SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 20, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

6954 William Doyle Galleries, Inc., Index 653204/17
Plaintiff-Appellant,

-against-

Brett Stettner,
Defendant,

HSBC Bank USA, N.A.,
Defendant-Respondent.

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Lichtenberg PLLC, New York (Barry Lichtenberg of counsel), for appellant.

McGlinchey Stafford, New York (Brian S. McGrath of counsel), for respondent.

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Order, Supreme Court, New York County (Gerald Lebovits, J.), entered February 14, 2018, which granted defendant HSBC Bank USA, N.A.'s (HSBC) motion under CPLR 3211(a)(1),(5), and (7) to dismiss the complaint as against it and dismissed the action, modified, on the law, solely to reinstate the causes of action against HSBC for aiding and abetting fraud and aiding and abetting conversion, and to reinstate the action as against defendant Stettner, and otherwise affirmed, without costs.

In considering this motion to dismiss, we assume the facts stated in plaintiff's verified complaint to be true (*Simkin v Blank*, 19 NY3d 46, 52 [2012]), and give the pleadings the benefit of every possible favorable inference (*Rivietz v Wolohojian*, 38 AD3d 301 [1st Dept 2007]).

At an auction held by plaintiff on April 16, 2012, defendant Brett Stettner successfully bid on multiple antique watches and items of jewelry. Stettner presented a check dated May 16, 2012 for $425,750.00 as payment, which plaintiff declined to honor without a credit reference. Sometime after, William Caban, a vice president of defendant HSBC, contacted plaintiff and advised plaintiff that Stettner had a long-standing banking relationship with HSBC in the United States and Hong Kong, and that Stettner's account contained funds sufficient to cover the check. Plaintiff informed Mr. Caban that, in addition to his verbal assurance, plaintiff would require HSBC to submit a credit reference in writing.

Mr. Caban provided plaintiff with a letter on HSBC stationery on April 27, 2012, stating:

"In reference to your request for a credit reference, I have the following information to provide:

- Brett Stettner currently has Commercial and Personal relationships with HSBC in the US and in HK for his various

international business needs
- The relationships have been established and in good standing since 2008
- Worldwide the average balances can fluctuate from $1 MM US to $20 MM US
- There have been no problems with the accounts as we have maintained a good standing relationship for over 4 years
- We value the worldwide relationships Brett and his company have with us and continue to work closely to maintain this high level relationship."

In reliance upon HSBC's verbal and written representations, plaintiff released the jewelry and watches to Stettner. However, Stettner's HSBC check was rejected for insufficient funds, and plaintiff did not receive payment.

On August 14, 2015, Stettner was arrested and indicted for several thefts against auction houses in Manhattan, including the theft from plaintiff. On May 6, 2016, Stettner pleaded guilty to the charges filed against him. As part of his plea allocution, Stettner stated, "I presented a letter to [plaintiff] which I knew contained false information about my bank balances for the purposes of inducing [plaintiff] to give me [the watches and jewelry]."

"A plaintiff alleging an aiding-and-abetting fraud claim must allege the existence of the underlying fraud, actual knowledge, and substantial assistance" (*Oster v Kirschner*, 77

AD3d 51, 55 [1st Dept 2010]). In turn, the elements of an underlying fraud are "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Genger v Genger*, 152 AD3d 444, 445 [1st Dept 2017] [internal quotation marks omitted]).

Plaintiff sufficiently pleaded that there was an underlying fraud. It alleged that Stettner admitted in his plea allocution that he knowingly presented a letter containing false information about his bank balances to plaintiff, and that he did so in order to induce plaintiff to release the jewelry and watches to him. Plaintiff pleaded that it reasonably relied on the letter and its misrepresentations, and that it was injured as a result, since it did not receive payment.

We reject HSBC's argument that plaintiff's pleading of an underlying fraud was defective because it failed to plead the misrepresentation of a present or existing fact (*see Roney v Janis*, 77 AD2d 555, 556-557 [1st Dept 1980], *affd* 53 NY2d 1025 [1981]). Here, the HSBC letter made representations about Stettner's bank balances as they existed at the time the letter was written. Indeed, the HSBC letter explained that Stettner had

"current[]" personal and commercial relationships with HSBC and that "[w]orldwide," Stettner's average balances "can fluctuate from $1 MM US to $20 MM US." We disagree with HSBC that the letter's use of the language "can fluctuate" precludes the letter from establishing a misrepresentation of a present or existing fact. The HSBC letter clearly represented to plaintiff that Stettner's accounts contained a minimum of $1,000,000, an amount that was specific, and that was sufficient to cover Stettner's $425,750.00 check. The letter was thus a statement of existing fact, as opposed to a "nonactionable opinion" or "a prediction as to future performance" (*FMC Corp. v Fleet Bank*, 226 AD2d 225, 225 [1st Dept 1996] [No actionable fraud where bank officer made statement that it "felt" that a particular line of credit would be adequate to cover its customer's debt to plaintiff]).

Plaintiff sufficiently alleged the element of actual knowledge. "This Court has stated that actual knowledge need only be pleaded generally . . . particularly at the prediscovery stage, [since] a plaintiff lacks access to the very discovery materials which would illuminate a defendant's state of mind. Participants in a fraud do not affirmatively declare to the world that they are engaged in the perpetration of a fraud" (*Oster*, 77 AD3d at 55-56; *see also Chambers v Weinstein*, 135 AD3d 450, 451

[1st Dept 2016]; *AIG Fin. Prods. Corp. v ICP Asset Mgt., LLC*, 108 AD3d 444, 446 [1st Dept 2013]). Stettner admitted that he knew that the letter that he provided plaintiff contained false information about his bank balances. HSBC was the source of that letter, and had the means to verify if it was accurate.[1] Prior to providing the letter, HSBC verbally represented that Stettner and HSBC had a long-standing relationship and that his accounts contained funds sufficient to cover the check. These allegations are sufficient, on this prediscovery, pre-answer motion, to plead that HSBC knew that the letter contained misrepresentations about Stettner's accounts. Indeed, this Court has declined to "'endorse what is essentially a "see no evil, hear no evil" approach'" when reviewing whether a cause of action for aiding and abetting fraud adequately pleads actual knowledge (*AIG Fin. Prods. Corp.*, 108 AD3d at 446, quoting *Oster*, 77 AD3d at 57).

Plaintiff's allegations are also sufficient as to the element of substantial assistance, since plaintiff pleaded that "[b]ut for the verbal assurances by HSBC Vice President Caban and the HSBC Letter vouching for Stettner's financial and personal integrity, Stettner's scheme would have failed. Doyle released

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[1] Indeed, HSBC conceded its authorship of the letter during oral argument before the motion court.

the Valuables only after HSBC's repeated representations . . ." (*see Oster*, 77 AD3d at 56, citing *Nathel v Siegal*, 592 F Supp 2d 452, 470 [SD NY 2008]).[2]

The cause of action for aiding and abetting conversion, which was based upon fraud, was timely under the six-year statute of limitations governing fraud (*see D. Penguin Bros. Ltd. v City Natl. Bank*, 158 AD3d 432 [1st Dept 2018]; *Loeuis v Grushin*, 126 AD3d 761, 764 [2d Dept 2015]).

This cause of action was also adequately stated by plaintiff. Aiding and abetting conversion requires the existence of a conversion by the primary tortfeasor, actual knowledge, and substantial assistance (*see Dangerfield v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 2006 WL 335357, *5, 2006 US Dist LEXIS 7761, *17 [SD NY 2006]*; see also Weisman, Celler, Spett & Modlin v Chadbourne & Parke*, 271 AD2d 329, 330 [1st Dept 2000], *lv denied* 95 NY2d 760 [2000]). "A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone

[2] While our dissenting colleague contends that HSBC's oral representations did not induce plaintiff to accept the check and release the jewelry and watches, these paragraphs of the complaint clearly allege that plaintiff relied on the oral representations together with the subsequent letter.

else, interfering with that person's right of possession" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]).

Plaintiff sufficiently alleged the element of an underlying conversion by Stettner, the primary tortfeasor. Plaintiff alleged that Stettner took physical possession of its property without paying for it, and thus exercised unauthorized dominion and control over it. Moreover, plaintiff alleged that Stettner obtained control over the property by misrepresenting his ability to pay for it.

Plaintiff's allegations are also sufficient as to HSBC's actual knowledge. Since actual knowledge that one is participating in a fraud may be alleged "generally" (*Oster*, 77 AD3d at 55-56; *see also Chambers*, 135 AD3d at 451; *AIG Fin. Prods. Corp.*, 108 AD3d at 446), plaintiff's allegations that "HSBC had actual knowledge that the HSBC Account did not have sufficient funds to cover the HSBC Check, yet represented to [plaintiff] . . . that the HSBC Account held sufficient funds," are sufficient. We reject our dissenting colleague's contention that plaintiff has failed to allege that HSBC had actual knowledge of Stettner's plan to convert the property in the future. On this motion, plaintiff is entitled to the benefit of

every favorable inference (*Rivietz*, 38 AD3d at 301). In addition to alleging that HSBC represented that Stettner's account was sufficient to cover the check despite its actual knowledge that the account did not contain sufficient funds, plaintiff clearly alleged that it required references from HSBC before it would honor Stettner's check. Taken together, these allegations are sufficient at this early, prediscovery, pre-answer stage to allege HSBC's actual knowledge that it had "aided and assisted the converter with culpable knowledge that [the property] did not belong to [him]" (*Dangerfield, 2006 WL* 335357, *5, 2006 US Dist LEXIS 7761, *18 [internal quotation marks and emphasis omitted]). The complaint's allegations provide a sufficient basis to infer that HSBC knew that its misrepresentations would cause Stettner to obtain plaintiff's property despite his inability to pay for it.

As to the element of substantial assistance, plaintiff sufficiently alleged this element by pleading that "HSBC's services to Stettner enabled his fraudulent conversion of the [watches and jewelry]," and that plaintiff would not have released the watches and jewelry to Stettner but for the verbal and written assurances provided by HSBC (see Oster, 77 AD3d at 56).

We reject HSBC's argument that its letter was merely a business service performed for Stettner that fails to evince its actual knowledge or substantial assistance. Stettner admitted that the letter contained false information about his accounts, and at this early pre-answer, prediscovery stage, we see no reason not to infer that HSBC also knew of the letter's falsities, an inference buttressed by HSBC's verbal assurance that preceded the letter.[3] HSBC's citation to *Weisman, Celler, Spett & Modlin v Chadbourne & Parke* does not assist it, since that case involved a motion under CPLR 3212 where we held that, "[b]ased upon the evidence obtained through discovery, the IAS court properly held that plaintiff could not establish that defendant knowingly aided in the conversion of the shares by their original owner" (271 AD2d at 330 [emphasis added and internal quotation marks omitted]).

As to the branch of HSBC's motion under CPLR 3211(a)(1), the only documentary evidence relied upon by HSBC is the letter it

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[3] This inference is consistent with giving the pleadings the benefit of every possible favorable inference (*Rivietz*, 38 AD3d at 301). In addition, it is consistent with our rejection of a "see no evil, hear no evil" approach to reviewing allegations of actual knowledge by an alleged aider and abetter of fraud (*see AIG Fin. Prods. Corp.*, 108 AD3d at 446; *Oster*, 77 AD3d at 57).

provided to plaintiff. The letter does not "utterly refute["] plaintiff's allegations as to the causes of action for aiding and abetting fraud or aiding or abetting conversion (Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002). Rather, the letter is itself a component of the allegations forming the basis of these adequately stated causes of action.[4] The remaining causes of action as against HSBC were properly dismissed.

Since defendant Stettner did not seek dismissal, we modify to reinstate the complaint as against him.

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

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

[4] In the absence of any other documentary evidence on this prediscovery motion, we reject our dissenting colleague's contention that "it would appear" that Stettner withdrew funds from his account before the presentment date of the check. There is no record of Stettner's account withdrawals in the record before us. Accordingly, we have no basis upon which to draw that inference, particularly since this is a CPLR 3211 motion and all inferences must be drawn in plaintiff's favor.

TOM, J. (dissenting)

In this action, the complaint does not sufficiently allege facts to sustain the claims for aiding and abetting fraud or aiding and abetting conversion as against defendant HSBC Bank USA, N.A. Moreover, the documentary evidence refutes plaintiff's factual allegations (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Mill Fin., LLC v Gillett*, 122 AD3d 98, 103 [1st Dept 2014]). Accordingly, I dissent and would affirm Supreme Court's grant of HSBC's motion to dismiss the complaint as against it.

This action is part of the fallout of defendant Stettner's fraud scheme against several auction houses in Manhattan, through which he obtained possession of hundreds of thousands of dollars worth of watches and jewelry, and attempted to take possession of additional items worth millions of dollars.

Specifically, between 2012 and 2015, Stettner attended auctions and bid on valuable jewelry and watches. In each case, Stettner presented checks to the auction houses that were eventually rejected for insufficient funds. However, in connection with auctions he attended at Christie's and Sotheby's, Stettner never took possession of the jewelry.

With regard to plaintiff William Doyle Galleries in the

instant action, on April 6, 2012, Stettner was the successful high bidder on a lot of items sold for the aggregate sum of $425,750.00. Stettner presented a check postdated for May 16, 2012 as payment, which plaintiff declined to honor without a credit reference. The complaint alleges that William Caban, a vice president at defendant HSBC Bank USA, N.A., contacted a employee of plaintiff and represented that Stettner had long-standing banking relationships with HSBC in the United States and Hong Kong and that Stettner's account was sufficient to cover the check. Plaintiff advised that it would require something in writing.

On April 27, 2012, Caban provided plaintiff with a letter from HSBC. In it, Caban stated that Stettner has relationships with HSBC in the US and Hong Kong for his "various international business needs"; HSBC and Stettner had a "high level relationship"; the valued "worldwide relationships" had been in good standing and there had been no problems with the "accounts" for four years (since 2008); and "[w]orldwide the average balances can fluctuate from $1 [million] to $20 [million]."

Thereafter, plaintiff released the jewelry and watches to Stettner. However, Stettner's check was rejected for presentment weeks later due to insufficient funds.

After Stettner's arrest and indictment in 2015, he pleaded guilty on May 6, 2016, to grand larceny in the second degree, criminal possession of stolen property in the second degree, attempted grand larceny in the first and third degrees, and scheme to defraud in the first degree. He was ordered to pay restitution, and was sentenced in accordance with a plea agreement. As part of his plea allocution, Stettner stated, "I presented a letter to [plaintiff] which I knew contained false information about my bank balances for the purposes of inducing [plaintiff] to give me [the items]."

Plaintiff commenced this action against Stettner and HSBC setting forth various causes of action against Stettner, including fraud, conversion, breach of contract, unjust enrichment, breach of the implied covenant of good faith and fair dealing, and promissory estoppel. In addition, plaintiff set forth four causes of action against HSBC: aiding and abetting fraud, aiding and abetting conversion, breach of the implied covenant of good faith and fair dealing, and detrimental reliance/promissory estoppel.

Initially, the causes of action for both aiding and abetting conversion and aiding and abetting fraud fail based on the documentary evidence submitted, and due to failure to plead

critical allegations in the pleadings.

Pursuant to CPLR 3016, where a cause of action is grounded in misrepresentation or fraud, the circumstances constituting the wrong shall be stated in detail. Thus, although on a CPLR 3211 motion to dismiss we "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), fraud based claims must meet this particularity pleading requirement.

Further, where documentary evidence "utterly refutes plaintiff's factual allegations" (*Goshen*, 98 NY2d at 326), dismissal is warranted. And, "[i]f the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(1) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action" (*Mill Fin., LLC*, 122 AD3d at 103).

The elements of aiding and abetting fraud are: 1) sufficient proof of an underlying fraud claim, 2) the rendering of substantial assistance in the commission of the fraud by the alleged aider and abettor, and 3) the alleged aider and abettor's actual knowledge of the fraud (*Stanfield Offshore Leveraged*

Assets, Ltd. v Metropolitan Life Ins. Co., 64 AD3d 472, 476 [1st Dept 2009], *lv denied* 13 NY3d 709 [2009]).

The contents of the credit reference letter utterly contradict the allegations that the letter was fraudulent and that it provided substantial assistance to Stettner. While it is reasonable to infer that HSBC knew Stettner's balance on the account the check was drawn upon, the letter did not mention the specific balance or its sufficiency in any particular account. Instead, it referred only generally to Stettner's "average balances" in the plural on a "worldwide" basis. Thus, it failed to provide specific existing facts upon which a fraud could be perpetrated and it did not contain any false representation of an existing fact (*see Auchincloss v Allen*, 211 AD2d 417 [1st Dept 1995]). Indeed, stating a customer's average balances across multiple accounts and throughout the world is no guarantee or representation regarding the balance in one account at that time or, as relevant here, on a future date.

Significantly, the check here was postdated and first eligible for presentment several weeks after HSBC issued the letter, so it was impossible for the letter to state whether the balance would be adequate in the future because of possible withdrawal activity in the account during the interim. Thus, the

documentary evidence does not support the majority's position that the complaint sufficiently alleges that plaintiff relied on the oral representations together with the subsequent letter. Nowhere does the oral representation or letter set forth a specific balance in the future upon which plaintiff could rely.

Nor could HSBC have possibly set forth a specific balance on a future date when the check was to be negotiated. This was Stettner's personal checking account from which he can withdraw funds at his sole discretion and at any time he pleases. Critically, at the time of HSBC's alleged representations there may have been sufficient funds in the account but the check issued by Stettner was postdated close to three weeks after HSBC's reference letter.

It would be improper and unreasonable to hold the banking institution responsible for an account holder withdrawing funds to bring the account below the amount of a postdated check when the bank clearly did not guarantee any such result. In any event, the documentary evidence coupled with the lack of further required detail of fraud on behalf of HSBC in the complaint require dismissal of the claim.

The majority's heavy reliance on Stettner's plea allocution does not change the analysis. Stettner's allocution was

unspecific concerning the letter and ultimately inaccurate as the letter clearly made no representations about his specific bank balances on particular dates. To the extent Stettner himself planned to use the letter to later commit a fraud, this does not show that the letter itself misrepresented any facts or was written with the goal of substantially assisting the fraud, or that the bank had knowledge of the fraud. Indeed, at the time of the letter the bank could not have had knowledge of a fraud that was yet to occur for some weeks. It would appear Stettner as part of the fraud scheme withdrew funds from the account before the presentment date. Accordingly, the majority's conclusion that Stettner's allocution, which refers unspecifically to the fraud in the letter, without more could establish the bank's knowledge is belied by the documentary evidence and surrounding circumstances. It was Stettner's action that created the fraud and not HSBC's reference letter.

Thus, the cause of action for aiding and abetting fraud, predicated on the bank's issuance of a credit reference letter on behalf of the primary wrongdoer, is also barred by the lack of an underlying fraud and failure to assert that the bank had actual knowledge of the fraud (*see Stanfield Offshore Leveraged Assets, Ltd.*, 64 AD3d at 476).

Moreover, the complaint is devoid of allegations identifying circumstances from which the bank's actual knowledge of the fraud could be discerned (*see CDR Créances S.A.S. v First Hotels & Resorts Invs., Inc.*, 101 AD3d 485, 486-487 [1st Dept 2012]; *Goel v Ramachandran*, 111 AD3d 783, 792-793 [2d Dept 2013] [CPLR 3016 specificity requirement applies to allegation of actual knowledge of aider and abettor]). While plaintiff may be entitled to every favorable inference, the specific pleading requirements for fraud require plaintiff to have alleged detailed facts from which we can infer that HSBC knew of the fraud. This, plaintiff has utterly failed to do.

The majority erroneously states that the letter made representations about Stettner's bank balances at the time the letter was written. The letter merely stated Stettner's average worldwide balances across many accounts and noted that these balances can fluctuate. Nor did the letter represent that the account from which the check was written to plaintiff contained a "minimum" of $1 million as urged by the majority.

In light of plaintiff's request for a written credit reference before transferring to the primary wrongdoer the auction lots on which he was the successful bidder, the bank's alleged oral assurance that the primary wrongdoer had sufficient

funds in his account to cover the check he had given plaintiff does not support the substantial assistance element of aiding and abetting (*see id.*). The oral representation did not induce plaintiff to accept the check and release the auctioned items to Stettner.

Critically, the majority's holding would subject banking institutions to potential liability any time they issue an accurate reference letter and the account holder later decides to withdraw funds to prevent the collection of an issued check. This would lead to an unreasonable and unjustifiable result.

The cause of action for aiding and abetting conversion fails to allege that the bank knowingly aided in the conversion (*see Weisman, Celler, Spett & Modlin v Chadbourne & Parke*, 271 AD2d 329 [1st Dept 2000], *lv denied* 95 NY2d 760 [2000]). Such claim requires an allegation that the aider and abettor knowingly aided in the commission of the underlying tort. A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession *(Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). Here, however, the conversion had not yet taken place at the time of the letter, and there are no allegations that HSBC

had actual knowledge of Stettner's plan to convert the property in the future. Contrary to the majority's position, HSBC did not misrepresent Stettner's ability to pay for the property from the account, and could not have guaranteed the balance in the account on a future date.

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

ENTERED: DECEMBER 20, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Webber, Singh, JJ.

7256 Eusebio Nava-Juarez, Index 301694/14
Plaintiff-Appellant,

-against-

Mosholu Fieldston Realty, LLC,
et al.,
Defendants-Respondents.

Oresky & Associates, PLLC, Bronx (John J. Nonnenmacher of counsel), for appellant.

Methfessel & Werbel, New York (Frank J. Keenan of counsel), for respondents.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about June 9, 2017, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff established his prima facie entitlement to partial summary judgment on his section 240(1) claim through his testimony that he fell and was injured when the ladder he was working on shifted suddenly and the affidavit of a coworker who witnessed the accident and averred that plaintiff was painting the exterior facade of defendant's tavern when his ladder

shifted, causing plaintiff to fall from his position three-quarters of the way up the ladder.

Defendants, in turn, failed to raise a triable issue of fact. Hearsay, standing alone, is insufficient to defeat summary judgment. The mistranslated statement in the C-3 report ("while walking I fell down stairs") does not qualify as a prior inconsistent statement or as a business record so as to fit within an exception to the hearsay rule (*see Van Dina v City of New York*, 292 AD2d 267 [1st Dept 2002]; *Quispe v Lemle & Wolf., Inc.*, 266 AD2d 95, 96 [1st Dept 1999]; *see e.g. Coker v Bakkal Foods, Inc.*, 52 AD3d 765, 766 [2d Dept 2008], *lv denied* 11 NY3d 708 [2008] [entry in hospital record made by physician's assistant was properly precluded where it was unclear whether the plaintiff was the source of information that she had fallen at home, as opposed to at the defendant's store]). The declaration against interest hearsay exception to the hearsay rule is likewise inapplicable inasmuch as, among other reasons, the declarant was indisputably unaware that the statement was adverse when made (*see People v Soto*, 26 NY3d 455, 460-461 [2015]).

Defendants, as the proponents of the evidence, were obligated to show that plaintiff was the source of the information recorded in the C-3 indicating that he fell from

"stairs," and that "the translation was provided by a competent, objective interpreter whose translation was accurate, a fact generally established by calling the translator to the stand" (*Quispe*, 266 AD2d at 96). This defendants have failed to do. The C-3 form was prepared by plaintiff's worker's compensation attorney with the aid of a translator. Plaintiff averred that he told the translator "Mientras estaba trabajando me cai de una escalera," and asserts that the statement should have been translated as "While working I fell off a ladder."[5] It should be noted that the Spanish word "escalera" may be translated as either "stairs" or "ladder" (*see* Oxford Spanish Dictionary [1994]). In this case, of course, there were no "stairs" to speak of as the premises is a one-story building and does not have an exterior staircase. Plaintiff was incapable of discovering the error in the translation of the description of his accident because he could not read English and correct the statement.

Defendant Mosholu Realty, as the fee owner of the subject premises, is liable for any Labor Law violation occurring on the premises, regardless of whether it lacked knowledge of the work

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[5]An FDNY prehospital report submitted on reply similarly noted that "patient fell off a ladder about 15-20 feet."

or control over how it was performed (*see Sanatass v Consolidated Investing Co., Inc.*, 10 NY3d 333, 335 [2008]). Defendant Mosholu Enterprises is liable as the tenant who hired plaintiff's employer (*cf. Guzman v L.M.P. Realty Corp.*, 262 AD2d 99 [1st Dept 1999]). The testimony of Mosholu Enterprises' witness, who admittedly lacked knowledge about the extent of the work plaintiff's employer was hired to perform in September 2013, was insufficient to raise a triable issue of fact sufficient to defeat summary judgment. Mosholu's witness admitted that she allowed another person to act as her agent in connection with work plaintiff's employer performed on an "as needed basis."

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

ENTERED: DECEMBER 20, 2018

CLERK

Renwick, J.P., Tom, Gesmer, Singh, JJ.

7355- Ind. 1000/12
7356 The People of the State of New York,
Respondent,

-against-

Lataya Carter,
Defendant-Appellant.

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

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

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Order, Supreme Court, New York County (Patricia M. Nuñez, J.), entered on or about September 14, 2017, which denied defendant's CPL 440.10 motion to vacate a judgment, same court (Rena K. Uviller, J.), rendered August 12, 2013, convicting defendant, after a jury trial, of assault in the second degree, vehicular assault in the first degree and two counts of operating a motor vehicle while under the influence of alcohol, and sentencing her to an aggregate prison term of three years, unanimously reversed, on the law and the facts, the motion granted, the judgment vacated, and the matter remanded for a new trial. Appeal from the foregoing judgment, unanimously dismissed, without costs, as academic, in light of this decision.

Based upon our review of the evidence adduced at the CPL 440.10 hearing, we conclude that defendant met her burden of establishing that her trial counsel rendered prejudicially ineffective assistance under both the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). This case turned on whether defendant was intoxicated at the time of the vehicular accident at issue, and there was a serious issue about the accuracy of the final Intoxilyzer reading, which conflicted with an earlier reading showing no intoxication. Defense counsel failed to take steps to consult with and produce an appropriate expert on breath and blood alcohol analysis to rebut the People's proof (*see e.g. People v Oliveras*, 21 NY3d 339, 346 [2013]).

At the 440.10 hearing, trial counsel conceded that his only reason for not calling an expert was the inability of his client, who was also unable to pay counsel's fee, to pay for an expert. He also conceded that he took no steps to obtain a court-appointed expert, and was unaware that this remedy might be available. This constituted constitutionally deficient performance (*see Hinton v Alabama*, 571 US 263, 273-274 [2014]). As for the prejudice prong of an ineffective assistance claim, we find that there is a reasonable probability that calling an

expert would have affected the outcome of the trial, and that the absence of expert testimony rendered the proceeding unfair under the facts of the case.

Since we are ordering a new trial, we find it unnecessary to reach any other issues, except that we find that the verdict was supported by legally sufficient evidence and was not against the weight of the evidence.

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

ENTERED: DECEMBER 20, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Gische, Kapnick, Gesmer, JJ.

7757- Index 158294/13
7758-
7759N Valbona Fetahu,
Plaintiff-Appellant,

-against-

New Jersey Transit Corp.,
Defendant-Respondent.

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Jonah Grossman, Jamaica, for appellant.

Lynch & Lynch, Garden City (Charlene I. Lund of counsel), for respondent.

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Order, Supreme Court, New York County (Paul A. Goetz, J.), entered October 24, 2017, which denied plaintiff's motion to deem Item Nos. 1 and 2 of her second notice to admit admitted, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered March 29, 2018, which, in effect, granted plaintiff's motion for reargument and adhered to the original determination, unanimously dismissed, without costs, as academic. Order, Supreme Court, New York County (Adam Silvera, J.), entered on or about June 1, 2018, which granted defendant's motion for a protective order striking plaintiff's Third Notice to Admit, unanimously modified, on the facts, to deny the motion as to Item No. 13, to direct defendant to respond to this item

within 20 days of the date of this order, and otherwise affirmed, without costs.

Plaintiff seeks damages for injuries she allegedly sustained when a bus owned and operated by defendant and on which she was a passenger stopped short. The instant discovery disputes concern plaintiff's requests for admissions relating to defendant's use of a service called "DriveCam" to capture and review video recordings of certain risky driving events.

"A notice to admit is designed to elicit admissions on matters which the requesting party 'reasonably believes there can be no substantial dispute' (CPLR 3123[a])" (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Allen*, 232 AD2d 80, 85 [1st Dept 1997]). "[A] notice to admit may not be utilized to request admission of material issues or ultimate or conclusory facts," or "facts within the unique knowledge of other parties" (*Taylor v Blair*, 116 AD2d 204, 206 [1st Dept 1986]). Rather, it is "only properly used to eliminate from trial matters which are easily provable and about which there can be no controversy" (*Samsung Am. v Yugoslav-Korean Consulting & Trading Co.*, 199 AD2d 48, 49 [1st Dept 1993]). Further, because a notice to admit "is not intended as simply another means for achieving discovery," it may not be used to obtain information in lieu of other disclosure

devices (*see Hodes v City of New York*, 165 AD2d 168, 170 [1st Dept 1991]).

Based on these principles, plaintiff's motion to deem admitted the matters in the second notice to admit was properly denied. In this notice, plaintiff requested that defendant admit that a brochure describing the DriveCam service, and an "Event List" purportedly containing information about the subject incident, were obtained by defendant, in the ordinary course of its business, from a third party. The notice also requested that defendant admit that the Event List reflects events recorded on the day of the incident. These requests are not proper because they involve either material issues in the case or information within the unique knowledge of a third party (*see Kimmel v Paul, Weiss, Rifkind, Wharton & Garrison*, 214 AD2d 453 [1st Dept 1995]; *Taylor*, 116 AD2d at 206).

To the extent the requests seek admissions that the two documents were received in the ordinary course of defendant's business, plaintiff could not have "reasonably believe[d]," based on the testimony of defendant's claims manager, that there could be no "substantial dispute" on this issue (*see* CPLR 3123[a]; *Nacherlilla v Prospect Park Alliance, Inc.*, 88 AD3d 770, 772 [2d Dept 2011]). Indeed, the claims manager indicated otherwise,

testifying that he obtained the brochure by requesting it from a third party and compiled the Event List by conducting a search of the third party's website.

The court properly granted a protective order with respect to Item Nos. 1-2, 14, and 16-20 in plaintiff's third notice to admit because plaintiff could not have reasonably believed that there was no substantial dispute regarding these issues (*see* CPLR 3123[a]; *Nacherlilla*, 88 AD3d at 772). Item Nos. 16 and 19 are also improper insofar as they call for admissions of "legal conclusions" (*see Kimmel*, 214 AD2d at 453), and Item No. 14 is also improper insofar as it seeks information "within the unique knowledge of other parties" (*Taylor*, 116 AD2d at 206; *see* CPLR 3123[a]).

Item Nos. 4-12 and 15 were properly struck because they represented an improper "subterfuge for obtaining further discovery" post-filing of the note of issue (*Ahroner v Israel Discount Bank of N.Y.*, 79 AD3d 481, 483 [1st Dept 2010] [internal quotation marks omitted]; *see Taylor*, 116 AD2d at 206). Item No. 3 was properly struck because whether defendant provided plaintiff with a document as part of discovery is not a fact relevant to the trial of this matter.

Item No. 13 should not have been struck because it is essentially undeniable based on prior testimony in this litigation.

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

ENTERED: DECEMBER 20, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Tom, Gesmer, Kern, JJ.

7906 The People of the State of New York, Ind. 3022/15
Respondent,

-against-

John Brito,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered September 14, 2016, convicting defendant, after a jury trial, of assault in the second degree and criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to an aggregate term of five years, unanimously affirmed.

The court providently exercised its discretion in denying defendant's challenge for cause to a prospective juror. The panelist's responses, viewed as a whole, and with particular reference to her final statements to the court, as viewed in context, provided an unequivocal assurance that she could be fair and not be influenced by a crime committed against her niece (*see People v Chambers*, 97 NY2d 417, 419 [2002]).

The court correctly denied defendant's request for submission to the jury of the lesser included offense of criminally negligent assault under Penal Law 120.00(3) where there was no reasonable view of the evidence, viewed most favorably to defendant, under which defendant committed the lesser offense but did not commit the greater (*see generally People v Glover*, 57 NY2d 61, 63 [1982]). Defendant's defense, as reflected in his testimony, was that he intentionally struck the December 10, 2018 victim with a pair of pliers, but did so in self-defense, and there was no other evidence to support a theory of criminal negligence.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 20, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Tom, Gesmer, Kern, JJ.

7907 Global Liberty Insurance Company of New York,
Plaintiff-Appellant,

-against-

Spine Consultation NJ, P.C. as assignee of Neville Gibson,
Defendant-Respondent.

Index 650446/18

Law Office of Jason Tenenbaum, P.C., Garden City (Talia Beard of counsel), for appellant.

Revaz Chachanashvili & Associates, Richmond Hill (Rachel Drachman of counsel), for respondent.

Order, Supreme Court, New York County (Andrew Borrok, J.), entered July 11, 2018, which, to the extent appealed from, denied plaintiff's motion for partial summary judgment, unanimously affirmed, with costs.

The court correctly denied plaintiff's motion, interpreting Department of Financial Services Regulations (11 NYCRR) § 68.6(b)(1), amended effective January 23, 2018, to apply prospectively. The regulations do not indicate that they apply

retroactively, and the law is settled that retroactivity is not imputed where not expressly stated (*Bowen v Georgetown Univ. Hosp.*, 488 US 204, 208 [1988]; *Matter of Rudin Mgt. Co. v Commissioner of Dept. of Consumer Affairs of City of N.Y.*, 213 AD2d 185, 185 [1st Dept 1995]).

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

ENTERED: DECEMBER 20, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Tom, Gesmer, Kern, JJ.

7908 In re Marco B.,
Petitioner-Appellant,

-against-

Marnie Ann J.,
Respondent-Respondent.

_____

Larry S. Bachner, New York, for appellant.

Marnie Ann J., respondent pro se.

Tennille M. Tatum-Evans, New York, attorney for the child.

_____

Order, Family Court, New York County (Carol Goldstein, J.), entered on or about September 20, 2017, which, after a hearing, denied and dismissed petitioner father's application for modification of a prior custody order, unanimously affirmed, without costs.

The record supports the court's finding that modification of the prior custody order was not warranted on the basis of a substantial change in circumstances (*Matter of Nava v Kinsler*, 85 AD3d 1186 [2d Dept 2011]). While the father had moved to a new apartment, this alone is not sufficient to meet his burden of showing changed circumstances, as required for modification of custody (*see St. Clement v Casale*, 29 AD3d 367, 368 [1st Dept 2006]). Further, it appears that the children are thriving under

the present custody arrangement.

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

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

ENTERED: DECEMBER 20, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Tom, Gesmer, Kern, JJ.

7910 The People of the State of New York, Ind. 2827/12
Respondent,

-against-

Octavio Rivera,
Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Katherine M.A. Pecore of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Robert C. McIver of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered February 11, 2015, convicting defendant, after a jury trial, of assault in the first degree and criminal possession of a weapon in the fourth degree, and sentencing him, as a second violent felony offender, to an aggregate term of 17 years, unanimously reversed, on the law, and the matter remanded for a new trial.

As the People concede, the court erred in denying defendant's challenge for cause to a prospective juror who stated that her belief in "hearing both sides of the story" would make it difficult for her to reach a verdict "without hearing from the

defendant," and who was repeatedly unable to give an equivocal assurance that she would follow the law as charged by the court.

Defendant's other arguments for reversal have been withdrawn in light of the conceded error.

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

ENTERED: DECEMBER 20, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Tom, Gesmer, Kern, JJ.

7911 & M-5559 The People of the State of New York, Respondent,

Ind. 1181/12

-against-

Jonathan Lee,
Defendant-Appellant.

_____

Stanley Neustadter, Cardozo Appeals Clinic, New York (Joshua S. Moskovitz of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Shannon Henderson of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (John W. Carter, J.), rendered January 29, 2014, convicting defendant, after a jury trial, of attempted murder in the first degree, assault in the second degree (two counts), criminal possession of a weapon in the second degree (two counts) and resisting arrest, and sentencing him, as a persistent violent felony offender, to an aggregate term of 40 years to life, unanimously modified, as a matter of discretion in the interest of justice, to the extent of directing that all sentences run concurrently, and otherwise affirmed.

We reject defendant's argument that the attempted murder conviction was against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-49 [2007]). The evidence supports

inferences that defendant intended to kill a parole officer, and came dangerously close to doing so (*see generally People v Bracey*, 41 NY2d 296, 299-300 [1977]). During a prolonged and extremely violent struggle between defendant and several officers, defendant had his finger on the trigger of a pistol pointed at an officer while he threatened to kill her, and defendant was only prevented from firing the pistol by officers' actions in holding back the weapon's slide.

Defendant did not preserve his challenge to evidence that the parole officers were aware of defendant's history of violence and weapon possession, and we decline to review it in the interest of justice. As an alternative holding, we find that the court providently exercised its discretion in receiving this evidence, with suitable limiting instructions, as background information to explain the officers' actions leading up to the arrest, and that its probative value outweighed any prejudicial effect.

We find the sentence excessive to the extent indicated.

M-5559 - ***People v Lee***

Motion to adjourn appeal denied.

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

ENTERED: DECEMBER 20, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Tom, Gesmer, Kern, JJ.

7912 Lanmark Group, Inc., Index 653952/15
Plaintiff-Respondent,

-against-

New York City School Construction Authority,
Defendant-Appellant.

_____

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

Milber Makris Plousadis & Seiden, LLP, Woodbury (Joseph J. Cooke of counsel), for respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered June 8, 2017, which, to the extent appealed from as limited by the briefs, denied defendant's motion to dismiss plaintiff's first cause of action, unanimously affirmed, without costs.

Contrary to defendant's contention, the record establishes that plaintiff's notice of claim was timely served, because it was filed before defendant executed the certificate of completion (*see D & L Assoc., Inc. v New York City School Constr. Auth.*, 69 AD3d 435, 435 [1st Dept 2010]). Plaintiff's December 1, 2014 change order proposal did not trigger the running of the three-month time period to timely file a notice of claim, as required

by the version of Public Authorities Law § 1744(2) in effect at the time the parties executed the subject construction contract, because it was not a request for final payment for the work it had performed (*see Popular Constr. v New York City School Constr. Auth.*, 268 AD2d 467 [2d Dept 2000]).

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

ENTERED: DECEMBER 20, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Tom, Gesmer, Kern, JJ.

7914 Elizabeth A. Barrett, et al., Index 24799/13E
Plaintiffs-Appellants,

-against-

Aero Snow Removal Corp., et al.,
Defendants-Respondents.

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Gruenberg Kelly Della, Ronkonkoma (Zachary M. Beriloff of counsel), for appellants.

McBreen & Kopko, Jericho (Richard A. Auerbach of counsel), for Aero Snow Removal Corp., respondent.

Law Office of Lori D. Fishman, Tarrytown (Silvia C. Souto of counsel), for Cristi Cleaning Services, respondent.

Port Authority Law Department, New York (David K. Kromm of counsel), for Port Authority of New York and New Jersey, respondent.

Jeffrey Samel & Partners, New York (Richard A. Soberman of counsel), for ABM Building Solutions, LLC ABM Parking Services, Inc., and AMPCO System Parking, respondents.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered on or about May 15, 2017, which, to the extent appealed from as limited by the briefs, granted defendant Port Authority of New York and New Jersey's (PA) motion for summary judgment dismissing all claims as against it and, upon a search of the record, granted summary judgment dismissing all claims against defendants Aero Snow Removal Corp. (Aero) and Cristi Cleaning

Services (Cristi), unanimously modified, on the law, to deny summary judgment as to PA and Cristi, and otherwise affirmed, without costs.

Plaintiff Elizabeth A. Barrett allegedly sustained personal injuries when she slipped on an icy patch in the employee parking lot at LaGuardia Airport. Defendant PA effectively owns and operates LaGuardia. PA contracted with defendants Cristi and Aero to remove snow from portions of the subject parking lot.

PA's motion for summary judgment should have been denied, since PA failed to meet its prima facie burden of demonstrating that it did not have constructive notice of the alleged icy condition (*see Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

To demonstrate lack of constructive notice, a defendant must "produc[e] evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]; *see also Savio v St. Raymond Cemetery*, 160 AD3d 602, 603 [1st Dept 2018]). PA failed to produce such evidence. PA's representative testified that PA's logs for the day of and day

prior to the accident did not identify any icy conditions in the parking lot. However, he also admitted that it would not necessarily be documented in these logs (or elsewhere) if a PA employee noticed an icy condition. Moreover, he testified that checking for icy conditions was not the focus of PA's inspections.

Plaintiff's own failure to notice the icy condition before her accident is not conclusive, as she testified that she did not see the icy condition because she did not look down, not because it was not visible (*see Covington v New York City Hous. Auth.*, 135 AD3d 665, 666 [1st Dept 2016]).

The motion court also should have denied Cristi's motion for summary judgment dismissing all claims against it. "[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]). However, there are exceptions to this rule, including where "the contracting party, in failing to exercise reasonable care in the performance of [its] duties, 'launches a force or instrument of harm'" by "creat[ing] or exacerbat[ing]" a dangerous condition (*id.* at 140, 142-143). It is undisputed that Cristi performed snow removal and salting in the area of the accident and that it had a

continuing obligation to inspect and maintain the area even after snow removal was complete, but it offered no evidence regarding the actual state of the area at issue prior to the accident. Its "silence with respect to the actual snow removal operations at issue" renders Cristi's prima facie showing "patently insufficient" (*Prenderville v International Serv. Sys., Inc.*, 10 AD3d 334, 338 [1st Dept 2004]; *accord Mastroddi v WDG Dutchess Assoc. Ltd. Partnership*, 52 AD3d 341, 342 [1st Dept 2008]).

The motion court properly granted Aero's motion for summary judgment dismissing all claims against it. Aero met its prima facie burden of establishing that it did not create or exacerbate the alleged icy condition, by presenting proof that it was only required to perform snow removal once "activated" by PA, that it did not retain any duty to inspect or remove snow once "released" by PA, and that it was released by PA 11 days before the subject accident and was not "reactivated" within that time.

In opposition, plaintiffs failed to create an issue of fact. Apart from sheer speculation, plaintiffs offered no climatological or other evidence in support of their theory that the icy condition resulted from Aero's failure to plow 11 days earlier or from the melting and refreezing of a pile of snow Aero left in the area. Such speculation is not sufficient to

withstand summary judgment (*see Lenti v Initial Cleaning Servs., Inc.*, 52 AD3d 288, 289 [1st Dept 2008]; *Nadel v Cucinella*, 299 AD2d 250, 252 [1st Dept 2002]).

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

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

ENTERED: DECEMBER 20, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Tom, Gesmer, Kern, JJ.

7915-
7516&
M-5424 The People of the State of New York,
Respondent,

-against-

Benjamin Yu,
Defendant-Appellant.

- - - - -

The People of the State of New York,
Respondent,

-against-

Jose Nunez,
Defendant-Appellant.

Ind. 3874/14

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Patrick J. Brackley, New York, for Benjamin Yu, appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Jan Hoth of counsel), for Jose Nunez, appellant.

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

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Judgments, Supreme Court, New York County (James M. Burke, J.), rendered August 17, 2016, convicting each defendant of bribery in the second degree (2 counts), conspiracy in the fourth degree and rewarding official misconduct in the second degree (13 counts), and sentencing each defendant to an aggregate term of three to nine years, unanimously affirmed. The matter is remitted to Supreme Court for further proceedings as to both

defendants pursuant to CPL 460.50(5).

Defendants Yu and Nunez, an attorney and paralegal respectively, were convicted of bribing an employee of the Criminal Justice Agency (CJA) to refer arrestees as potential clients. The principal issues on appeal arise out of the fact that CJA employees, who interview arrestees regarding their suitability for pretrial release, are not City employees, but employees of a City-funded nonprofit agency. Thus, under the bribery statutes, the CJA employee was not a "public servant" under Penal Law § 10.00(15)(a), which is limited to public employees, and the parties disagree about whether he qualified as a public servant under § 10.00(15)(b), as a "person exercising the functions of any such public officer or employee."

There was no impermissible variance between the trial evidence and the indictment. At trial, the People proceeded on the theory that the CJA employee was a public servant under the "exercising" theory set forth in § 10.00(15)(b), and the court charged the jury accordingly. Both the "public employee" and "exercising" theories had been submitted to the grand jury, and the indictment was compatible with both theories, except for some language in the narrative portion of the conspiracy count relating to the employee's status, which the court modified. To

the extent the court amended the indictment, the amendment satisfied the requirements of CPL 200.70. Defendants were not prejudiced, because they received notice long before trial that the People's theory would be that the employee was a public servant under the "exercising" theory. To the extent that defendants are arguing that the evidence before the grand jury was insufficient to support that theory, that claim is unreviewable (CPL 210.30[6]).

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Testimonial and documentary evidence established that the CJA employee was a public servant under § 10.00(15)(b) because he exercised the functions of a public employee in interviewing arrestees and making recommendations to arraignment judges whether to release the arrestees on their own recognizance. Evidence was presented that CJA is wholly funded by the City, and receipt of such public funds is a relevant factor in the determination (*see People v Kruger*, 87 AD2d 473, 475-76 [2d Dept 1982]). CJA performs a function previously performed by the Probation Department in New York City, and still performed by the Probation Department in counties outside of the City. In addition, CJA recommendations facilitate an important

government interest, namely, regulating pretrial incarceration (*Matter of Bernard T.*, 250 AD2d 532 [1st Dept 1998], *lv denied* 92 NY2d 808 [1998]; *Kruger*, 87 AD2d at 475).

The evidence also sufficiently established that defendants sought to influence the CJA employee with respect to his "vote, opinion, judgment, action, decision, or exercise of discretion as a public servant," as required to convict them of bribery in the second degree (Penal Law § 200.03). Although the bribe was not offered to influence bail recommendations, which was the employee's primary responsibility, it was offered to influence the employee to interview and screen arrestees so as to identify those who could afford private counsel, to make false and misleading statements to the arrestees, and to make improper referrals. The employee's actions violated CJA's prohibition against private attorney referrals, and violated its general policy that its employees maintain neutrality. He also took advantage of his position and access to information within the CJA. Thus, at the very least, the employee's "action" as a public servant was influenced (Penal Law § 200.03).

Although the court's jury charge defining the term public servant contained some overly broad language, the court also read the statutory definition, and the charge, when viewed as a whole,

conveyed the proper definition *(see generally People v Fields*, 87 NY2d 821 [1995]). In any event, any error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975).

Defendant Yu's remaining contentions are unpreserved and we decline to review them in interest of justice. As an alternative holding, we reject those arguments on the merits. Yu's ineffective assistance of counsel claims relating to these unpreserved issues are generally unreviewable because Yu has not made a CPL 440.10 motion. In the alternative, to the extent the existing record permits review, we find that Yu 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]).

We have considered and rejected defendant Nunez's excessive

sentence claim.

M-5424 - ***People v Benjamin Yu***

Motion to adopt defendant Nunez's arguments granted.

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

ENTERED: DECEMBER 20, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Tom, Gesmer, Kern, JJ.

7917 Nationstar Mortgage LLC, Index 382890/09
Plaintiff-Appellant,

-against-

Nicola McCallum,
Defendant-Respondent,

Clevon McCallum, et al.,
Defendants.

_____

Sandelands Eyet LLP, New York (Margaret S. Stefandl of counsel), for appellant.

Joseph A. Altman, P.C., Bronx (Joseph A. Altman of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about February 14, 2017, which granted defendant Nicola McCallum's motion to vacate the judgment of foreclosure and order of reference and dismiss the action as against her, unanimously reversed, on the law, without costs, and the matter remanded for a traverse hearing and further proceedings consistent with the determination rendered after such hearing.

In this foreclosure matter commenced in 2009, plaintiff's affidavit of service indicated that service of the summons, complaint and RPAPL 1303 notice was effectuated upon defendant Nicola McCallum pursuant to CPLR 308(2) by serving an individual,

who allegedly identified himself as her brother, at her "dwelling place," and mailing the same documents to that address.

In response, defendant averred that she was never served with the summons and complaint, that she does not reside at the address where service was made, and that her primary residence has always been at the property that is the subject of this foreclosure action.

"While a proper affidavit of a process server attesting to personal delivery upon a defendant constitutes prima facie evidence of proper service, a sworn non-conclusory denial of service by a defendant is sufficient to dispute the veracity or content of the affidavit, requiring a traverse hearing" (*NYCTL 1998-1 Trust & Bank of N.Y. v Rabinowitz*, 7 AD3d 459, 460 [1st Dept 2004]; *see also Bank of Am., N.A. v Diaz*, 160 AD3d 457, 458-459 [1st Dept 2018]). The competing averments concerning plaintiff's residence at the time of service raise a factual issue concerning whether the service address was her "dwelling place or usual place of abode" at the time of service (CPLR 308[2]) warranting a traverse hearing concerning whether defendant was properly served with the summons, complaint and RPAPL 1303 notice (*see* 160 AD3d at 458-459).

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: DECEMBER 20, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Tom, Gesmer, Kern, JJ.

7918 William J. Cox, Jr., Index 151260/16
Plaintiff-Respondent-Appellant,

-against-

Prudential Foundation, Inc.,
Defendant-Appellant-Respondent.

_____

Cahill Gordon & Reindel LLP, New York (Thomas J. Kavaler of counsel), for appellant-respondent.

Judd Burstein, P.C., New York (Judd Burstein of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Lynn R. Kottler, J.), entered July 3, 2018, which granted defendant's motion for summary judgment only to the extent of dismissing plaintiff's claim of tortious interference with business expectancy, and denied plaintiff's motion for partial summary judgment on his libel claim, unanimously affirmed, without costs.

The motion court, applying New Jersey substantive law, properly determined that issues of fact remained whether defendant made a slanderous statement of fact concerning plaintiff which was false and was communicated to a third person (*see Feggans v Billington*, 291 NJ Super 382, 390-391, 677 A2d 771, 775 [1996]). Although defendant's program officer and others denied that she had made the complained of statement,

credibility issues remain to be resolved at trial.

Denial of so much of defendant's motion seeking dismissal of plaintiff's libel claim, which had been interposed in an amended complaint, was proper. The claim, based upon an email produced during discovery in this action, related back to the defamation claims made in the first, timely complaint (*see Pickholz v First Boston*, 202 AD2d 277 [1st Dept 1994]; *compare Torati v Hodak*, 147 AD3d 502, 503 [1st Dept 2017]). The court also properly denied plaintiff partial summary judgment on the libel claim, since factual issues existed including whether defendant's statement was susceptible of a nondefamatory meaning and whether it was false. The court also properly determined that a qualified privilege applied to the alleged statements, but that issues remained as to whether the privilege was abused (*see Williams v Bell Tel. Labs. Inc.*, 132 NJ 109, 121, 623 A2d 234, 240 [1993]).

Dismissal of plaintiff's tortious interference with business

expectancy claim was proper. Plaintiff failed to identify a specific prospective economic or contractual relationship that was interfered with (*see Printing Mart-Morristown v Sharp Elecs. Corp.*, 116 NJ 739, 751, 563 A2d 31, 37 [1989]).

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

ENTERED: DECEMBER 20, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Tom, Gesmer, Kern, JJ.

7919 The People of the State of New York, Ind. 2549/15
Respondent,

-against-

Shayne Lewis,
Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Daniel R. Lambright of counsel), for appellant.

Shayne Lewis, appellant pro se.

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered January 7, 2016, convicting defendant, upon his plea of guilty, of attempted assault in the first degree, and sentencing him to a term of four years, unanimously affirmed.

We perceive no basis for reducing the sentence.

Defendant's pro se claims are unreviewable on the existing record or foreclosed by his guilty plea.

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

ENTERED: DECEMBER 20, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Tom, Gesmer, Kern, JJ.

7920 The People of the State of New York, Ind. 39/17
Respondent,

-against-

Raymond Talavera,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Beth R. Kublin of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Shari R. Michels, J.), rendered February 16, 2017, convicting defendant, upon his plea of guilty, of course of sexual conduct against a child in the first degree, and sentencing him to a term of seven years, unanimously modified, on the law, to the extent of reducing the mandatory surcharge and crime victim assistance fee to $250 and $20, respectively, and otherwise affirmed.

We perceive no basis for reducing the sentence.

As the People concede, the surcharge and fee should be reduced to the amounts applicable at the time of the crime.

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

ENTERED: DECEMBER 20, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Tom, Gesmer, Kern, JJ.

7921-
7922 The People of the State of New York,
Respondent,

-against-

Terrence Sapp,
Defendant-Appellant.

Ind. 1202/14
2758/15

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Christina A. Swarns, Office of the Appellate Defender, New York (Kami Lizarraga of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (David A. Slott of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, Bronx County (Jeanette Rodriguez-Morick, J. at plea; Raymond Bruce, J. at sentencing), rendered March 11, 2016,

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

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

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

ENTERED: DECEMBER 20, 2018

CLERK

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

Richter, J.P., Manzanet-Daniels, Tom, Gesmer, Kern, JJ.

7923- Ind. 902N/11
7924 The People of the State of New York,
Respondent,

-against-

George Leeper,
Defendant-Appellant.

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Christina A. Swarns, Office of the Appellate Defender, New York (Emma L. Shreefter of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Hope Korenstein 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 (Robert Stolz, J.), rendered February 15, 2012,

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

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

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

ENTERED: December 20, 2018

CLERK

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

Sweeny, J.P., Richter, Tom, Kern, Singh, JJ.

8190 In re Keith Troxler Bey, OP 166/18
[M-6120] Petitioner,

-against-

Hon. Julio Rodriguez, etc.,
Respondent.

- - - - -

Darcel D. Clark, District Attorney,
Nonparty Respondent.

_____

Keith T. Bey, petitioner pro se.

Darcel D. Clark, District Attorney, Bronx (Kyle R. Silverstein of counsel), for Hon. Darcel D. Clark, respondent.

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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.

Justice Julio Rodriguez and Justice Denis J. Boyle have elected, pursuant to CPLR 7804(i) not to appear in this proceeding.

ENTERED: DECEMBER 20, 2018

CLERK