SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 13, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Acosta, Andrias, DeGrasse, Freedman, JJ.

10838-
10838A Index 100229/12

Paul Ferraro,
Plaintiff-Appellant,

-against-

New York City Department
of Education, et al.,
Defendants-Respondents.

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Wolin & Wolin, Jericho (Alan E. Wolin of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for respondents.

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Orders, Supreme Court, New York County (Geoffrey D. Wright, J.), entered September 5, 2012, which granted defendants' motion to dismiss the complaint and sub silentio denied plaintiff's cross motion for leave to amend the complaint, unanimously reversed, on the law, without costs, the motion denied and the cross motion granted.

Upon defendants' pre-answer, pre-discovery motion to dismiss the complaint pursuant to CPLR 3211(a)(5) and (7), it cannot be said, as a matter of law, that the facts alleged by plaintiff, if

proven, would not constitute discrimination, retaliation and a hostile work environment in violation of the New York State and New York City Human Rights Laws. To the extent plaintiff alleges acts that occurred more than one year before he commenced this action (*see* Education Law § 3813[2-b]), it cannot be said, as a matter of law, that these acts, if proven, were not part of a single continuing pattern of unlawful conduct extending into the one-year period immediately preceding the filing of the complaint (*see Ain v Glazer*, 257 AD2d 422, 423 [1st Dept 1999]). Under the circumstances, plaintiff's cross motion for leave to amend his complaint should have been granted.

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

ENTERED: MARCH 13, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Freedman, Gische, JJ.

11410 The People of the State of New York, Ind. 2427/08
Respondent,

-against-

Hubert Diaz,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Alan S. Axelrod of counsel), and Patterson Belknap Webb & Tyler LLP, New York (John P. Figura of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Melanie A. Sarver of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Judith Lieb, J.), rendered December 16, 2010, convicting defendant, after a jury trial, of attempted assault in the first degree, and sentencing him, as a second felony offender, to a term of 12 years, unanimously reversed, on the facts, the conviction vacated, and the indictment dismissed.

At trial, the complainant testified that during the early morning hours of January 13, 2008, he and two friends went to a night club called Maribella. The complainant went to the bar to chat with a friend, and when he was returning to his table, he came into physical contact with another person. The complainant testified that the club was crowded, and that he did not even

realize that he made contact with the person; indeed, he bumped into a few people on his way back to the table where his companions were sitting. The person began accusing the complainant of hitting him in the face. The complainant attempted to shake the person's hand to defuse the situation. However, the person reached behind his back, revealing a machete that he swung twice at the complainant's head, striking it on the top and in the back. The complainant was immediately bathed in blood, and began to think that he was going to die. A chaotic scene ensued, in which the complainant struggled with his assailant, and the two knocked down multiple tables as they wrestled with each other. Another person then hit the complainant on the head with a bottle, and as he fell to the ground, he hit his head on a table. At some point he, or members of the nightclub's security staff, managed to take the machete away from the attacker, who left the club.

More than 40 minutes after the assailant left the club, police arrived and asked the complainant for a description of the perpetrator. He described the person as a short, Hispanic man, with black hair and a cut on his face. A few days after the incident, the complainant went to the local precinct, where he was given a binder of photographs to look through. He pointed to

one of the pictures and told the officer supervising him that the man depicted "looked like the person that assaulted [him]." On June 16, 2008, the complainant went to another nightclub. While he was there, he saw defendant, who he believed was the same person that assaulted him at Maribella. He called the police, who arrived and arrested defendant as he was leaving the club.

Defendant asserts that, to the extent the jury believed he was the person who assaulted complainant at Maribella, his conviction was against the weight of the evidence. "(W)eight of the evidence review requires a court first to determine whether an acquittal would not have been unreasonable. If so, the court must weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate the strength of such conclusions. Based on the weight of the credible evidence, the court then decides whether the jury was justified in finding the defendant guilty beyond a reasonable doubt" (*People v Danielson*, 9 NY3d 342, 348 [2007]). Issues of credibility are for the jury to resolve (*People v Bleakley*, 69 NY2d 490 [1987]).

Here, there were troubling discrepancies in the evidence presented to the jury. Most significantly, the complainant testified that the club was sufficiently well-lit for him to see his assailant's face while the encounter was ongoing. However,

the detective who investigated the incident and interviewed the complainant testified, after having had his recollection refreshed with the DD-5 report he prepared in connection with the investigation, that the complainant told him he "did not have a clear recollection of the suspect because it was somewhat dark" in the Maribella. While the complainant denies he told the detective that, the People do not offer, nor can we perceive of, any reason why the detective would have been untruthful not only on the witness stand, but also in a contemporaneous internal report documenting the investigation.

Further clouding the accuracy of the complainant's identification of defendant was the photograph he picked out of an array. We acknowledge that the complainant did not represent that the person in the photo he chose was his assailant, but rather that he looked like him. Nevertheless, there is a significant difference in the appearances, especially the complexions, of the people depicted in the two photographs, which calls into question the confidence the complainant had in recalling what his attacker looked like.

Although they are not as significant, the complainant demonstrated other lapses in memory which, when considered in light of those two more substantial inconsistencies, lead us, in

our role as a "thirteenth juror" performing a de novo review of the evidence (*People v Rayam*, 94 NY2d 557, 560 [2000]), to harbor significant doubts as to the complainant's ability to accurately identify his attacker. For example, he could not remember the name of the movie he saw immediately prior to going to the Maribella, nor could he recall the name of one of the two people who accompanied him to the nightclub. His recounting of the manner in which the brawl played out contained inherent inconsistencies, concerning who took the machete away from the attacker and whether that was before or after complainant was struck with a bottle in the head. In addition, the complainant testified that the investigating detective who interviewed him about the attack was the same person who supervised his viewing of the photo array. In fact, the detective was not on duty when the complainant viewed the array.

Because of these significant questions concerning the

accuracy of the complainant's in-court identification, we find that the weight of the evidence did not support the jury's verdict that defendant was guilty of attempted assault, beyond a reasonable doubt.

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

ENTERED: MARCH 13, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Freedman, Gische, JJ.

11425 Jared Scharf, Index 650644/12
Plaintiff-Appellant,

-against-

Idaho Farmers Market Inc.,
Defendant-Respondent,

Andrew Poma,
Intervenor Defendant-Respondent.

_____

Pearce Law Firm, New York (Jessica M. Pearce of counsel), for appellant.

Woods & Lonergan LLP, New York (James F. Woods of counsel), for Idaho Farmers Market Inc., respondent.

Rodriquez Law, P.C., New York (Argilio Rodriguez of counsel), for Andrew Poma, respondent.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered April 1, 2013, which, inter alia, denied plaintiff's motion for summary judgment in lieu of complaint, and granted proposed intervenor Andrew Poma's motion to intervene in the instant action, unanimously reversed, on the law, without costs, the motion for summary judgment granted and the motion to intervene denied.

The promissory note at issue was executed in favor of nonparty Adem Arici by Andrew Poma on behalf of defendant Idaho Farmers Market. Poma represented himself as being Idaho's

"President and 66% shareholder." Plaintiff, an assignee of the promissory note, demonstrated his prima facie entitlement to accelerated judgment on the note by submitting a copy of the note evidencing its assignment from Arici to plaintiff and proof of Idaho's default in payment (*see Bronsnick v Brisman*, 30 AD3d 224 [1st Dept 2006]; *Shearson Lehman Hutton, Inc. v Meyerson & Kuhn*, 197 AD2d 410 [1st Dept 1993]). Although plaintiff was not a holder in due course and took the note subject to Idaho's proffered defenses, Idaho failed to raise any triable issue of fact in opposition to plaintiff's motion for summary judgment (*see Carlin v Jemal*, 68 AD3d 655 [1st Dept 2009]; Uniform Commercial Code § 3-302[1]). Idaho's asserted defense, that Poma lacked corporate authority to execute the note, is unpersuasive because Poma signed the note as Idaho's "president and 66% shareholder."

Even assuming Poma's executive and ownership status was insufficient to confer actual authority, it still constituted apparent authority by a corporate president, which is sufficient to bind the corporation on its obligation with a third party (*Goldston v Bandwith Technology Corp.*, 52 AD3d 360 [1st Dept 2008] *lv denied* 11 NY3d 904 [2009]). It ill behooves Poma, who signed the note, to now claim on behalf of himself and Idaho that

he lacked authority as a means of avoiding payment on the note. The claim that Arici actually knew that Poma lacked authority when the note was signed is raised for the first time on appeal and will not be considered by this court to create a factual dispute on the reasonableness of Arici believing Poma had authority (*see Matter of Bank of N.Y. [UBS Warburg]*, 4 AD3d 112 [1st Dept 2004]).

The asserted defense of fraudulent inducement is based upon representations made by Arici to Poma in connection with a separately executed stock purchase agreement. Nothing on the face of either the note or the stock purchase agreement creates an issue of fact about whether the parties intended to treat these documents as mutually dependent contracts (*see Rudman v Cowles Communications*, 30 NY2d 1, 13 [1972]). While there are some minor references in the note to the stock purchase agreement, there is no affirmative language making their respective payment obligations interdependent. The parties to the note are not even the same as the parties to the stock purchase agreement. Plaintiff's right to payment can be ascertained from the face of the note itself, without resorting to extrinsic documents (*see Boland v Indah Kiat Fin. (IV) Mauritius*, 291 AD2d 342, 343 [1st Dept 2002]). Consequently, any

alleged misrepresentations made to induce Poma to sign the stock purchase agreement are not a defense assertable by Idaho to avoid payment of the note. Even if the note and stock purchase agreement were interdependent contracts, the alleged misrepresentations made in connection with the stock purchase agreement were waived and the agreement was ratified, when Poma, after learning about the fraud, continued to make payments and otherwise took no action to repudiate the stock purchase agreement (*see Lindenwood Dev. Corp. v Levine*, 178 AD2d 633, 634 [2d Dept 1991]).

The stock purchase agreement has never been rescinded, but remains a valid agreement, with Poma still in possession of the shares of Idaho's stock (*see Matter of Fresh Meadows Jewish Ctr.* (*Gordon*), 75 AD2d 814 [2nd Dept 1980]). Thus, permission for Poma to intervene should have been denied because "a shareholder, even a principal shareholder, who is incidentally injured by an injury to the corporation does not have standing to sue on the basis of either that direct or indirect injury" (*Breiterman v Elmar Props.*, 123 AD2d 735, 736 [2d Dept 1986], *lv dismissed* 69 NY2d 823 [1987]). Poma has no individual defenses to this action other than what can be asserted by Idaho itself and, for the reasons noted, Idaho's defenses lack merit (*see Amalgamated Bank*

v Helmsley-Spear, Inc., 109 AD3d 418, 420 [1st Dept 2013]). Poma may have personal rights and remedies under the stock purchase agreement, but those claims are not part of this action.

We have considered the remaining arguments and find them unavailing.

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

ENTERED: MARCH 13, 2014

CLERK

Sweeny, J.P., Renwick, Moskowitz, Richter, Gische, JJ.

11742 In re Manuel Mateo, etc., Index 102111/10
Petitioner,

-against-

Raymond W. Kelly, etc., et al.,
Respondents.

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Joseph Giaramita, Brooklyn, for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Drake A. Colley of counsel), for respondents.

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Determination of respondent Police Commissioner, dated October 27, 2009, terminating petitioner from his position as a New York City police officer, 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 [Lucy Billings, J.], entered August 12, 2010), dismissed, without costs.

Substantial evidence supports the determination that petitioner failed to take lawful police action against an individual who was driving without a license, in exchange for that individual agreeing to provide a benefit to petitioner (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). Crediting the testimony of

respondent's witnesses, including the driver who did not receive a summons, and considering the documentary evidence of subsequent phone calls between petitioner and the two individuals who were in the car, the record supports the finding that the failure to take lawful action was in exchange for said individuals installing sheetrock at petitioner's home (*see Matter of Collins v Codd*, 38 NY2d 269, 270 [1976]). Contrary to petitioner's contention, the subject charges were "reasonably specific, in light of all the relevant circumstances, to apprise [him] of the charges against him ... and to allow for the preparation of an adequate defense" (*Matter of Block v Ambach*, 73 NY2d 323, 333 [1989]).

In September 2011, almost two years after respondent had made its decision terminating petitioner's employment, and the instant petition challenging respondent's determination was already filed with the court, one of the two main witnesses relied upon by the hearing officer in reaching his conclusion recanted his testimony. After investigation, in 2013, respondent rejected petitioner's request for a new hearing based upon the recantation. Respondent's 2013 decision to deny petitioner's request for a new hearing based on this new evidence cannot be reviewed by the court in this proceeding. It requires, instead,

a separately brought petition (*see Matter of Douglaston Civic Assn. v Galvin*, 36 NY2d 1 [1974]). The subsequent recantation raised issues that were addressed by respondent, following consideration of the submissions by petitioner and review of all the evidence. Under the circumstances, including the sufficiency of the other evidence, the witness's recantation did not warrant a further hearing (*compare Matter of Browne v County of Dutchess*, 16 AD3d 495 [2d Dept 2005]).

The penalty of termination does not shock our sense of fairness (*see Matter of Kelly v Safir*, 96 NY2d 32-39 [2001]).

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

ENTERED: MARCH 13, 2014

CLERK

Sweeny, J.P., Renwick, Moskowitz, Richter, Gische, JJ.

11743-
11744 Index 650297/11

12 Broadway Realty, LLC,
Plaintiff,

-against-

Lakhani Enterprises USA, Corp.,
Defendant-Respondent,

William Simpson,
Defendant/Third-Party
Plaintiff-Appellant,

-against-

Imran Lakhani,
Third-Party Defendant-Respondent.

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McDonough Law, L.L.P., New Rochelle (Eli S. Cohn of counsel), for appellant.

Becker Ross, LLP, New York (Howard Justvig of counsel), for respondents.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about June 19, 2013, which denied defendant/third party plaintiff William Simpson's motion for summary judgment on his claim under a guaranty against third party defendant Imran Lakhani and granted Lakhani's cross motion to amend his answer and counterclaims, unanimously reversed, on the law, without costs, the motion granted and the cross motion denied. Appeal from order, same court and Justice, entered on or

about October 1, 2013, which granted Simpson's motion for reargument and adhered to its prior decision, unanimously dismissed, without costs, as academic. The Clerk is directed to enter judgment in Simpson's favor in the amount of $175,000.

In this commercial lease dispute, the underlying lease agreement, dated September 9, 2004, is not ambiguous. The tenant could operate only a Quiznos franchise on the premises and not, as argued, any similar sandwich-type shop. The lease provides:

> "Tenant shall use and occupy the demised [premises] for a [Quiznos] sandwich shop for purposes of an eat-in/take-out/delivery restaurant selling sandwiches, salads, soups, pizza, frozen desserts (yogurt, ice cream), fruit juice-based blended drinks, non-alcoholic beverages, and other food items sold in [Quiznos] sub stores (no cooking permitted, except solely that Tenant may utilize an electric convection oven) only ... and for no other purpose whatsoever."

To further indicate the signatories' intent that defendant Lakhani Enterprises USA, Corp. would operate the premises only as a Quiznos franchise, paragraph 65 of the lease rider provided for the display of certain Quiznos signage on the premises. Moreover, in 2008, Lakhani Enterprises assumed the lease from the original tenant, nonparty WRS Services Inc. (WRS), a corporation that defendant/third-party plaintiff Simpson solely owned, and bought WRS' assets under an asset purchase agreement. Under the asset purchase agreement, Lakhani Enterprises agreed to "use its

best efforts to become a bona-fide franchisee of [Quiznos]." The agreement was also "contingent on [Lakhani Enterprises] obtaining Quiznos' final approval." Lakhani Enterprises subsequently lost its Quiznos franchise.

The plain language of the lease supports Simpson's position that Lakhani Enterprises breached the lease by failing to maintain the premises as a Quiznos franchise (*see Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475-476 [2004]). Accordingly, Simpson is entitled to an award of summary judgment in his favor on a guaranty between him and third-party defendant Lakhani that is conditioned on a breach of the underlying lease.

In addition, the motion court should have denied third party defendant Lakhani's proposed amended answer and counterclaims, because they are palpably insufficient (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]). The proposed claims, alleging, among other things, fraud and

negligent misrepresentation, are either lacking in particularity or are contradicted by the merger clause, express terms and disclaimers contained in the underlying agreement (*see HSH Nordbank AG v UBS AG*, 95 AD3d 185, 201 [1st Dept 2012]).

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

ENTERED: MARCH 13, 2014

CLERK

Acosta, J.P., Renwick, Feinman, Clark, JJ.

11953 The People of the State of New York, Ind. 2661/08
Respondent,

-against-

Luis Cajigas,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Laura Lieberman Cohen of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Deborah L. Morse of counsel), and Pillsbury Winthrop Shaw Pittman LLP, New York (Timothy M. Russo of counsel), for respondent.

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Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered January 15, 2009, as amended January 23, 2009, convicting defendant, after a jury trial, of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. Notwithstanding any

weaknesses in the victim's testimony, that testimony was corroborated by the testimony of police officers who saw defendant discard money while being chased by the victim.

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

ENTERED: MARCH 13, 2014

CLERK

Acosta, J.P., Renwick, Feinman, Clark, JJ.

11954 Ana M. Vargas, et al., Index 300370/11
Plaintiffs-Appellants,

-against-

Akin Sabri,
Defendant-Respondent.

_____

Brand Brand Nomberg & Rosenbaum, LLP, New York (Brett J. Nomberg of counsel), for appellants.

Bleakley Platt & Schmidt, LLP, White Plains (John A. Risi of counsel), for respondent.

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Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered October 1, 2013, which denied plaintiffs' motion for a *Frye* hearing, unanimously affirmed, without costs.

The court did not improvidently exercise its discretion in denying plaintiffs' request for a *Frye* hearing (*Frye v United States*, 293 F 1013 [DC Cir 1923]) to determine the admissibility of the anticipated testimony of Dr. McRae, a biomechanical engineer. The fact that Dr. McRae lacked medical training did not render him unqualified to render an opinion as an expert that the force of the subject motor vehicle accident could not have caused the injuries allegedly sustained (*see e.g. Melo v Morm Mgt. Co.*, 93 AD3d 499, 499-500 [1st Dept 2012]). McRae's stated education, background, experience, and areas of specialty,

rendered him able him to testify as to the mechanics of injury (*see Colarossi v C.R. Bard, Inc.*, 113 AD3d 407 [1st Dept 2014]).

Plaintiffs' challenge to Dr. McRae's qualifications and the fact that his opinion conflicted with that of defendant's orthopedic expert go to the weight and not the admissibility of his testimony (*see Williams v Halpern*, 25 AD3d 467, 468 [1st Dept 2006]). Plaintiffs' challenge to the basis for Dr. McRae's opinion addressed only portions of the evidence relied upon by him. Furthermore, the record shows that plaintiffs improperly attempted to put defendant to his proof by asserting, in the moving papers, that "defendant has not shown that the hearsay 'studies' Mr. McRae relies upon are reliable," without identifying any of the studies referred to or explaining the basis for the belief that the studies were not reliable.

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

ENTERED: MARCH 13, 2014

CLERK

Acosta, J.P., Renwick, Feinman, Clark, JJ.

11955 Raisa Rozina, et al., Index 100617/09
Plaintiffs-Appellants,

-against-

Casa 74th Development LLC, et al.,
Defendants-Respondents.

_____

Tsyngauz & Associates, P.C., New York (Michael Treybich of counsel), for appellants.

Starr Associates LLP, New York (Shaun W. Pappas of counsel), for respondents.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered on or about November 28, 2012, which granted defendants' motion for summary judgment dismissing the ninth cause of action and on the counterclaims of defendant Casa 74th Development LLC (Casa), unanimously affirmed, without costs.

Sufficient cause existed for defendants' second summary judgment motion (*see Varsity Tr. v Board of Educ. of City of N.Y.*, 300 AD2d 38, 39 [1st Dept 2002]).

The ninth cause of action, which seeks rescission of the contract whereby plaintiffs were supposed to purchase a condominium unit from Casa on the ground that the layout of the windows differed from that in the floor plan, is barred by the parties' agreement, which states, "Except as otherwise set forth

in the [Offering] Plan, Purchaser [i.e., plaintiffs] agrees ... to purchase the Unit, without offset or any claim against, or liability of, Sponsor [i.e., Casa], *whether or not any layout ... of the Unit or any part thereof ..., as shown on the Floor Plans is accurate or correct* ..." (emphasis added). *Plaza PH2001 LLC v Plaza Residential Owner LP* (98 AD2d 89 [1st Dept 2012]) does not require a contrary result, as the plaintiff's claims in *Plaza* were not limited to differences between the floor plan and the completed unit (*see id.* at 101).

We decline to consider plaintiffs' argument, raised for the first time in their reply brief, that the parties' agreement does not trump certain rules promulgated by the New York State Attorney General (*see e.g. Shia v McFarlane,* 46 AD3d 320, 321 [1st Dept 2007]).

In light of the plain language of the parties' contract, plaintiffs did not need discovery to oppose defendants' motion. In any event, the record shows that plaintiff Rozina visited the unit with her contractor/interior designer before plaintiffs commenced the instant action.

Plaintiffs' argument that Casa had to have produced a deed and transfer tax returns before the closing is unavailing. The parties' contract makes it clear that Casa was required to

produce the deed only at closing and that the parties were going to complete the transfer tax returns at the closing. Thus, Casa was properly granted summary judgment on its first counterclaim.

In their opening brief, plaintiffs raised no arguments about Casa's entitlement to attorneys' fees. Thus, they abandoned their appeal from the grant of summary judgment to Casa on its second counterclaim (*see e.g. Mehmet v Add2Net, Inc.*, 66 AD3d 437, 438 [1st Dept 2009]). In any event, Casa is entitled to attorneys' fees pursuant to the clear language of the parties' agreement.

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

ENTERED: MARCH 13, 2014

CLERK

Acosta, J.P., Renwick, Feinman, Clark, JJ.

11956 Kim Swift, Index 300595/08
Plaintiff-Appellant,

-against-

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

_____

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Jillian Rosen of counsel), for appellant.

Zaklukiewicz, Puzo & Morrissey, LLP, Islip Terrace (Candace M. Bartone of counsel), for New York Transit Authority, American Transit, Inc. and Ralph Brown, respondents.

Cuomo LLC, New York (Sherri A. Jayson of counsel), for Norcia Paulino, respondent.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered October 1, 2012, which granted defendants' motions for summary judgment dismissing the complaint on the threshold issue of serious injury under Insurance Law § 5102(d), unanimously modified, on the law, to deny so much of the motions as sought to dismiss the claims of permanent consequential and significant limitations in use of the knees and a 90/180-day injury, and otherwise affirmed, without costs.

Defendants established prima facie the absence of serious injury to plaintiff's cervical spine by submitting their neurologist's report finding the full range of motion and an

absence of neurological deficits therein (*Malupa v Oppong*, 106 AD3d 538 1st Dept 2013]). The neurologist's explanation that the limitations in plaintiff's lumbar spine were subjective and secondary to her body habitus, the absence of spasms, and the negative straight leg raising bilaterally, establish prima facie the absence of permanent consequential or significant limitation in that part of the spine (*see Eichinger v Jone Cab Corp.*, 55 AD3d 364 [1st Dept 2008]). Defendants established prima facie that plaintiff's claimed injuries to her knees, as well as her cervical and lumbar spine, were not causally related to the accident by submitting their radiologist's MRI reports finding long-standing degenerative changes consistent with plaintiff's age and body habitus (*see Santos v Perez*, 107 AD3d 572 [1st Dept 2013]).

Plaintiff failed to raise a triable issue of fact as to significant or permanent consequential limitations in her cervical or lumbar spine since her chiropractor's report is not notarized and is therefore inadmissible (*see Barry v Arias*, 94 AD3d 499, 500 [1st Dept 2012]). However, she raised a triable issue of fact as to her claimed knee injuries by submitting medical reports, in admissible form, by her orthopedic surgeon, Dr. Randall Ehrlich, who confirmed during arthroscopic surgery

the existence of tears in both knees, and measured continuing significant limitations in range of motion and positive clinical test results in the knees. Both Dr. Ehrlich and the surgeon who performed a knee replacement operation on the right knee concluded that the persisting limitations and knee symptoms were permanent in nature and that plaintiff would require further knee surgery in the future (*see Collazo v Anderson*, 103 AD3d 527, 528 [1st Dept 2013]).

Plaintiff raised an issue of fact as to causation through her radiologist's findings and her orthopedist's opinion. The radiologist acknowledged degeneration but also found acute and superimposed tears and microfractures shown in the MRI films. Dr. Ehrlich's conclusion that plaintiff's underlying arthritic conditions were "quiescent" before the accident, and the surgeons' notations that the accident resulted in a "marked decrease in her ability to ambulate," "marked limitations in her gait," and an inability to return to work, sufficiently explain "how the subject accident reduced the functioning of the knee below the level of function that existed immediately prior to the accident" (*Suarez v Abe*, 4 AD3d 288, 289 [1st Dept 2004]; *see also Lugo v Adom Rental Transp., Inc.*, 102 AD3d 444, 446 [1st Dept 2013]). Dr. Ehrlich's report noting that he began treating

plaintiff a month after the accident provides sufficient contemporaneous proof of injuries (*see Perl v Meher*, 18 NY3d 208, 217-218 [2011]; *Salman v Rosario*, 87 AD3d 482, 484 [1st Dept 2011]). Plaintiff's testimony that she was looking for a doctor who would accept her Medicaid plan adequately explained the gap in treatment between her initial visit to the surgeon and the knee replacement surgery in November 2010 (*see Pommells v Perez*, 4 NY3d 566, 574 [2005]). Plaintiff's medical evidence undermines defendants' other contentions as to gaps in treatment.

Dr. Ehrlich's report showing that plaintiff underwent arthroscopic knee surgery 2½ and 3½ months after the accident and the letter from plaintiff's employer terminating her employment due to her inability to return to work for more than a year sufficiently raise a triable issue of fact as to the existence of a 90/180-day injury (*see Van Norden-Lipe v Hamilton*, 294 AD2d 749 [3d Dept 2002]).

As the record does not reflect a total loss of use of her knees or her cervical or lumbar spine, plaintiff's claim under the permanent loss of use category should be dismissed (*see Oberly v Bangs Ambulance*, 96 NY2d 295, 299 [2001]). We note, however, that if plaintiff prevails at trial on her other claims,

she will be entitled to recover for all injuries caused by the accident (*see Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549-550 [1st Dept 2010]).

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

ENTERED: MARCH 13, 2014

CLERK

Acosta, J.P., Renwick, Feinman, Clark, JJ.

11957 In re 21 Group, Inc., doing business as Gypsy Rose,
Petitioner-Respondent,

-against-

New York State Liquor Authority,
Respondent-Appellant.

- - - - -

Office of New York State Assembly Member, Aravella Simotas,
Amicus Curiae.

Index 103932/12

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Jacqueline Flug, Albany (Mark D. Frering of counsel), for appellant.

Albert J. Pirro, Jr., White Plains, for respondent.

Aravella Simotas, New York, for amicus curiae.

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Order and judgment (one paper), Supreme Court, New York County (Manuel J. Mendez, J.), entered April 24, 2013, annulling respondent's determination, dated June 4, 2012, which denied petitioner's application for an on-premises liquor license, and remanding the matter to respondent for further proceedings consistent with the order, unanimously reversed, on the law, without costs, the judgment vacated, the petition to annul the determination denied, and the proceeding brought pursuant to CPLR article 78 dismissed.

Respondent denied petitioner's application for a liquor

license in connection with a strip club to be located in Long Island City. It had previously denied a similar application by another corporate entity with one of the same individual principals. In both cases, respondent found, after a public hearing, that good cause had been shown to deny the application, i.e. that "public convenience and advantage and the public interest" would not be promoted by issuance of the license (Alcoholic Beverage Control [ABC] Law § 64[1], [6-a]).

Respondent's determination is supported by two reasons, including community impact, articulated in its written determination and by information presented to it in the hearings conducted in connection with the application (*see Matter of Soho Alliance v New York State Liq. Auth.*, 32 AD3d 363 [1st Dept 2006]; *compare Matter of Circus Disco v New York State Liq. Auth.*, 51 NY2d 24, 38 [1980]).

Respondent's determination to adhere to its prior determination that one of the individual applicants did not possess the requisite character and fitness is supported by the evidence that the individual had become a shareholder of another licensed business without obtaining prior approval by respondent, as required by statute. The hearing testimony supports respondent's further conclusion that, although the proposed

establishment is consistent with existing zoning, issuance of the liquor license would conflict with recent development and capital improvements in the area, including new residential units, hotels and businesses and a new high school.

Respondent's concern that petitioner did not make a full disclosure of all persons financially interested in the business, and the sources of investment (ABC § 110[1][h]), is based on petitioner's claim that it had invested much more in the business than the disclosed amounts invested by the two individual principals. While, as petitioner points out, members of respondent also expressed concern that the second individual principal was acting as a front for the prior individual applicant, who had a felony conviction and who remained involved as landlord, that concern was not articulated in the final written determination.

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

ENTERED: MARCH 13, 2014

CLERK

Acosta, J.P., Renwick, Feinman, Clark, JJ.

11958 The People of the State of New York, Ind. 1155/10
Respondent,

-against-

Mbarek Lafrem,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (David E.A. Crowley 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 (Ronald A. Zweibel, J.), rendered on or about September 1, 2011,

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

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

ENTERED: MARCH 13, 2014

CLERK

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

Acosta, J.P., Renwick, Feinman, Clark, JJ.

11962 The People of the State of New York, Ind. 1926/12
Respondent,

-against-

Albert Striegel,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Allen J. Vickey 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 (Edward J. McLaughlin, J.), rendered on or about July 11, 2012,

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

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

ENTERED: MARCH 13, 2014

CLERK

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

Acosta, J.P., Renwick, Feinman, Clark, JJ.

11966 In re Lourdes G.,
Petitioner-Respondent,

-against-

Julio P.,
Respondent-Appellant.

_____

Aleza Ross, Patchogue, for appellant.

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Order, Family Court, Bronx County (Alma Cordova, J.), entered on or about May 4, 2012, insofar as it denied respondent father's objection to an order, same court (Mary Elizabeth Neggie, S.M.), entered on or about February 21, 2012, denying his petition for downward modification of the parties' child support order, unanimously affirmed, without costs. Appeal from so much of the May 4, 2012 order as disposed of respondent's objection to a second order, same court and Support Magistrate, entered on or about February 21, 2012, which marked the mother's violation/enforcement petition off the calendar as of October 7, 2010, by remanding the matter to the Support Magistrate for "an appropriate disposition [], keeping in mind that a money judgment has already been issued under the petition," unanimously dismissed, without costs, as nonappealable.

The court properly denied the father's objection with

respect to his petition for a downward modification, since he failed to comply with the Support Magistrate's orders directing him to provide documents supporting his claim that his financial circumstances had changed for the worse (*see* Family Court Act § 451[2]; *Matter of Boden v Boden*, 42 NY2d 210, 213 [1977]; *Gordon v Gordon*, 82 AD3d 509 [1st Dept 2011]). The court properly found that the record was bereft of evidence that the Support Magistrate was biased or prejudiced against the father or that she acted improperly, and her skepticism appears to reflect the father's gaps in proof, rather than bias.

The portion of the order appealed addressing the mother's violation/enforcement petition did not finally resolve that issue and, thus, is not appealable (*see* CPLR 5701[a][1], [2]; Family Court Act § 1112).

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

ENTERED: MARCH 13, 2014

CLERK

Acosta, J.P., Renwick, Feinman, Clark, JJ.

11967 The People of the State of New York, Ind. 1009/11
Respondent,

-against-

Pettis Hardy,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Manu K. Balachandran of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered October 28, 2011, convicting defendant, after a jury trial, of grand larceny in the fourth degree (four counts) and petit larceny, and sentencing him, as a second felony offender, to an aggregate term of two to four years, unanimously affirmed.

On two occasions when the deliberating jury sent notes indicating their inability to agree, the court properly exercised its discretion in denying defendant's mistrial motions and instead delivering appropriate supplemental charges to encourage the jury to reach a verdict. Although the trial was relatively short and simple, at each of the two junctures the circumstances indicated that further deliberations might be fruitful (*see Matter of Plummer v Rothwax*, 63 NY2d 243, 250-251 [1984]). In

particular, neither of the jury's notes was indicative of a hopeless deadlock (*see e.g. People v Stephens*, 63 AD3d 624 [1st Dept 2009], *lv denied* 13 NY3d 800 [2009]). Defendant's remaining challenges to the court's interactions with the deliberating jury are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find them to be unavailing.

Defendant did not preserve his claim that when the jury viewed surveillance videotapes while two witnesses were testifying, these witnesses gave lay opinion testimony about the meaning of the events depicted. Defendant only objected that the video should be "played without narration." However, as defendant concedes on appeal, it was permissible for the witnesses to explain matters depicted on the videotapes that they had personally participated in or observed. Accordingly, defendant's general objection to "narration" was insufficient to alert the court to his present claim that the witnesses had strayed from areas of their personal knowledge and rendered opinions (*see People v Graves*, 85 NY2d 1024, 1026-1027 [1995]). We decline to review this unpreserved claim in the interest of justice. As an alternative holding, we find no basis for reversal. The witnesses' testimony did not provide improper lay

opinions, but "served to aid the jury in making an independent assessment" about the video (*see People v Russell*, 79 NY2d 1024, 1025 [1992]). Even when the witnesses described events depicted on the videotapes that they had not observed, they were still generally testifying about matters within their knowledge, and nothing in their testimony deprived defendant of a fair trial.

The court properly declined to provide a circumstantial evidence charge, since there was both direct and circumstantial evidence of defendant's guilt, notwithstanding that defendant's intent was a matter to be inferred from the evidence (*see People v Roldan*, 88 NY2d 826 [1996]; *People v Daddona*, 81 NY2d 990 [1993]).

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 13, 2014

CLERK

Acosta, J.P., Renwick, Feinman, Clark, JJ.

11968 Patricia Cohen, Index 111735/10
Plaintiff-Respondent-Appellant,

-against-

Gaytri D. Kachroo, etc., et al.,
Defendants-Appellants-Respondents.

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Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Lisa L. Shrewsberry of counsel), appellants-respondents.

Law Offices of Robert A. Roseman, New York (Robert A. Roseman of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered February 28, 2013, which denied defendants' motion to dismiss the claims for breach of fiduciary duty, breach of the New York Rules of Professional Conduct, and breach of Judiciary Law § 487 and the claims for punitive damages, and granted the motion as to plaintiff's claim for legal malpractice, unanimously modified, on the law, to grant the motion as to the causes of action for breach of fiduciary duty and breach of the New York Rules of Professional Conduct, and otherwise affirmed, without costs.

Regarding the legal malpractice claim, plaintiff failed to allege that but for defendants' alleged omissions in their representation in the underlying actions, she would have

prevailed in those actions (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 272 [1st Dept 2004]; *Golden v Cascione, Chechanover & Purcigliotti*, 286 AD2d 281 [1st Dept 2001]). To the extent that plaintiff alleges damages in the form of fees that she will incur by substitute counsel, she would have incurred such fees whether she was represented by defendants or other counsel. Thus, she cannot allege that defendants, by withdrawing from the underlying actions, proximately caused her to incur those fees. To the extent that substitute counsel might ultimately bill plaintiff for more legal fees than defendants would have, those claims seem too speculative to be ascertainable (*see Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass*, 301 AD2d 63, 67 [1st Dept 2002]).

To the extent that plaintiff seeks to allege malpractice based on a violation of the New York Rules of Professional Conduct, such an alleged violation does not, without more, support a malpractice claim (*Schafrann v N.V. Famka, Inc.*, 14 AD3d 363 [1st Dept 2005]; *see also Sumo Container Sta. v Evans, Orr Pacelli, Norton & Laffan*, 278 AD2d 169, 170-171 [1st Dept 2000]). Moreover, "[t]he violation of a disciplinary rule does not, without more, generate a cause of action" (*Schwartz v Olshan Grundman Frome & Rosenzweig*, 302 AD2d 193, 199 [1st Dept 2003]).

Plaintiff's cause of action alleging breach of fiduciary duty is dismissed as duplicative of the legal malpractice cause of action. Contrary to plaintiff's assertion, the breach of fiduciary duty claim alleged no new facts and sought the same damages as the legal malpractice claim (*Cobble Cr. Consulting, Inc. v Sichenzia Ross Friedman Ference LLP*, 110 AD3d 550, 551 [1st Dept 2013]; *Garnett v Fox, Horan & Camerini, LLP*, 82 AD3d 435, 436 [1st Dept 2011]).

The allegations that defendants were fully paid under the terms of the retainer agreement, but falsely represented in court that they sought to be relieved because they had not been paid, suffice to allege that defendants acted with intent to deceive the respective courts (*see e.g. Schindler v Issler & Schrage*, 262 AD2d 226 [1st Dept 1999], *lv dismissed* 94 NY2d 791 [1999]). In addition, plaintiff sufficiently alleged a chronic and extreme pattern of legal delinquency by averring that defendants fabricated certain charges, attempted to extract more money than agreed upon in the retainer, and threatened to abandon the matter if plaintiff did not execute an addendum to the retainer, to defendants' benefit (*see e.g. Kinberg v Opinsky*, 51 AD3d 548, 549 [1st Dept 2008]). The allegedly false representations in two courts, and the coercive threats to plaintiff in an attempt to

elicit additional remuneration are sufficiently egregious to state a claim for punitive damages (*see Dobroshi v Bank of Am., N.A.*, 65 AD3d 882, 884 [1st Dept 2009], *lv dismissed* 14 NY3d 785 [2010]; *Smith v Lightning Bolt Prods.*, 861 F2d 363, 372-373 [2d Cir 1988]).

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

ENTERED: MARCH 13, 2014

CLERK

Acosta, J.P., Renwick, Feinman, Clark, JJ.

11969 The People of the State of New York, Ind. 1236/12
Respondent,

-against-

Charles Stewart,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

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Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered on or about May 23, 2012, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: MARCH 13, 2014

CLERK

Acosta, J.P., Renwick, Feinman, Clark, JJ.

11970 John Fernandez, et al., Index 114910/08
Plaintiffs-Respondents,

-against-

213 East 63rd Street LLC, et al.,
Defendants-Appellants.

_____

Conway Farrell Curtin & Kelly, P.C., New York (Jonathan T. Uejio of counsel), for appellants.

Sacks & Sacks, LLP, New York (Scott N. Singer of counsel), for respondents.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered April 12, 2013, which granted plaintiff's motion for summary judgment on the issue of liability under Labor Law § 240(1), unanimously affirmed, without costs.

Plaintiff established his entitlement to judgment as a matter of law. Plaintiff submitted evidence, including his deposition testimony, showing that while installing black iron into a concrete ceiling, the A-frame ladder that he was using "kicked out" from underneath him, causing him to fall to the ground (*see Panek v County of Albany*, 99 NY2d 452, 458 [2003]).

Defendants' opposition failed to raise a triable issue of fact as to whether plaintiff was the sole proximate cause of his injuries. Even assuming that defendants presented sufficient

evidence to raise a triable issue as to whether at the time of his accident, plaintiff, contrary to his deposition testimony, was using the ladder by leaning it against the wall in a folded position, defendants nonetheless offered no evidence that plaintiff was ever instructed not to use the ladder in this manner (*see e.g. Cuentas v Sephora USA, Inc.*, 102 AD3d 504 [1s Dept 2013]).

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

ENTERED: MARCH 13, 2014

CLERK

Acosta, J.P., Renwick, Feinman, Clark, JJ.

11971N Barbara Bradshaw, Index 114078/05
Plaintiff-Appellant,

-against-

Lenox Hill Hospital, et al.,
Defendants-Respondents.

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The Greenberg Law Firm, LLP, Purchase (Bill Greenberg of counsel), for appellant.

Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Elliott J. Zucker of counsel), for respondents.

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Order, Supreme Court, New York County (Joan B. Lobis, J.), entered November 22, 2013, which, to the extent appealed from as limited by the briefs, denied plaintiff's cross motion for leave to serve an amended bill of particulars, unanimously affirmed, without costs.

The court providently exercised its discretion in denying plaintiff's cross motion to amend her bill of particulars. The proposed amendments, alleging that defendant Lenox Hill Hospital was negligent in failing to revoke defendant Jeffery Moses M.D.'s privileges when it knew or should have known that he was treating patients after ingesting cocaine, were not asserted in the complaint, nor is there any assertion in the pleadings that would provide the hospital with notice that such a claim would be made

(*see McSweeney v Levin*, 27 AD2d 916 [1st Dept 1967]; *cf. DaSilva v C & E Ventures, Inc.*, 83 AD3d 551, 551-552 [1st Dept 2011]). In addition, there is no evidence in the record that the hospital was, or should have been, aware of allegations that Moses was abusing cocaine at the time of plaintiff's injury.

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

ENTERED: MARCH 13, 2014

CLERK

Acosta, J.P., Renwick, Feinman, Clark, JJ.

11972N In re Morgan Keegan & Company, Inc., Index 650505/12
Petitioner-Appellant,

-against-

W. Kyle Rote, Jr., etc., et al.,
Respondents-Respondents.

_____

Greenberg Traurig, LLP, New York (James W. Perkins of counsel), for appellant.

Levin Papantonio Thomas Mitchell Rafferty & Proctor, Pensacola, FL (Peter J. Mougey of the bar of the State of Florida, admitted pro hac vice, of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered on or about December 12, 2012, which granted respondents' motion pursuant to CPLR 3211(a)(8) to dismiss the petition to vacate an arbitration award, and denied petitioner's motion to vacate the arbitration award as moot, unanimously affirmed, with costs.

Petitioner's reliance on CPLR 7501 as the basis for conferring personal jurisdiction on the courts of this state is unavailing. Although in this matter there was a written agreement to arbitrate, the agreement provided that any arbitration was to be held in accordance with FINRA rules, which set the hearing location as Memphis, Tennessee (*see Koob v IDS*

Fin. Servs., 213 AD2d 26 [1st Dept 1995]; *cf. Summit Jet Corp. v Meyers*, 193 Misc 2d 480, 481 [App Term, 2d Dept 2002]). The fact that several days of hearings were held in New York did not alter the parties' agreement or change the official hearing location. Respondents did not consent to change the official hearing site; they merely acquiesced, for the convenience of the arbitrators, to hold several days of hearings in New York.

Furthermore, respondents' travel to New York for the sole purpose of conducting the remaining hearing sessions from the Tennessee arbitration in the New York office of petitioner's counsel was insufficient to establish personal jurisdiction, particularly where the cause of action at issue did not arise from those business transactions (CPLR 302[a][1]; *see D & R Global Selections, S.L. v Bodega Olegario Falcon Pineiro*, 90 AD3d 403, 404 [1st Dept 2011]). Forcing respondents to defend their actions in New York solely because they agreed to accommodate the arbitrators' request to hold the remaining hearings in New York, when New York law and New York courts had nothing to do with any previous proceedings, would also offend "traditional notions of fair play and substantial justice" (*LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 217 [2000] [internal quotation marks omitted]).

Since the motion court properly determined that it did not have personal jurisdiction over respondents, it was correct in denying, as moot, the petition to vacate the arbitral award.

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

ENTERED: MARCH 13, 2014

CLERK

Sweeny, J.P., Andrias, Freedman, Richter, Clark, JJ.

11676 Maria Park, etc., Index 104987/08
Plaintiff-Respondent,

-against-

Dr. Thomas Kovachevich, et al.,
Defendants-Appellants,

Dr. Charles Shamoian, et al.,
Defendants.

_____

Morris Duffy Alonso & Faley, New York (Iryna S. Krauchanka of counsel), for Dr. Thomas Kovachevich, appellant.

Martin Clearwater & Bell, New York (Barbara D. Goldberg of counsel), for Dr. Aryeh Klahr, The Payne Whitney Clinic and New York Presbyterian Hospital, appellants.

Lisa M. Comeau, Garden City, for respondent.

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Order, Supreme Court, New York County (Alice Schlesinger, J.), entered March 19, 2013, reversed, on the law, without costs, and defendants' motions granted. The Clerk is directed to enter judgment accordingly.

Opinion by Sweeny, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, Jr., J.P.
Richard T. Andrias
Helen E. Freedman
Rosalyn H. Richter
Darcel D. Clark, JJ.

11676
Index 104987/08

_____x

Maria Park, etc.,
Plaintiff-Respondent,

-against-

Dr. Thomas Kovachevich, et al.,
Defendants-Appellants,

Dr. Charles Shamoian, et al.,
Defendants.

_____x

Defendants Dr. Thomas Kovachevich, Dr. Aryeh Klahr, the Payne Whitney Clinic and New York Presbyterian Hospital appeal from the order of the Supreme Court, New York County (Alice Schlesinger, J.), entered March 19, 2013, which denied their motions for summary judgment dismissing the complaint as against them.

Morris Duffy Alonso & Faley, New York (Iryna S. Krauchanka and Barry M. Viuker of counsel), for Dr. Thomas Kovachevich, appellant.

Martin Clearwater & Bell, LLP, New York (Barbara D. Goldberg, Peter T. Crean and Geri B. Horenstein of counsel), for Dr. Aryeh Klahr, The Payne Whitney Clinic and New York Presbyterian Hospital, appellants.

Lisa M. Comeau, Garden City, for respondent.

SWEENY, J.P.

This case involves the application of the professional medical judgment doctrine, which, as set forth herein, warrants dismissal of plaintiff's complaint.

On April 20, 2006, plaintiff's decedent Cooper Park, called defendant Dr. Kovachevich, an osteopathic physician and family medicine practitioner who had been his primary care provider since 1999, and told Dr. Kovachevich that he was separating from plaintiff, his wife and needed "something because his nerves were shot." Dr. Kovachevich called in a prescription for Xanax, and asked that Park come see him the following day.

On April 21, Park came in as directed, presenting with complaints of depression, anxiety, and an inability to sleep. Park stated he was "distraught" over his separation from plaintiff. Dr. Kovachevich discussed Park's thoughts on suicide and Park stated that, while suicide had crossed his mind, he would never do that because he had three children. Although he did not believe that Park was at risk of hurting himself, Dr. Kovachevich told Park to consult Dr. Moss, a psychiatrist, that day. He also advised Park to immediately go to an emergency room if he had suicidal thoughts and to call him at any time. Dr. Kovachevich prescribed Lexapro and Xanax, medications used to treat anxiety and depression, and Ambien, a sedative to help Park

sleep. A follow-up appointment was scheduled for April 25.

That same evening, Park called plaintiff several times in an attempt to reconcile. He told her he was going to take pills and kill himself. Plaintiff called 911 and the police took Park from his residence to Greenwich Hospital's Emergency Room. The hospital record states that Park ingested Ambien and Xanax tablets "in the context of a divorce." Park never lost consciousness and was treated with activated charcoal. On April 22, while still at Greenwich Hospital, Park had a consultation with Dr. Charles Gardner, a psychiatrist. Park denied "active suicidal ideation" and claimed to be "overwhelmed." He refused hospitalization, telling Dr. Gardner that he had a therapist. Dr. Gardner's impression was "adjustment disorder with depressed mood" and Park was discharged with instructions to follow up with Dr. Gardner within seven days. Park also agreed to follow up with therapy. Arrangements were made to have Park's parents and sister stay with him.

On April 25, Park again saw Dr. Kovachevich as previously scheduled. Although Park reported that he had gone to the emergency room with thoughts of suicide and was released the next morning, he did not mention the suicide attempt. He told Dr. Kovachevich that he felt better, that his father was staying with him and that he was working. Dr. Kovachevich testified that

Park's presentation on this date was "markedly improved" from his prior visit.

On May 1, after repeatedly attempting reconciliation with plaintiff, Park ingested several tablets of Ambien, Xanax and Tylenol PM. His father found him unconscious and took him to Greenwich Hospital, where he was admitted, unresponsive and in respiratory arrest. He was intubated, placed on a ventilator and stabilized. He remained at Greenwich Hospital from May 1 through May 4, when he was transferred to defendant Payne Whitney Clinic pursuant to an involuntary inpatient psychiatric commitment. Park's discharge diagnosis from Greenwich was suicidal ideation with a history of depression.

At Payne Whitney, Park was treated by a team of no less than seven psychiatrists, social workers and nurses who met daily to discuss his progress. Park was initially assessed by a licensed clinical social worker, which assessment was reviewed by an attending psychiatrist, defendant Dr. Shamoian. His Axis I Diagnosis was "Depressive Disorder NOS (not otherwise specified)" and Axis II Diagnosis was to "rule out narcissistic personality disorder."

On May 5, Park was seen by defendant Dr. Klahr, who testified that he believed Park when he stated his April 21 suicide attempt was a "gesture," an attempt to get plaintiff's

attention. The May 1 incident, however, was considered a serious suicide attempt. Dr. Klahr noted that Park was remorseful about that attempt and denied any suicidal ideation. He was seen the same day by another team social worker who discussed his marital difficulties and documented Park's contention that he resolved to let his wife go and focus on his three daughters.

The team's treatment goal was to have Park free of suicidal ideation and maintain impulse control for three consecutive days. To attain these goals, Park would be closely monitored, attend therapy sessions and participate in the planning process to ensure that appropriate aftercare was in place following discharge.

That same day, plaintiff called Dr. Kovachevich and advised him that Park tried to commit suicide, was in the hospital and that if Park came in to see him again, Dr. Kovachevich was not to see or treat him.

Between May 5 and 10, Park met daily with the Payne Whitney team, and attended group and individual therapy sessions. He repeatedly expressed remorse over his actions, denied suicidal ideation and told the team he would never try to hurt himself again. Park's father agreed to stay with him as long as necessary when he was discharged.

On May 10, the team discussed Park's condition and agreed

that he no longer posed a risk to himself. In the presence of his father, Park was instructed on the need to continue his medication as well as for continuing psychotherapy. He was given the names of two psychiatrists, Dr. Tamerin and Dr. Phansalker, and was instructed to follow up with either of them. Park agreed to the treatment plan and his father stated that he would encourage him to follow up as instructed. He was discharged with a diagnosis of depressive disorder, NOS.

The next day Park met with Dr. Phansalker, who documented that he displayed "no thought disorder," "no suicidal ideation," and "no evidence of psychosis." She found him to be stable and saw no reason to believe he would commit suicide. Park told her he would contact her for a follow up appointment but never did. On May 16, Dr. Phansalker left a message for him to make an appointment. Park called back the next day and said he would seek treatment with another psychiatrist.

Park returned to work on May 15. That same day, he planned a business trip, purchasing a round trip ticket to fly from New York to Sao Paulo, Brazil, leaving May 22 and returning May 25.

On May 16, Park went to see Dr. Kovachevich, who found him markedly improved since his last visit on April 25. On May 18, Park called Dr. Kovachevich and requested a prescription for Lexapro because he was going out of town on business. The next

day, a Payne Whitney social worker left a message for Park to follow up regarding his outpatient treatment. On May 20, Park's father flew back home to Australia, despite having assured Payne Whitney that he would be staying with Park indefinitely.

That same evening, Park called plaintiff to say good night to their daughter. Although told that she was asleep, Park nonetheless went to plaintiff's apartment where he had an altercation with plaintiff's boyfriend, resulting in a call to the police.

The next morning, May 21, Park was found dead in his car, which was parked in his garage with the engine running and a tube duct taped to the exhaust and leading to the inside of the driver's side window. The garage door was closed and sealed with towels, and its windows covered with black plastic. Park's autopsy report initially listed the cause of death as carbon monoxide poisoning, but was later amended to read death by acute mixed drug intoxication of Lexapro and Benadryl, "suicide." Park's blood toxicology report listed Lexapro, acetaminophen, salicylate, Ambien, naproxen, ibuprofen and Benadryl, the latter being the only drug at a near-toxic blood level.

Plaintiff commenced this action on behalf of Park's estate against Dr. Kovachevich, David Klahr, M.D. s/h/a Dr. Aryeh Klahr, and The New York and Presbyterian Hospital s/h/a The Payne

Whitney Clinic and New York Presbyterian Hospital (collectively Payne Whitney defendants) and other medical providers alleging, inter alia, that their prescriptions of Lexapro caused and/or contributed to Park's suicide. Plaintiff also alleges that the Payne Whitney defendants failed to properly evaluate and diagnose Park's condition, leading to his premature discharge from their facility.

The Payne Whitney defendants moved for summary judgment supported by, inter alia, the affirmed report of Dr. Neil Zolkind, a board-certified psychiatrist, who reviewed all the deposition testimony as well as Park's medical records from all his medical providers and facilities. Dr. Zolkind opined that Payne Whitney, to meet the applicable standard of care, had to evaluate Park to determine whether he "require[d] in-patient treatment, and if so, the extent of treatment necessary for [him]." He stated that Payne Whitney satisfied that standard of care by having "multiple personnel with differing specialties conduct thorough evaluations of the decedent and by devising an appropriate plan of care based upon those evaluations." Zolkind observed that Payne Whitney appropriately diagnosed Park, set treatment goals, and established a treatment plan "within the range of accepted treatment choices." As part of the plan, Dr. Klahr's prescription of Lexapro was also appropriate, since the

dosage had the potential to help Park feel less depressed. Further, since Dr. Kovachevich had previously prescribed Lexapro, as did Greenwich Hospital, it was likely that Park would remain compliant, and could be monitored by his after care providers.

With respect to whether a possible diagnosis of narcissistic personality disorder was properly considered, Dr. Zolkind opined that the Payne Whitney team, through numerous individual evaluations of Park over a sufficient period of time, was able to identify any narcissistic traits. These issues, according to Zolkind, cannot be effectively treated on an in-patient basis, and therefore, discharge was appropriate.

Finally, Dr. Zolkind observed that the appropriateness of Park's discharge was demonstrated by his ability to carry out the discharge plan. He followed-up with Dr. Phansalker, returned to work, scheduled a business trip to Brazil, participated in family functions and interacted with his parents and children.

Dr. Kovachevich likewise moved for summary judgment relying on the same records and testimony as the Payne Whitney defendants. He also submitted affirmed reports from Dr. Alan A. Pollock, a physician board-certified in internal medicine and infectious diseases, and Dr. Philip Muskin, a board-certified psychiatrist.

Both Dr. Muskin and Dr. Pollock agreed that, as a specialist

in internal medicine and an osteopathic physician, Dr. Kovachevich was "absolutely competent to prescribe psychotropic medications to a patient" presenting with Park's symptoms. Moreover, Dr. Kovachevich was professionally responsible in balancing his prescriptions with a "prudent" recommendation to seek psychiatric treatment.

Both experts opined that Dr. Kovachevich did not depart from accepted medical practices in continuing Ambien, Xanax and Lexapro after seeing Park on April 25, since he was unaware that Park had used Ambien in a suicidal gesture. Further, when Park presented to him on May 16 "doing much better" and reporting that he was in therapy, Park had not disclosed to Dr. Kovachevich that he made a second suicide attempt on May 1 using the Xanax and Ambien, nor did he disclose that he had been involuntarily admitted to Payne Whitney. Thus, Dr. Pollock opined that Dr. Kovachevich properly honored Park's May 18 request for additional Lexapro in advance of his Brazil trip. Indeed, Dr. Pollack stated that the failure to renew Lexapro, which other health care providers had also prescribed, would have resulted in potentially catastrophic withdrawal symptoms for Park. Additionally, the amount of Lexapro prescribed by Dr. Kovachevich was not enough to cause an overdose. In fact, the autopsy report, Dr. Pollock, Dr. Muskin and plaintiff's expert all agreed that the level of

Lexapro in Park's blood revealed a therapeutic, not toxic level. Dr. Kovachevich's experts both agreed that he had no control over whether Park chose to mix this prescription with Benadryl, an over-the-counter medication that was found in Park's body at near toxic levels.

Dr. Muskin also opined that Dr. Kovachevich's management of Park's medications was crucial to help control his depression because Park had chosen not to follow up with any of a number of mental health care providers to whom he had been referred.

It was his opinion, based upon a reasonable degree of medical certainty, that Park's suicide was not the result of any negligence by Dr. Kovachevich.

In opposition, plaintiff submitted a redacted affirmation from a psychiatrist who acknowledged that, while "a psychiatrist cannot prevent suicide," the Payne Whitney defendants failed, inter alia, to diagnose Park properly with narcissistic personality disorder and that its treatment plan was flawed as a result. This expert opined that acceptable standards of care require that the risk factors here, i.e., "the marital breakup" needed to be reduced by "a combined approach of medication and individual psychotherapy." In order to do this, information from plaintiff and his family was "clinically critical," and the failure to contact plaintiff was a departure from good and

accepted practice.

The expert asserted that, since Dr. Kovachevich was treating Park for psychiatric symptoms, his actions must be evaluated as though he was a psychiatrist. By providing Park with Lexapro, both Dr. Kovachevich and Payne Whitney were treating the wrong ailment, i.e., depression, rather than narcissistic personality disorder. Curiously, the expert asserted the treatment plan was inadequate because one or two doses of Lexapro cannot achieve a therapeutic effect as it can take up to at least a week before therapeutic levels are found in the brain. Nevertheless, since the autopsy report noted the cause of death as an overdose of Lexapro and Benadryl, plaintiff's expert opined that the defendants' combined failures were the proximate cause of Park's suicide.

In reply, Payne Whitney argued, inter alia, that plaintiff's expert's opinion was conclusory, based on hindsight, and failed to identify a different course of treatment that would have averted Park's suicide. With respect to the issue of failing to include plaintiff in Park's treatment plan, Payne Whitney argued that this was not in plaintiff's bill of particulars, was raised for the first time in opposition to the motion for summary judgment and, in any event, would have violated Park's rights under the Health Insurance Portability and Accountability Act of

1996 (HIPAA). Dr. Kovachevich submitted a supplemental affirmation from Dr. Pollock stating that primary care providers routinely prescribe medications to treat conditions common to more specialized fields of medicine outside of general practice and that he should therefore not be held to the standards of a psychiatrist. Moreover, with respect to the alleged failure to include plaintiff in Park's treatment plan, "a physician can only treat a patient on his or her medical history and physical presentation," not on what a spouse or third person does or does not tell the physician.

It is well settled that "a doctor is not liable in negligence merely because a treatment, which the doctor as a matter of professional judgment elected to pursue, proves ineffective. . ." (*Nestorowich v Ricotta*, 97 NY2d 393, 398 [2002]). Liability is imposed "only if the doctor's treatment decisions do not reflect his or her own best judgment, or fall short of the generally accepted standard of care" (*id.* at 399). Although a plaintiff's expert may have chosen a different course of treatment, "this, without more, 'represents, at most, a difference of opinion among [medical providers], which is not sufficient to sustain a prima facie case of malpractice'" (*Ibguy v State of New York*, 261 AD2d 510 [2d Dept 1999], *lv denied* 93 NY2d 816 [1997], quoting *Darren v Safier*, 207 AD2d 473, 474 [2d

Dept 1994]). In the context of mental health providers, we have held that "[w]hen a psychiatrist chooses a course of treatment, within a range of medically accepted choices for a patient after a proper examination and evaluation, the doctrine of professional medical judgment will insulate such psychiatrist from liability" (*Durney v Terk*, 42 AD3d 335 [1st Dept 2007], *lv denied* 9 NY3d 813 [2007][internal quotation marks omitted]; *see Centeno v City of New York*, 48 AD2d 812 [1st Dept 1975], *affd* 40 NY2d 932 [1976]; *Betty v City of New York*, 65 AD3d 507 [2d Dept 2009]). Where a psychiatrist fails to predict that a patient will harm his or herself if released, liability will likewise not attach for a mere error in professional judgment (*Schrempf v State of New York*, 66 NY2d 289, 295 [1985]; *Ozugowski v City of New York*, 90 AD3d 875, 876 [2d Dept 2011]). While it is true that "the line between medical judgment and deviation from good medical practice is not easy to draw" (*Topel v Long Is. Jewish Med. Ctr.*, 55 NY2d 682, 684 [1981]), the "prediction of the future course of a mental illness is a professional judgment of high responsibility and in some instance it involves a measure of calculated risk. If liability were imposed on the physician or the State each time the prediction of future course of mental disease was wrong, few releases would ever be made and the hope of recovery and rehabilitations of a vast number of patients would be impeded and

frustrated" (*Centeno,* 48 AD2d at 813). However, if a decision to release a patient was less than a professional medical determination, liability may attach (*see O'Sullivan v Presbyterian Hosp. in City of N.Y. at Columbia Presbyt. Med. Ctr.*, 217 AD2d 98, 100 [1st Dept 1995]). A decision will not be insulated by the medical judgment rule if it is not based upon a careful examination (*see Thomas v Reddy*, 86 AD3d 602, 604 [2d Dept 2011]).

Generally, "'the opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants'" (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002], quoting *Murphy v Connor*, 84 NY2d 969, 972 [1994]). To suffice, the expert's opinion "must demonstrate 'the requisite nexus between the malpractice allegedly committed' and the harm suffered" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 307 [1st Dept 2007], quoting *Ferrara v South Shore Orthopedic Assoc.*, 178 AD2d 364, 366 [1st Dept 1991]). However, where "the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz*, 99 NY2d at 544).

The Payne Whitney defendants established their entitlement

to judgment as a matter of law by tendering, inter alia, deposition testimony, the affirmed reports of their experts, and their office charts and hospital records. Although plaintiff contends that they failed to perform a proper assessment of Park prior to discharge, her expert does not elaborate on how their evaluation, conducted by at least seven health care professionals in several different disciplines, was deficient or what steps they should have taken to bring it within acceptable medical standards. Moreover, the contention by plaintiff's expert that Payne Whitney should have "reached out" to plaintiff, who the expert conceded was a main stressor for Park, is improperly raised for the first time in plaintiff's opposition papers (*see Abalola v Flower Hosp.*, 44 AD3d 522 [1st Dept 2007]), and in any event, lacks merit. The expert does not explain what, if any, information plaintiff could have provided or how such information would have been relevant to Park's diagnosis and treatment. These omissions render the opinion conclusory (*see Davis v Patel*, 287 AD2d 479, 480 [2d Dept 2001]). In addition, as noted above, contacting plaintiff would have constituted a HIPAA violation and expose Payne Whitney to other liability (*see* CPLR 4504).

Significantly, plaintiff's expert's opinion that Payne Whitney's alleged failure to diagnose Park's "narcissistic personality disorder" was a departure from accepted care is also

conclusory, since plaintiff's expert did not make any evaluation of Park and failed to provide support in the record for this conclusion (*see Foster-Sturrup v Long*, 95 AD3d 726, 728 [1st Dept 2012]). "Opinion evidence must be based on facts in the record or personally known to the witness" (*Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]). Plaintiff was required to demonstrate that the Payne Whitney defendants departed from the standard of care in treating Park and that those departures were the proximate cause of his death (*Dallas-Stephenson v Waisman*, 39 AD3d at 306-307). The unsupported opinion that Payne Whitney failed to perform a proper evaluation of Park prior to discharge reflects a "reasoning back" from the fact of an injury to find negligence, and is not sufficient to defeat a summary judgment motion (*see Fernandez v Moskowitz*, 85 AD3d 566, 568 [1st Dept 2011]; *Brown v Bauman*, 42 AD3d 390, 392 [1st Dept 2007]).

Simply put, plaintiff's expert merely presents a different course of treatment, which is insufficient to defeat Payne Whitney's prima facie showing of entitlement to summary judgment (*Ibguy*, 261 AD2d 510).

Similarly, Dr. Kovachevich met his prima facie burden through, inter alia, the affirmed reports of Dr. Pollock and Dr. Muskin. Both physicians opined that the amount of Lexapro prescribed by Dr. Kovachevich was insufficient for an overdose

and that the amount of Lexapro in Park's blood was at therapeutic levels. This lack of causal connection between Dr. Kovachevich's actions and Park's suicide severs liability (*Foster-Sturrup*, 95 AD3d at 728; *Dallas-Stephenson*, 39 AD3d at 307).

Additionally, plaintiff's claim that Dr. Kovachevich should be held to the standard of care of a psychiatrist was improperly raised for the first time in her expert's affirmation and we decline to consider this new theory of liability (*Abalola*, 44 AD3d 522).

Since plaintiff has not met her burden of raising a triable issue of fact, defendants motions should have been granted.

Accordingly, the order of the Supreme Court, New York County (Alice Schlesinger, J.), entered March 19, 2013, which denied the motions of defendant Dr. Thomas Kovachevich and the Payne Whitney defendants for summary judgment dismissing the complaint as against them, should be reversed, on the law, without costs, and

the motions granted. The Clerk is directed to enter judgment accordingly.

All concur.

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

ENTERED: MARCH 13, 2014

CLERK