at about the same time and place on 34th Street, leaving Josephine Zavolakis in front of her workplace. Plaintiff established her freedom from negligence by demonstrating that she was holding onto a pole as the bus moved (*see Rountree v Manhattan & Bronx Surface Tr. Operating Auth.*, 261 AD2d 324, 328 [1st Dept 1999], *lv denied* 94 NY2d 754 [1999]). The transit authority defendants established the bus driver's freedom from negligence by demonstrating that she was faced with an emergency situation not of her own making (*see Orsos v Hudson Tr. Corp.*, 111 AD3d 561 [1st Dept 2013]).

In opposition, the Zavolakis defendants failed to raise a triable issue of fact as to their own involvement in the accident; they testified that they did not recall it, but did not

deny being involved, and they presented no evidence that would support any other explanation (*see Pichardo v Urban Renaissance Collaboration Ltd. Partnership*, 51 AD3d 472 [1st Dept 2008]). Nor did they submit evidence that would support a finding that plaintiff was negligent (*see Cuadrado v New York City Tr. Auth.*, 65 AD3d 434, 435 [1st Dept 2009], *lv dismissed* 14 NY3d 748 [2010]).

Neither plaintiff nor the Zavolakis defendants raised an issue of fact as to negligence on the part of the bus driver; they merely speculated that she may have been driving too fast. However, even if, as plaintiff testified, the bus accelerated to 20 miles per hour before the accident, it was operating within the citywide legal speed limit at the time (*see* 34 RCNY 4-06), and there is no evidence that weather or traffic conditions at the time warranted a slower speed. The bus driver had no duty to anticipate another driver's sudden, illegal maneuver (*see e.g. Ward v Cox*, 38 AD3d 313 [1st Dept 2007]).

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

ENTERED: APRIL 20, 2017

CLERK

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Gische, Kahn, JJ.

3786 The People of the State of New York, Ind. 2423/13
Respondent,

-against-

Dapree Peterson,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie Wittner, J.), rendered August 26 2015,

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

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

ENTERED: APRIL 20, 2017

CLERK

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

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Gische, Kahn, JJ.

3787 Trevor McDaniel, Index 21468/14
Plaintiff-Appellant,

-against-

Codi Transport, Ltd., et al.,
Defendants-Respondents.

_____

The Altman Law Firm PLLC, New York (Michael T. Altman of counsel), for appellant.

Nicoletti Gonson Spinner LLP, New York (Benjamin N. Gonson of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Barry Salman, J.), entered November 14, 2016, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment on the issue of liability, with leave to renew after the completion of discovery, denied plaintiff's motion to quash a nonparty subpoena, and, in effect, granted defendants' cross motion to compel discovery, unanimously reversed, on the law, without costs, plaintiff's motions granted, and defendants' cross motion denied.

In support of his motion for partial summary judgment, plaintiff, a driver for the New York City Transit Authority (NYCTA), submitted an affidavit averring that his bus was stopped in the right lane at an intersection next to defendants' box truck, when defendant driver made a right turn, across

plaintiff's lane of traffic. The rear of the truck struck the front corner of the bus, which remained stopped and in its own lane of travel. Defendant driver left the scene of the accident. Accordingly, plaintiff met his prima facie burden by demonstrating that defendant driver entered plaintiff's lane of traffic in violation of Vehicle and Traffic Law § 1128(a), and that plaintiff did not contribute to the accident (*see Steigelman v Transervice Lease Corp.*, 145 AD3d 439, 439 [1st Dept 2016]). In opposition, defendants submitted no evidence of a nonnegligent explanation for the accident, and their "arguments about how plaintiff driver may have contributed to the accident, or been able to avoid it, are speculative," and therefore insufficient to raise an issue of fact (*Steigelman*, 145 AD3d at 440).

Denial of plaintiff's summary judgment motion as premature is unwarranted, as defendants have not identified any information in the exclusive control of plaintiff that could raise a material issue of fact (*see* CPLR 3212[f]; *Erkan v McDonald's Corp.*, 146 AD3d 466, 467 [1st Dept 2017]). Defendants' speculation that plaintiff or the subpoenaed nonparty witness, a safety and training employee of the NYCTA, may provide information about

NYCTA policies and procedures that could be relevant is insufficient, since such internal policies do not provide the standard of care in a negligence case (*see Asantewaa v City of New York*, 90 AD3d 537, 538 [1st Dept 2011]).

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

ENTERED: APRIL 20, 2017

CLERK

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Gische, Kahn, JJ.

3788 The People of the State of New York, Ind. 566/15
Respondent,

-against-

Andrew Bravo,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald 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 (Thomas Farber, J.), rendered December 1, 2015,

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

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

ENTERED: APRIL 20, 2017

CLERK

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

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Gische, Kahn, JJ.

3789-
3790 Patrick Nunziante, et al.,
Plaintiffs,

-against-

New York Quarterly Meeting of The Religious Society of Friends, et al.,
Defendants-Appellants.

- - - - -

New York Quarterly Meeting Of The Religious Society of Friends, et al.,
Third-Party Plaintiffs-Appellants,

-against-

Liberty Contracting Corp.,
Third-Party Defendant,

Kaback Enterprises, Inc., et al.,
Third-Party Defendants-Respondents.

- - - - -

[And Another Action]

Index 112504/08
590900/09

_____

Mauro Lilling Naparty LLP, Woodbury (Anthony F. DeStefano of counsel), for appellants.

Marshall Dennehey Warner Coleman & Goggin, P.C., Melville (William R. Pirk of counsel), for Kaback Enterprises, Inc., respondent.

Clausen Miller, PC, New York (Joseph J. Ferrini of counsel), for DAL Electric Corporation, respondent.

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Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered May 27, 2016, which, insofar as appealed from as limited by the briefs, granted third-party defendant DAL Electric Corporation's motion for summary judgment dismissing the third-

party claim of failure to procure insurance as against it, and granted third-party defendant Kaback Enterprises, Inc.'s motion for summary judgment dismissing the third-party complaint as against it, unanimously reversed, on the law, without costs, and the motions denied. Appeal from order, same court and Justice, entered October 14, 2016, unanimously dismissed, without costs, as abandoned.

The plain language of DAL's agreement required DAL to procure insurance adding defendants as additional insureds under its policy (*see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162-163 [1990]).

Conflicting testimony presents an issue of fact whether Kaback's work on the roof was a contributing cause of the accident.

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

ENTERED: APRIL 20, 2017

CLERK

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Gische, Kahn, JJ.

3791 Mary Parke, Index 155358/13
Plaintiff-Appellant,

-against-

ST Owner LP, et al.,
Defendants,

Strike Force of New Jersey, Inc.,
el al.,
Defendants-Respondents.

_____

Mahon, Mahon, Kerins & O'Brien, LLC, Garden City South (Robert P. O'Brien of counsel), for appellant.

Chasan Lamparello Mallon & Cappuzzo, PC, New York (Joseph E. Santanasto of counsel), for respondents.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered March 9, 2016, which, to the extent appealed from as limited by the briefs, granted the motion of defendants Strike Force of New Jersey, Inc. (Strike Force) and Jonathan Ubogu for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Plaintiff was injured when she fell down a darkened staircase in her apartment building, which was left without electricity in the aftermath of Hurricane Sandy. The building's owners retained Strike Force to provide additional security guards in the building and to control access to the lobby, since the lack of electricity prevented the electronic access card

readers on the building's entrances from working.

Plaintiff asserted that, upon returning to her building, defendant Ubogu, a Strike Force security guard, advised her that it was "okay" to use her cell phone to light her way up the staircase since her flashlight was no longer working. She further asserted that Ubogu turned his own flashlight on, and guided her to the doorway of the staircase and up the first flight of stairs. When she reached the landing, Ubogu turned his flashlight off, leaving her in the dark. When she then attempted to find the stairway to continue up, she instead fell down the flight of stairs she had just ascended.

Contrary to plaintiff's contention, Ubogu did not voluntarily assume a duty of care toward her by any negligent words or acts inducing reliance (*see Heard v City of New York*, 82 NY2d 66, 71-72 [1993]). Obogu's casual response of "okay," in response to plaintiff's suggestion that she use her cell phone to light her way up the stairs, did not amount to a "deliberate misrepresentation for purposes of determining whether an action in negligence has been established" (*id.* at 74-75; *see Ferrari v Bob's Canoe Rental, Inc.*, 143 AD3d 937, 939 [2d Dept 2016]).

Furthermore, Ubogu's conduct in shining his flashlight up the first flight of stairs did not alter the fact that plaintiff had intended to climb the steps in the first place, and was

already using her cell phone for light. Accordingly, Ubogu's actions did not place plaintiff "in a more vulnerable position" than she would have been in had he done nothing (*Murshed v New York Hotel Trades Council & Hotel Assn. of N.Y. City Health Ctr., Inc.*, 71 AD3d 578, 579 [1st Dept 2010]).

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

ENTERED: APRIL 20, 2017

CLERK

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Gische, Kahn, JJ.

3792 The People of the State of New York, Ind. 2472/12
Respondent,

-against-

Vincent Medina,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Malancha Chanda 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 (Thomas Farber, J.), rendered July 16, 2013,

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: APRIL 20, 2017

CLERK

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

Mazzarelli, J.P., Manzanet-Daniels, Gische, Kahn, JJ.

3793 406 Broome St Rest Inc., Index 650358/08
Plaintiff-Respondent,

-against-

Lafayette Center, LLC,
Defendant-Appellant.

_____

Nixon Peabody LLP, New York (Adam B. Gilbert of counsel), for appellant.

The Stolper Group, LLP, New York (Michael T. Stolper of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Arthur F. Engoron, J.), entered March 1, 2016, after a nonjury trial, awarding plaintiff the principal sum of $900,000, unanimously affirmed, with costs.

A fair interpretation of the evidence supports the trial court's conclusion that defendant violated the terms of the parties' lease by unreasonably withholding consent to plaintiff's proposed assignment of the leased space to a third party (*see Garza v 508 W. 112th St., Inc.*, 71 AD3d 567 [1st Dept 2010]). The court appropriately determined that the measure of plaintiff's damages due to defendant's withholding of consent was

the $900,000 that the potential assignee had offered as key money (*see e.g. Giordano v Miller*, 288 AD2d 181 [2d Dept 2001]).

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

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

ENTERED: APRIL 20, 2017

CLERK

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Gische, Kahn, JJ.

3794-
3795 Index 107240/04

James Couri,
Plaintiff-Appellant,

-against-

John Siebert, et al.,
Defendants-Respondents.

_____

James Couri, appellant pro se.

Abrams Deemer PLLC, New York (Joseph M. Burke of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Paul Wooten, J.), entered February 3, 2016, awarding defendants the total sum of $15,091,471.04 as against plaintiff, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered January 27, 2016, which confirmed the Report and Recommendation of JHO Ira Gammerman recommending that defendants have judgment on their counterclaims against plaintiff in the amount of $7,110,532, with interest from August 18, 2013, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

In a prior order, the court granted defendants' motion to strike pro se plaintiff's reply to the counterclaims, and directed an inquest assessing damages on the counterclaims, based on plaintiff's failure to comply with multiple court orders and

abuse of the litigation process. Plaintiff failed to perfect an appeal from that order. The JHO held an inquest on December 15, 2014, and after plaintiff, who initially appeared by telephone, declined to further participate, the JHO took defendant's testimony, and based on that testimony and the record, recommended judgment in favor of defendants.

Under the circumstances here, we find that the recommendation of the JHO was amply supported by the record (*see Matter of Musano*, 302 AD2d 302 [1st Dept 2003]).

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

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

ENTERED: APRIL 20, 2017

CLERK

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Gische, Kahn, JJ.

3796 The People of the State of New York, Respondent, SCI 694/15

-against-

Lloyd McFadden,
Defendant-Appellant.

_____

Feldman and Feldman, Uniondale (Steven A. Feldman of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Samuel L. Yellen of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Shari R. Michels, J.), rendered May 28, 2015, convicting defendant, upon his plea of guilty, of sexual abuse in the first degree, and sentencing him, as a second felony offender, to a term of 3½ years, unanimously affirmed.

Defendant's claim that his plea was coerced by a remark made by the court during the plea proceeding is concededly unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we find that the plea was knowingly, intelligently and voluntarily made. The remark at issue was essentially an accurate, noncoercive statement that if defendant did not go through with the contemplated plea to sexual abuse under a superior court information, the People were free to

obtain an indictment charging a crime carrying a potential sentence of 25 years (*see e.g. People v Tabares*, 52 AD3d 437 [1st Dept 2008], *lv denied* 11 NY3d 835 [2008]).

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

ENTERED: APRIL 20, 2017

CLERK

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Gische, Kahn, JJ.

3797N Deutsche Bank, AG, Index 161257/13
Plaintiff-Respondent,

-against-

Alexander Vik,
Defendant-Appellant,

Carrie Vik, etc., et al.,
Defendants.

_____

Zaroff & Zaroff LLP, Garden City (Ira S. Zaroff of counsel), for appellant.

Cahill Gordon & Reindel LLP, New York (David G. Januszewski of counsel), for respondent.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered March 7, 2016, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion to extend its time for service pursuant to CPLR 306-b, unanimously affirmed, with costs.

The motion court exercised its discretion in a provident manner in granting the extension both for "good cause shown" and "in the interest of justice" (CPLR 306-b; *see Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104-105 [2001]). Although plaintiff waited to move for the extension until 18 months after service was contested, this was not unreasonable under the circumstances presented. Furthermore, other relevant factors

weighed in favor of granting the motion including plaintiff's diligence, the expiration of the statute of limitations on a number of the plaintiff's claims and the absence of prejudice to defendant in light of his actual notice of the summons and complaint (*see Petracca v Hudson Tower Owners LLC*, 139 AD3d 518 [1st Dept 2016]). Where "'some factors weigh in favor of granting an interest of justice extension and some do not,'" this Court will not disturb the motion court's "'discretion-laden determination'" (*id.* at 519, quoting *Sutter v Reyes*, 60 AD3d 448, 449 [1st Dept 2009])

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

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

ENTERED: APRIL 20, 2017

CLERK

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Gische, Kahn, JJ.

3798 In re Jean Azor, OP 97/17
[M-600] Petitioner,

-against-

Hon. Vincent T. Quattrochi, etc., et al.,
Respondents.

_____

Jean Azor, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Charles F. Sanders of counsel), for Hon. Vincent Quattrochi, respondent.

_____

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: APRIL 20, 2017

CLERK