SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 11, 2020

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Kapnick, J.P., Mazzarelli, Gesmer, Moulton, JJ.

10439- Index 652735/18
10439A J. Carlo Cannell, et al.,
Plaintiffs-Respondents,

-against-

Grail Partners, LLC,
Defendant-Appellant.

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Aguilar Bentley LLC, New York (Ryan Weiner of counsel), for appellant.

Law Offices of Carole R. Bernstein, New York (Carole R. Bernstein of counsel), for respondents.

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Judgment, Supreme Court, New York County (Gerald Lebovits, J.), entered October 1, 2018, awarding plaintiffs damages, and bringing up for review an order, same court and Justice, entered September 25, 2018, which granted plaintiffs' motion for summary judgment in lieu of complaint, unanimously reversed, on the law, without costs, the judgment vacated, plaintiffs' motion for summary judgment denied as to the payments due before June 1, 2012, and the matter remanded for a determination of the principal and interest due plaintiffs on the notes due on or after June 1, 2012. Appeal from the foregoing order, unanimously

dismissed, without costs, as subsumed in the appeal from the judgment.

On December 31, 2008, defendant Grail Partners, LLC issued separate notes payable to each of the three plaintiffs. The "Payment Terms" of the notes were identical. Each note required the payment of principal in ten equal semiannual installments on June 30th and December 31st of each year, commencing June 30, 2009 and ending on December 31, 2013. Each note provided for interest at 8% per year "payable in arrears with each installment of principal hereunder." Each note contained an acceleration clause that provided that, "in case of the happening and during the continuance" of any of the specified "Events of Default," the payee "may, by notice to [Grail Partners, LLC], declare this Subordinated Note and all interest hereon to be immediately due and payable."

Plaintiffs commenced this action for summary judgment in lieu of complaint on June 1, 2018. Plaintiffs did not pinpoint an exact date of default in their motion for summary judgment. In opposition, defendant claimed that the action was time-barred because the "cause of action accrued in 2011, when Grail Partners, LLC defaulted in performance of its payment obligations." In reply, plaintiffs claimed that the first date of default was on June 30, 2012. To support that default date,

plaintiffs pointed to defendant's records which reflected that, until June 30, 2012, defendant made small and sporadic payments which were not made in accordance with the payment terms of the notes.

Supreme Court granted plaintiffs summary judgment, agreeing with their position that the first default occurred on June 30, 2012 and that the action was timely in its entirety. A judgment for the total amount of the three notes was entered on October 1, 2018.

On appeal, the position of both parties changed. Contrary to defendant's position before Supreme Court (that the first default occurred in 2011), defendant argues on appeal that causes of actions accrued when it defaulted in making the June 30th and December 31st semiannual payments in 2009, 2010, and 2011. Pointing to plaintiffs' Excel spreadsheets, demand letters, affidavit, and notices of default, defendant maintains that all installment payments due and unpaid prior to June 1, 2012 (six years prior to the commencement of the action) are time-barred. Plaintiffs' acceleration of the notes would not, according to defendant, reset the statute of limitations for those installment payments that were already in default.

On appeal, plaintiffs no longer claim, as they did before Supreme Court, that the first default occurred on June 30, 2012.

Instead, they argue that defendant did not meet its burden to establish a statute of limitations defense because, as Supreme Court found, defendant failed to state an exact date of default and did not provide evidence in support of any date. Plaintiffs further argue that the action is not time-barred because the cause of action for breach of contract accrued and began to run on the date that the notes were accelerated on August 15, 2013.

Supreme Court erred in concluding that defendant's first default occurred on June 30, 2012. The record evidence establishes that defendant defaulted on every semi-annual payment of principal due prior to June 1, 2012 and on every interest payment (in whole or in part) other than the initial payment. Plaintiffs do not contend otherwise on appeal. Moreover, Supreme Court erred in concluding that the action was timely in its entirety.

The statute of limitations for breach of a promissory note payable in installments is six years (CPLR 213[2]; *see Cadlerock, L.L.C. v Renner*, 72 AD3d 454 [1st Dept 2010]). A default on a single installment payment does not trigger the running of the statute of limitations on the entire debt (*see Phoenix Acquisition Corp. v Campcore, Inc.*, 81 NY2d 138 [1993]). Rather, "separate causes of action accrued as installments of the loan indebtedness became due and payable" (*id.* at 141). Installment

payments that have accrued more than six years prior to commencement of the action are time-barred (*see Cadlerock, L.L.C.*, 72 AD3d at 454).

Acceleration of the debt does not change this analysis. Acceleration causes those future installment payments that are not yet due and payable to become immediately due and payable. It enables a lender to advance the due date for the future installment payments and thus, the statute of limitations runs on the balance of the debt (*see Phoenix Acquisition Corp.*, 81 NY2d at 142). It does not change the due date of those past due installment payments to that of the date of acceleration (*see e.g. U.S. Bank N.A. v Atia*, 2019 NY Slip Op 08727, *2 [2d Dept 2019] [action commenced within six years of the acceleration was timely but the unpaid installments which accrued before the six-year period prior to the commencement of the foreclosure action were time-barred]; *but see Nationstar Mtge., LLC v Weisblum*, 143 AD3d 866, 868 [2016]). Said differently, acceleration does not reset the limitations period for the earlier missed payments (*see e.g. Pace Indus. Union-Mgt. Pension Fund v Singer*, 2011 WL 841142, *3, 2011 US Dist LEXIS 22875, *11 [ED NY, Mar. 8, 2011]).

Accordingly, plaintiffs demonstrated, prima facie, that defendant breached each of the notes by submitting evidence of

the duly executed notes and defendant's failure to make payments in accordance with their payment terms (*see Edison Stone Corp. v 42nd St. Dev. Corp.*, 145 AD2d 249, 254 [1st Dept 1989]). Defendant, however, demonstrated prima facie, that the unpaid installment payments due prior to June 1, 2012 were time-barred. Plaintiffs in turn, failed to raise an issue of fact.

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

ENTERED: FEBRUARY 11, 2020

CLERK

Friedman, J.P., Webber, Gesmer, Kern, JJ.

10631N Estate of Arthur Klein, et al., Index 160174/17
Plaintiffs-Respondents,

-against-

400 East 85th Street Realty Corp.,
Defendant-Appellant.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Kathryn E. Freed, J.), entered on or about July 13, 2018,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated January 14, 2020,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: FEBRUARY 11, 2020

CLERK

Manzanet-Daniels, J.P., Gesmer, Oing, Moulton, González, JJ.

10821-
10821A Brunette Dookhie, etc.,
Plaintiff-Appellant,

-against-

Danny Woo, M.D., et al.,
Defendants-Respondents,

John Doe, M.D., et al.,
Defendants.

Index 23746/14E

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

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Nicholas Tam of counsel), for respondents.

Orders, Supreme Court, Bronx County (Joseph E. Capella, J.), entered July 9, 2018 and October 10, 2018, which granted the motion of defendants Danny Woo, M.D. and Peter K. Keller, M.D., P.C. d/b/a Williamsbridge Cardiology (Keller) to dismiss the complaint as time-barred pursuant to CPLR 3211(a)(5) and 214-a, and, insofar as appealed from as limited by the briefs, denied plaintiff's motion for leave to renew, respectively, unanimously reversed, on the law, without costs, and the motion to dismiss denied.

On this record, an issue of fact exists as to the last date on which defendant Dr. Woo treated the decedent, and thus, as to

when the applicable statute of limitations began running. We accordingly reverse and reinstate the complaint.

Beginning in 1999, Dr. Woo treated the decedent for various issues including hypertension, high cholesterol, back pain, insomnia, and fatigue.

On April 6, 2006, the decedent underwent an MRI of his lumbar spine. The resulting report set forth various findings, including multilevel degenerative changes. The report also stated: "A 2.9 cm x 1.9 cm right renal cyst is seen. There is a 2.8 cm x 2.7 cm heterogenous right renal upper pole slightly exophytic focus that is not well characterized on this examination." Although the radiologist recommended "further evaluation by renal ultrasound," Dr. Woo did not refer the decedent to a nephrologist, nor did he discuss the findings of the MRI with him. Dr. Woo testified that he did not consider the findings regarding the renal mass to be abnormal and did not in any event associate them with the decedent's back pain.

The decedent continued to suffer from hypertension and to complain of back pain. On April 12, 2011, he was admitted to the Westchester Square emergency room[1] complaining of "right flank pain." Imaging revealed a mass in the upper pole of the

[1] Westchester Square closed in 2013 and its records pertaining to the decedent were destroyed in a fire.

decedent's right kidney that was suggestive of renal cancer. Dr. Woo discharged the decedent on April 13, 2011 with instructions to follow up with physicians at Cornell Hospital for further evaluation of the renal mass.

On April 25, 2011, the decedent's right kidney was removed by a surgeon at Montefiore Medical Center. The decedent underwent further surgery at Montefiore on May 31, 2011 to remove a lung nodule. In addition, he underwent chemotherapy at St. Luke's/Roosevelt Hospital Center.

The decedent was admitted to Westchester Square on July 2, 2012 and discharged by Dr. Woo on July 9, 2012. In his discharge report, Dr. Woo noted that the decedent had been treated for "failure to thrive." Dr. Woo also noted: "From an oncology standpoint, [the decedent] was end stage and at this point in time conservative therapy, which included pain management and placement of a feed tube[,] were advised." Dr. Woo testified that the decedent's failure to thrive was attributable to the status of his renal cancer. He instructed the decedent to follow up with him as an outpatient.

On July 24, 2012, Dr. Woo wrote a home health certification and plan of treatment for the decedent that referenced the decedent's renal cancer. On July 25, 2012, Dr. Woo wrote a letter stating that, after examining the decedent, he had

determined that the decedent was suffering from renal cancer and required a wheelchair, seatbelt, and leg rest. Dr. Woo prescribed a wheelchair on July 27, 2012. On August 28, 2012, the decedent died from renal cancer.

On August 8, 2014, plaintiff sued Dr. Woo and other defendants, asserting medical malpractice and related causes of action.[2] Plaintiff alleges, essentially, that Dr. Woo, a member of defendant Peter K. Keller, M.D., P.C., negligently ignored the kidney lesion noted in the 2006 MRI and that his negligence resulted in delayed diagnosis of the decedent's renal cancer.

After the note of issue was filed, defendants moved to dismiss the complaint under CPLR 3211(a)(5), arguing that plaintiff's claims were barred by the statute of limitations. In support, defendants relied on an affirmation by Jerry Gliklich, M.D. Dr. Gliklich opined that Dr. Woo did not treat the decedent for renal cysts or renal cell carcinoma before the April 2011 diagnosis of renal cell carcinoma or provide any course of treatment for same during the period of alleged negligence between 2006 and 2012. Dr. Gliklich opined that before April 2011, the decedent did not once present to Dr. Woo with any classic clinical signs of renal cysts or renal carcinoma. He

[2] There is no indication that the other defendants — John Doe, M.D. and ABC Company — have appeared in this action.

opined that "there is no clinical correlation between [the] decedent's renal cysts or renal cell carcinoma and the decedent's complaints of musculoskeletal back pain," which he ascribed to the decedent's degenerative spinal condition. He conceded that "flank pain" may be indicative of renal cysts or renal cell carcinoma, but opined that the decedent's back pain was in "an anatomically distinct location" from that associated with renal cell carcinoma.

Plaintiff opposed, arguing that Dr. Woo continuously treated the decedent for symptoms of renal cysts and renal cell carcinoma, namely back pain, insomnia caused by back pain, and hypertension. Plaintiff asserted that there were issues of fact as to whether Dr. Woo was treating the decedent for symptoms associated with his renal cell cancer, and "whether the continuous treatment doctrine applies to toll the statute of limitations until the last date of treatment, July 9, 2012 (and even after said date, the plan was for Decedent to follow up with Dr. Woo)."

Plaintiffs' expert, Dr. Alan Feit, opined that Dr. Woo departed from accepted medical practice in treating the decedent's symptoms of back pain, hypertension, and insomnia, all of which were symptoms of and related to renal cell carcinoma.

Dr. Feit opined that Dr. Woo departed from the standard of

care when he failed to follow the recommendation of the radiologist who interpreted the April 2006 MRI report that the decedent undergo "further evaluation by renal ultrasound," given the findings of a "right renal cyst" and "heterogenous right renal upper pole," that was not well characterized on the examination.

Dr. Feit noted that while hypertension alone may not raise suspicion of renal cancer, hypertension in conjunction with MRI findings of a renal mass warranted consideration of renal carcinoma as a cause of the hypertension. Dr. Feit noted that the decedent's hypertension resolved after his kidney was removed.

Dr. Feit opined that Dr. Woo rendered treatment to the decedent for his renal mass or renal carcinoma when he prescribed medication for the decedent's back pain. Dr. Feit explained that "[r]enal cancer can present with back pain that is not well described and can be generalized" and when "described as more general back pain, it can mean that the mass or tumor has gone beyond an area and may have metastasized the disease in the bone." Dr. Feit noted that Dr. Woo had prescribed sleeping aids to the decedent when he complained that his back pain prevented him from sleeping.

The motion court granted Dr. Woo's motion to dismiss the

complaint. The court found that defendants met their burden on the motion because there was no dispute that the action was commenced more than 2 ½ years after the alleged malpractice, namely, Dr. Woo's failure to order the renal ultrasound as recommended in the 2006 MRI report. The court found that plaintiff, in turn, failed to show that the statute of limitations had been tolled by the continuous treatment doctrine.

The court observed that plaintiff's expert did not discuss Dr. Woo's treatment of the decedent in 2012: the evaluation for failure to thrive on July 2, 2012, and the wheelchair prescription on July 25, 2013. The court stated that "[a]s the expert's affidavit makes no reference to either of these July [2012] dates, this court can only conclude that the continuous treatment doctrine tolled the statute of limitations through October 2013, which is 2½ years after April 2011."

Plaintiff moved for leave to renew. She asserted that her expert did not address Dr. Woo's treatment of the decedent in 2012 because defendants never argued that the July 2012 treatment was not related to the decedent's cancer; indeed, defendants conceded and Dr. Woo testified that the treatment in 2012 was related to the decedent's renal cancer. Accordingly, plaintiff asserted, her expert should be allowed to address that treatment. On her motion, plaintiff submitted another affirmation by Dr.

Feit.

In the new affirmation, Dr. Feit acknowledged that his earlier affirmation only "addressed the continuous treatment rendered by Dr. Woo from 1999 to 2011," but noted that "[t]here were admissions by Dr. Woo as to the treatment he gave [the decedent] in 2012." Dr. Feit stated that he was "in agreement with Dr. Woo[,] who testified that the treatment he provided in July 2012 was related to [the decedent's] kidney cancer." Dr. Feit explained that it was common for patients suffering from renal cell carcinoma to have symptoms of failure to thrive with diminished appetite and to require medical care and treatment such as the treatment given during the decedent's July 2012 hospitalization. Dr. Feit stated that "Dr. Woo's care then continued as he prescribed medical care at the end of July 2012 in home health certification plans (in or about July 24th, 2012), a medical treatment letter (July 25, 2012) and prescription for a wheelchair (dated July 27th 2012)." Dr. Feit opined that "[a]ll this treatment was for continued symptoms related to . . . renal cell carcinoma."

Defendants opposed, arguing that plaintiff failed to offer any new facts or a reasonable excuse for failing to present those facts so as to justify renewal. Defendants argued that Dr. Woo's deposition testimony was before the court on their motion to

dismiss, and that Dr. Feit's additional affirmation was merely an attempt to cure plaintiff's deficient opposition to the motion.

The motion court summarily denied plaintiff's motion for leave to renew defendants' motion to dismiss.

We now reverse and reinstate the complaint. On this record, a triable issue of fact exists as to whether the statute of limitations was tolled by the continuous treatment doctrine.

An action for medical malpractice must be commenced within 2½ years of the date of accrual (CPLR 214-a). Under the continuing treatment doctrine, the statutory limitation period is stayed "when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint" (*McDermott v Torre*, 56 NY2d 399, 405 [1982] [internal quotation marks omitted]; *see Wilson v Southampton Urgent Med. Care, P.C.*, 112 AD3d 499, 500-501 [1st Dept 2013]). Where, as here, a malpractice claim is predicated upon an alleged failure to properly diagnose a condition, "the continuous treatment doctrine may apply as long as the symptoms being treated indicate the presence of that condition" (*Simons v Bassett Health Care*, 73 AD3d 1252, 1254 [3d Dept 2010]; *Wilson*, 112 AD3d at 500).

Plaintiff raised an issue of fact as to whether Dr. Woo continuously treated the decedent for conditions related to renal

cell carcinoma. Plaintiff's expert, Dr. Feit, opined that Dr. Woo treated the decedent for symptoms of back pain, hypertension, and insomnia, all of which were symptoms of and related to renal cell carcinoma, a diagnosis that should have been considered given the findings in the 2006 MRI of a renal mass.

Plaintiff sufficiently established that such treatment continued through the decedent's hospitalization in July 2012. Notably, Dr. Woo authored the decedent's discharge summary from the hospital. Under "Hospital Course," Dr. Woo noted that "[f]rom an oncology standpoint, [the decedent] was end stage," and conservative therapy, including pain management and placement of a feeding tube, were advised. The decedent was instructed to follow up with Dr. Woo as an outpatient. On July 25, 2012, Dr. Woo wrote a letter "to whom it may concern" ordering a wheel chair and home care for the decedent given his debilitated condition following hospitalization for renal cancer.

Dr. Woo testified that the decedent was hospitalized for failure to thrive attributable "[t]o the status of his [renal cell] cancer." Indeed, the decedent died – from renal cell carcinoma – less than one month later. Defendants' argument that the "failure to thrive" bore no relation to the decedent's cancer treatment borders on specious. (It should be noted that this argument was raised for the first time on reply, and for that

reason should not have been considered, let alone credited.) Under the circumstances, expert testimony was unnecessary to a conclusion that Dr. Woo treated the decedent for renal cell carcinoma in July 2012 (*see Matter of Joshua Hezekiah B. [Edgar B.]*, 77 AD3d 441, 442 [1st Dept 2010], *lv denied* 15 NY3d 716 [2010]).

The one-year-and-three month gap between the April 2011 visit and the July 2012 note does not preclude application of the continuous treatment doctrine (*see Hilts v FF Thompson Health Sys., Inc.*, 78 AD3d 1689, 1691-1692 [4th Dept 2010] [reinstating complaint where the plaintiff's expert established that the plaintiff's complaints of headaches dating back to an office visit in 1996 were related to the aneurysm she sustained in 2003]).

The motion for renewal should in any event have been granted. It was not until reply that defendants contended, for the first time, and notwithstanding Dr. Woo's records and testimony, that the July 2012 treatment was unrelated to the decedent's renal cancer. A party's submission of new evidence or argument in reply on the underlying motion constitutes reasonable

justification for granting renewal (*see Schenectady Steel Co., Inc. v Meyer Contr. Corp.*, 73 AD3d 1013, 1015-1016 [2d Dept 2010]).

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

ENTERED: FEBRUARY 11, 2020

CLERK

Renwick, J.P., Manzanet-Daniels, Kern, Oing, González, JJ.

10848 In re Perry Lopez, Index 656897/17
Petitioner-Appellant,

-against-

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

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Glass & Hogrogian, LLP, New York (Bryan D. Glass of counsel), for appellant.

Georgina M. Pestana, Acting Corporation Counsel, New York (Susan Paulson of counsel), for respondents.

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Order, Supreme Court, New York County (John J. Kelley, J.), entered September 28, 2018, which denied the petition to vacate an arbitration award, dated October 31, 2017, suspending petitioner 15 days without pay, and dismissed the petition, unanimously affirmed, without costs.

The arbitrator's decision has a rational basis and is supported by the evidence (*see Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563, 567-568 [1st Dept 2008]). The record shows that the arbitrator reasonably determined that petitioner was guilty of misconduct when he locked a 10-year old student out of the classroom and left him unsupervised in the hallway. Even if petitioner was justified in removing the student from the classroom, his actions in locking the boy out of the room, in a state of distress, and leaving him in the hallway

without adequate supervision violated school policy (*see Matter of Asch v New York City Bd./Dept. of Educ.*, 104 AD3d 415, 419-420 [1st Dept 2013]).

The penalty of a 15-day suspension from employment does not shock our sense of fairness (*see Matter of Ghastin v New York City Dept. of Educ.*, 169 AD3d 507, 508 [1st Dept 2019]).

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

ENTERED: FEBRUARY 11, 2020

CLERK

Friedman, J.P., Renwick, Kern, Oing, JJ.

10978 The People of the State of New York, Respondent, Ind. 1971/15

-against-

Wilmer Cueva, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Thomas Farber, J. at motion; Anthony J. Ferrara, J. at jury trial and sentencing), rendered December 15, 2016, convicting defendant of criminally negligent homicide and reckless endangerment in the second degree (four counts), and sentencing him to an aggregate term of 1 to 3 years, unanimously affirmed.

Defendant's legal insufficiency 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 [2007]). Moreover, we find that the evidence of defendant's guilt was overwhelming. The evidence established that, despite repeated warnings and full comprehension of the dangers involved, defendant, a construction

foreman, personally ordered the unsafe actions that led to a fatal trench collapse.

The court, which thoroughly instructed the jury on all the elements of the charges, providently exercised its discretion in denying defendant's request to instruct the jury that he could not be found criminally liable based on his mere supervision of workers. The specific language requested by defendant would have risked confusing or misleading the jury because defendant's criminal liability was based in large part on his personal conduct as a supervisor in ordering others to perform unsafe acts. In any event, we find that any error was harmless in light of the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230, 237 [1975]).

The court providently exercised its discretion in admitting autopsy photos that were gruesome, but were relevant to demonstrate the extreme risk posed by the inadequately protected trench that collapsed onto the victim and to illustrate the medical examiner's testimony (*see People v Wood*, 79 NY2d 958, 960 [1992]; *People v Stevens*, 76 NY2d 833, 836 [1990]). The photos were not so inflammatory as to outweigh their probative value. Defendant's challenge to a photo of the victim when he was alive is unpreserved, and we decline to review it in the interest of justice. In any event, we find that any error in the admission

of that photo, or any other photos at issue on appeal, was harmless.

Defendant's challenges to the introduction of redacted email messages and related testimony are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find that defendant fails to present any basis for reversal.

The motion court properly denied defendant's request for a hearing on his motion to suppress his statements made to an employee of a private company. Defendant made only a general allegation that the statement was made to an agent of law enforcement, and he did not dispute the People's specific allegations to the contrary (*see People v Lewis*, 258 AD2d 287 [1st Dept 1999]).

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

ENTERED: FEBRUARY 11, 2020

CLERK

Friedman, J.P., Renwick, Kern, Oing, JJ.

10979 Rick Silver, Index 160435/18
Plaintiff-Respondent,

-against-

Alon Zakaim Fine Art Limited, et al.,
Defendants-Appellants.

_____

Lebow & Sokolow LLP, New York (Mark D. Lebow of counsel), for appellants.

Grossman LLP, New York (Judd B. Grossman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joel M. Cohen, J.), entered on or about July 31, 2019, which denied without prejudice defendants' motion to dismiss the complaint, unanimously affirmed, with costs.

Plaintiff seeks a declaration that he is the owner of a painting that he purchased in 2015, that he was deceived into sending the painting to a now defunct art gallery in New York to be sold on his behalf, and that the painting was transferred to defendants, three art galleries based in London, England, who have refused to return the painting to him.

Supreme Court has personal jurisdiction of defendants based on the allegations that defendants transacted business in New York by purporting to purchase a majority interest in a painting from a New York art gallery, which retained a minority interest

in the painting, and marketing the painting for sale in New York under a consignment agreement with Christie's New York, using a New York address (*see Matter of Stettiner*, 148 AD3d 184, 192 [1st Dept 2017], *lv denied* 30 NY3d 907 [2017]).

The complaint adequately alleges that there were warning signs that should have alerted defendants that the sale was not legitimate and prompted them to undertake further inquiry (*see Davis v Carroll*, 937 F Supp 2d 390, 423-425 [SD NY 2013]).

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

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

ENTERED: FEBRUARY 11, 2020

CLERK

Friedman, J.P., Renwick, Kern, Oing, JJ.

10980 In re K. S., Dkt. NN-35088/16

A Child Under Eighteen Years
of Age, etc.,

Dyllin S.,
Respondent-Appellant,

The Administration for Children's Services,
Petitioner-Respondent.

_____

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

James E. Johnson, Corporation Counsel, New York (Julia Bedell of counsel), for respondent.

Dawne A. Mitchell, The Legal Aid Society, New York (Patricia Colella of counsel), attorney for the child.

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Order of disposition, Family Court, New York County (Patria Frias-Colón, J.), entered on or about June 19, 2018, which brings up for review a fact-finding order, same court (Ta-Tanisha D. James, J.), entered on or about December 28, 2017, which found that respondent father neglected the subject child, unanimously reversed, on the law and the facts, without costs, the finding of neglect vacated, and the petition dismissed.

The Family Court's finding that the father neglected the subject child lacks a sound and substantial basis in the record because a preponderance of the evidence does not demonstrate that the child's physical, mental or emotional condition was impaired

or in danger of becoming impaired, or that the actual or threatened harm to the child was a consequence of the father's failure to exercise a minimal degree of care in providing her with proper supervision or guardianship during the February 14, 2016 incident (*see* Family Ct Act § 1012[f]; § 1046[b][i]; *Matter of Christy C. [Jeffrey C.]*, 74 AD3d 561, 562 [1st Dept 2010]). Although the mother's and the father's fact-finding testimony established that the child was in the home when the incident occurred, petitioner failed to establish a prima facie case of neglect because their testimony also established that the child was sleeping in another room in the apartment and was unaware of what occurred, which testimony was supported by the testimony of the responding police officer (*see Matter of Harper F.-L. [Gary L.]*, 125 AD3d 652, 654-655 [2d Dept 2015]).

In light of the foregoing, we do not reach the father's remaining contentions.

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

ENTERED: FEBRUARY 11, 2020

CLERK

Friedman, J.P., Renwick, Kern, Oing, JJ.

10981 Venisha Gardner, Index 153937/12
Plaintiff-Appellant,

-against-

Consolidated Edison Company of New York, Inc.,
Defendant-Respondent.

_____

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

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

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Order, Supreme Court, New York County (Richard F. Braun, J.), entered January 3, 2018, which granted defendant's motion to set aside a jury verdict in favor of plaintiff, and dismissed the complaint, unanimously affirmed, without costs.

The trial evidence was insufficient as a matter of law to support the jury's verdict that defendant (Con Ed) was responsible for the injury plaintiff received when she bumped into a trash bag containing broken fluorescent bulbs in the store where she was working (*see Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). Even if there was sufficient evidence to show that the person who changed the bulb and then discarded it in the bag was a Con Ed employee, plaintiff presented no evidence that the

person was acting within the scope of his employment (*see Davis v City of New York*, 226 AD2d 271 [1st Dept 1996], *lv denied* 88 NY2d 815 [1996]). Indeed, Con Ed presented unrefuted evidence that its employees did not change light bulbs, that its service ended at the building wall, that it did not own or maintain electrical equipment inside the building, that independent contractors provided the services for the energy efficiency program it sponsored, and that the subject building was not enrolled in that program at the time of the accident.

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

ENTERED: FEBRUARY 11, 2020

CLERK

Friedman, J.P., Renwick, Kern, Oing, JJ.

10982 In re Brook D. Whitman, Index 160535/16
Petitioner-Appellant,

-against-

State of New York Division of
Housing and Community Renewal,
et al.,
Respondents-Respondents.

_____

Brook D. Whitman, appellant pro se.

Mark F. Palomino, New York (Martin B. Schneider of counsel), for State of New York Housing and Community Renewal, respondent.

Judith M. Brener, New York (David L. Hamill of counsel), for Sol Goldman Investments LLC, respondent.

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Judgment, Supreme Court, New York County (Lynn R. Kotler, J.), entered on or about December 13, 2017, denying the petition to vacate a determination of respondent State of New York Division of Housing and Community Renewal (DHCR), dated October 25, 2016, which upheld an upward adjustment of the maximum base rent (MBR) for petitioner's rent-controlled apartment for the 2016-2017 biennial period, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

DHCR's denial of petitioner's challenge to the upward adjustment of his rent was not arbitrary and capricious (*Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]). Petitioner does not dispute that respondent landlord made all certifications

required for MBR eligibility (9 NYCRR 2202.3[b][2], [h]). An audit of the building was not required, as "[t]he extent to which the agency exercises its right to audit is . . . a matter of administrative discretion" (*Matter of Tenants' Union of W. Side v Beame*, 40 NY2d 133, 139 [1976]; *see* Administrative Code of City of NY § 26-405[a][4]). DHCR's interpretation of its own regulation governing biennial MBR adjustments, which requires landlords to certify that they corrected "all rent-impairing violations" and "at least 80 percent of all other violations of the Housing Maintenance Code or Multiple Dwelling Law" on record with the New York City Department of Housing Preservation and Development (9 NYCRR 2202.3[h]), is reasonable and entitled to deference (*Matter of Peckham*, 12 NY3d at 431).

Petitioner's challenge to the methodology used to calculate the MBR using a city-wide standard adjustment factor is presented for the first time on appeal, and is therefore not reviewable (*see Matter of Peckham*, 12 NY3d at 430). In any event,

petitioner proffers no reason to overturn Court of Appeals precedent approving this method (*see Matter of Tenants' Union*, 40 NY2d at 136-137).

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

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

ENTERED: FEBRUARY 11, 2020

CLERK

Friedman, J.P., Renwick, Kern, Oing, JJ.

10983 In re Cynthia Rodriguez, Index 161182/17
Petitioner-Appellant,

-against-

Maria Torres-Springer, Commissioner,
New York City Department of Housing
Preservation and Development, et al.,
Respondents-Respondents.

_____

Caraballo & Mandell, LLC, New York (Dolly Caraballo of counsel), for appellant.

Georgia M. Pestana, Acting Corporation Counsel, New York (Ashley R. Garman of counsel), for Maria Torres-Springer, respondent.

Gallet Dreyer & Berkey, LLP, New York (Michelle P. Quinn of counsel), for Lindsay Park Housing Corp., respondent.

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Determination of New York City Department of Housing Preservation and Development, dated August 16, 2017, which, after a hearing, found that petitioner failed to meet her burden of proving that her deceased grandmother's apartment was her primary residence since the inception of her occupancy in 2005, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Shlomo Hagler, J.], entered August 8, 2018), dismissed, without costs.

Substantial evidence supports the hearing officer's determination that petitioner failed to prove her primary

residency since the inception of her occupancy in the subject apartment in 2005 (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). According to 28 RCNY 3-02(n)(4), "[i]t is required that the apartment of the tenant/cooperator be at initial occupancy and continue to be his or her primary place of residence." As the presumptive shareholder and cooperator, petitioner bore the burden of proving that she maintained the apartment as her primary residency at initial occupancy and continuously thereafter, which she failed to do (*see* 28 RCNY 3-02(n)(4)(iv); *Matter of Giddings v New York City Dept. of Hous. Preserv. & Dev.*, 138 AD3d 508, 509 [1st Dept 2016]).

While petitioner's name appeared on the income affidavits up to 2009, and then again in 2014, her name did not appear on the income affidavits for the years 2010 through and including 2013. Although there are instances "where the evidence of primary residence during the operative period is so overwhelming that the absence of an income affidavit may be overlooked" (*Matter of Borekas v New York City Dept. of Hous. Preserv. & Dev.*, 151 AD3d 539, 540 [1st Dept 2017], *lv denied* 29 NY3d 1106 [2017]), this is not such a case. Petitioner failed to produce utility bills, a driver's license, or a vehicle registration for that period (*see* 28 RCNY 3-02[n][4][i]), nor did she begin filing her tax returns

with the address of the apartment until after her grandmother's death, a fact which the hearing officer found "in itself mandates a finding that the apartment was not her primary residence" (*see Matter of Ayvazayan v City of N.Y. Dept. of Hous. Preserv. & Dev.*, 129 AD3d 494 [1st Dept 2015]).

Petitioner's argument that the mandatory time frame for purposes of residency proceedings is only one year prior to the housing corporation's challenge to the tenant-cooperator's residency, which here, was the date of the May 11, 2016 stipulation, is inconsistent with the statutory language and relevant case law (*see Matter of Trilling v New York City Dept. of Hous. Preserv. & Dev.*, 169 AD3d 492 [1st Dept 2019]; *Giddings*, 138 AD3d at 508-509).

Under these circumstances, "the issuance of a certificate of eviction does not shock the conscience" (*Matter of Charles v New York City Dept. of Hous. Preserv.*, 144 AD3d 444 [1st Dept 2016]).

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

ENTERED: FEBRUARY 11, 2020

CLERK

Friedman, J.P., Renwick, Kern, Oing, JJ.

10984 The People of the State of New York, Ind. 567/17
Respondent,

-against-

Amidu Sall,
Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Mandy E. Jaramillo of counsel), for appellant.

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Robert Mandelbaum, J. at plea; Ellen Biben, J. at sentencing), rendered September 14, 2017,

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 11, 2020

CLERK

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

Friedman, J.P., Renwick, Kern, Oing, JJ.

10986 The People of the State of New York, Ind. 3197/15
Respondent,

-against-

Sabastian Bryant,
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 (Brent Ferguson 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 January 11, 2017,

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 11, 2020

CLERK

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

Friedman, J.P., Renwick, Kern, Oing, JJ.

10987-
10987A Ames Ray, Index 604381/98
Plaintiff-Appellant,

-against-

Christina Ray,
Defendant-Respondent.

_____

McLaughlin & Stern, LLP, New York (Peter C. Alkalay of counsel), for appellant.

Ropers Majeski Kohn Bentley P.C., New York (Matthew A. Beyer of counsel), for respondent.

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Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered November 9, 2018, which granted defendant's motion under CPLR 5016(b) to enter judgment upon the jury verdict dismissing the complaint, and to impose sanctions against plaintiff under 11 NYCRR § 130-1.1, unanimously reversed, on the law and the facts, without costs, the judgment vacated, the second cause of action reinstated, and the matter remanded for a new trial as to that cause of action. Appeal from order, same court and Justice, entered October 12, 2018, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

We find no error occurred requiring a new trial on the first cause of action alleging a $590,000 debt stemming from several

agreements. We reject plaintiff's claim that the trial court improperly shifted the burden to him to demonstrate that the agreements were fair to defendant. The ruling was proper because the evidence established that the parties were involved in a romantic relationship during the time defendant entered into the agreements underlying the first cause of action (*see Robinson v Day*, 103 AD3d 584, 585-586 [1st Dept 2013]).

Likewise, the jury charge properly addressed the relevance of plaintiff's continued deduction of mortgage interest and property taxes on the Sagaponack house after the parties executed an agreement in which plaintiff stated that he relinquished all his "right, title and interest" in the property. This evidence was relevant to whether the transfer was valid or a "sham."

The trial court also properly noted for the jury that plaintiff's "ledger" containing meticulous recorded entries of the parties' expenses was not substantiated by backup documentation. As such, the jury might view the ledger as insufficient evidence of the alleged transactions.

The trial court, however, committed reversible error in dismissing the second cause of action pertaining to investment losses. Unlike the alleged debts accrued under the first cause of action, the second cause of action was based on an agreement, signed by defendant, whereby plaintiff allowed defendant to

continue trading on his commodity account, and defendant agreed to pay plaintiff any amount by which his account "falls" below $350,000. To the extent that the parties entered into this agreement after they physically separated in 1992, a question of fact exists as to whether they remained in a confidential relationship that would shift the burden to plaintiff to prove that the agreement was fair (*see Robinson, supra*).

Moreover, the trial court incorrectly stated that the parties both testified at their depositions that they agreed that defendant would be responsible for "going forward losses," without acknowledging that defendant actually gave conflicting deposition testimony. She first testified that the agreement in question was "not just further losses, but $350,000 worth of losses," and then later changed her testimony, asserting that she only agreed to indemnify prospective losses. As this Court previously noted, an issue of fact existed as to the parties' understanding of the extent defendant agreed to indemnify plaintiff in exchange for trading on his commodity account (*see Ray v Ray*, 61 AD3d 442, 446 [2009]), a central question in

evaluating plaintiff's second cause of action (*see Nineteen Eighty-Nine, LLC v Icahn*, 155 AD3d 566, 567 [1st Dept 2017]; *Sadhwani v New York City Tr. Auth.*, 66 AD3d 405, 406 [1st Dept 2009], *lv denied* 14 NY3d 705 [2010]).

In that same vein, the verdict sheet erroneously assumed that defendant was only prospectively responsible for losses in the commodity account as of the date she signed the agreement, although again, as this Court previously noted, a question of fact existed as to whether the parties came to an agreement in June 1993, upon which defendant continued to trade on the commodity account, and then defendant signed the agreement in September 1993 merely as "recognition on her part that she had so agreed" (*Ray*, 61 AD3d at 446). In presuming an "effective date" of the parties' agreement, the trial court usurped the jury's fact-finding function, and had a substantial influence on the result of the trial (*see Nineteen Eighty-Nine, LLC*, *supra*; *Sadhwani, supra*).

Finally, we find that the court erred in imposing sanctions against plaintiff under 11 NYCRR § 130-1.1 for "frivolous conduct," because plaintiff did not manifest the "extreme behavior" usually required to sustain the award of sanctions (*Hunts Point Term. Produce Coop. Assn., Inc. v New York City Economic Dev. Corp.*, 54 AD3d 296, 296 [1st Dept 2008]). Contrary

to defendant's contention, plaintiff did not knowingly assert false material statements at trial, but rather maintained that he retained legal title to the Sagaponock house and transferred equitable title to plaintiff (*compare Sanders v Copley*, 194 AD2d 85, 86-87 [1st Dept 1993]), an issue that the court allowed to be submitted to the jury for determination, indicating that plaintiff's position was not "completely without merit" (*see Kremen v Benedict P. Morrelli & Assoc., P.C.*, 80 AD3d 521, 523 [1st Dept 2011]). Accordingly, we vacate the award of sanctions.

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 11, 2020

CLERK

Friedman, J.P., Renwick, Kern, Oing, JJ.

10988-
10988A In re Ian G., and Others,

Dkt. NN-48776-78/15
V-6988-9/02/15A
O-4719/17

Simon G.,
Respondent-Appellant,

-against-

Administration for Children's Services,
Petitioner-Respondent.

- - - - -

Victoria G.,
Nonparty Respondent.

- - - - -

Victoria G.,
Petitioner-Respondent,

-against-

Simon G.,
Respondent-Appellant.

_____

Bruce A. Young, New York, for appellant.

James E. Johnson, Corporation Counsel, New York (Julie Steiner of counsel), for Administration for Children's Services, respondent.

Simpson Thacher & Bartlett LLP, New York (Courtney Gabrielle Skarupski of counsel), for Victoria G., respondent.

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

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Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about July 6, 2018, insofar as it brings up for review a fact-finding order of the same court and Judge, entered on or about April 19, 2017, which found, after

a hearing, that the father, respondent Simon G., neglected the subject children, unanimously affirmed, without costs. Appeal from fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

Family Court properly denied the father's request to appear by phone for the final day of hearings. The record reflects the court's efforts to accommodate the father's needs throughout the proceedings, for instance, ensuring that hearings did not take place in the morning, per his request. The father does not explain why he waited until two days before the April 20, 2018 hearing to make the motion, and his delay was unreasonable. His request did not arise from an emergency, but because he claimed to have become homebound due to mobility and related issues, issues he had been experiencing since at least the month before, as shown by the March 14, 2018 supporting letter from his doctor.

The court reasonably found these grounds inadequate. The father had appeared in person on numerous prior court dates and it was unclear when or if his health had worsened. Moreover, his counsel was present on April 20, 2018 and prepared to actively participate on his behalf, and his right to be present was not absolute *(Matter of Neamiah Harry-Ray M. [Donna Marie M.]*, 127 AD3d 409 [1st Dept 2015]; *Matter of Kalantarov v Kalantarova*, 109 AD3d 471 [2d Dept 2013]).

Even were we to consider the father's Americans with Disabilities Act-related arguments, raised for the first time on appeal, we would reject them. He cites evidence of his physical and psychiatric issues to bolster his claim that he was disabled, but this undercuts his position, as those issues did not affect his ability to appear in court any time before April 20, 2018.

Nor does he make the requisite showing to support a finding of an ADA violation here. He did not show his health issues constituted a disability for ADA purposes or that the court actually denied him an opportunity to participate, when his counsel was present and actively participated on his behalf (*Matter of Lacee L. [Stephanie L.]*, 32 NY3d 219, 227 [2018]).

The events of October 8, 2015 constituted excessive corporal punishment, and ACS proved neglect by a preponderance of the evidence (Family Ct Act § 1012[f][i][B]). After presiding over extensive testimony, the court had ample grounds to conclude the father created a "reign of terror" in his household. The mother's testimony about October 8, 2015 alone, testimony that was, moreover, consistent with Ariella's and Adam's statements to ACS, furnished a solid basis for the court's determination. The father's violence towards the family dog terrified the children, and when Ariella reacted to his having thrown the dog to the floor, he viciously hit her repeatedly on her back, shoulder, and

head, producing red welts and causing her to start sobbing (*see e.g. Matter of David R. [Carmen R.]*, 123 AD3d 483, 484-485 [1st Dept 2014]). The father acknowledges having hit her, but his efforts to justify his behavior as reasonable parenting reveal a lack of judgment as to the extremity of his reactions, and an absence of insight as to why the upsetting situation arose in the first place: namely, his sudden violence towards the dog.

The determination of neglect is all the more reasonable against the backdrop of volatile, violently charged behavior the father exhibited towards and around his children. Evidence of his sudden eruptions of rage, such as ripping apart a keyboard on which his son was playing, flipping over a dining room table, slapping Ariella's buttocks and legs after trapping her by stepping on her bathrobe's ties, or singlehandedly wrenching the door off of her bedroom, taken together with the evidence of what occurred on October 8, 2015, underscore the propriety of the determination (*see e.g. Matter of Genesis F. [Xiomaris S.]*, 121 AD3d 526 [1st Dept 2014]).

The father's claim that his mental health issues did not constitute neglect are largely beside the point, since the main focus of the court's neglect determination was the physical and psychological abuse he wrought rather than his own mental health issues. The fact-finding order stated he was only "to some

degree," influenced by his bipolar disorder and anxiety disorder, and found it "unclear" whether the disorders caused his behavior.

The record belies the father's claim that the children's out-of-court statements were not corroborated. The mother's testimony, based on her own first-hand observations and experiences, provided ample corroboration. Moreover, she testified twice, once at fact-finding and again at disposition, and her testimony was both internally consistent and consistent with her children's statements to ACS (Family Ct Act § 1046[a][vi]; *Matter of Ninoshka M. [Liz R.]*, 125 AD3d 567 [1st Dept 2015]; *Matter of David R.*, 123 AD3d at 484).

The father states the court should not have found ACS credible, on grounds that it called only the mother as its witness and relied on case notes that, in his view, were unreliable. However, ACS's caseworker was also a witness for ACS. Moreover, he offers no support for his conclusory statement about the reliability of the case notes. As the caseworker testified, the records were kept in the ordinary course of ACS's business and created at or around the time of the events recorded therein, and, beyond blanket denials unsupported by any other proof, the father offers no evidence to show the records were inaccurate in any respect.

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

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

ENTERED: FEBRUARY 11, 2020

CLERK

Friedman, J.P., Manzanet-Daniels, Kern, Oing, JJ.

10989-
10990 The People of the State of New York,
Respondent,

-against-

Djiba Kourouma,
Defendant-Appellant.

Ind. 3047/15

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Robert S. Dean, Center for Appellate Litigation, New York (Allison Frankel and Abigail Everett of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Diana J. Lewis of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Ralph A. Fabrizio, J.), rendered August 7, 2017, convicting defendant, upon his plea of guilty, of course of sexual conduct against a child in the second degree, and sentencing him to a term of two years, unanimously affirmed. Order, same court and Justice, entered on or about October 27, 2017, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

As to the appeal from the judgment of conviction, we find that defendant made a valid waiver of his right to appeal (*see People v Thomas*, __NY3d__, 2019 NY Slip Op 08545 [2019]; *People v Bryant*, 28 NY3d 1094 [2016]). Regardless of whether defendant

validly waived his right to appeal, we perceive no basis for reducing the sentence, including the 10-year term of postrelease supervision.

As to defendant's civil appeal from his sex offender adjudication, we conclude that the court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant were adequately taken into account by the risk assessment instrument or outweighed by the seriousness of defendant's repeated sex offenses against his young daughter.

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

ENTERED: FEBRUARY 11, 2020

CLERK

Friedman, J.P., Renwick, Kern, Oing, JJ.

10991 Nicholas Natoli, Index 154612/12
Plaintiff-Respondent,

-against-

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

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

Asta & Associates, PC, New York (Michael Asta of counsel), for respondent.

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Order, Supreme Court, New York County (Lisa A. Sokoloff, J.), entered April 29, 2019, which, to the extent appealed from as limited by the briefs, denied defendants' motion pursuant to CPLR 4404 to set aside the verdict, and granted plaintiff's cross motion pursuant to CPLR 4404 to set aside the verdict to the extent of directing a new trial on the issues of past and future pain and suffering unless defendants stipulated to an increase in the jury's awards for those categories of damages, unanimously affirmed, without costs.

In a prior appeal, we determined that a triable issue of fact existed as to the weight of the wooden pallet/skid involved in plaintiff's accident, and whether a safety device was therefore required by Labor Law § 240(1) when plaintiff and a

coworker were attempting to move it (*see* 28 ad3d 148 AD3d 489 [1st Dept 2017]). At trial, plaintiff's expert engineer testified that, based on its size, weight, and configuration, it was unsafe for two laborers, such as plaintiff and his coworker, to manually move the pallet/skid, and that a safety device, such as a hoist, crane, gantry crane, or panel truck, was required. This testimony afforded the jury a valid line of reasoning and permissible inferences to conclude that defendants violated Labor Law § 240(1), and its verdict is therefore supported by legally sufficient evidence (*see Gutierrez v Harco Consultants Corp.*, 157 AD3d 537 [1st Dept 2018]; *Cardenas v One State St., LLC*, 68 AD3d 436 [1st Dept 2009]; *see generally Killon v Parrotta*, 28 NY3d 101, 108 [2016]; *Cohen v Hallmark Cards*, 45 NY2d 493, 498-499 [1978]).

The court properly declined to set aside the jury's verdict on the ground of juror confusion. There is no evidence on the trial record "that the jury was 'substantially confused' by the verdict sheet and the charge and thus was unable to make a proper determination upon adequate consideration of the evidence"

(*Martinez v Te*, 75 AD3d 1, 6 [1st Dept 2010] [citation omitted]; *see Selzer v New York City Tr. Auth.*, 100 AD3d 157, 164-165 [1st Dept 2012]; *Breen-Burns v Scarsdale Woods Homeowners' Assn. Inc.*, 73 AD3d 661, 662 [1st Dept], *lv dismissed* 15 NY3d 837 [2010], *lv denied* 16 NY3d 704 [2011]; *see also Sharrow v Dick Corp.*, 86 NY2d 54, 60-61 [1995]).

Contrary to defendants' contention, the jury was entitled to credit the testimony of plaintiff's treating orthopedic surgeon and neurologist, as well as that of his expert economist, which was legally sufficient to support the awards for future medical expenses and future lost earnings with the requisite degree of reasonable certainty (*see Coleman v City of New York*, 87 AD3d 401, 401 [1st Dept 2011]; *see generally Beh v Jim Willis & Sons Bldrs., Inc.*, 28 AD3d 1227, 1227-1228 [4th Dept 2006], cited in *Peat v Fordham Hill Owners Corp.*, 110 AD3d 643, 645 [1st Dept 2013], *lv denied* 23 NY3d 903 [2014]; *compare Martinez v Metropolitan Transp. Auth.*, 159 AD3d 584, 585 [1st Dept 2018]; *Jeffries v 3520 Broadway Mgt. Co.*, 36 AD3d 421, 423 [1st Dept], *lv denied* 8 NY3d 811 [2007]).

Finally, plaintiff's failure to object to the jury's award of $0 for both past and future pain and suffering as inconsistent with the jury's awards for past and future lost earnings and future medical expenses did not preclude the court from deciding

whether "'the jury's failure to award damages for pain and suffering [wa]s contrary to a fair interpretation of the evidence and constitute[d] a material deviation from what would be reasonable compensation'" (*Ramos v New York City Hous. Auth.*, 280 AD2d 325, 326 [1st Dept 2001] [internal quotation omitted]; *see Stanford v Rideway Corp.*, 161 AD3d 505 [1st Dept 2018] [separately evaluating whether jury's award of $0 for past pain and suffering was against the weight of the evidence and deviated from what would be reasonable compensation even though plaintiff had waived her argument that the jury's verdict was inconsistent]).

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

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

ENTERED: FEBRUARY 11, 2020

CLERK

Friedman, J.P., Renwick, Kern, Oing, JJ.

10992 In re Christopher Sigmon, Index 100579/17
Petitioner-Respondent,

-against-

James P. O'Neill, etc., et al.,
Respondents-Appellants.

_____

James E. Johnson, Corporation Counsel, New York (Jeremy W. Shweder of counsel), for appellants.

Chet Lukaszewski, P.C., Garden City (Chester Lukaszewski of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Arlene P. Bluth, J.), entered March 29, 2018, which granted the petition seeking to annul respondents' determination, dated January 11, 2017, denying petitioner's application for an Accident Disability Retirement (ADR) pension, and awarded petitioner ADR retroactive to January 11, 2017, unanimously affirmed, without costs.

Petitioner met his burden of establishing that he was entitled to ADR benefits by submitting a report from the surgeon who performed his spinal surgery, an emergency room report and a contemporaneous line-of-duty (LOD) report each indicating injury to his shoulder and back, and an MRI showing chronic changes consistent with the symptoms reported to petitioner's surgeon

(*see Matter of Salvia v Bratton*, 159 AD3d 583 [1st Dept 2018], *lv denied* 31 NY3d 913 [2018]). Such medical evidence showed that petitioner suffered from chronic back pain as a result of the LOD injury.

Respondents' determination that petitioner's accident was not causally related to his disability, based primarily on an almost two-year gap in treatment, during which time petitioner returned to full duty, was conclusory in light of the medical evidence (*see Matter of Boder v O'Neill*, 170 AD3d 528, 529 [1st Dept 2019] *lv denied* 33 NY3d 910 [2019]; *Salvia* at 583-584). Respondents failed to refute the opinion of petitioner's surgeon that the condition was causally related to the LOD injury, or offer an alternative trigger, and failed to consider the measures petitioner took during the gap in treatment to control his back pain.

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

ENTERED: FEBRUARY 11, 2020

CLERK

Friedman, J.P., Renwick, Kern, Oing, JJ.

10993 The Bank of New York Mellon Trust Company, etc., Plaintiff-Respondent-Appellant, Index 382422/09

-against-

Patti Van Dyke, Defendant-Appellant-Respondent,

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

_____

Law Office of Thomas M. Curtis, New York (Thomas M. Curtis of counsel), for appellant-respondent.

Blank Rome LLP, New York (Jacquelyn A. DeCicco of counsel), for respondent-appellant.

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Order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered on or about February 19, 2019, which denied plaintiff's motion for summary judgment on its mortgage foreclosure complaint, and denied defendant Van Dyke's cross motion for summary judgment dismissing the complaint, except denied the part seeking discovery with leave to renew in the appropriate part of Supreme Court, unanimously affirmed, without costs.

The motion court correctly denied both plaintiff's and Van Dyke's motions for summary judgment in this foreclosure action on the ground that issues of fact exist as to whether plaintiff had

possession of the note when the action was commenced (*see US Bank N.A. v Richards*, 155 AD3d 522, 523 [1st Dept 2017]). The affidavits on which plaintiff relies to establish that the note was in its possession at the time of commencement are inconsistent and conclusory. In support of her cross motion, Van Dyke failed to establish that plaintiff was not in possession of the note at the time of commencement.

The court providently exercised its discretion in denying Van Dyke's cross motion to dismiss the complaint pursuant to CPLR 3126, as there is no evidence that plaintiff has willfully withheld discovery from defendant (*see HSBC Bank USA, N.A. v Oscar*, 161 AD3d 1055, 1057 [2d Dept 2018]).

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

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

ENTERED: FEBRUARY 11, 2020

CLERK

Friedman, J.P., Renwick, Kern, Oing, JJ.

10994 Andrea K. Tantaros, etc., et al., Index 650476/18
Plaintiffs-Respondents,

-against-

Michael Krechmer also known as "Michael Malice," etc.,
Defendant-Appellant.

_____

Randazza Legal Group, PLLC, Long Island City (Jay M. Wolman of counsel), for appellant.

Jonathan Askin, Brooklyn, for respondents.

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Order, Supreme Court, New York County (Alan C. Marin, J.), entered January 16, 2019, which, to the extent appealed from as limited by the briefs, granted plaintiffs' motion to dismiss the first, third, fourth and fifth counterclaims, unanimously affirmed, without costs.

In the parties' collaboration agreement, plaintiffs retained defendant to provide editing and writing services for plaintiffs' book. Plaintiffs agreed to compensate defendant upon the completion of certain stages of those services, and an additional payment if the book was listed on the New York Times bestseller list. Since the agreement contained a "no oral modification" clause, defendant is precluded from claiming that plaintiffs orally agreed to pay him for additional writing services not

included in the contract (*see* General Obligations Law § 15-301[1]; *Israel v Chabra*, 12 NY3d 158, 167 [2009]). Defendant's claim that the oral agreement effectively terminated, not modified, the contract is similarly unavailing.

Defendant's counterclaim for breach of the implied covenant of good faith and fair dealing was properly dismissed as redundant of the counterclaim for breach of contract (*see Shilkoff, Inc. v 885 Third Ave. Corp.*, 299 AD2d 253 [1st Dept 2002]).

Defendant's copyright claim is barred by the doctrine of res judicata, as it was dismissed on the merits in a prior federal action (*Matter of Hunter*, 4 NY3d 260, 269 [2005]).

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 11, 2020

CLERK

Friedman, J.P., Renwick, Kern, Oing, JJ.

10997N Medical Building Associates, Inc., Index 105724/11
Plaintiff-Appellant,

-against-

Abner Properties Company,
Defendant-Respondent.

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Law Offices of James C. Mantia, P.C., New York (James C. Mantia of counsel), for appellant.

Belkin Burden Wenig & Goldman, LLP, New York (Jeffrey Levine of counsel), for respondent.

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Order, Supreme Court, New York County (Gerald Lebovits, J.), entered April 16, 2019, which, to the extent appealed from as limited by the briefs, granted defendant owner's motion to vacate a *Yellowstone* injunction previously issued to plaintiff tenant, awarded defendant in the amount of $212,806.78 in unpaid use and occupancy, plus attorney's fees to be calculated later, and denied plaintiff's cross motion for an order requiring defendant to consent to the filing of plaintiff's alteration plans and building applications with the Department of Buildings, pursuant to a 2013 so-ordered stipulation between the parties, unanimously reversed, on the law and the facts, with costs, to reinstate the *Yellowstone* injunction, vacate the monetary award in favor of defendant and deny the application for attorney's fees, and direct defendant to file tenant's "as built plans" with

Department of Buildings.

The court's 2016 order finding that triable issues of fact precluded all the relief requested, including the vacatur of the *Yellowstone* injunction and the entry of a money judgment for unpaid use and occupancy and additional rent, necessarily encompassed a finding that the record evidence, including the evidence concerning tenant's alleged failure to pay outstanding use and occupancy and additional rent, did not support the vacatur of the injunction and entry of a money judgment, which, in all material respects, is identical to the relief sought in owner's instant motion. As there were no extraordinary circumstances permitting the court to ignore the prior order and no new evidence was proffered that differs from the type of evidence presented on the prior motion, there was no basis for the court to depart from the prior ruling that issues of fact exist concerning tenant's alleged failure to pay use and occupancy so as to warrant the denial of the motion to vacate the *Yellowstone* injunction based on tenant's alleged failure to pay the full use and occupancy owed, as well as the request for entry of a money judgment for use and occupancy and additional rent (*see Brownrigg v New York City Hous. Auth.*, 29 AD3d 721, 722 [2d Dept 2006]). Based on that ruling, the grant of attorneys' fees to owner should also be vacated and denied.

Under the circumstances, including the unending dispute between the parties with respect to whether tenant's plans are in compliance with the terms of the "punch list" and the pertinent building codes and law, and tenant's waiver of the right to self-certification, which leaves the Department of Buildings as the ultimate arbiter of whether the "as built" plans and the prior build-out conform with the building code, tenant's cross motion for an order directing owner to comply with the parties 2013 so-ordered stipulation is granted to the extent of directing owner to file tenant's current building plans with DOB.

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

ENTERED: FEBRUARY 11, 2020

CLERK

Friedman, J.P., Renwick, Kern, Oing, JJ.

10998N In re Diet Drug Litigation Index 105122/09

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Clara Appel-Hole, et al.,
Plaintiffs-Appellants,

-against-

Wyeth-Ayerst Laboratories, et al.,
Defendants,

Paul J. Napoli, et al.,
Defendants-Respondents.

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Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph, III of counsel), for appellants.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Eric Alan Stone of counsel), for Paul J. Napoli, Napoli Kaiser & Associates LLP, Napoli Kaiser Bern LLP, Napoli Kaiser Bern & Associates LLP, and Napoli Kaiser & Bern, P.C., respondents.

Ropers Majeski Kohn & Bentley, P.C., New York (Christopher B. Hitchcock of counsel), for Marc J. Bern and Law Office of Marc J. Bern, respondents.

Godosky & Gentile, P.C., New York (Anthony Gentile of counsel), for Gerald Kaiser, respondent.

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Order, Supreme Court, New York County (Andrew Borrok, J.), entered June 25, 2019, which granted defendants-respondents' (defendants) motion to disqualify attorneys from Parker Waichman LLP (the Parker firm) from representing plaintiffs at their depositions in this action, unanimously affirmed, without costs.

The court correctly determined that provisions of the Rules of Professional Conduct (22 NYCRR 1200.0) applied to the facts at

issue and prohibit current associates at the Parker firm from representing plaintiffs in this case. Specifically, rule 3.7(a) provides that "[a] lawyer shall not act as an advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact," which is the case here. This rule extends to associate attorneys that practice within the same firm as the potential witness pursuant to rule 3.7(b)(1).

It was uncontested before the motion court that the witnesses from the Parker firm would be material witnesses. At oral argument, defendants' counsel represented that it was "undisputed" that Mr. Parker would be a material witness, and plaintiffs' counsel did not respond or object. Regardless, it is undeniable that the Parker firm witnesses will provide material and necessary testimony at trial. In fact, this Court has previously recognized the potential materiality of the Parker firm witnesses' testimony in holding that their knowledge of the circumstances surrounding the underlying settlement agreements would be imputed to plaintiffs, and could result in plaintiffs' claims being dismissed (*see Matter of Diet Drug Litig.*, 155 AD3d 450, 451 [1st Dept 2017]).

Nor will plaintiffs be prejudiced by the disqualification order. Plaintiffs' counsel has represented plaintiffs for the more than 10 years that this action has been pending.

Furthermore, plaintiffs' argument that the disqualification motion should be barred because it is untimely is unavailing. The Parker firm has not appeared in this lawsuit, and defendants brought the issue to the court's attention immediately after it was put on notice of the conflict.

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

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

ENTERED: FEBRUARY 11, 2020

CLERK