SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 4, 2020

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10682N Federal National Mortgage Association ("Fannie Mae"), etc.,
Plaintiff-Respondent,

-against-

Jacob Rosenberg,
Defendant-Appellant,

New York City Environmental Control Board, et al.,
Defendants.

Index 32417/16

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Tamir Law Group PC, New York (Geoffrey Bowser of counsel), for appellant.

Sandelands Eyet LLP, New York (Michael T. Madaio of counsel), for respondent.

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Order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered on or about February 26, 2018, which granted plaintiff's motion pursuant to CPLR 5015(a)(1) to vacate an order dismissing the action to the extent of ordering a framed issue hearing to determine whether the lender revoked its election to accelerate the subject mortgage, unanimously modified, on the law, the direction for a framed hearing vacated, and the matter restored

to trial calender, and otherwise affirmed, without costs.

In April 2010, plaintiff's predecessor (OneWest) commenced a mortgage foreclosure action, which accelerated the mortgage debt on defendant's property. In April 2015, OneWest moved to voluntarily discontinue that action, the motion was granted and the action was discontinued without prejudice.

Plaintiff commenced the instant action in May 2016. Defendant moved to dismiss the complaint claiming that the action was time-barred. The motion court also scheduled a conference on the same date the motion was calendared. Plaintiff sought an adjournment of defendant's motion to dismiss but failed to adjourn the scheduled conference. The court granted the motion to dismiss and canceled the Notice of Pendency when plaintiff's counsel failed to appear at the conference.

Plaintiff subsequently moved, pursuant to CPLR 5015(a)(1), to vacate the dismissal order and reinstate the claim. It contended that it had a meritorious claim because OneWest lacked standing to commence the prior foreclosure action.[1] The motion court held that OneWest had standing to sue and granted the

[1] Plaintiff also argued that it had a reasonable excuse for not appearing at the scheduled conference. Since defendant does not dispute this issue on appeal, it will not be discussed further.

motion to the extent that it ordered a framed hearing "to determine whether the plaintiff has a meritorious cause of action by establishing that the lender revoked its election to accelerate the mortgage." We now reverse.

An order dismissing a case based on a party's failure to appear at a scheduled conference should be vacated if the defaulting party shows a reasonable excuse for the default and a meritorious cause of action (*Hardwood v Chaliha*, 291 Ad2d 234 [1st Dept 2002]). The moving party simply "needs to show a substantial possibility of success in the action" (*Ronsco Constr. Co. V 30 E. 85th St. Co.*, 219 AD2d 281, 284 [1st Dept 1996] [internal quotation marks ommitted]*; see also Polir Constr. v Etingin*, 297 AD2d 509, 512 [1st Dept 2002]). However, in this case, defendant raised an affirmative defense based on the statute of limitations. If this action is time-barred, plaintiff will not be able to show that it has a meritorious cause of action.

An action to foreclose on a mortgage is subject to a six-year statute of limitations (*see* CPLR 213[4]). Once a mortgage debt is accelerated, and the entire amount is due and owing, the statute of limitations begins to run on the entire debt. However, "[a] lender may revoke its election to accelerate the

mortgage, but it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period" (*NMNT Realty Corp. V Knoxville 2012 Trust*, 151 AD3d 1068, 1069 [2d Dept 2017]).

In this case, plaintiff provided evidence that it took affirmative action to de-accelerate the mortgage, which would have stopped the running of the statute of limitations on the mortgage debt. The 90-day notice provided to defendant sought an amount lower than the accelerated amount, which may evidence an intent to de-accelerate. While seeking a lower amount in and of itself is not enough to establish, as a matter of law, that the 90-day notice "destroy[ed] the effect of the sworn statement that the plaintiff had elected to accelerate the maturity of the debt" *(Deutsche Bank Natl. Trust Co. v Adrian*, 157 AD3d 934, 935-936 [2d Dept 2018] [internal quotation marks omitted]), it is sufficient to meet the "minimal showing" required on a motion to restore (*Polir Constr.* at 512). Therefore, there is no need to hold a framed issue hearing.[2]

Defendants reliance on *Vargas v Deutsche Bank Natl. Trust*

[2] Because the only issue before us is whether the order should be vacated under CPLR 5015, we do not decide whether the case should be dismissed on statute of limitations grounds if there is further motion practice or discovery.

Co. (168 AD3d 630 [1st Dept 2019]) for the proposition that a 90-day notice is insufficient to establish an affirmative act because OneWest made "continued efforts" to collect the mortgage debt is unavailing. This case is distinguishable from *Vargas* because in that case, the lender sent notices "attempting to collect...the accelerated mortgage debt" (*id.* at 630). Here, in contrast, plaintiff did not attempt to collect the accelerated mortgage debt; rather, it sought to collect enough to cure the default.

We have considered defendant's remaining arguments, including the issue of standing, and find them unavailing.

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

ENTERED: FEBRUARY 4, 2020

CLERK

Kapnick, J.P., Oing, Singh, Moulton, JJ.

10879 Eugenie Mathiew, Index 310704/17
Plaintiff-Respondent,

-against-

Joseph G. Michels,
Defendant-Appellant.

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Bikel & Schanfeld, New York (Dror Bikel of counsel), for appellant.

Dobrish Michaels Gross LLP, New York (Nina S. Gross of counsel), for respondent.

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Order, Supreme Court, New York County (Matthew F. Cooper, J.), entered July 11, 2019, which, inter alia, after a trial, granted plaintiff mother's application to relocate with the parties' minor children to London, England, for one year, unanimously affirmed, without costs.

This case, involving a petition for relocation, falls into that category of cases which "present some of the knottiest and most disturbing problems that our courts are called upon to resolve" (*Matter of Tropea v Tropea*, 87 NY2d 727, 736 [1996]). Because there was no prior custody order in place at the time of the mother's relocation petition, the test that should have been applied here is that of the best interests of the children, and relocation is but one factor in determining the children's best

interests (*see Matter of Michael B. [Lillian B.]*, 145 AD3d 425, 430 [1st Dept 2016]; *see also Arthur v Galletti*, 176 AD3d 412 [1st Dept 2019]; *Matter of Saperston v Holdaway*, 93 AD3d 1271 [4th Dept 2012], appeal dismissed 19 NY3d 887 [2012]). However,"'in reviewing relocation and other custody issues, deference is to be accorded to the determination rendered by the factfinder, unless it lacks a sound and substantial basis in the record'" (*Matter of David J.B. v Monique H.*, 52 AD3d 414, 415 [1st Dept 2008], quoting *Yolanda R. v Eugene I.G.*, 38 AD3d 288, 289 [1st Dept 2007]; *see also Matter of Carmen G. v Rogelio D.*, 100 AD3d 568 [1st Dept 2012]; *Matter of Alaire K.G. v Anthony P.G.*, 86 AD3d 216, 220 [1st Dept 2011]). Thus, while this appeal presents some admittedly difficult issues, with which the trial court clearly struggled, we find that the court's decision to allow the mother to relocate to London with the children for one year has a sound and substantial basis in the record.

The record shows that the mother obtained employment in London in reliance on defendant father's representation that the family would move there if she found a job with a certain salary. Furthermore, she had an apartment in London; her family, who lived nearby, was going to provide practical and emotional support; and the children spent a significant amount of time

there every year with their grandmother, aunt and cousins. Moreover, the record shows that the mother, as the primary caregiver, will not engage in "negative gatekeeping" and will continue to work towards strengthening the relationship between the children and their father.

In contrast, the father, who was employed by a company with an office in London, failed to provide any evidence as to why he could not work in the firm's London office. Although he maintained that a move from New York would uproot the children, he had no such concerns when he was considering a move to Texas and Massachusetts that would have benefitted his own career.

We have considered the father's remaining arguments and find them unavailing. We therefore affirm the trial court's order granting the mother's petition for relocation, with continued oversight and implementation of the relocation to be conducted by Supreme Court.

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

ENTERED: FEBRUARY 4, 2020

CLERK

Kapnick, J.P., Oing, Singh, Moulton, JJ.

10881 Lori Bogin, As Executrix of the Estate of Heath Bogin, deceased, etc., Plaintiff-Appellant-Respondent, Index 805160/16

-against-

Yasmin Metz, M.D., et al., Defendants,

Danielle Nicolo, M.D., Defendant-Respondent-Appellant,

Weill Cornell Medical Associates, et al., Defendants-Respondents.

_____

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

Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Deirdre E. Tracey of counsel), for respondent-appellant and respondents.

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Order, Supreme Court, New York County (Martin Shulman, J.), entered December 5, 2018, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing plaintiff's claims against defendant Ruben Niesvizky, M.D., and against Danielle Nicolo, M.D. arising from her treatment of decedent on November 18, 2014, and denied their motion as to the claim against Dr. Nicolo arising out of her telephone consultation with decedent on December 29, 2014, unanimously affirmed, without costs.

Plaintiff alleges that defendant doctors negligently delayed in diagnosing and treating decedent Heath Bogin for Primary Mediastinal Large B Cell Lymphoma (PMBCL). The motion court correctly dismissed claims against Dr. Nicolo, a general practitioner, based on her first examination of decedent for a physical examination on November 18, 2014. Defendants' expert established prima facie that the treatment provided to decedent on that day comported with good and accepted practice (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Coronel v New York City Health & Hosps. Corp.*, 47 AD3d 456 [1st Dept 2008]). In response, plaintiff failed to present medical evidence sufficient to raise a triable issue of fact, as her expert points to nothing in the record supporting his analysis that plaintiff, who complained only of puffy eyes with nasal congestion, required cancer blood screening and a chest X ray at that time (*see Bartolacci-Meir v Sassoon*, 149 AD3d 567, 572 [1st Dept 2017]).

The court also correctly denied summary judgment to Dr. Nicolo dismissing malpractice claims based on her telephone consultation with decedent on December 29, 2014. On that date, decedent contacted the doctor to advise that he was having extreme difficulties swallowing, and Dr. Nicolo referred him to a gastroenterologist, who he saw the following day. Plaintiff's

expert opined that Dr. Nicolo deviated from the applicable standard of care by not also ordering her own testing, specifically, an immediate imaging of the chest, neck and throat and/or a motility study to rule out a non-gastrointestinally related cause of the patient's swallowing difficulty. Plaintiff's expert further states that Dr. Nicolo's differential diagnosis on December 29, 2014 should have included mediastinal mass/tumor and PMBCL. Defendants' expert does not address why such imaging and/or other studies were not warranted at that time in addition to the referral to the gastroenterologist.

Summary judgment was also correctly granted dismissing plaintiff's claims against Dr. Niesvizky, the oncologist who performed plaintiff's biopsy and ordered his first round of chemotherapy. As explained by both Dr. Niesvizky and his expert oncologist/hematologist, commencement of treatment could not occur until after the final pathology report of the biopsy was issued, and the type of cancer decedent suffered from was determined. While plaintiff's expert opines that immediately after the mass was observed on a chest X ray, it was known with "overwhelming certainty" that the cancer was PMBCL, the record does not support this conclusion. After discovery by X ray, the doctors considered several types of cancer in the differential

diagnosis, including two different lymphomas and a germ cell tumor. Moreover, plaintiff's expert did not address defendants' expert's opinion that initiating chemotherapy without confirming the diagnosis could pose a fatal risk to the patient. While the preliminary biopsy stated that the cells were consistent with lymphoproliferative disease, the pathologist added that, upon further review, the results were suggestive of a solid tumor malignancy, and indicated that they would await a final pathology. While the cancer ultimately did turn out to be PMBCL, malpractice cannot rest solely on 20/20 hindsight (*see Rodriguez v Montefiore Med. Ctr.*, 28 AD3d 357 [1st Dept 2006]; *Henry v Bronx Lebanon Med. Ctr.*, 53 AD2d 476, 481 [1st Dept 1976]).

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

ENTERED: FEBRUARY 4, 2020

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Singh, González, JJ.

10935 The People of the State of New York, Ind. 12/14
Respondent,

-against-

Erik White,
Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Anastasia Heeger of counsel), and Dechert LLP, New York (Emily Van Tuyl of counsel), for appellant.

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

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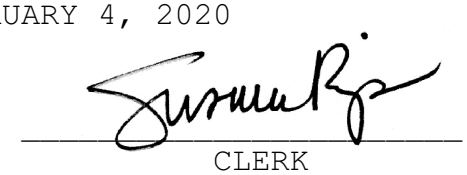
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Maxwell Wiley, J.), rendered September 19, 2018,

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: FEBRUARY 4, 2020



CLERK

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

Friedman, J.P., Renwick, Manzanet-Daniels, Singh, González, JJ.

10936 Jenny H.B., Index 306490/11
Plaintiff-Appellant,

-against-

C. Joel B.,
Defendant-Respondent.

_____

Franklin S. Bonem, New York, for appellant.

Law Office of Nancy J. Dreeben, Garden City (Bryan A. McKenna of counsel), for respondent.

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Judgment of divorce, Supreme Court, New York County (Lori S. Sattler, J.), entered January 31, 2019, insofar as appealed from as limited by the briefs, bringing up for review an order, same court and Justice, entered on or about June 23, 2016, which, inter alia, granted defendant husband's motion to strike plaintiff wife's pleadings for failure to comply with discovery and referred the issues of equitable distribution and the counterclaim for divorce to the Office of the Special Referee to hear and report, unanimously affirmed, without costs.

The court did not abuse its discretion in striking the wife's pleadings (*see e.g. Fish & Richardson, P.C. v Schindler*, 75 AD3d 219, 220 [1st Dept 2010]). The record shows that the wife did not comply with repeated discovery demands or explain

why she was unable to do so. In any event, the record demonstrates that despite the fact that her pleadings had been stricken, the wife was allowed to testify and present evidence on the issues outside of the scope of the husband's direct testimony during the June 14, 2018 hearing. She was also permitted to call witnesses, but she declined.

Furthermore, the wife contends that she was not given an opportunity to present evidence because the court prevented her from testifying about her inability to work as an artist due to her hand injury and declined to admit certain documents into evidence. During the hearing, the wife testified that she received disability payments because she was permanently and completely disabled. In light of this permanent disability, she fails to explain how her attempts to earn income as an artist were relevant to the proceedings, especially since the husband was willing to pay her nondurational spousal maintenance. The wife also provides no explanation as to how the order striking

her pleadings negatively impacted upon her ability to enter certain papers into evidence where the court reviewed them and declined to enter them as unenforceable and incomplete hearsay documents.

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

ENTERED: FEBRUARY 4, 2020

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Singh, González, JJ.

10937 In re Madisynn W., and Another, Dkt. B44164-65/15
G42966-7/14

Children Under Eighteen Years
of Age, etc.,

Esprit L.,
Respondent-Appellant,

Sheltering Arms Children & Family Services,
Petitioner-Respondent.

_____

Larry S. Bachner, New York, for appellant.

Dawn M. Shammas, New York, for respondent.

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

_____

Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about February 11, 2019, which revoked a September 26, 2016 suspended judgment and terminated respondent mother's rights to the subject children, unanimously affirmed, without costs.

The finding that the mother violated the terms of the suspended judgment is supported by a preponderance of the evidence (*see Matter of Aliyah Careema D. [Sophia Seku D.]*, 88 AD3d 529, 529 [1st Dept 2011]). Hearing evidence revealed that the mother failed to consistently and timely submit to drug testing, was inconsistent in her contact with the service

providers, did not consistently attend scheduled weekly visits with the girls, and took no measures to ensure that individuals who had not been cleared with the agency not be present during visits, all required elements of the suspended judgment (*see In re Lourdes O.*, 52 AD3d 203 [1st Dept 2008]).

A preponderance of the evidence also supports the court's determination to terminate the mother's parental rights and free the children for adoption by their current, long-term foster parents (*see Matter of Anissa Jaquanna Aishah H. [Gregory C.]*, 159 AD3d 516 [1st Dept 2018]). The children have resided for most of their lives in a stable, loving pre-adoptive foster home, where they are well cared for and thriving. Their grandmother "has no preemptive statutory or constitutional right to custody surpassing that [of the foster family] selected by the Commissioner of Social Services as suitable adoptive parents" (*Matter of Alma R. v Ruth M.*, 237 AD2d 127 [1st Dept 1997], *lv dismissed* 90 NY2d 935 [1997]).

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

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

ENTERED: FEBRUARY 4, 2020

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Singh, González, JJ.

10938 Joel Stanger, et al., Index 152038/18
Plaintiffs-Respondents,

-against-

Shoprite of Monroe, NY,
Defendant,

Brixmor Property Group, Inc.,
et al.,
Defendants-Appellants.

_____

Faust Goetz Schenker & Blee LLP, New York (Lisa De Lindsay of counsel), for appellants.

Westerman, Sheehy, Keenan, Samaan & Aydelott, LLP, White Plains (Matthew A. Bialor of counsel), for respondents.

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Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered February 22, 2019, which granted plaintiffs' motion for leave to serve an amended summons and amended verified complaint adding Brixmor Monroe Plaza, LLC (Brixmor Monroe) as a defendant to this action, and denied Brixmor Monroe's motion to dismiss the complaint and all cross claims against it as time barred, unanimously affirmed, without costs.

Plaintiffs timely commenced this action by summons with notice on March 6, 2018 against defendants Shoprite of Monroe, NY, Brixmor Property Group, Inc., Unisource Management Corporation, and Centrop NP. Plaintiffs filed and served a

verified complaint on May 22, 2018. They then moved on June 4, 2018 for leave to amend the summons and complaint to add Brixmor Monroe as an additional defendant. Under CPLR 3025(a), plaintiffs were permitted to amend their pleadings as of right within 20 days from service of defendants' answers, the earliest of which was served on June 5, 2018. Since plaintiffs moved to amend their pleadings within the 20-day period, the court properly granted their motion, notwithstanding that they did not submit proposed amended pleadings with the motion, since they were permitted to amend their pleadings as of right.

The court also properly denied Brixmor Monroe's motion to dismiss the complaint against it as time-barred, since plaintiffs may rely on the relation back doctrine (CPLR 203[f]). Where a plaintiff seeks to add a new defendant under the relation back doctrine, the following three criteria must be met: "(1) both claims arose out of same conduct, transaction or occurrence, (2) the new party is 'united in interest' with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits and (3) the new party knew or should have known that, but for an excusable mistake by plaintiff as to the identity of the proper parties,

the action would have been brought against him as well" (*Buran v Coupal*, 87 NY2d 173, 178 [1995] [internal quotation marks and citations omitted]; *see also Higgins v City of New York*, 144 AD3d 511, 512-513 [1st Dept 2016]; CPLR 203[f]).

Brixmor Monroe does not dispute the first and third elements. At this stage of the litigation, in which discovery has not yet taken place, Brixmor Monroe's argument that plaintiffs' submissions do not establish that it is united in interest with Brixmor is unavailing, since on a motion to dismiss, the pleadings are to be liberally construed, and plaintiffs are entitled to the benefit of every favorable inference (*see* CPLR 3211; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Whether plaintiffs can ultimately establish their allegation "is not part of the calculus in determining a motion to dismiss" (*see EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

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

ENTERED: FEBRUARY 4, 2020

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Singh, González, JJ.

10941 The People of the State of New York, Ind. 5412/16
Respondent,

-against-

Melvin Rice,
Defendant-Appellant.

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Janet E. Sabel, The Legal Aid Society, New York (Heidi Bota of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin 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 (Abraham Clott, J.), rendered April 7, 2019,

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: FEBRUARY 4, 2020

CLERK

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

Friedman, J.P., Renwick, Manzanet-Daniels, Singh, González, JJ.

10942- Index 651156/18
10942A-
10942B-
10942C Crede CG III, Ltd.,
Plaintiff-Respondent,

-against-

Tanzanian Gold Corporation,
formerly known as Tanzanian
Royalty Exploration Corp.,
Defendant-Appellant.

_____

Lewis Brisbois Bisgaard & Smith LLP, Sacramento, CA (Greg Johnson of the bar of the State of California, admitted pro hac vice, of counsel), for appellant.

McDermott Will & Emery LLP, New York (Andrew B. Kratenstein of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (O. Peter Sherwood, J.), entered August 19, 2019, directing defendant to deliver to plaintiff 1,332,222 shares of plaintiff's stock and declaring that the stock purchase agreement and Warrants (including the Exchange Formula) are valid and binding legal obligations that defendant is required to honor, unanimously affirmed, with costs. Appeal from orders, same court and Justice, entered November 23, 2018, June 20, 2019, and August 6, 2019, which denied defendant's motions for a stay and granted plaintiff's motion for summary judgment on its specific

performance and declaratory judgment claims, unanimously dismissed, without costs, as subsumed in the appeal from the order and judgment.

The court providently exercised its discretion in declining to stay this litigation pending resolution of defendant's later-filed federal action asserting related securities law violations against plaintiff (*Banque Indosuez v Pandeff*, 193 AD2d 265, 269 [1st Dept 1993], *lv dismissed* 86 NY2d 809 [1995]).

Furthermore, the court properly declined to find that defendant's alleged defenses raised a triable issue of fact or that defendant demonstrated an entitlement to discovery. The court correctly rejected defendant's arguments that it could avoid its obligations under the warrants based on allegations that plaintiffs acted fraudulently with respect to the definition of the Black Scholes Value included in the operative documents and based on allegations that plaintiff violated the securities laws by engaging in a complex market manipulation scheme to drive down defendant's stock price.

In addition, we reject defendant's argument that an issue of fact exists as to whether plaintiff engaged in conduct that resulted in its exceeding the beneficial ownership limitation in Section 1(f) of the warrants. Plaintiff demonstrated that it was

never the beneficial owner of more than 9.9% of defendant's outstanding stock at any time it sought to exercise additional warrants. In this regard, plaintiff submitted evidence that each time it received shares of defendant, it liquidated those shares prior to exercising additional warrants. In response, defendant failed to submit evidence that plaintiff owned a beneficial ownership in defendant greater than 9.9% at the relevant time at issue.

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: FEBRUARY 4, 2020

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Singh, González, JJ.

10943-
10943A Amanda Ungaro,
Plaintiff,

-against-

Paolo Zampolli,
Defendant-Appellant.

- - - - -

Aronson Mayefsky & Sloan, LLP,
Nonparty Respondent.

Index 301822/18

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Sidoti Law Firm, LLC, New York (Thomas Sidoti of counsel), for appellant.

Aronson Mayefsky & Sloan, LLP, New York (Daniel Mark Lipschutz of counsel), for respondent.

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Orders, Supreme Court, New York County (Michael L. Katz, J.), entered December 3, 2018, and December 26, 2018, which granted nonparty respondent Aronson Mayefsky & Sloan, LLP's (AMS) motion, inter alia, to deny defendant's exemption claims and to direct his financial institutions to release funds in partial satisfaction of a money judgment, and awarded AMS its counsel fees incurred in connection with the motion, unanimously affirmed, without costs.

Defendant's contention that the motion court should have vacated the underlying interim fee order and corresponding money judgment is without merit. Defendant failed to cross-move for

such relief when AMS moved to deny his exemption claims (*see* CPLR 5015). The closest defendant came to seeking that relief was his order to show cause in an effort to reargue the exemption motion, and both this Court and the motion court declined to allow him to proceed in that manner.

Nor did defendant take the opportunity to appeal from the order or the judgment, the merits of which are therefore not properly before this Court. In any event, defendant's argument is without merit. He and plaintiff had no authority on their own to "vacate" or "modify" a court order that affected the rights of AMS, and their stipulated settlement agreement was not presented to or signed by the motion court.

Defendant advances no arguments in support of his contention that the award of attorneys' fees to AMS in connection with the instant motion should be overturned or that he should have been granted a hearing to contest the award. We note that there is no indication in the record that he requested such a hearing.

The court correctly denied defendant's exemption claims on the ground that defendant's submissions were insufficient under CPLR 5222-a(b)(4)(c) to demonstrate that the funds were exempt.

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: FEBRUARY 4, 2020

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Singh, González, JJ.

10944 & M-8922 Greenway Mews Realty, L.L.C., Index 652364/18
Plaintiff-Appellant,

-against-

Liberty Insurance Underwriters, Inc., et al.,
Defendants-Respondents.

- - - - -

Liberty Insurance Underwriters, Inc.,
Interpleader Plaintiff-Respondent,

-against-

Seneca Insurance Company, et al.,
Interpleader Defendants-Appellants,

Federal Insurance Company,
Interpleader Defendant.

- - - - -

Illinois National Insurance Company,
Interpleader Plaintiff-Respondent,

-against-

Seneca Insurance Company, et al.,
Interpleader Defendants-Appellants,

Federal Insurance Company,
Interpleader Defendant.

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Saretsky Katz & Dranoff, L.L.P., New York (Barry G. Saretsky of counsel), for Greenway Mews Realty, L.L.C. and Seneca Insurance Company, appellants.

DLA Piper, LLP (US), New York (R. Brian Seibert of counsel), for Little Rest Twelve, Inc., appellant.

Hardin, Kundla, McKeon & Poletto, P.A., New York (George R. Hardin of counsel), for Liberty Insurance Underwriters, Inc., respondent.

Robinson & Cole LLP, New York (Lawrence Klein of counsel), for Illinois National Insurance Company, respondent.

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Order, Supreme Court, New York County (Martin Shulman, J.), entered July 8, 2019, which, to the extent appealed from as limited by the briefs, granted defendant/interpleader plaintiff Liberty Insurance Underwriters, Inc.'s (LIUI) motion to enforce a settlement agreement, denied plaintiff/interpleader defendant Greenway Mews Realty, LLC (Greenway) and interpleader defendant Seneca Insurance Company's (Seneca) motion to dismiss LIUI's and interpleader plaintiff Illinois National Insurance Company's (INIC) interpleader actions, and denied interpleader defendant Little Rest Twelve, Inc.'s (LRT) motion to dismiss LIUI's and INIC's interpleader actions, unanimously modified, on the law, to deny LIUI's motion to enforce the settlement agreement, and otherwise affirmed, without costs.

LIUI's motion to enforce an oral settlement agreement purportedly agreed to before the court during a mediation session in May 2018 should be denied. Although the record reflects that the parties agreed to various settlement terms, including the amount to be paid by LIUI, the oral agreement has no binding

effect under CPLR 2104, because it and its terms were not sufficiently documented, recorded or memorialized (*see Velazquez v St. Barnabas Hosp.*, 13 NY3d 894 [2009]; *Matter of Janis*, 210 AD2d 101 [1st Dept 1994]). Further, there is a dispute between the parties as to a material term of the settlement, whether or not the funds paid by LIUI and INIC were to be held in escrow pending resolution of the dispute between Seneca and Federal Insurance Company (Federal). While the alleged oral settlement is not enforceable, under the facts of this case, LIUI's and INIC's obligations to pay post-judgment interest ceased on May 25, 2018, when the insurers made a good faith offer to satisfy the judgment. We note that counsel for both LIUI and INIC represent that their clients have placed the funds in their respective attorney's escrow accounts.

In view of our finding that the settlement is unenforceable, LIUI's interpleader action is not moot. Accordingly, Seneca, Greenway and LRT's motions to dismiss the interpleader action were properly denied. The court also correctly denied Seneca, Greenway and LRT's motions to dismiss INIC's interpleader action. The record establishes that interpleader defendant Federal, Greenway's excess liability insurer, has a colorable claim to the funds at issue (*see Nelson v Cross & Brown Co.*, 9 AD2d 140, 144

[1st Dept 1959]) and that INIC will be subject to multiple liabilities (*see* CPLR 1006[a]; *Royal Bank of Can. v Weiss*, 172 AD2d 167, 169 [1st Dept 1991]). The record does not establish as a matter of law that Federal waived its subrogation rights by failing to join Seneca in the lawsuit seeking to recover settlement funds. Each party's entitlement, if any, to the funds paid by LIUI and INIC may be properly determined in the context of the *interpleader actions*.

Assuming INIC's claim that it is not obligated to pay interest toward the judgment is preserved for appellate review, we find that the court correctly determined that the terms of its policy require it to pay interest as a covered loss (*see Fireman's Fund Ins. Co. v Illinois Natl. Ins. Co.*, 2015 WL 1198079, *5, 2015 WL 1198079, *13-15 [SD Miss 2015]).

M-8922 - *Greenway Mews Realty, L.L.C. v Liberty Insurance Underwriters, Inc.*

Motion to expand the record granted.

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

ENTERED: FEBRUARY 4, 2020

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Singh, González, JJ.

10945-
10945A Dkt. NN-30860/15

In re Rebecca V.,

A Child Under Eighteen Years
of Age, etc.,

Diomedes V.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

The Law Office of Steven P. Forbes, Jamaica (Steven P. Forbes of counsel), for appellant.

James E. Johnson, Corporation Counsel, New York (Cynthia Kao of counsel), for respondent.

Dawne A. Mitchell, The Legal Aid Society, New York (Claire V. Merkine of counsel), attorney for the child.

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Order of disposition, Family Court, Bronx County (Gilbert A. Taylor, J.), entered on or about December 18, 2018, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about June 7, 2018, which found that respondent father neglected the subject child, unanimously affirmed, without costs. Appeal from fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The finding that the father neglected the child during a

December 2015 incident was supported by a preponderance of the evidence (*see* Family Ct Act §§ 1012[f][i][B]). The mother's statements that the father stabbed her, took the child from the home and was driving a grey car were admissible under the present sense impression and excited utterance exceptions to the hearsay rule, because the statements were made to a 911 operator moments after the mother was stabbed in her neck, face and upper extremities, supporting an inference that her statements were so influenced by the excitement and shock of the event that it is probable that she spoke impulsively and without reflection (*see People v Rodriguez*, 166 AD3d 459, 460 [1st Dept 2018], *lv denied* 32 NY3d 1209 [2019]).

That the finding was based on a single incident did not preclude the Family Court from entering a finding of neglect, as the father's violence during the December incident demonstrated that his judgment was strongly impaired and exposed the child to a risk of substantial harm (*see Matter of Allyerra E. [Alando E.]*, 132 AD3d 472, 473 [1st Dept 2015], *lv denied* 26 NY3d 913 [2015]). Impairment or an imminent danger of impairment to the physical, mental, or emotional condition of the child could be inferred from record evidence that the child was in close

proximity to extreme violence directed against the mother even absent evidence that she was aware of or emotionally impacted by it (*see Matter of O'Ryan Elizah H. [Kairo E.]*, 171 AD3d 429 [1st Dept 2019]).

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: FEBRUARY 4, 2020

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Singh, González, JJ.

10946 & M-8919 & M-89
Raul Marquez,
Plaintiff-Respondent,

Index 106616/11
590934/12

-against-

171 Tenants Corp,
Defendant-Appellant,

David Kleinberg Levin, et al.,
Defendants-Respondents.

- - - - -

[And Third-Party Actions]

- - - - -

171 Tenants Corp.,
Third Third-Party Plaintiff-Appellant,

-against-

Cynthia Cook,
Third Third-Party Defendant-Respondent.

_____

Mischel & Horn, P.C., New York (Lauren Bryant of counsel), for appellant.

Law Office of Stephen H. Frankel, Garden City (Nicholas E. Tzaneteas of counsel), for Raul Marquez, respondent.

Law Office of James J. Toomey, New York (Evy L. Kazansky of counsel), for David Kleinberg Levin, respondent.

Leahey & Johnson, P.C., New York (Michael G. Dempsey of counsel), for Kenneth Cook and Cynthia Cook, respondents.

_____

Order, Supreme Court, New York County (Alan C. Marin, J.), entered May 22, 2019, which, to the extent appealed from as limited by the briefs, denied defendant/third third-party

plaintiff 171 Tenants Corp.'s motion for summary judgment on its contractual indemnification claims against defendants David Kleinberg-Levin and Kenneth Cook and third-third party defendant Cynthia Cook, and granted the cross motions of Kleinberg-Levin and the Cooks for summary judgment dismissing all claims and cross claims against them, unanimously affirmed, without costs.

Plaintiff's employer was retained by Kleinberg-Levin and the Cooks, tenant-shareholders of two units in defendant 171 Tenants' cooperative building, to paint the common hallway outside their units. Plaintiff allegedly fell from a ladder while painting the hallway, and brought suit against 171 Tenants, Kleinberg-Levin and Kenneth Cook asserting common-law negligence and Labor Law claims. 171 Tenants asserted claims against Kleinberg-Levin and the Cooks seeking contractual indemnification under their respective proprietary leases.

Kleinberg-Levin and the Cooks demonstrated entitlement to summary judgment dismissing all Labor Law claims against them because they are exempt from liability under the homeowner's exemption of the Labor Law (*see Urquiza v Park & 76th St., Inc.*, 172 AD3d 518 [1st Dept 2019]; *Brown v Christopher St. Owners Corp.*, 211 AD2d 441 [1st Dept 1995], *affd* 87 NY2d 983 [1996]). While the work was not performed within their residences, it was

undertaken for their benefit as single-family occupants, and not for any commercial purpose (*see Cannon v Putnam*, 76 NY2d 644, 650 [1990]; *Jimenez v Pacheco*, 73 AD3d 1129, 1130 [2d Dept 2010]). Further, the fact that Kleinberg-Levin and the Cooks selected paint colors and wallpaper samples is insufficient to cast them in Labor Law liability (*see Pesa v Ginsberg*, 186 AD2d 521 [1st Dept 1992]).

The motion court also correctly dismissed the 171 Tenants' contractual indemnity claims against Kleinberg-Levin and the Cooks. The proprietary lease required them to indemnify 171 Tenants from any loss or claim "due wholly or in part to any act, default or omission of the Lessee or of any person dwelling or visiting in the apartment." Merely engaging plaintiff's employer to paint the hallway outside their apartment is not an "act" in and of itself that would trigger the indemnity clause in the

proprietary lease (*see Campos v 68 E. 86th St. Owners Corp.*, 117 AD3d 593, 595 [1st Dept 2014]; *Agrispin v 31 E. 12th St. Owners, Inc.*, 77 AD3d 562 [1st Dept 2010]).

M -8919 &
M -89 - ***Marquez v 171 Tenants Corp., et al.***

Motions to strike plaintiff-respondent's brief denied.

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

ENTERED: FEBRUARY 4, 2020

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Singh, González, JJ.

10947 The People of the State of New York, Ind. 4136/14
Respondent,

-against-

Jose Rodriguez,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), and Hughes Hubbard & Reed LLP, New York (James Henseler of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered December 9, 2015, convicting defendant, after a jury trial, of attempted assault in the first degree and assault in the second degree, and sentencing him to an aggregate term of seven years, unanimously affirmed.

The record fails to support defendant's claim that the People called the victim, who was defendant's girlfriend, to the witness stand impermissibly and in bad faith (*see generally People v Russ*, 79 NY2d 173, 178 [1992]) for the sole or primary purpose of impeaching her with prior inconsistent statements in which she had implicated defendant in the assault. Even assuming that the prosecutor had no genuine expectation that the victim would directly implicate defendant at trial, we find no

prosecutorial bad faith because the victim provided direct testimony as to other important matters, independent of the prior inconsistent statements that were introduced for impeachment purposes (*see People v Berry*, 27 NY3d 10, 16-17 [2016]). Most significantly, although the victim testified that her injuries were self-inflicted, her testimony indicated that defendant was in the apartment with her at the time the assault was alleged to have occurred, and she specifically described discovering a suggestive text which she believed was from another woman on his phone, asking defendant about it, and becoming upset – circumstances that the People sought to show precipitated the assault. The victim was the sole source of evidence of the text incident, and to the extent additional relevant matters contained in her testimony could be established by other evidence, the People were not required to limit their proof to such other evidence. In any event, even if the victim had not testified at trial, defendant's guilt would still have been established by overwhelming evidence, including extensive medical evidence.

The court providently exercised its discretion in receiving evidence of an uncharged assault committed by defendant against the victim approximately 18 months before the incident at issue. This was admissible as background information to show "the nature of the relationship" between defendant and the victim (*People v*

Leonard, 29 NY3d 1, 7 [2017]), that is, the abusive, domestic-violence aspect of the relationship (*see People v Dorm*, 12 NY3d 16, 19 [2009]; *People v Levasseur*, 133 AD3d 411 [1st Dept 2015], *lv denied* 27 NY3d 1001 [2016]), rather than the relationship's mere existence. The probative value of the evidence outweighed any potential prejudice, which the court minimized by way of a limiting instruction.

However, we agree with defendant that the victim's testimony regarding the uncharged assault was not affirmatively damaging to the People's case, and therefore that the court erred in permitting the prosecution to impeach her with a police report containing her description of that assault (*see People v Fitzpatick*, 40 NY2d 44, 48-50 [1976]). Nevertheless, we find this error to be harmless.

Defendant's right to counsel was not violated by his lawyer's absence from an ex parte conference whose subject was whether the victim would appear to testify in response to a subpoena (*see People v Fermin*, 150 AD3d 876, 878 [2d Dept 2017], *lv denied* 30 NY3d 1060 [2017]). The incidental mention, by the victim's counsel, of the possibility that the victim would invoke her Fifth Amendment privilege – neither solicited nor pursued by the trial court – did not implicate a substantive issue requiring the presence of defense counsel (*see People v Rahman*, 137 AD3d

523, 524-25 [1st Dept 2016], *lv denied* 28 NY3d 935 [2016]).

We perceive no basis for reducing the sentence.

We have considered defendant's remaining claims, including those relating to a business record, the People's domestic violence expert, and the court's jury instructions on prior inconsistent statements, and we find that none of these claims warrant reversal.

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

ENTERED: FEBRUARY 4, 2020

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Singh, González, JJ.

10948- Ind. 2250/16
10948A The People of the State of New York 2375/17
Respondent,

-against-

Aaron Dais,
Defendant-Appellant.

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

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

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Judgments, Supreme Court, New York County (Abraham L. Clott, J.), rendered November 9, 2017, as amended December 22, 2017, and January 3 and 4, 2018, convicting defendant, after a jury trial, of attempted murder in the first and second degrees, assault in the first degree, three counts of robbery in the first degree, and two counts of criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 25 years to life, unanimously modified, on the law, to the extent of vacating the sentences on all convictions other than first-degree attempted murder, and remanding for resentencing on those convictions, and otherwise affirmed.

The court providently exercised its discretion in declining

to strike the testimony of the victim, who was the People's main witness, based on his numerous invocations of his privilege against self-incrimination when defense counsel sought to question him about his drug-related activities from 2013 to the time of the shooting. There was no substantial risk of prejudice to defendant and no violation of his right of confrontation (*see Delaware v Van Arsdall*, 475 US 673, 678-679 [1986]). The matters that counsel sought to elicit would have been cumulative, because it was already undisputed that the victim was a drug dealer and was in New York for the purpose of purchasing drugs to resell on the day of the shooting (*see People v Chin*, 67 NY2d 22 [1986]; *People v Roseboro*, 151 AD3d 526 [1st Dept 2017], *lv denied* 30 NY3d 983 [2017]). We find unpersuasive defendant's assertion that he needed to explore additional details of the victim's drug activities leading up to the incident in order to present his defense that he disarmed and shot the victim, who had allegedly produced a weapon and attempted to coerce defendant to rob their drug supplier. Furthermore, on summation defense counsel was able to exploit the victim's repeated refusals to answer, and the court fashioned a suitable remedy by instructing the jury that it could consider invocation of the privilege in determining the victim's credibility (*see id.*). In any event, any error was

harmless in light of the overwhelming evidence establishing defendant's guilt and refuting his unbelievable justification defense (*see People v Hall*, 18 NY3d 122, 132 [2011]).

The prosecutor effectively became an unsworn witness during redirect examination of the victim. There was a material issue involving the prosecutor's personal conduct as to whether he had informed the victim about his statutory immunity, and by repeatedly asking the victim if he remembered discussing the importance of "telling the truth," he created the risk of improperly influencing the jury (*see People v Paperno*, 54 NY2d 294, 300-301 [1981]). Nevertheless, the error was harmless. There was no substantial likelihood of prejudice flowing from the prosecutor's conduct (*id.* at 304), in light of the overwhelming evidence, as previously noted.

Defendant was not deprived of his right to be present when, in his absence, the court and counsel formulated a response to jury notes requesting readbacks of testimony (*see People v Harrell*, 168 AD3d 591 [1st Dept 2019], *lv denied* 33 NY3d 976 [2019]).

We perceive no basis for reducing the sentence. However, the People concede that because defendant was absent during the

December 22, 2017 proceeding at which the court imposed lawful terms of postrelease supervision on the convictions for which determinate sentences were imposed, defendant should be resentenced on those convictions.

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

ENTERED: FEBRUARY 4, 2020

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Singh, González, JJ.

10949 State of New York ex rel. Index 100337/14
Stephen B. Diamond, P.C.,
Plaintiff-Appellant-Respondent,

-against-

My Pillow, Inc.,
Defendant-Respondent-Appellant.

_____

McInnis Law, New York (Timothy J. McInnis of counsel), for appellant-respondent.

Kennedys CMK LLP, New York (Michael J. Tricarico of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (James E. d'Auguste, J.), entered June 21, 2018, which, to the extent appealed from as limited by the briefs, confirmed the report of the special referee; denied plaintiff's request to grant plaintiff "fees on fees" under State Finance Law § 190(6)(b); and denied defendant's request to disallow payment of plaintiff attorneys' fees for work done by attorneys not admitted in New York, unanimously modified, on the law, to grant defendant's request to disallow attorneys' fees incurred by plaintiff's attorneys not admitted in New York, and otherwise affirmed, without costs.

Judiciary Law § 478 provides that it is unlawful for a person to practice law in New York without having first, inter

alia, been duly and regularly licensed or admitted pro hac vice. The Court of Appeals has interpreted this section broadly to include "legal advice as counsel as well as appearing in the courts and holding oneself out as a lawyer" (*Spivak v Sachs*, 16 NY2d 163, 166 [1965]). It has also held that parties that engage in the illegal practice of law in New York may not recover legal fees (*id.*). The prohibition of the unauthorized practice of law "is intended to protect citizens against the dangers of legal representation and advice given by persons not trained, examined and licensed for such work" (*Jemzura v McCue*, 45 AD2d 797, 797 [3d Dept 1974], *lv dismissed* 37 NY2d 750 [1975][internal quotation marks omitted]).

Here, plaintiff testified before the special referee that attorneys employed by Stephen B. Diamond, P.C. drafted the complaint that was ultimately filed in New York Supreme Court, conducted research, prepared the memorandum for the New York Attorney General and assisted with settlement negotiations. Plaintiff also admitted that, at the time of the litigation, none of the attorneys working on this matter were admitted in New York. Because the attorneys were engaged in the unauthorized practice of law, the fees incurred by them were unlawful. The fact that plaintiff hired New York counsel to assist in some of

the legal work does not alter the analysis or cure his failure to seek pro hac vice admission in New York.

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

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

ENTERED: FEBRUARY 4, 2020

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Singh, González, JJ.

10950-
10950A-
10950B Koya Abe,
Plaintiff-Appellant,

-against-

New York University, et al.,
Defendants-Respondents.

Index 105985/10

Jennifer L. Unruh, Astoria, for appellant.

DLA Piper LLP (US), New York (Evan D. Parness of counsel), for respondents.

Judgment, Supreme Court, New York County (W. Franc Perry, J.), entered March 6, 2019, upon a jury verdict, in favor of defendants, unanimously affirmed, without costs. Appeals from orders, same court and Justice, entered on or about February 4, 2019, and February 13, 2019, which, inter alia, denied plaintiff's oral application for judgment notwithstanding the verdict, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The jury verdict was not against the weight of the evidence (*see McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [1st Dept 2004]). The trial record contains abundant evidence tending to show that defendants decided to eliminate plaintiff's two part-

time positions (darkroom manager and adjunct photography instructor) as part of far-reaching institution-wide budget cuts resorted to in the wake of the post-2008 global financial crisis. Plaintiff was one of seven adjuncts in his department whose positions were cut and one of two adjuncts holding administrative positions that were cut. Moreover, every one of the seven individual defendants testified that the elimination of plaintiff's positions was not retaliatory and had nothing to do with the 2007 settlement that underpinned his retaliation claim. While there is evidence that could conceivably have supported a verdict for plaintiff, including an internal April 2009 email chain in which New York University employees discussed whether terminating plaintiff would be perceived as "retribution" for the 2007 settlement, a fair interpretation of the evidence supports the verdict that the jury rendered (*see McDermott*, 9 AD3d at 206). Plaintiff's contentions about alleged inaccuracies and contradictions in the testimony of the defense witnesses are unavailing, as the jury weighed the evidence and was entitled to make the credibility and fact-finding determinations it made.

Plaintiff's contention that defendants' trial counsel engaged in a pattern of rhetoric and misstatements that confused the jury is unpreserved, and we decline to review it in the

interest of justice (*see Boyd v Manhattan & Bronx Surface Tr. Operating Auth.*, 79 AD3d 412, 413 [1st Dept 2010]). Were we to review it, we would find it unavailing.

Plaintiff's arguments about the court's instructions as to his retaliation claim, including that the court's opening remarks unduly restricted the scope of the claim, are unpreserved, and we decline to consider them in the interest of justice. Were we to review them, we would find that, viewed as a whole, the court's instructions properly charged the jury on the scope and elements of plaintiff's retaliation claims (*see Cadet-Legros v New York Univ. Hosp. Ctr.*, 135 AD3d 196, 206 [1st Dept 2015]; Administrative Code of City of NY § 8-107[7]).

Plaintiff argues that the trial court erred in limiting references to the 2005 Equal Employment Opportunity Commission (EEOC) complaint underlying the 2007 settlement, an EEOC complaint he may have filed in the summer of 2009, and the discrimination and hostile work environment claims whose dismissal on summary judgment we recently affirmed (*Abe v New York Univ.*, 169 AD3d 445 [1st Dept 2019]). However, plaintiff's trial counsel joined in the request for that in limine ruling (*compare Benavides v City of New York*, 115 AD3d 518, 519 [1st Dept 2014] [in motion in limine plaintiff only objected to four

specific entries in medical records; "admissibility of entries to which no timely specific objections were made is not preserved for this appeal"]; *Balsz v A&T Bus Co.*, 252 AD2d 458, 458 [1st Dept 1998] [argument that trial court erred in admitting hearsay medical reports "was not preserved by objection on that specific ground"]). Were we to consider the argument, we would find that the trial court providently exercised its discretion in precluding details of the 2007 settlement, because they would have lacked probative value and would have tended to prejudice defendants. Evidence of an EEOC complaint that plaintiff asserts he filed in the summer of 2009 also would have lacked probative value with respect to his claim for retaliation, as by May 2009 defendants had already committed to the actions that ended in plaintiff's termination (*see Sims v Trustees of Columbia Univ. in City of N.Y.*, 168 AD3d 622 [1st Dept 2019]).

The trial court providently exercised its discretion in denying plaintiff's motion in limine to introduce evidence of NYU's finances. The documents identified by plaintiff would have had little if any probative value as to the core issue of NYU's motivation to engage in the budget cuts that led to plaintiff's termination, and would have needlessly distracted from the core issue of defendants' motives in its employment actions vis-a-vis

plaintiff.

We decline to consider plaintiff's unpreserved argument about the trial court's interruption of his counsel's closing argument to excuse the jury during one juror's sudden indisposition, from which she recovered after a recess of a few minutes. Were to consider the argument, we would find that the trial court providently exercised its "broad discretion to control and manage ... court proceedings" (*People v Williams*, 92 NY2d 993, 995 [1998]), which of course may include delays occasioned by a juror's illness or other unavailability (*see e.g. People v Johnson*, 297 AD2d 586, 587 [1st Dept 2002], *lv denied* 99 NY2d 629 [2003]).

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

ENTERED: FEBRUARY 4, 2020

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Singh, González, JJ.

10952 Steven Blake, Index 162041/15
Plaintiff-Appellant,

-against-

Brookfield Properties One WFC Co., LLC, et al.,
Defendants-Respondents,

Creative Office Pavilion,
Defendant.

_____

Law Office of Neil R. Finkston, Great Neck (Neil R. Finkston of counsel), for appellant.

Brownell Partners, PLLC, New York (John P. Collins of counsel), for Brookfield Properties One WFC Co., LLC, The Clearing House Association, LLC and The Clearing House Payments Company, LLC, respondents.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Ian Marc Herman of counsel), for Holt Construction Corp., respondent.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered September 4, 2018, which, to the extent appealed from as limited by the briefs, granted defendant Holt Construction Corp.'s and defendants Brookfield Properties One WFC, LLC, The Clearing House Association, LLC, and The Clearinghouse Payments Company, LLC's motions for summary judgment dismissing the complaint and all cross claims against them, unanimously affirmed, without costs.

Even assuming that plaintiff's work installing office furniture in a newly renovated leased space involved "altering" the building's configuration or composition within the meaning of Labor Law § 240(1) (*see Joblon v Solow*, 91 NY2d 457, 465 [1998]), his claim that he was injured by an upper wall cabinet that broke free from the wall after having been permanently installed does not implicate the protections of Labor Law § 240(1). The cabinet neither was being hoisted or secured nor could be deemed an object that required securing for purposes of the undertaking at the time it fell (*see Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 662-663 [2014]; *Cammon v City of New York*, 21 AD3d 196, 200 [1st Dept 2005]). Further, contrary to plaintiff's expert opinion, anti-dislodgement screws do not constitute "safety devices" within the meaning of Labor Law § 240(1), because such screws are not "meant to function as a safety device in the same manner as those devices enumerated in section 240(1)" (*Fabrizi*, 22 NY3d at 663).

The Labor Law § 200 and common-law negligence claims were correctly dismissed because there is no evidence in the record that the installation of the office furniture was done other than in accordance with the direction and supervision of plaintiff's employer, and there is no evidence that defendants, the owner,

lessee, and construction manager at the job site, had any authority or supervisory obligation over plaintiff's employer's work or that they actually exercised any authority or supervision over it (*see Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]; *Mitchell v New York Univ.*, 12 AD3d 200 [1st Dept 2004]). Nor is there evidence that defendants either created or had actual or constructive notice of the dangerous condition presented by the faultily installed cabinet (*see Bradley v HWA 1290 III LLC*, 157 AD3d 627, 631 [1st Dept 2018], *affd* 32 NY3d 1010 [2018]).

The Industrial Code provisions on which the Labor Law § 241(6) claim is predicated pertain to safety devices (12 NYCRR 23-1.5) and working areas that are "normally exposed" to falling objects (12 NYCRR 23-1.7), and have no applicability to the instant facts.

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

ENTERED: FEBRUARY 4, 2020

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Singh, González, JJ.

10953 The People of the State of New York, Ind. 1951/14
Respondent,

-against-

Damon Hayes,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Richard D. Carruthers and Michael J. Obus, JJ., at CPL 30.30 motions; Anthony J. Ferrara, J. at jury trial and sentencing), rendered March 16, 2016, as amended April 27, 2016, convicting defendant of sex trafficking, promoting prostitution in the second and third degrees and endangering the welfare of a child, and sentencing him, as a second felony offender, to an aggregate term of 12½ to 25 years, unanimously modified, on the law, to the extent of vacating the conviction of sex trafficking and dismissing that count of the indictment, and otherwise affirmed.

Defendant's speedy trial motion was properly denied. The adjournments of November 12, 2014, December 17, 2014 and January 21, 2015 were excludable because they were on consent (*see* CPL

30.30[4][b]; *People v Barden*, 27 NY3d 550, 555 [2016]), notwithstanding the People's delay in producing grand jury minutes for inspection by the court and their belated production of some discovery items. "[A]djournments which are otherwise excludable pursuant to CPL 30.30(4) are excludable from the period of non-production" of grand jury minutes (*People v Jones*, 235 AD2d 297, 297 [1st Dept 1997], *lv denied* 89 NY2d 1095 [1997]). Defendant's challenges to the validity of counsel's consent to these adjournments are unavailing. The motion court also properly excluded the period from February 25, 2015 to March 18, 2015 for motion practice (*see* CPL 30.30[4][a]), because defendant's motion to controvert a search warrant was pending. The delay in producing the grand jury minutes had no effect on this motion (*see People v Davis*, 80 AD3d 494 [1st Dept 2011]), and defendant has not shown any other reason not to apply the statutory exclusion.

Defendant's conviction of sex trafficking was not supported by legally sufficient evidence (*People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence failed to prove beyond a reasonable doubt that he used force or engaged in a scheme, pattern, or plan to compel or induce the alleged victim, who did not testify at trial, to engage in prostitution by any threat of

physical harm (Penal Law § 230.34[5][a]). The evidence showed that the alleged victim, her mother, and a third woman, sought to earn more money than they were earning in Florida, that they voluntarily traveled with defendant to New York to earn money as prostitutes, and that defendant left them alone at times in Florida and New York. There was no evidence presented at trial that defendant ever threatened to harm the alleged victim if she failed to begin or continue working as a prostitute. A detective described a call he overheard between defendant and the alleged victim, after she was apprehended, in which defendant was angry because he believed that she did not get money from a client. However, this does not suffice to prove any use of force or a "scheme" to compel her to work as a prostitute. Similarly, although the third woman in the group that came with defendant from Florida testified that she was a "little intimidated" by an argument over money between defendant and another man, this does not establish the required threat of harm, even assuming the alleged victim also saw and heard the argument.

Although defendant initially requested a mistrial based on the alleged victim's nonappearance after her expected testimony had been referred to in the prosecutor's opening statement, defendant abandoned that request later in the trial following

further efforts by the People to locate the witness (*see People v Graves*, 85 NY2d 1024, 1027 [1995]); defendant instead sought and obtained a missing witness charge. We decline to review defendant's present claim in the interest of justice. As an alternative holding, we find that defendant has not established bad faith on the People's part or undue prejudice (*see People v De Tore*, 34 NY2d 199, 207 [1974], *cert denied* 419 US 1025 [1974]). In any event, any error was harmless because, under the circumstances of the case, it would only have affected the sex trafficking charge, which we are dismissing.

The portion of the prosecutor's summation that suggested a reason for the alleged victim's failure to testify was not so egregious as to warrant a mistrial. Defendant's remaining challenges to the summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-120 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

In light of our dismissal of the sex trafficking charge, defendant's procedural arguments relating to that charge are academic.

We perceive no basis for reducing the sentences on the remaining convictions.

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

ENTERED: FEBRUARY 4, 2020

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Singh, González, JJ.

10954N Hector Newell, Index 21863/12E
Plaintiff-Appellant,

-against-

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

_____

G. Wesley Simpson PC, Brooklyn (G. Wesley Simpson of counsel), for appellant.

Georgia M. Pestana, Acting Corporation Counsel, New York (Ellen Ravitch of counsel), for respondents.

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Order, Supreme Court, Bronx County (George J. Silver, J.), entered November 8, 2018, which, in this action alleging medical malpractice, denied plaintiff's motion to extend the time to file a note of issue, to compel defendants to produce two additional physicians for deposition and to produce documentation of physician work schedules, unanimously affirmed, without costs.

The court exercised its discretion in a provident manner in declining to compel depositions of two physicians, in addition to those already conducted of defendants Drs. Stone and Tepperman. Plaintiff's showing was not sufficiently detailed to demonstrate that the already-deposed witnesses had insufficient knowledge, and that those sought to be deposed have information that is material and necessary to plaintiff's action (*see Epperson v City*

of New York, 133 AD3d 522, 523 [1st Dept 2015]; *Colicchio v City of New York*, 181 AD2d 528, 529 [1st Dept 1992]). There also exists no basis to disturb the court's discovery rulings, since plaintiff failed to show how the other discovery items he requested were material and necessary (*see Forman v Henkin*, 30 NY3d 656, 661 [2018]; *Don Buchwald & Assoc. v Maber-Rich*, 305 AD2d 338 [1st Dept 2003).

Plaintiff's argument that he has the right to depose additional witnesses pursuant to a stipulation is made for the first time in his reply brief (*see e.g. Matter of Erdey v City of New York*, 129 AD3d 546 [1st Dept 2015]). In any event, the argument is unavailing.

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

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

ENTERED: FEBRUARY 4, 2020

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Singh, González, JJ.

10955N Daniel Venture, et al., Index 155587/14
Plaintiffs-Appellants,

-against-

Preferred Mutual Insurance Company,
Defendant-Respondent.
- - - - -
[And A Third-Party Action]

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Law Offices of Eric Dinnocenzo, New York (Eric Dinnocenzo of counsel), for appellants.

Dodge & Monroy, P.C., Lake Success (Peter X. Dodge of counsel), for respondent.

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Order, Supreme Court, New York County (Robert R. Reed, J.), entered on April 10, 2019, which after a hearing, denied plaintiffs' motion for the production of documents withheld or redacted by defendants on the basis of privilege, and to depose and disqualify defendant's counsel, unanimously modified, on the law, to produce some documents with redactions, and some produced in their entirety, as indicated herein, and otherwise affirmed, without costs.

"The work product of an attorney shall not be obtainable" (CPLR 3101[c]). This privilege is absolute (*see Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 376 [1991}). It "applies only to documents prepared by counsel acting as such,

and to materials uniquely the product of a lawyer's learning and professional skills, such as those reflecting an attorney's legal research, analysis, conclusions, legal theory or strategy" (*Brooklyn Union Gas Co. v American Home Assur. Co.*, 23 AD3d 190, 190–191 [1st Dept 2005]; *see Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 376 [1991]).

Since plaintiffs retained counsel and did not allow Preferred's cause and origin expert to take a written or recorded statement from him, Preferred retained Dodge to schedule an examination under oath based on his professional skills with SIU investigations, particularly, Dodge's knowledge of National Fire Protection Association (NFPA) guidelines, which pertained to fire science and fire investigation, and had a foundation of questions to ask in a case that involved a suspicious fire. Dodge's involvement was only part of the process and was as an attorney, not a claims investigator.

Nevertheless, the emails between McGuire and Dodge, two dated February 11, 2014, one dated March 10, 2014, and one dated January 20, 2014 (SR 183, 184-185, 197, and 203-205) that appear in email chains forwarding nonprivileged messages between McGuire and witnesses or government employees pertaining to the investigation should be redacted to obscure only communications

between McGuire and Dodge, and the entire documents must be produced in redacted form. The remainder of each of these email chains, which include forwarded emails between McGuire and other parties, contain nonprivileged communications regarding defendant's investigation (*see Brooklyn Union Gas Co.*, 23 AD3d at 191) and should be produced.

Other documents that should be produced in full are: the January 13, 2014 emails between McGuire and Dodge exchanging cell phone numbers; the January 13, 2014 email between Jones and McGuire exchanging cell phone numbers; the January 21, 2014 emails between investigators McGuire and Jones; the January 17, 2014 email between Dodge and opposing counsel concerning EUOs; the January 20, 2014 email between Dodge and opposing counsel concerning EUOs; the January 20, 2014 invoice from Veritext to Dodge; the June 4, 2014 transmittal of Veritext invoices from Dodge to McGuire; the December 11, 2013 letter from opposing counsel to Dodge; the February 4, 2014 letters between Dodge and opposing counsel confirming EUO dates; the January 14, 2014 letter from Dodge to opposing counsel seeking additional documentation; the February 28, 2014 email chain between Lee, Bodie, Roth and McGuire seeking review of the disclaimer letter; the March 3, 2014 email chain between McGuire, Bodie, and Roth

approving the release of the disclaimer letter; the March 4, 2014 email between Bodie and Lawlor regarding typing of the disclaimer letter; the summons and complaint; notice of commencement of the action by electronic filing; the January 3, 2013 email from McGuire to Dodge concerning a drug raid; the September 17, 2014 email chain between investigators McGuire and Jones; the January 13, 2014 email chain from McGuire to Vieau concerning post-fire photos; the March 31, 2014 email chain from Prentice to McGuire concerning "Boomerang - Expense Report Approved"; the June 2, 2014 email from Bodie to McGuire concerning "IR10000.pdf"; the June 2, 2014 email chain between Bodie and McGuire asking for a response to an agent; the June 11, 2014 email between Bodie and McGuire, concerning "IR110000.pdf"; the March 3, 2014 email chain from Roth to McGuire and Bodie regarding "13012286 Venture Disclaimer"; the November 26, 2013 email chain between McGuire and Benjamin regarding "PHO 745407 Venture"; the January 10, 2014 email chain from McGuire to Claims regarding "Venture" and distributing post-fire photos received from opposing counsel; the March 4, 2014 email from McGuire to Veritext regarding "Assignment Number 1810796"; the January 7, 2014 email chain from McGuire to Claims regarding "13012286," and distributing photos received from opposing counsel; the January 28, 2014 emails

between Dodge and McGuire regarding “Venture EUO”; the January 20, 2014 email between Dodge and opposing counsel regarding “Follow up”; the January 20, 2014 email chain between McGuire and Cargill regarding “claim 13012286"; the January 7, 2014 chain between McGuire and Claims, Dodge and opposing counsel regarding “Venture 17 (notice of foreclosure)”; the January 7, 2014 email chain between Dodge, McGuire and opposing counsel regarding “Venture 15 (Sovereign bank 09-13)”; the January 7, 2014 email chain between Dodge, McGuire and opposing counsel regarding “Venture 13 (Sovereign bank 09-13)”; the January 7, 2014 email chain between Dodge, McGuire and opposing counsel regarding “Venture 13 (tax returns 2009 - 2012)”; the January 7, 2014 email chain between Dodge, McGuire and opposing counsel regarding “Venture 10 (missing April statement from before)”; the January 7, 2014 email chain between Dodge, McGuire and opposing counsel regarding “Venture 11 (Daniel Visa 2013)”; the January 7, 2014 email chain between Dodge, McGuire and opposing counsel regarding “Venture 11 (Daniel Visa 2013)”; the January 7, 2014 email chain between Dodge, McGuire and opposing counsel regarding “Venture 12 (car registration)”; the January 2, 2014 email chain between Dodge, McGuire and opposing counsel regarding “Venture 14 (home phone)”; the January 7, 2014 email chain between Dodge, McGuire

and opposing counsel regarding “Venture 14 (home phone)”; the January 7, 2014 email chain between Dodge, McGuire and opposing counsel regarding “Venture 9 CC bills 2013)”; the January 7, 2014 email chain between McGuire and Claims, and including emails from Dodge and opposing counsel regarding “Venture 16 (mortgage)”; the January 7, 2014 email from McGuire to Dodge regarding “13012286 – Venture (adj stmt of loss)”; the January 7, 2014 email chain between McGuire and Claims, Dodge and opposing counsel regarding “Venture 8 (Isabel bank)”; 14 (home phone)”; the January 7, 2014 email chain between McGuire and Claims, Dodge and opposing counsel regarding “Venture 6 (Isabel Bank 2011)”; the January 7, 2014 email chain between McGuire and Claims, Dodge and opposing counsel regarding “Venture 5 (Isabel Bank)”; the December 5, 2013 emails between McGuire and Myers regarding “Venture”; an aborted January 3, 2014 email from McGuire to Dodge; the February 10, 2014 email from Gervasi to McGuire regarding “Assignment #1785222 Venture V. EUO”; the January 17, 2014 email from Litsup-NJ to Dodge and Gervasi regarding “Assignment # 1785222 Venture V. EUO”; the January 13, 2014 email chain from Gervais to McAuliffe and McAuliffe to McGuire regarding “Venture #13012286" and concerning the EUO transcripts; and the January 7, 2014 emails exchanged between Bodie and Dodge concerning “Cust Claim

#13012286 - Insured: Venture, Daniel and Isabel" chain (SR 21-28, 39, 42-44, 55-58, 68-73, 94-96, 105, 115-137, 139-161, 164-169, 172-175, 177, 181-182, 186-190, 196, 198, 202, 206-207, 210-213, 223-233, 235-240, 248, 259, 265, 282, 284-286, 288-289). Pleadings, communication with opposing counsel, and communications solely between investigators, should be produced without redactions, since they do not contain legal advice, a request for legal advice, attorney work product, or any other category of privileged information (*see* CPLR 3101(b), (c), (d)(2); *Spectrum Sys. Intl. Corp.*, 78 NY2d, at 376-377).

Given that Dodge and the Dodge firm were acting as counsel, and were not primarily responsible for investigating this matter, they need not be disqualified from representing defendant, since Dodge is not likely to be called as a witness. Disqualification will not be granted where evidence from the attorney would be cumulative (*see O'Donnell, Fox & Gartner v R-2000 Corp.*, 198 AD2d 154, 155 [1st Dept 1993]).

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

ENTERED: FEBRUARY 4, 2020

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