SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 6, 2020

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Richter, Kapnick, Mazzarelli, Moulton, JJ.

10956 The People of the State of New York, Ind. 5625/12
Respondent,

-against-

Benjamin Gaston,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered September 3, 2014, as amended October 7, 2014, convicting defendant, after a jury trial, of rape in the first degree (three counts), criminal sexual act in the first degree, sex trafficking (three counts), sexual abuse in the first degree, assault in the first degree and kidnapping in the first degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 50 years to life, unanimously affirmed.

The court providently exercised its discretion in limiting evidence of the victim's use of or addiction to drugs, and the

court's rulings did not violate defendant's right to present a defense (*see Crane v Kentucky*, 476 US 683, 689-690 [1986]). Defendant sought to call an expert psychiatrist who had not examined the victim to testify about the effects of drug use, and sought to ask related questions of the victim's treating physician, who testified for the People. Defendant asserts that expert testimony could have shown that the victim's drug use impaired her "cognition" to the point of irrationally imagining that she was being forcibly restrained and forced to engage in various sexual conduct, even to the point that when she tried to lower herself out of a sixth floor window, she was similarly imagining that she needed to escape. However, there was only limited evidence in the record of the victim's drug use during the events at issue and on a chronic basis. Furthermore, there was no evidence suggesting that the victim's cognition was impaired at all at the relevant times. The treating physician and a paramedic both observed shortly after the incident that the victim seemed alert and coherent, which was consistent with about 27 minutes of audio recordings of her four calls to 911 (*see People v Ruffule*, 172 AD2d 1053, 1054 [4th Dept], *lv denied* 78 NY2d 973 [1991] [expert testimony on defendant's drug withdrawal as bearing on fraudulent intent properly precluded, where "three police officers who participated in defendant's arrest testified

that defendant appeared to be normal and responded appropriately to their questions"]). We have considered and rejected defendant's remaining arguments relating to this issue.

The court's jury charge on the causation element of first-degree assault, arising out of the injuries the victim sustained when she fell from the sixth floor window in her escape attempt, correctly stated the law (*see People v Morrow*, 261 AD2d 279, 280 [1st Dept 1999], *lv denied* 93 NY2d 1023 [1999]; *see also People v Davis*, 28 NY3d 294, 301 [2016]; *People v DaCosta*, 6 NY3d 181, 186 [2006]), and could not have caused any prejudice.

The conviction of first-degree kidnapping was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There was ample evidence that defendant secreted the victim in places where she was "not likely to be found" (Penal Law § 135.00[2]), thereby satisfying the element of abduction (*see e.g. People v Ehinger*, 152 AD2d 97, 101 [1st Dept 1989], *lv denied* 75 NY2d 812 [1990]). Among other things, the evidence showed that, in addition to preventing the victim from escaping or calling for help, defendant took measures to prevent her from knowing her location, so she could not reveal it in the event she was able to make a call. Defendant's similar argument that the court should have charged second-degree unlawful imprisonment as a lesser included offense is unavailing, because

there was no reasonable view of the evidence, viewed most favorably to defendant, that he committed the lesser offense but not the greater (*see People v Grohoske*, 148 AD3d 97, 104-105 [1st Dept 2017], *lv denied* 28 NY3d 1184 [2017]).

The court providently exercised its discretion in admitting uncharged crimes committed by defendant against a woman who participated in some of the instant crimes, whose testimony could have seemed "incredible without the background that the abuse evidence would provide" (*see People v Steinberg*, 170 AD2d 50, 73 [1st Dept 1991], *affd* 79 NY2d 673 [1992]). The uncharged crimes were also relevant to defendant's criminal intent. The court sufficiently limited the scope of this evidence, and its probative value outweighed any prejudicial effect.

The People acknowledge that some improprieties may have occurred in the testimony by a trial preparation assistant about a PowerPoint presentation. However, we find that any error involving that testimony, or the presentation itself, was harmless in light of the overwhelming evidence of guilt

(*see People v Crimmins*, 36 NY2d 230 [1975]). Likewise, insofar as harmless error analysis is applicable to the other rulings challenged on appeal, we find that any error was harmless.

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 6, 2020

CLERK

Acosta, P.J., Richter, Kapnick, Mazzarelli, Moulton, JJ.

10957 Michelle Launders, etc., Index 155648/14
Plaintiff-Respondent,

-against-

Joel Steinberg,
Defendant-Appellant.

_____

Joel Steinberg, appellant pro se.

Schaefer Law Group, P.C., Smithtown (Wayne J. Schaefer of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (David B. Cohen, J.), entered June 14, 2018, in favor of plaintiff in the total amount of $9,071,611.19, and bringing up for review an order, same court and Justice, entered April 25, 2018, which granted plaintiff's motion to modify and renew a judgment previously entered June 10, 2004 to the extent of reducing the principal amount of the award from $15,000,000 to $4,010,660.92, and directing entry of renewal judgment in that amount with interest thereon from June 10, 2004, unanimously affirmed, without costs.

In 2007 the Court of Appeals partially vacated plaintiff's June 2004 judgment against defendant (*Launders v Steinberg*, 9 NY3d 930 [2007]). Accordingly, the motion court correctly modified the judgment to eliminate the $5,000,000 in compensatory damages awarded with respect to the fifth and sixth causes of

action, and the $5,000,000 in punitive damages, and directed the entry of judgment in the amount of $5,000,000, representing compensatory damages awarded in connection with the seventh cause of action. The Court of Appeals held that defendant was collaterally estopped by his criminal conviction from contesting liability on the seventh cause of action, which concerned the pain and suffering endured by the decedent child in the hours preceding her death (CPLR 5015[a][5]). The motion court properly applied setoffs for the amounts received by plaintiff from defendant and through settlement of the original action against additional defendants (General Obligations Law § 15-108).

Contrary to defendant's contention, plaintiff timely filed a notice of settlement "within 60 days after the signing and filing of the decision directing that the order be settled" (Uniform Rules for Trial Cts [22 NYCRR] § 202.48[a]).

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 6, 2020

CLERK

Acosta, P.J., Richter, Kapnick, Mazzarelli, Moulton, JJ.

10958 In re Malachi A.D., Dkt B-36970/15

A Dependent Child Under Eighteen Years of Age, etc.,

Zilasia D.,
Respondent-Appellant,

New York Foundling Hospital,
Petitioner-Respondent.

_____

Andrew J. Baer, New York, for appellant.

Daniel Gartenstein, Long Island City, for respondent.

Dawne A. Mitchell, The Legal Aid Society, New York (Riti P. Singh of counsel), attorney for the child.

_____

Order, Family Court, New York County (Emily M. Olshansky, J.), entered on or about September 25, 2018, which, inter alia, upon a determination that respondent mother suffers from a mental illness within the meaning of the Social Services Law, terminated her parental rights to the subject child and committed custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence supports the finding that respondent, by reason of her mental illness, is presently and for the foreseeable future unable to provide proper and adequate care for her son (Social Services Law § 384-b[4][c]; *see Matter of*

Priseten T. [Miatta T.], 147 AD3d 458 [1st Dept 2017]). The evidence included a detailed clinical report and testimony from an expert in clinical and forensic psychology who reviewed respondent's medical records, mental health evaluations, conducted his own clinical interview of her on three separate dates, and observed how she and the child interacted during supervised visits. The expert concluded that respondent suffers from schizoaffective and other psychotic disorders, has a history of paranoia, impaired judgment, erratic behaviors, and paranoid delusions. Respondent blamed others for her instability, lacked insight into her illness, had a history of inconsistent engagement in treatment, and failed to consistently take her prescribed medication (*see Matter of Elizabeth H. [Ylein S.]*, 165 AD3d 402 [1st Dept 2018]).

The court providently exercised its discretion in denying respondent's request for an adjournment to secure an expert on her behalf. Respondent had ample time to secure such an expert

in preparation for the fact-finding hearing and failed to show how securing an expert would have been favorable to her case (*see Matter of Steven B.*, 6 NY3d 888 [2006]).

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

ENTERED: FEBRUARY 6, 2020

CLERK

Acosta, P.J., Richter, Kapnick, Mazzarelli, Moulton, JJ.

10960 Bobby Atterbury, Index 160506/17
Plaintiff-Respondent,

-against-

Metropolitan Transportation Authority, et al.,
Defendants-Appellants.

_____

Lawrence Heisler, Brooklyn (Harriet Wong of counsel), for appellants.

Siler & Ingber, LLP, Mineola (Jeffrey P. Miller of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lisa A. Sokoloff, J.), entered October 25, 2018, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff testified at his 50-h hearing that, after boarding a bus, he started to sit and reached for a strap to steady himself, when the bus "jerked" as it pulled out of the station causing him to fall. In support of their motion, defendants submitted the bus driver's affidavit and video of the interior of the bus, which shows that the bus was pulling smoothly out of the bus stop and had reached a speed of 3 miles per hour, when plaintiff fell forward as he was sitting.

In opposition, plaintiff failed to raise an issue of fact since he provided no "objective evidence" that the jerk of the bus that he felt "was extraordinary and violent, of a different class than the jerks and jolts commonly experienced in city bus travel and, therefore, attributable to the negligence of defendant" (*Urquhart v New York City Tr. Auth.*, 85 NY2d 828, 830 [1995]; *see Patterson v New York City Tr. Auth.*, 151 AD3d 519 [1st Dept 2017]; *Pfleshinger v Metropolitan Transp. Auth.*, 137 AD3d 516 [1st Dept 2016]; *Cohen v City of New York*, 94 AD3d 450 [1st Dept 2012]). Proof that the jerk was unusual or violent must consist of more than a "mere characterization of the stop in those terms by the plaintiff" (*Urquhart*, at 830).

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

ENTERED: FEBRUARY 6, 2020

CLERK

Acosta, P.J., Richter, Kapnick, Mazzarelli, Moulton, JJ.

10961 In re William Harvey, Index 152926/18
Petitioner,

-against-

New York City Department of Buildings, et al.,
Respondents.

_____

Klein Slowik PLLC, New York (Christopher M. Slowik of counsel), for petitioner.

Georgia M. Pestana, Acting Corporation Counsel, New York (Ashley R. Garman of counsel), for respondents.

_____

Determination of respondents, dated November 30, 2017, which, after a hearing, revoked petitioner's Master Plumber and Fire Suppression Piping Contractor licenses, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [W. Franc Perry, III, J.], entered November 13, 2018) dismissed, without costs.

There is substantial evidence in the record to support the findings that petitioner allowed non-employees to perform plumbing work on sites for which he held a permit, failed to perform work or inspections before requesting sign-offs, conducted work without a permit, and submitted a false or misleading statement to the New York City Department of Buildings

(DOB) (*Matter of Board of Educ. of Monticello Cent. School Dist. v Commissioner of Educ.*, 91 NY2d 133, 141 [1997]; *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]; *see* Administrative Code of City of NY §§ 28-105.1, 28-116.1 to 28-116.4, 28-408.6[4]). Contrary to petitioner's contention, "[h]earsay evidence can be the basis of an administrative determination and, if sufficiently probative, it alone may constitute substantial evidence" (*Matter of Café La China Corp. v New York State Liq. Auth.*, 43 AD3d 280, 281 [1st Dept 2007]). This Court "may not weigh the evidence, choose between conflicting proof, or substitute its assessment of the evidence or witness credibility for that of the administrative factfinder" (*Matter of Porter v New York City Hous. Auth.*, 42 AD3d 314, 314 [1st Dept 2007]).

We do not find that, under the circumstances, the penalty of revocation is so disproportionate to the offense as to be shocking to one's sense of fairness (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974]). The DOB commissioner is authorized to revoke a license for "[t]he making of a material false or misleading statement on any form or report filed with the department or other governmental entity" or "[n]egligence, incompetence, lack of knowledge, or disregard of

[the construction] code and related laws and rules" (Administrative Code § 28-401.19[2], [6]).

Petitioner did not preserve the argument that being charged in the disjunctive with negligence, incompetence, lack of knowledge, or disregard of the law was reversible error (*see Matter of Esperon v Kelly*, 125 AD3d 460, 460 [1st Dept 2015]).It is also unavailing, as he was apprised of the charges and specific events (*see* 48 RCNY 1-22).

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

ENTERED: FEBRUARY 6, 2020

CLERK

Acosta, P.J., Richter, Kapnick, Mazzarelli, Moulton, JJ.

10962 The People of the State of New York, SCI 382N/15
Respondent,

-against-

Danny Rodriguez,
Defendant-Appellant.

_____

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.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Richard Weinberg, J.), rendered May 29, 2015,

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

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

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

ENTERED: FEBRUARY 6, 2020

CLERK

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

Acosta, P.J., Richter, Kapnick, Mazzarelli, Moulton, JJ.

10963-
10963A Eric Adjmi,
Plaintiff-Respondent-Appellant,

-against-

Vanessa Tawil,
Defendant-Appellant-Respondent.

Index 300805/17

Ezra Sutton, P.A., New York (Ezra Sutton of counsel), for appellant-respondent.

Rower LLC, New York (Alyssa A. Rower of counsel), for respondent-appellant.

Judgment, Supreme Court, New York County (Laura E. Drager, J.), to the extent appealed from as limited by the briefs, directing plaintiff husband to pay $7,000 monthly in child support and the parties' child's tuition at a Jewish day school from preschool through 12th grade, unanimously affirmed, without costs. Order, same court and Justice, entered January 22, 2019, to the extent it awarded defendant wife counsel fees, unanimously reversed, on the law, and the order vacated to that extent, and appeal therefrom otherwise dismissed, without costs, as subsumed in the appeal from the judgment.

The trial record demonstrates that the child support award amply provides for the child's actual needs (*see Matter of Vladlena B. v Mathias G.*, 52 AD3d 431 [1st Dept 2008]). As the

parties separated while defendant was still pregnant, "it cannot be said that a standard of living was established for the child" (*Michael J.D. v Carolina E.P.*, 138 AD3d 151, 157 [1st Dept 2016]). Contrary to defendant's contention, plaintiff's wealth alone is insufficient to warrant doubling the child support award (*see id.* at 157-158; *Vladlena B.*, 52 AD3d at 431).

The trial court providently exercised its discretion in directing plaintiff to pay 100% of the child's tuition at a Jewish day school from preschool through 12th grade (*see* Domestic Relations Law § 240[1-b][c][7]). The evidence establishes that two of defendant's children and three of plaintiff's children attended Jewish day schools and that plaintiff actively supported religious education and could afford the tuition (*see Friedman v Friedman*, 216 AD2d 204, 205 [1st Dept 1995] [private religious school appropriate where "religion has been an integral part of the family lifestyle"]).

The award of counsel fees to defendant is precluded by her attorney's failure to comply with the rules pertaining to domestic relations matters (22 NYCRR part 1400) (*Montoya v Montoya*, 143 AD3d 865, 865-866 [2d Dept 2016]; *Julien v Machson*, 245 AD2d 122 [1st Dept 1997]). Defendant was represented in these matrimonial proceedings by her father, a patent lawyer, for

more than a year. However, she did not execute a retainer agreement until shortly before the trial, and she testified that her father had never sent her an itemized bill (*see* 22 NYCRR 1400.3).

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

ENTERED: FEBRUARY 6, 2020

CLERK

Acosta, P.J., Richter, Kapnick, Mazzarelli, Moulton, JJ.

10966 In re Steven R., Dkt 05576/18

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

_____

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

James E. Johnson, Corporation Counsel, New York (Nwamaka Ejebe of counsel), for presentment agency.

_____

Order of disposition, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about May 1, 2018, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of attempted gang assault in the first degree, attempted assault in the first and second degrees, assault in the second degree, menacing in the second and third degrees and criminal possession of a weapon in the fourth degree, and placed him on probation for a period of 24 months, unanimously modified, on the law, to the extent of dismissing the third-degree menacing count, and otherwise affirmed, without costs.

The court's finding was supported by legally sufficient evidence and not against the weight of the evidence (*see People v*

Danielson, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning identification and credibility. The victim made a reliable identification of appellant as the person who stabbed him.

However, we dismiss the third-degree menacing count as a lesser included offense of second-degree menacing. We have considered and rejected appellant's remaining argument regarding lesser included offenses.

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

ENTERED: FEBRUARY 6, 2020

CLERK

Acosta, P.J., Richter, Kapnick, Mazzarelli, Moulton, JJ.

10967 The People of the State of New York, Ind. 2194/15
Respondent,

-against-

Jonathan Bennett,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Brittany N. Francis of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered November 8, 2017, convicting defendant, after a nonjury trial, of attempted assault in the first degree, assault in the second degree and criminal possession of a weapon in the third degree, and sentencing him, as a second violent felony offender, to an aggregate term of 10 years, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find

that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations, including its evaluation of conflicting versions of the events.

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 6, 2020

CLERK

Acosta, P.J., Richter, Kapnick, Mazzarelli, Moulton, JJ.

10968 Edmond J. O'Brian, Index 22310/12E
Plaintiff-Appellant,

-against-

4300 Crescent L.L.C., et al.,
Defendants-Respondents.
- - - - -
[And a Third-Party Action]

_____

The Dearie Law Firm, P.C., New York (Dana E. Heitz of counsel), for appellant.

McGaw, Alventosa & Zajac, Jericho (Ross P. Masler of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Lizbeth González, J.), entered February 7, 2019, which, inter alia, granted defendants' motion for summary judgment dismissing the Labor Law § 240(1) claim, and granted third-party defendants' motion for summary judgment dismissing the third-party complaint, unanimously modified, on the law, defendants' motion for summary judgment dismissing the Labor Law § 240(1) claim and third-party defendants' motion for summary judgment dismissing the third-party complaint denied, and otherwise affirmed, without costs.

Plaintiff alleges that he was unloading windows from a tractor trailer when a stack of eight or nine windows that were stored vertically at an angle against the trailer wall tipped over and fell on him. He claims that the coworker who was

holding up the stack while he was transferring one of the windows onto an A-frame could no longer support it due to the weight. According to plaintiff, each window weighed at least 175 pounds.

Defendants were not entitled to summary judgment dismissing the Labor Law § 240(1) claim. The accident arose from an elevation-related risk contemplated by the statute. Furthermore plaintiff's injuries flowed directly from the application of the force of gravity to the windows, and the elevation differential was not de minimis, as the combined weight of the windows could generate a significant amount of force during the short descent (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 9-10 [2011]; *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 605 [2009]).

A triable issue of fact exists in this case as to whether the stack of windows was required to be secured. Plaintiff claims that the trailer was tilted, due to broken wooden planks that were used to elevate the trailer to reach the loading dock, exacerbating the already precarious position of the windows. If the trailer was tilted, then additional securing would be required (*see Velez-Tejada v 4525-4555 Apts. Corp.*, 58 Misc 3d 1216[A] [Sup Ct, Bronx County 2018]).

Summary judgment is also not warranted given the parties' dispute as to whether a protective device prescribed by § 240(1)

could have provided adequate protection (*see Wilinski*, 18 NY3d at 11). Since issues of fact exist, none of the parties are entitled to summary judgment.

In view of the foregoing, the third-complaint asserting claims sounding in contribution and common-law and contractual indemnification against Pioneer Windows is also reinstated.

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

ENTERED: FEBRUARY 6, 2020

CLERK

Acosta, P.J., Richter, Kapnick, Mazzarelli, Moulton, JJ.

10969 The People of the State of New York, Ind. 3207/17
Respondent,

-against-

Darrick Herman,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (David J. Klem of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Samuel Z. Goldfine of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ann E. Scherzer, J. at plea and resentencing; Stephen Antignani, J. at sentencing), rendered September 20, 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 6, 2020

CLERK

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

Acosta, P.J., Richter, Kapnick, Mazzarelli, Moulton, JJ.

10970 & M-193 Stere Gogu, Plaintiff-Respondent, Index 161370/17

-against-

Gap, Inc., et al., Defendants,

Amdar Company, LLC, et al., Defendants-Appellants.

_____

Mauro Lilling Naparty LLP, Woodbury (Melissa A. Danowski of counsel), for appellants.

Patterson & Sciarrino, LLP, Bayside (Jerome D. Patterson of counsel), for respondent.

_____

Order, Supreme Court, New York County (Robert D. Kalish, J.), entered July 16, 2019, which, to the extent appealed from as limited by the briefs, denied the motion of defendants Amdar Company, LLC and Metro Real Estate Management Company (collectively Amdar) for summary judgment dismissing the complaint and cross claims as against them, unanimously affirmed, without costs.

Plaintiff was injured when he tripped and fell on the sidewalk abutting premises owned and managed by Amdar, as he attempted to avoid an oncoming vehicle, driven by codefendant Dimitrov, which mounted the sidewalk. Plaintiff testified that he was hit by the vehicle after he fell, and that he would have

been able to avoid Dimitrov's vehicle had he not tripped and fallen on the defect in the sidewalk.

Plaintiff's account as to how he tripped and fell was not inherently incredible. Plaintiff's testimony that he took one or two steps away from the mailbox before falling on the defect while attempting to avoid the oncoming vehicle is not so improbable as to render it physically impossible (*cf. Espinal v Trezechahn 1065 Ave. of the Ams., LLC*, 94 AD3d 611, 613 [1st Dept 2012]). Plaintiff also sufficiently identified the cause of his fall, as he testified that he felt his foot trip on concrete and fell due to a "hole" in the sidewalk, and identified the defect in photographs during his deposition (*see Taveras v 1149 Webster Realty Corp.*, 134 AD3d 495, 496 [1st Dept 2015], *affd* 28 NY3d 958 [2016]; *Figueroa v City of New York*, 126 AD3d 438, 440 [1st Dept 2015]).

Amdar failed to proffer sufficient evidence to establish prima facie that the identified defect was trivial and, thus, nonactionable as a matter of law under the conditions existing at the time (*see Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 77 [2015]). The photographs that were submitted do not clearly depict the dimensions of the defect, since they were taken from a distance and the defect was never measured (*see Rivas v Crotona Estates Hous. Dev. Fund Co., Inc.*, 74 AD3d 541 [1st Dept 2010]).

Furthermore, Amdar failed to establish that Dimitrov's negligence was the sole proximate cause of plaintiff's accident. Plaintiff testified that he would have safely avoided Dimitrov's vehicle if not for the negligently maintained sidewalk, and his testimony is supported by a police report showing that others were able to successfully avoid the vehicle.

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

M-193 - ***Stere Gogu v Gap Inc.***

Motion for stay denied.

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

ENTERED: FEBRUARY 6, 2020

CLERK

Acosta, P.J., Richter, Kapnick, Mazzarelli, Moulton, JJ.

10971 In re Patricia H. Penick, Deceased, etc. File 4509B/16

- - - - -

Earl G. Thompson,
Petitioner-Appellant,

-against-

Gerald Anderson, et al.,
Respondents-Respondents.

_____

Earl G. Thompson, appellant pro se.

Palmeri & Gaven, New York (Daniel F. Gaven of counsel), for respondents.

_____

Order, Surrogate's Court, New York County (Rita Mella, S.), entered October 12, 2018, which denied petitioner husband's motion for summary judgment dismissing objections to probate of a will purportedly executed by his spouse, unanimously affirmed, without costs.

The court properly denied petitioner's motion for summary judgment, since the record presents disputed issues of fact as to whether the instrument submitted by petitioner was duly executed by the decedent in conformance with the statutory requirements (*see* EPTL 3-2.1 ; *Matter of Falk*, 47 AD3d 21, 26 [1st Dept 2007], *lv denied* 10 NY3d 702 [2008]; *see Matter of Halpern*, 76 AD3d 429, 431-432 [1st Dept 2010], *affd* 16 NY3d 777 [2011]). Petitioner submitted affidavits and testimony of individuals who claimed to

have witnessed the decedent sign the one-page instrument, dated November 23, 2016, but their accounts were inconsistent in significant ways as to when and where they signed it. Moreover, assuming the burden shifted, in opposition, the objectants submitted admissible evidence raising issues of fact as to whether the decedent would have been able to read her will aloud twice given her advanced amyotrophic lateral sclerosis (ALS) and whether the execution of the will actually took place in her hospice room on November 23, 2016, five days before decedent's death. Their evidence included affidavits of the decedent's sister and brother-in-law, as well as the hospice's resident services director, who averred that the decedent suffered from aphasia as the result of her advanced ALS disease and would not have been able to read her will aloud twice.

The court did not improperly rely on unauthenticated medical records submitted by the objectors, but noted that they

buttressed other admissible evidence concerning decedent's condition at the time (*see Bishop v Maurer*, 106 AD3d 622 [1st Dept 2013]).

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

ENTERED: FEBRUARY 6, 2020

CLERK

Acosta, P.J., Richter, Kapnick, Mazzarelli, Moulton, JJ.

10973 Jacqueline Girard, Index 161946/15
Plaintiff-Appellant,

-against-

The Port Authority of New York
and New Jersey,
Defendant-Respondent.

_____

Morris Duffy Alonso & Faley, New York (Iryna S. Krauchanka and William Manning of counsel), for appellant.

Port Authority Law Department, New York (Juan M. Barragan of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered on or about December 14, 2018, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant made a prima facie showing of entitlement to summary judgment by submitting evidence demonstrating that it does not own the location where plaintiff alleges she fell or the property abutting the public sidewalk in that area (*see* Administrative Code of City of NY § 7-210*; Cohen v City of New York*, 101 AD3d 426 [1st Dept 2012]). Defendant also demonstrated it did not create the alleged condition by submitting affidavits from employees who averred that they were familiar with defendant's construction activities at the time of the accident

and that it performed no construction work at the subject location before the accident (*see Camacho v City of New York*, 135 AD3d 482, 482-483 [1st Dept 2016]; *Melcher v City of New York*, 38 AD3d 376, 377 [1st Dept 2007]).

In opposition, plaintiff failed to raise a triable issue of fact as to whether defendant caused or created the alleged defect. Her claim that defendant's subsurface work or its contractor's snow or trash removal activities at the accident location created the complained-of height differential in the pavement is speculative, given that she submitted no expert affidavit or any evidence that would demonstrate the existence of a question of fact as to how those activities proximately caused the alleged condition (*see Jones v Consolidated Edison Co. of N.Y., Inc.*, 95 AD3d 659, 661 [1st Dept 2012]).

Furthermore, plaintiff's claim that defendant owed her a duty of care to maintain the sidewalk because it owned 2 World Trade Center is not preserved for appellate review (*see Leitner v*

304 Assoc., LLC, 129 AD3d 415, 416 [1st Dept 2015]). In any event, plaintiff alleges that she fell on the sidewalk across the street from that property.

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

ENTERED: FEBRUARY 6, 2020

CLERK

Acosta, P.J., Richter, Kapnick, Mazzarelli, Moulton, JJ.

10974 The People of the State of New York, Ind. 1019/16
Respondent,

-against-

Shelton Bryant,
Defendant-Appellant.

_____

Christina A. Swarns, Office of The Appellate Defender, New York (Rosemary Herbert of counsel), and Freshfields Bruckhaus Deringer US LLP, New York (Rebecca Curwin of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered April 27, 2017, convicting defendant, after a jury trial, of two counts of robbery in the second degree, and sentencing him, as a second violent felony offender, to concurrent terms of nine years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. Defendant's accessorial liability could be readily inferred from the totality of the conduct of defendant and his codefendant.

Defendant's challenges to the court's supplemental instructions are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find that

the court meaningfully responded to the jury's notes (*see generally People v Almodovar*, 62 NY2d 126, 131 [1984]; *People v Malloy*, 55 NY2d 296, 302 [1982], *cert denied* 459 US 847 [1982]).

Defendant's challenges to the admission of the victim's 911 call are also unpreserved, and we likewise decline to review them in the interest of justice. As an alternative holding, we find that the recording qualified as an excited utterance and a present sense impression (*see generally People v Johnson*, 1 NY3d 302, 306 [2003]; *People v Vasquez*, 88 NY2d 561, 575 [1996]).

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

ENTERED: FEBRUARY 6, 2020

CLERK

Acosta, P.J., Richter, Kapnick, Mazzarelli, Moulton, JJ.

10975 In re The 45 Great Jones Apartment Corp.
Petitioner-Appellant,

-against-

The Tax Commission of the City of New York, et al.,
Respondents-Respondents.

Index 152939/18

Stroock & Stroock & Lavan LLP, New York (Daniel J. Yost of counsel), for appellant.

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

Judgment, Supreme Court, New York County (W. Franc Perry, J.), entered October 31, 2018, denying the petition to annul a determination of respondent Tax Commission of the City of New York, dated January 31, 2018, which withdrew a Notice of Offer and Acceptance, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondent Tax Commission's withdrawal of the Notice of Offer and Acceptance, following an audit that revealed that the reduction of the tax assessment value was based on a faulty estimate of the property's potential rental income, was rational. The language of the offer and the governing rules permitted the withdrawal of an offer for any reason prior to the Tax Commission's approval of the offer (*see* 21 RCNY 4-12[k][1]). The

Tax Commission also rationally concluded that the language of the offer and the applicable rules permitted it to withdraw the offer even after it had been implemented by respondent Department of Finance and then to reinstate the original assessment (*id.*).

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

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

ENTERED: FEBRUARY 6, 2020

CLERK

Acosta, P.J., Richter, Kapnick, Mazzarelli, Moulton, JJ.

10976N Christopher Bradley, Index 350025/17
Plaintiff-Respondent,

-against-

Lisa Bakal,
Defendant-Appellant.

_____

Warshaw Burstein, LLP, New York (Eric Wrubel of counsel), for appellant.

Cohen Clair Lans Greifer Thorpe & Rottenstreich LLP, New York (Nicholas F. Cohen of counsel), for respondent.

_____

Order, Supreme Court, New York County (Laura E. Drager, J.), entered April 8, 2019, which, to the extent appealed from as limited by the briefs, ordered plaintiff husband pendente lite to pay all carrying charges on the marital apartment and to make direct payments to defendant wife of $800 per month in temporary spousal maintenance, and allocated the parties' child's private school tuition costs 50/50, unanimously affirmed.

Defendant's motion for pendente lite relief was properly denied for failure to offer proof of exigent circumstances (*see Anonymous v Anonymous*, 167 AD3d 527 [1st Dept 2018]).

Defendant contends that the court should have adjusted her maintenance award after sale of the marital apartment. However, the apartment had not yet been sold when her motion was before the court.

Defendant never requested the $6,500 increase in plaintiff's monthly maintenance obligation post-sale that she now contends the court could have provided for. Moreover, that amount is keyed to the approximately $13,000/month in carrying charges on the marital apartment, which the court found prohibitive in light of the parties' overall finances. Under the circumstances, the court providently exercised its discretion in deciding not to maintain the precise "status quo" upon the potential sale of the marital apartment (*cf. Hills v Hills*, 182 AD2d 584 [1st Dept 1992] [given defendant's voluntary payments to plaintiff of $2,000 per month for 10 years, award of $480 in temporary support to maintain the status quo was appropriate]).

Defendant's contention that, as the parties are no longer living together, the temporary maintenance award should be increased by an amount equal to half the former carrying charges, is not supported by the cases she cites (*see e.g. Francis v Francis*, 111 AD3d 454 [1st Dept 2013]; *Galvin v Galvin*, 154 AD3d 1141, 1143 [3d Dept 2017]).

Defendant failed to establish that the temporary support award does not help cover her and the child's shelter costs. Her assertion that she has had to move in with her parents is based on facts outside the record. In any event, defendant has not shown that the significant financial support she received during

the marriage, combined with her previous income, her more recent part-time income, and her significant separate property funds, does not afford her the means to find alternative living arrangements, at least for the short term.

The court's imputation to defendant of $125,000 in annual income was a provident exercise of its discretion in light of the regular financial support she receives from her family (*see e.g. Nederlander v Nederlander*, 102 AD3d 416, 417-418 [1st Dept 2013]; *Fabrikant v Fabrikant*, 62 AD3d 585 [1st Dept 2009]; *Rostropovich v Guerrand-Hermes*, 18 AD3d 211 [1st Dept 2005]). Defendant argues that family assistance is not deemed imputed income when necessitated by a spouse's default of his or her own financial obligations, but she does not address the fact that she received sizeable financial gifts during the marriage.

Defendant's educational credentials and employment history further support the imputation of annual income in the amount of $125,000. Defendant conceded that up to $75,000 could be imputed, and she showed that she could readily parlay her part-time employment into a full-time position. While she later claimed that she had encountered difficulties in attaining expected income levels, she offered no proof of efforts to seek other full-time employment and almost no information about the employment that she obtained. Moreover, defendant's

responsibilities at home had been reduced since her child was in school all day and busy with after-school activities, and she had regular child care and housekeeping assistance. Defendant argues that the 50/50 allocation of tuition was in error because it does not reflect a pro rata allocation between the parties based on their income. However, in contrast to other add-ons, educational expenses are not necessarily pro rated (*see* Domestic Relations Law § 240(1-b)(c)(7); *see also Klauer v Abeliovich*, 149 AD3d 617, 618-619 [1st Dept 2017]). Contrary to defendant's contention, the court adequately set forth its reasons for its equal allocation of tuition costs.

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 6, 2020

CLERK

Acosta, P.J., Richter, Kapnick, Mazzarelli, Moulton, JJ.

10977N- Index 653234/16
10977NA Kensington Insurance Company,
Plaintiff-Appellant,

-against-

Paulino Ramales, et al.,
Defendants,

Rocio Garcia,
Defendant-Respondent.

_____

Ahmuty, Demers & McManus, New York (Frank J. Wenick of counsel), for appellant.

Pasich LLP, New York (Jeffrey L. Schuman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arhtur F. Engoron, J.), entered April 17, 2018, which granted defendant's motion to vacate her default, and order, same court and Justice, entered November 13, 2018, which granted reargument only to the extent of clarifying that defendant had two meritorious defenses, unanimously affirmed, without costs.

The motion court providently exercised its discretion in accepting defendant's excuse of law office failure where the excuse was reasonably detailed and credible (*B & H Fla. Notes LLC v Ashkenazi*, 172 AD3d 433, 434 [1st Dept 2019]). As for a meritorious defense, the motion court properly determined that the insured's lack of cooperation had not been established as a

matter of law to preclude defendant from asserting it as an improper basis for denial of coverage, as "[m]ere inaction by the insured is not a sufficient basis for a disclaimer" (*City of New York v Continental Cas. Co.*, 27 AD3d 28, 32 [1st Dept 2005]). On reargument, the motion court providently exercised its discretion in granting reargument to clarify that plaintiff also had not established conclusively that the insured did not reside at the premises, and without the policy before it, the issue of whether the insured lived at the premises was not dispositive of whether defendant had a defense to the action (*Dean v Tower Ins. Co. of N.Y.*, 19 NY3d 704, 708 [2012]).

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

ENTERED: FEBRUARY 6, 2020

CLERK

Gische, J.P., Webber, Kern, Moulton, JJ.

10334- Index 101616/17
10334A Jessica Denson,
Plaintiff-Appellant,

-against-

Donald J. Trump For President, Inc.,
Defendant-Respondent.

_____

The Law Office of Maury B. Josephson, P.C., Uniondale (Maury B. Josephson of counsel), for appellant.

LaRocca Hornik Rosen & Greenberg, LLP, New York (Patrick McPartland of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Arlene Bluth, J.), entered July 22, 2019, in defendant's favor, unanimously reversed, on the law, the judgment and the arbitration awards upon which they were entered vacated, without costs. Appeal from order, same court and Justice, entered on or about March 14, 2019, which denied plaintiff's motion to vacate the arbitration awards, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The gravamen of this appeal is whether arbitration awards, predicated on claimed violations of a non-disclosure, non-disparagement agreement, should be vacated. For the reasons that follow, the awards should be vacated because they were partly made in violation of public policy, and otherwise in excess of

the arbitrator's authority, as limited by defendant's demand for arbitration. The parties' various disputes have endured a circuitous route through state court, federal court and an arbitrator.

Plaintiff is the former Director of Hispanic Engagement for defendant, the company that ran Donald J. Trump's 2016 presidential campaign. She contends that during her term of employment, she was subject to a hostile work environment and experienced sex discrimination, and that after she complained, high ranking persons in the campaign retaliated against her. In November 2017, plaintiff filed this action in Supreme Court asserting violations of the New York City Human Rights Law against the campaign, including sexual discrimination, a hostile work environment, and retaliation. She also asserted claims of defamation, defamation per se, and intentional and negligent infliction of emotional distress, all arising from the events occurring during her term of employment.

As a condition of her initial engagement by defendant, plaintiff was required to sign a non-competition, non-disclosure, non-disparagement agreement (NDA). This dispute only concerns that part of the NDA addressing non-disclosure and non-disparagement. The NDA contains broad prohibitions against plaintiff disclosing, disseminating, or publishing any

confidential information detrimental to Candidate Donald J. Trump, or any "Trump Person," broadly defined in the NDA to include various Trump family members and Trump entities (collectively Trump or defendant). The NDA also prohibited plaintiff from demeaning or disparaging Trump publicly. These particular provisions have no temporal duration, no geographic restriction, and apply to all manner of expression in all and any contexts. Confidential information is expressly defined and includes, in its most general application, all information "that Mr. Trump insists remain private or confidential. . . ." There is no definition of disparagement or demeaning conduct in the NDA.

With respect to the resolution of disputes, the NDA provides in relevant part, that any dispute arising under or relating to the NDA, at the sole discretion of each covered Trump person or entity, may be submitted to binding arbitration in the State of New York, pursuant to the rules for commercial arbitrations of the American Association for Arbitration. Pursuant to the terms of the NDA, plaintiff expressly agreed that she would not contest such submission. Notably, the discretion to seek arbitration of issues arising out of the NDA is unilateral in Trump's favor and plaintiff has no right to seek arbitration. The NDA does not restrict plaintiff from asserting her rights in a court

proceeding, but if that dispute arises out of the NDA, and Trump demands arbitration, then plaintiff has no right to challenge the procedure. The NDA also provides that any arbitration award shall include costs and legal fees to the prevailing party.

In December 2017, following the filing of this action, defendant filed a demand to arbitrate with the AAA providing the following description of its dispute with plaintiff:

> "Respondent [Denson] breached confidentiality and non-disparagement obligations contained in a written agreement she executed during her employment with claimant Donald J. Trump for President, Inc. She breached her obligations by publishing certain confidential information and disparaging statements in connection with a lawsuit she filed against claimant in New York Supreme Court. Claimant is seeking compensatory damages, punitive damages, and all legal fees and costs incurred."

No later or amended demand was ever filed. Consequently, this December 2017 Demand to Arbitrate provides the guidepost for the issues that were before the arbitrator when he made his awards.

In March 2018, defendant filed a motion in this action to compel arbitration. Supreme Court (Judge Bluth) denied the motion in a prior order dated August 9, 2018. The court decided that although the arbitration clause applied to "any dispute arising under this agreement," it did not apply to "any" dispute

between the parties or to any employment related dispute. The court also observed that although the NDA regulated plaintiff's behavior in prohibiting certain acts by her, it did not obligate plaintiff to arbitrate any claim she might have against defendant. The court concluded that the claims made in this state action arise out of the terms of plaintiff's employment and are not covered by the NDA.

While the motion to compel was sub judice, on March 26, 2018, plaintiff commenced a second action against defendant in Federal District Court. She sought a declaration that the NDA was void and unenforceable as against public policy (*Denson v Donald J. Trump for President, Inc.*, US Dist Ct., SD NY, 18 Civ 2690, Furman J., 2018). In response, defendant brought another motion to compel arbitration. By order dated August 30, 2018, Judge Jesse Furman granted defendant's motion, determining that the parties had agreed to proceed with binding arbitration and it was up to the arbitrator to rule on whether the arbitration agreement was valid. Judge Furman, referring to Judge Bluth's August 9, 2018 order, distinguished the two lawsuits, describing the federal action as a direct challenge to the NDA, whereas the state action pertained to plaintiff's affirmative human rights law violations claims, arising out of her employment relationship and they were not otherwise covered by the NDA (*id.* at *2).

Upon prevailing on its motion to compel arbitration in the federal action, defendant proceeded with the arbitration process. Plaintiff, though aware of the arbitration proceeding, chose not to fully participate in it. She did, however, send a letter to the arbitrator that raised two critical points. She argued that per Judge Bluth's August 9, 2018 order, the claims she made in this human rights action were not part of the arbitration and that she was not time barred and was appealing the federal court's finding that the validity of the NDA as a whole should be decided at arbitration.

The arbitrator issued a partial award dated October 19, 2018 and then a final award on December 11, 2018 (collectively the arbitration award). Based upon plaintiff's letter and Judge Furman's order, the arbitrator concluded that the issue of the validity of the NDA was before him. He decided that the NDA, as a whole, was neither void nor unenforceable.

The arbitrator went on to generally find that plaintiff breached the NDA by "disclosing, disseminating, and publishing confidential matter in the Federal Action, and by making disparaging comments about [c]laimant and the [a]greement on the Internet on her GoFundMe page and on her Twitter account." There were no detailed or further findings of fact. A monetary award was made against plaintiff consisting of $24,808.20 attorneys'

fees in the federal action, and a supplemental award was made for $4,291.85 attorneys' fees in the federal action, plus $20,407.59 in attorneys' fees incurred in the arbitration. Notably, notwithstanding defendant's continuing claim (even before this court) that the mere filing of this State Human Rights Law action was itself a violation of the NDA, the arbitrator denied that aspect of defendant's relief as requested in its Demand to Arbitrate, based upon Judge Bluth's August 9, 2018 order.

Following the award, plaintiff brought a motion in this action to vacate the award.[1],[2] By judgment entered July 22, 2019, Judge Bluth denied the motion. This appeal ensued.

Plaintiff seeks reversal of Supreme Court's denial of the request to vacate the arbitration award. She advances wide ranging arguments that the award violates strong public policy and that the arbitrator otherwise exceeded his authority, as limited by the Demand to Arbitrate.

---

[1]It is unclear why this motion was not brought as a completely separate proceeding, under a new index number, given that Supreme Court, the federal court and the arbitrator each treated this action as separate from the arbitration proceeding.

[2]The parties also brought a motion and cross motion to affirm (defendant), and to vacate (plaintiff), in the Federal action. The motions were eventually denied by Judge Furman on the basis of res judicata (or claim preclusion), after Judge Bluth denied plaintiff's motion and entered judgment (*Denson v Donald J. Trump for President, Inc.*, US Dist Ct, SD NY, 18 Civ 2690, Furman J., 2019).

CPLR7511(b) sets forth the statutory grounds for vacating an arbitration award. Where, as here, the movant was served with a notice of intention to arbitrate, the court may vacate the award if the rights of the movant were prejudiced by: (1) corruption, fraud or misconduct in procuring the award; (2) partiality of the arbitrator; (3) the arbitrator exceeding or imperfectly executing his/her power or (4) the arbitrator failing to follow the procedure of CPLR article 75 (CPLR 7511[b][1]). With respect to whether an arbitrator exceeded or imperfectly executed his/her power, an award will not be overturned unless the award violates a strong public policy, is totally irrational or exceeds a specifically enumerated limitation on the arbitrator's power (*Matter of Silverman [Benmore Coats]*, 61 NY2d 299 [1984]; *Matter of Kowalski [New York State Dept. of Correctional Services]*, 16 NY3d 85, 90 [2010], *Frankel v Sardis*, 76 AD3d 136, 139 [1st Dept. 2016].

In general, the grounds for vacating an arbitration award are narrowly construed (*Frankel,* 76 AD3d at 139-140). Moreover, an arbitration award must be upheld, even where the arbitrator makes errors of law and/or fact (*Wein & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479-480 [2006], citing *Matter of Sprinzen [Nomberg]*, 46 NY2d 623, 629 [1979]). It is not for the court to assume the role of overseer of the arbitration; nor may

it mold an award to its sense of justice (*Wein & Malkin,* 6 NY3d at 480).

An arbitration award violates strong public policy "only where [the] court can conclude, without engaging in any extended fact finding or legal analysis, that a law prohibits the particular matters to be decided by arbitration, or where the award itself violates a well defined constitutional, statutory or common law of this state" (*Matter of Reddy v Schaffer*, 123 AD3d 935, 937 [2d Dept 2014]). An award will be found violative on public policy grounds only where such policy prohibits, in the absolute sense, particular matters being decided or certain relief being granted by the arbitrator (*Sprinzen*, 46 NY2d at 631). Vacatur on public policy grounds is exercised sparingly (*Matter of Niers-Folks Inc. [Drake]*, 75 AD2d 787 [1st Dept 1980]). This is to preserve the parties' choice of a nonjudicial forum to the greatest extent possible (*Sprinzen* 46 NY2d at 630).

Nonetheless, some examples where the courts have held that public policy renders a particular issue nonarbitrable prove instructive in determining this issue (*Sprinzen*, 46 NY2d at 630; *Associated Teachers of Huntington v Board of Education Union Free School Dist. No.3, Town of Huntington*, 33 NY2d 229, 235-236 [1973]). They include: punitive damages (*Garrity v Lyle Stuart, Inc.*, 40 NY2d 354 [1976]; violation of the State anti-trust laws

(*Matter of Aimee Wholesale Corp. [Tomar Prods.]*, 21 NY2d 621, 625-626 [1968]); liquidation of insolvent insurance companies (*Matter of Knickerbocker Agency [Holz]*, 4 NY2d 245, 254 [1958]); usury (*Durst v Abash*, 22 AD2d 39 [1st Dept 1964], *affd* 17 NY2d 445 [1965]); where an award prevents an employer from fulfilling its legal obligation to protect against workplace sexual harassment (*Matter of Wertheim & Co. v Halpert*, 48 NY2d 681 [1979]; *Matter of New York City Tr. Auth. v Phillips*, 162 AD3d 93 [1st Dept 2018], *lv dismissed* 31 NY3d 1139 [2018]); where an award of child support violates the Child Support Standards Act (*Hirsch v Hirsch*, 4 AD3d 451 [2d Dept 2004]); and where an award violates the State's public policy of providing the public with high quality, efficient and effective hospital services *(Matter of State Univ. of N.Y. v Young*, 170 AD2d 510 [2d Dept 1991], *lv denied* 78 NY2d 908 [1991], *cert denied* 506 US 1035 [1992]). Recently, the legislature enacted laws prohibiting mandatory arbitration of sexual harassment claims, and more broadly, all discrimination claims (CPLR 7515).

Exceeding expressly enumerated limits on an arbitrator's authority is a separate basis to invalidate an award as an excess of authority. Enumerated limits of an arbitrator's authority may be found in the arbitration clause of an agreement, in a statute, or in a notice or demand for arbitration (*Silverman*, 61 NY2d at

307 [arbitration clause of contract]; *Matter of MKC Dev. Corp. v Weiss*, 203 AD2d 573, 574 [2d Dept 1994] [statutory, i.e., CPLR 7513]; *Matter of Denihan*, 97 AD2d 69, 73 [1st Dept 1983], *appeal dismissed* 61 NY2d 905 [1984] [arbitrators purported to resolve an issue that had not been submitted to them]). It is well established that an arbitrator's authority extends only to those issues that are actually presented by the parties (*Matter of Joan Hansen & Co. Inc. v Everlast World's Boxing Headquarters Corp.*, 13 NY3d 168 [2009]). Even where a claim is otherwise arbitrable, the scope of the arbitration is still limited to the specific issues presented and may not extend to those that are materially different or legally distinct (*Joan Hansen*, 13 NY3d at 173-174). Simply stated, an arbitrator exceeds his or her authority by reaching issues not raised by the parties *(Matter of Banegas v GEICO Ins. Co.*, 167 AD3d 873, 875 [2d Dept 2018]; *Matter of Slocum v Madariaga*, 123 AD3d 1046, 1047 [2d Dept 2014]). CPLR 7511(c)(2) provides that the remedy for an award issued in excess of the arbitrator's authority is modification of the award, if it can be modified without affecting the merits of decision on the issues submitted. If modification is not possible, then vacatur of the entire award is required (*see e.g. Slocum*, 123 AD3d at 1047).

A public policy argument may be raised for the first time on

a motion to vacate, and should be considered by the court *(Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Bd. of Educ. of City School Dist. of City of N.Y.*, 1 NY3d 72, 79 [2003] [internal citations omitted]; see *also Matter of Gansburg v Blachman*, 111 AD3d 935-936 [2d Dept 2013]). A claim that the arbitrator has decided issues that were not otherwise submitted can, for obvious reasons, only be raised once the award is made (*see Matter of Brijmohan v State Farm Ins. Co.*, 92 NY2d 821, 822-823 [1998]). Consequently, even though plaintiff did not fully participate in the arbitration proceedings and failed to assert certain arguments the she now raises, this does not mean the award should automatically be confirmed.

Plaintiff contends that the NDA is so broad and over-inclusive, prohibiting virtually any negative statement about the campaign and Trump Person, that it is void or should be invalidated as against public policy. There is no legal basis for the court to conclude that non-disparagement agreements per se violate public policy. Quite the contrary, the courts routinely resolve the merits of conflicting claims pertaining to non-disparagement agreements and the scope of their coverage, without relying on public policy grounds (*see e.g. Davis v Nyack Hosp.*, 130 AD3d 455 [1st Dept 2015], *BDCM Fund Advisser, L.L.C. v Zenni*, 103 AD3d 475 [1st Dept 2013]; *Smolev v Carole Hochman*

Design Group, Inc., 79 AD3d 540 [1st Dept 2010]). Nor is there any legal basis to find that issues regarding NDAs and their permissible scope cannot be decided by an arbitrator. The inclusion of a non-disparagement provision in the NDA, which when executed, was an agreement between private parties, does not impermissibly intrude on plaintiff's rights of free expression (*see Matter of Lancaster v Inc. Vil. of Freeport*, 22 NY3d 30, 37 [2013]; *see also Forty-Seventh-Fifth Co. v Nektalov*, 225 AD2d 343 [1st Dept 1996]). Here, non-disparagement and keeping certain matters confidential during the term of plaintiff's service and thereafter were specific conditions of plaintiff's engagement with the campaign. To the extent that the plaintiff makes legal arguments concerning the scope of the NDA, any error by the arbitrator is, at most, a mistake of law that cannot serve as a predicate basis for vacating these awards (*Sprinzen*, 46 NY2d at 629; *Merrill Lynch, Pierce, Fenner & Smith, v Benjamin*, 1 AD3d 39, 44 [1st Dept 2003] [internal citation omitted]).

Although plaintiff also contends that the NDA was "weaponized" by defendant to suppress and defeat her human rights violation claims, this state action is going forward, in accordance with the Supreme Court, federal court and arbitration orders. Plaintiff's public policy argument is really that the arbitration action was initiated by defendant as a litigation

tactic. However, examining defendant's motives in demanding arbitration would require the court's engagement in an extended factual analysis. Such inquiry is contrary to established law that a strong public policy justifying the vacatur of an arbitration award must be apparent from the face of the award, without extended factual inquiry (*Matter of New York City Tr. Auth. v Transport Workers Union of Am. Local 100, AFL-CIO*, 99 NY2d 1, 7 [2002]; *see Lancaster v Incorp. Vil. of Freeport*, 22 NY3d 30, 37 [2013]).[3]

The arbitrator did not exceed his enumerated authority by reaching the gateway issue of the validity of the NDA. The parties agreed that the rules of the AAA would apply, which provide that questions concerning the scope and validity of the NDA, including issues of arbitrability, would be decided by the arbitrator (*Flintlock Constr. Servs., L.L.C. v Weiss*, 122 AD3d 51, 54 [1st Dept 2014] [internal citations omitted], *appeal dismissed* 24 NY3d 1209 [2015]). Morever, implicit in the Demand to Arbitrate is defendant's claim that the underlying NDA containing the arbitration provision is valid and enforceable. Plaintiff's only articulated defense to arbitration, asserted

[3]Plaintiff's claims concerning defendant's motivation might have been considered in the arbitration, had she participated in that proceeding and fully developed the record (*see Matter of Kowalski*, 16 NY3d 85, 90).

both in the federal action and her letter to the arbitrator, was that the NDA was void and unenforceable. Thus, the issue of the validity of the NDA was properly before the arbitrator. The arbitrator's decision on the validity of the NDA did not run afoul of the rule that a party cannot be forced to arbitrate a dispute it did not agree to submit to arbitration (*see Howsam v Dean Witter Reynolds, Inc.*, 537 US 79, 83 [2002]; *Matter of Steyn v CRTV, L.L.C.*, 175 AD3d 1, 10-11 [1st Dept 2019]).

Plaintiff's other arguments pertain to the award itself as being in violation of public policy or made in excess of authority. The award can be broken down into two parts. The first part is an award for the disclosure of confidences in filing the federal action, in which plaintiff attacks the validity of the NDA. The arbitrator stated that plaintiff breached the NDA "by making disparaging statements about [defendant in the Federal action]. . . ." We find that this portion of the award violates public policy.

There is a deep-rooted, long-standing public policy in favor of a person's right to make statements during the course of court proceedings without penalty (*Rosenberg v MetLife, Inc.*, 8 NY3d 359, 365 [2007], quoting *Toker v Pollak*, 44 NY2d 211, 218 [1978]). "[S]tatements uttered in the course of a judicial . . . proceeding are absolutely privileged" (*Herzfeld & Stern v Beck*,

175 AD2d 689, 691 [1st Dept 1991] [internal citations omitted], *lv dismissed* 79 NY2d 914 [1992], *lv dismissed* 82 NY2d 789 [1993], *lv dismissed* 89 NY2d [1997]). This is true so long as the statements are material and pertinent to the issues involved and "regardless of the motive with which they are made" (*Herzfeld*, 175 AD2d at 691). This legal principle is also found in cases where a party claims it was defamed in court or court documents. Disparagement, although not exactly the same as defamation, is analogous because both torts concern communications of a negative and unflattering nature (see *Ruder & Finn Inc. v Seaboard Sur. Co.*, 52 NY2d 663, 670 [1981] ["defamation and disparagement in the commercial context are allied in that the gravamen of both are falsehoods published to third parties"]). In defamation actions, "[p]ublic policy mandates that certain communications, although defamatory, cannot serve as the basis for the imposition of liability" (*Rosenberg v MetLife, Inc.*, 8 NY3d 359, 365 [2007], quoting *Toker v Pollak*, 44 NY2d at 218). To hold otherwise would impede justice by "hamper[ing] the search for truth and prevent [the] making [of] inquiries with that freedom and boldness which the welfare of society requires" (*Front, Inc. v Khalil*, 24 NY3d 713, 718 [2015]).

Plaintiff's negative statements about defendant, for which the arbitrator made an award, were made in the context of the

federal action in which she sought a declaration that the NDA was unenforceable (*Rosenberg v MetLife, Inc.*, 8 NY3d at 365-366). By concluding that the allegations in the federal action are tantamount to disclosure of confidential information violative of the NDA, the arbitrator improperly punished plaintiff for availing herself of a judicial forum. Defendant is hard-pressed to explain how plaintiff could have pursued her rights without setting forth necessary factual statements for the federal court to consider.

The remainder of the award was based upon certain Twitter "Tweets" and statements on a GoFundMe page. The nature of the Demand to Arbitrate, however, was limited to statements made "in connection" with this state action. Moreover, the Demand to Arbitrate, dated December 20, 2017, could not have included after-occurring events. The arbitration award does not identify these offending Tweets or posts and we do not know when they were posted. Nor does the award correlate the posts to this state action. While the arbitrator was not required to make specific findings of fact, the award on its face does not allow for a conclusion that the offending conduct was made within the scope of the Demand to Arbitrate. The record made by defendant before Supreme Court only highlights this defect. Defendant relies on plaintiff's actions subsequent to the date of its Demand to

Arbitrate in an effort to have the arbitration award confirmed. Since the award takes into account events occurring after the demand, which could not have been legitimately considered at arbitration, the award was made in excess of the arbitrator's enumerated authority. Furthermore, given the nature of the award, there is no way to modify it and it must be vacated in its entirety (CPLR 7511[c][2]).

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

ENTERED: FEBRUARY 6, 2020

CLERK

Friedman, J.P., Richter, Kern, Singh, JJ.

10796 The People of the State of New York, Respondent, Ind. 3368/14

-against-

Mohammed Chowdhury,
Defendant-Appellant.

_____

The Law Office of Samuel Gregory, Brooklyn (Samuel Gregory of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Lori Ann Farrington of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Michael A. Gross, J.), rendered May 2, 2018, convicting defendant, after a jury trial, of attempted murder in the second degree, and sentencing him to a term of 18 years, unanimously affirmed.

On appeal, defendant contends that the official court interpreter's translation of the testimony of two trial witnesses was so defective as to deprive him of the right of confrontation and a fair trial. After the direct examination of the first witness, a question arose about whether the interpreter was providing verbatim, accurate translations. At that point, the court reminded the interpreter of his duty to provide simultaneous verbatim translations. Defendant sought a mistrial on the ground that the interpreter's alleged errors hampered his ability to fully confront the witness. The court denied

defendant's motion.

The court providently exercised its discretion in denying defendant's mistrial motion. When defendant made the motion, there was an insufficient basis for finding that the purported translation errors were so egregious as to warrant a mistrial, which was the only remedy requested. Notably, defendant did not request that a new interpreter be appointed. Nor did he accept the court's offer to reopen the direct examination of the witness. Further, defendant raised no objection to the interpretation of the cross-examination testimony of this witness, which continued with the same interpreter.

Defendant abandoned, or failed to preserve, his claim with respect to the translation of the testimony of the second witness, and we decline to review this claim in the interest of justice. When the People raised alleged translation deficiencies during this witness's direct testimony, defendant expressed no objections or concerns, even though the same interpreter was being used. To the contrary, defendant disputed the People's claim that the translation was not accurate. When the court decided to give a curative instruction to the jury, defendant consented and sought no additional relief.

As an alternate holding, we reject the claim on the merits. Defendant has not established, on the record before us, that the

interpreter made "a serious error in translation" so as to warrant a new trial (*People v Frazier*, 159 AD2d 278, 278 [1st Dept 1990], *lv denied* 76 NY2d 857 [1990]). Nor has defendant shown that the alleged problems with the translation prevented him from conducting an effective cross-examination or caused any other prejudice (*see People v Kowlessar*, 82 AD3d 417, 418 [1st Dept 2011]; *People v Watkins*, 12 AD3d 165, 166 [1st Dept 2004], *lv denied* 5 NY3d 771 [2005]).

Defendant did not preserve his claim that the court improperly questioned an expert witness, and we decline to review it in the interest of justice. As an alternative holding, we find that the record fails to support defendant's contention that the court took on the function and appearance of an advocate. The court's limited questioning of defendant's expert was a permissible attempt to clarify the testimony for the jury's benefit (*see People v Adams*, 117 AD3d 104, 109 [1st Dept 2014],

lv denied 24 NY3d 1000 [2014]).

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 6, 2020

CLERK

Friedman, J.P., Richter, Webber, Singh, JJ.

11120 In re The People of the State of New York, ex rel. Christopher Renfroe, on behalf of Curtis Brown,
Petitioner-Appellant,

-against-

Warden, Anna M. Kross Correctional Facility,
Respondent-Respondent.

Index 100901/19
Ind. 1226/19

Christopher Renfroe, Forest Hills, for petitioner.

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

Judgment (denominated an order), Supreme Court, New York County (Michael Obus, J.), entered on or about June 24, 2019, denying the petition for a writ of habeas corpus and dismissing the proceeding, unanimously affirmed, without costs.

We find that the writ of habeas corpus was properly denied (*see* CPLR 7010).

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

ENTERED: FEBRUARY 6, 2020

CLERK