SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 14, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Andrias, Saxe, Richter, JJ.

649N- Index 151792/14
649NA Kevin McDermott, et al.,
Plaintiffs-Respondents,

-against-

Jon Chapski, etc., et al.,
Defendants-Appellants.

_____

Neil L. Postrygacz, P.C., New York (Neil L. Postrygacz of counsel), for appellants.

Joshua Bardavid, New York, for respondents.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered March 5, 2015, which denied defendants' motion to vacate a default judgment, and order, same court and Justice, entered June 23, 2015, which, to the extent appealed from as limited by the briefs, denied defendants' motions to set aside a JHO's report and to vacate the court's order confirming the report, unanimously reversed, on the law, without costs, the judgment vacated, and the motion granted. Defendants are directed to serve an answer to the complaint within 30 days after service upon them of a copy of this order with notice of entry.

Defendants put forth a reasonable excuse for their default and established potentially meritorious defenses. Accordingly defendants are entitled to vacatur of the default judgment and an opportunity to address the matter on its merits (CPLR 5015[a][1]; *D & R Global Selections, S.L. v Pineiro*, 90 AD3d 403 [1st Dept 2011]).

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

ENTERED: JUNE 14, 2016

CLERK

Friedman, J.P., Andrias, Moskowitz, Kapnick, Webber, JJ.

862 Cornwall Management Ltd., et al., Index 653675/13
Plaintiffs-Respondents,

-against-

Peter Kambolin, et al.,
Defendants-Appellants,

Oleg Batrachenko, et al.,
Defendants.

_____

Tannenbaum Helpern Syracuse & Hirschtritt LLP, New York (Paul D. Sarkozi of counsel), for appellants.

Moses & Singer LLP, New York (Robert D. Lillienstein of counsel), for respondents.

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered August 11, 2014, which, to the extent appealed from, denied defendants Peter Kambolin and Atlant Capital Holdings, LLC's motion to dismiss the cause of action for suit on judgment as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint as against said defendants.

The allegations that defendants Kambolin and Atlant Capital Holdings controlled and dominated defendant Thor United are insufficient to state a cause of action for alter ego liability (*see e.g. 501 Fifth Ave. Co. LLC v Alvona LLC.*, 110 AD3d 494 [1st Dept 2013]; *Morpheus Capital Advisors LLC v UBS AG*, 105 AD3d 145,

153-154 [1st Dept 2013], *revd on other grounds* 23 NY3d 528 [2014]; *Andejo Corp. v South St. Seaport Ltd. Partnership*, 40 AD3d 407, 407 [1st Dept 2007]). The complaint alleges, upon information and belief, only that Kambolin, after relinquishing his interest in Thor United, continued to dominate it by controlling its bank account and decision making, and that Thor United and other entities controlled by Kambolin, including Atlant Capital, commingled funds and shared a business address. It alleges no specific facts to establish actions taken by Thor United or its owners in connection with the loans and the alleged scheme to avoid their repayment or that Kambolin's control of Thor United encompassed any such actions.

Nor does it allege any of the other factors that support a veil-piercing claim, such as a lack of corporate formalities or undercapitalization. Contrary to plaintiffs' argument, *Tap Holdings, LLC v Orix Fin. Corp.* (109 AD3d 167 [1st Dept 2013])

does not compel a different result. The operative pleading in *Tap Holdings*, unlike here, alleged that the owners of the entity whose veil the plaintiff sought to pierce abused the corporate form for the purpose of harming noteholders (*id.* at 175).

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

ENTERED: JUNE 14, 2016

CLERK

Tom, J.P., Saxe, Richter, Gische, Webber, JJ.

1216N Craig Crovato,
Plaintiff-Respondent,

Index 304191/10
83792/11
83835/12

-against-

H&M Hennes & Mauritz, L.P., et al.,
Defendants-Appellants,

Diversified Construction Corp., etc., et al.,
Defendants.

- - - - -

[And Third-Party Actions]

_____

Carol R. Finocchio, New York, for appellants.

Wingate, Russotti, Shapiro & Halperin, LLP, New York (Kenneth J. Halperin of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered September 16, 2015, which, in an action for personal injuries, denied defendants-appellants' motion to change venue from Bronx County to Westchester County and granted plaintiff's cross motion to retain venue in Bronx County, unanimously reversed, on the law, without costs, and the matter remanded for a hearing to resolve the factual issues raised in the motions.

The denial of defendants' motion to change venue from Bronx County to Westchester County without a hearing was an improvident exercise of discretion. Once a movant establishes in a venue motion that the plaintiff's residence was other than that claimed

in the complaint, the plaintiff opposing a motion for a change of venue must "establish through documentary evidence" his claimed residence (*Forbes v Rubinovich*, 94 AD3d 809, 810 [2d Dept 2012]). Here, substantial documentary evidence produced in discovery and submitted by defendants on their motion indicated that on the date of the accident plaintiff resided in Westchester County. These documents include hospital records from the time of plaintiff's accident, the incident report from the day of the accident, plaintiff's employment records, tax records and forms from the Internal Revenue Service, pharmacy records, Department of Motor Vehicle records, and automobile insurance records, all of which indicate that his address is in New Rochelle, Westchester County. In response, plaintiff's assertion that he resides at the Bronx residence that he co-owns with his fiancée, while buttressed by the affidavits of his fiancée and a neighbor, was not supported by *any* objective documentation. The only document plaintiff provided, which he describes as a water bill, is merely an undated commercial solicitation sent to him as a listed homeowner.

Although a person may have more than one residence, for venue purposes, there must be evidence that the plaintiff actually resided at the claimed residence at the time the action

was commenced (*see Siegfried v Siegfried*, 92 AD2d 916 [2d Dept 1983]). An ownership interest in property does not alone demonstrate residence at that property.

Unlike the cases on which plaintiff relies (*see e.g. Washington v Sow*, 127 AD3d 492 [1st Dept 2015]; *Kelly v Karsenty*, 117 AD3d 912 [2d Dept 2014]), plaintiff offered no valid objective documentation supporting the assertions that he resides at the Bronx residence. Because his affidavit and those of his fiancée and a neighbor, unlike the type of documents submitted by defendants, are subject to credibility challenges, a hearing should have been ordered to address and resolve that issue of fact (*see Collins v Glenwood Mgt. Corp.*, 25 AD3d 447 [1st Dept 2006]) before ruling on the venue motions.

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

ENTERED: JUNE 14, 2016

CLERK

Friedman, J.P., Acosta, Saxe, Gische, Webber, JJ.

1281-
1282 Lisa J. Weksler, etc.,
Plaintiff-Respondent,

-against-

Joseph Weksler, etc., et al.,
Defendants-Appellants,

Mitchell D. Hollander, Esq.,
et al.,
Defendants.

- - - - -

In re Lisa J. Weksler,
Petitioner-Respondent,

-against-

Joseph Weksler, et al.,
Respondents-Appellants.

Index 603288/07
652843/11

_____

Putney, Twombly, Hall & Hirson LLP, New York (Thomas A. Martin of counsel), for appellants.

Berg & Androphy, New York (Michael M. Fay of counsel), for respondent.

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Order, Supreme Court, New York County (Bernard J. Fried, J.), entered March 30, 2012, which, to the extent appealed from as limited by the briefs, denied the motion of defendants Joseph Weksler (Joseph) and Bruce Weksler (Bruce) for summary judgment dismissing the first and second causes of action (breach of contract and promissory estoppel, respectively), unanimously affirmed, without costs. Order, same court (Marcy S. Friedman,

J.), entered July 31, 2014, which, to the extent appealed from as limited by the briefs, denied respondents' motion to dismiss allegations predating October 17, 2005 as time-barred, unanimously affirmed.

The alleged oral agreement between plaintiff, on the one hand, and Joseph and Bruce, on the other, is not too indefinite to be enforced. Rejecting an agreement as indefinite is a last resort (*see e.g. Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 485 [1989], *cert denied* 498 US 816 [1990]). The alleged agreement was that Joseph and Bruce (plaintiff's brothers) and nonparty Jack Weksler (the parties' father) would give plaintiff shares of defendant Bruce Supply Corp. until plaintiff, Joseph, and Bruce each had an equal number of shares.

It is true that the alleged agreement did not say when gifting was to commence or how long it would take. However, "[w]hen a contract does not specify time of performance, the law implies a reasonable time" (*Savasta v 470 Newport Assoc.*, 82 NY2d 763, 765 [1993]).

The agreement could have been performed within one year; therefore, it does not run afoul of the statute of frauds (General Obligations Law § 5-701[a][1].

Joseph and Bruce's argument that the promissory estoppel claim should be dismissed as duplicative of an insufficient

breach of contract claim is improperly made for the first time in reply (*see e.g. Shia v McFarlane*, 46 AD3d 320 [1st Dept 2007]).

Joseph and Bruce's preserved arguments regarding promissory estoppel are unavailing. At a minimum, there are triable issues of fact as to the existence of a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained in reliance on that promise. The general merger clauses in the stock purchase agreements and the amended and restated shareholders agreement, which do not concern the same subject matter as the alleged promise, do not bar the promissory estoppel claim (*see Urban Holding Corp. v Haberman*, 162 AD2d 230, 231 [1st Dept 1990]).

The court properly found that CPLR 205(a) applied to index no. 652843/11. The first action (index no. 603288/07) was "timely commenced" (*id.*). Because CPLR 205(a) is a remedial statute, whose "broad and liberal purpose is not to be frittered away by any narrow construction" (*George v Mt. Sinai Hosp.*, 47 NY2d 170, 177 [1979] [internal quotation marks omitted]; *see also Malay v City of Syracuse*, 25 NY3d 323, 327, 329 [2015]), the eleventh cause of action of index no. 603288/07 should be deemed "terminated" within the meaning of CPLR 205(a) as of this Court's decision in *Weksler v Weksler* (85 AD3d 688 [1st Dept 2011]). Petitioner commenced index no. 652843/11 within six months after

that decision (*see* CPLR 205[a]).

Respondents' claim that CPLR 205(a) does not apply because the eleventh cause of action was a nullity is without merit. "[R]esolution of questions involving CPLR 205 (subd [a]) is not aided by use of the word 'nullity'" (*Carrick v Central Gen. Hosp.*, 51 NY2d 242, 248 [1980] [ellipses and some internal quotation marks omitted]). "Indeed, . . . the statute by its very nature is applicable in those instances in which the prior action was properly dismissed because of some fatal flaw; thus, to suggest that it should not be applied simply because there was a deadly defect in the prior action seems nonsensical" (*id.* [internal quotation marks and brackets omitted]).

Respondents complain that the 2014 order effectively gave petitioner an 11-year statute of limitations. However, the Court of Appeals has "declined to subordinate CPLR 205(a) and the policy preference it embodies even where the effect of [the court's] declination was . . . to toll for a substantial period a designedly brief limitations period" (*Matter of Goldstein v New York State Urban Dev. Corp.*, 13 NY3d 511, 521 [2009]). We note

that "at least one of the fundamental purposes of the Statute of Limitations has in fact been served, and [respondents have] been given timely notice of the claim being asserted by [petitioner]" (*George*, 47 NY2d at 177).

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

ENTERED: JUNE 14, 2016

CLERK

Tom, J.P., Sweeny, Moskowitz, Richter, Gesmer, JJ.

1389 [M-1387] In re the Application of DC, Petitioner,

-against-

Hon. Andrea Masley, etc., Respondent.

Index 402790/10

_____

Mental Hygiene Legal Service, New York (Diane G. Temkin of counsel), for petitoner.

Eric T. Schneiderman, Attorney General, New York (Michael J. Siudzinski of counsel), for respondent.

_____

Application pursuant to CPLR article 78 for a writ of prohibition to prevent respondent Supreme Court Justice from conducting further proceedings in a guardianship matter unanimously denied, and the proceeding dismissed, without costs.

In a consent guardianship proceeding, upon granting petitioner's motion to discharge her guardian, the court reappointed the court evaluator and ordered a further hearing. Petitioner has "fail[ed] to identify any arrogation of power infringing a clear legal right, and thus the extraordinary remedy of prohibition is not available" (*Matter of Perry v Barrett*, 113 AD3d 536, 537 [1st Dept 2014], *lv denied* 23 NY3d 902 [2014]). The court did not dismiss the guardianship petition and did not lose jurisdiction when it discharged the guardian. Even if petitioner is correct that the court erred in ordering a hearing

when neither the guardian nor the original guardianship petitioner objected to the motion to discharge, these claims of legal error can be raised on direct appeal and are insufficient to warrant prohibition (*see DeVincenzo v Morgenthau*, 161 AD2d 476, 477 [1st Dept 1990]).

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

ENTERED: JUNE 14, 2016

CLERK

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

1433-
1434 The People of the State of New York,
Respondent,

-against-

Lynette Acevedo,
Defendant-Appellant.

Ind. 1467/10

_____

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

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

_____

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered January 4, 2013, as amended March 15, 2013, December 15, 2014 and January 7, 2015, convicting defendant, after a jury trial, of assault in the first degree (two counts) and criminal possession of a weapon in the third degree, and sentencing her to an aggregate term of six 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]). The element of serious physical injury was satisfied by evidence objectively supporting the jury's finding that the knife wound inflicted by defendant caused serious and protracted disfigurement, consisting of a scar on the

victim's neck (*see People v McKinnon*, 15 NY3d 311, 315-316 [2010]). Photographs taken shortly before trial, the jury's view of the scar, medical testimony, testimony from the victim and reasonable inferences to be drawn from the evidence support the conclusion that the scar was prominent and distressing, and that it remained so at the time of trial, years after the crime (*see e.g. People v Cruz*, 131 AD3d 889, 889 [1st Dept 2015] *lv denied* 26 NY3d 1108 [2016]).

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

ENTERED: JUNE 14, 2016

CLERK

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

1436-
1436A In re Kim Yvette W.,
Petitioner-Respondent,

-against-

Leola Patricia W.,
Respondent-Appellant.

_____

Kenneth M. Tuccillo, Hastings on Hudson, for appellant.

Leslie S. Lowenstein, Woodmere, for respondent.

_____

Orders, Family Court, New York County (Christopher W. Coffey, Referee), entered on or about September 4, 2015, which, upon a finding-determination that respondent daughter had committed the family offense of harassment in the second degree, granted petitioner mother a two-year order of protection against respondent, unanimously reversed, on the law, without costs, the orders vacated, and the petition dismissed.

The evidence proffered during the fact-finding hearing failed to establish, by a fair preponderance of the evidence, that respondent had committed the family offense of harassment in the second degree as alleged in the petition (Family Ct Act § 832). The petition alleged, among other things, that on August

12, 2015, at 2:30 p.m., the building superintendent told petitioner that he broke the lock on the door of her apartment to allow respondent access after she summoned the police. Although petitioner briefly testified during cross-examination that she had to pay for a lock to be repaired, she did not testify as to the date the lock was broken, that respondent broke it, or that the broken lock secured her apartment door (*see Matter of Ebony J. v Clarence D.*, 46 AD3d 309 [1st Dept 2007]). Petitioner's testimony during the dispositional hearing about the August 12, 2015 incident and her submission of a photograph purporting to show the broken lock caused by respondent is unavailing, because the evidence was not submitted during the fact-finding hearing.

Respondent's actions in the summer of 2013 could not support a finding that she had committed the family offense of harassment in the second degree, because the family offense petition contained no facts regarding those incidents (*see Matter of Sasha R. v Alberto A.*, 127 AD3d 567, 567 [1st Dept 2015]; *Matter of Salazar v Melendez*, 97 AD3d 754, 755 [2d Dept 2012], *lv denied* 20

NY3d 852 [2012]). Further, the remaining evidence at the fact-finding hearing was legally insufficient to support Family Court's fact-finding determination that respondent intended to harass, annoy or alarm petitioner (*see* Penal Law § 240.26).

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

ENTERED: JUNE 14, 2016

CLERK

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

1438 Arelie F., et al., Index 350662/09
Plaintiffs-Respondents,

-against-

Cathedral Properties, LLC, et al.,
Defendants,

4464 Park Avenue LLC, et al.,
Defendants-Appellants.

_____

Gallo Vitucci Klar LLP, New York (Michael L. Mangini of counsel), for appellants.

The Frankel Law Firm, New York (Reuven S. Frankel of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered July 2, 2015, which, to the extent appealed from, denied defendants 4464 Park Avenue LLC and Finger Management Corporation LLC's motion for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiffs, two brothers and their sister, commenced this action for damages for exposure to lead paint at various apartments they resided in and visited during their childhoods. Included in plaintiffs' claims was apartment #1 located at 4464 Park Avenue in the Bronx, where the infant plaintiffs' aunt

resided with their two cousins, who were under the age of seven. Defendants 4464 Park Avenue LLC and Finger Management Corporation moved for summary judgment dismissing the complaint, arguing that the infant plaintiffs did not reside in the apartment and that their injuries were sustained before 4464 Park and Finger Management took over the building. In opposition, plaintiffs argued that defendants had actual notice of the lead paint based on the fact that their two cousins under the age of seven resided there and based on lead paint violations issued by New York City's Department of Housing Preservation and Development.

The motion court granted defendants' motion as to plaintiffs Arelie F. and Joseph F., finding that those plaintiffs did not have elevated blood lead levels after the defendants took over management of the apartment, but denied it as to plaintiff Teodoro F., finding that issues of fact exist concerning his elevated blood lead levels and potential exposure at defendants' property. Defendants appealed, arguing that their motion for summary judgment should have been granted as to all three plaintiffs. We agree.

Defendants established their prima facie entitlement to summary judgment by submitting evidence that they did not own or manage the building until November 2007, when Teodoro was approximately twelve years old and after all the infant

plaintiffs were over the age of seven (*see Flores v Cathedral Props. LLC,* 101 AD3d 432 [1st Dept 2012]). In opposition, plaintiffs failed to raise a triable issue of fact concerning how Teodoro's existing injuries when defendants took ownership and management of the building were made significantly worse during their tenure (*see Williamsburg Around the Bridge Block Assn. v Giuliani*, 223 AD2d 64, 66 [1st Dept 1996]; *Munoz v Mael Equities*, 2 AD3d 118 [1st Dept 2003]).

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

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

ENTERED: JUNE 14, 2016

CLERK

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

1439 The People of the State of New York, Respondent, Ind. 4103/11

-against-

Gerardo Miguel, Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Arthur H. Hopkirk of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Patricia Nunez, J.), entered on or about August 7, 2014, which adjudicated defendant a level one sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Although this appeal from a risk level determination is not subject to dismissal, it does not bring up for review defendant's claim that his underlying New York felony conviction was not for an offense requiring registration as a sex offender. Sex offender certification is part of the judgment of conviction, and the proper occasion for defendant to have challenged that certification was on an appeal from the judgment (*see People v Hernandez*, 93 NY2d 261, 267 [1999]; *People v Smith*, 60 AD3d 580 [1st Dept 2009], *lv denied* 12 NY3d 921 [2009]; *compare People v*

Liden, 19 NY3d 271 [2012] [administrative determination that out-of-state conviction requires registration reviewable in risk level proceeding]), but defendant did not appeal. Contrary to defendant's contention, *People v Baluja* (109 AD3d 803 [2d Dept 2013), *lv denied* 22 NY3d 856 [2013]) did not address the reviewability issue presented here.

Since the issue is one of reviewability by this Court, it is of no moment that the SORA hearing court and the parties engaged in the essentially academic exercise of litigating the issue of whether defendant was required to register as a sex offender, an issue that had necessarily been decided at his sentencing.

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

ENTERED: JUNE 14, 2016

CLERK

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

1440 Hallmark Capital Corporation, Index 600897/01
Plaintiff-Appellant,

-against-

Adrian H. Courtenay, III,
Defendant,

Mill Hollow Corporation,
Defendant-Respondent.

_____

Nimkoff Rosenfeld & Schechter, LLP, Syosset (Ronald A. Nimkoff of counsel), for appellant.

Alfred Ferrer III, New York, for respondent.

_____

Order, Supreme Court, New York County (Kathryn Freed, J.), entered March 2, 2015, which, to the extent appealed from as limited by the briefs, granted the corporate defendant's motion to confirm the dismissal of all claims as against the individual defendant by this Court in a prior appeal, unanimously modified, on the law, to deny the motion with respect to the claim for unpaid monthly retainer fees, and otherwise affirmed, without costs.

As the corporate defendant was wholly owned by the individual defendant, and the two had been represented in this case by the same counsel for some 15 years, there is no issue as to the corporate defendant's authority to seek dismissal on behalf of the individual defendant (*see U.S. Underwriters Ins.*

Co. v Greenwald, 31 Misc 3d 1206[A], 2010 NY Slip Op 52394[U], *5-6 [Sup Ct, NY County 2010], *affd* 82 AD3d 411 [1st Dept 2011]). The order issued by the motion court before the case was assigned to the trial court did not bar the trial court from determining whether this Court's order in a prior appeal (52 AD3d 277 [1st Dept 2008]) had dismissed all claims as against the individual defendant. The motion court's ruling could not alter this Court's order (*see generally People v Evans*, 94 NY2d 499, 503-504 [2000] [discussing law of the case doctrine]). Nevertheless, the trial court misread our order. We modified the dismissal of the complaint by reinstating the claim for retainer fees, which was asserted against both defendants. The reference to the "corporate defendant" in the text of the order did not alter that decree. It was a shorthand reference to the terms of the parties' agreement as defined therein.

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

ENTERED: JUNE 14, 2016

CLERK

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

1441-
1442 Index 105895/11

In re Melville L. Fergang
Revocable Trust

- - - - -

Charles Scott, etc.,
Petitioner-Respondent,

-against-

Allen S. Fergang, et al.,
Respondents-Appellants.

- - - - -

Jane Fergang, et al.,
Objectants-Respondents.

_____

Law Offices of Annette G. Hasapidis, Mt. Kisco (Annette G. Hasapidis of counsel), for appellants.

Greenfield Stein & Senior, LLP, New York (Charles T. Scott of counsel), for Charles Scott, respondent.

Joseph Rokacz, New York, for Jane Fergang and Nicholas Casaccio, respondents.

_____

Amended judgment, Supreme Court, New York County (Kathryn Freed, J.), entered December 10, 2015, insofar as appealed from, awarding Charles Scott legal fees of $211,435 and reimbursement for expenses in the amount of $1,106.23, unanimously reversed, on the law, without costs, and the matter remanded for an explanation of the reasonableness of the fees awarded and reconsideration if warranted.

As petitioners concede, 22 NYCRR 36.4 does not apply to Scott because he was a guardian ad litem nominated by an infant

over 14 years of age (*see* 22 NYCRR 36.1[b][ii]). However, the common law still applies to Scott. Therefore, the court should have explained "the reasonableness of the fees" awarded (*Matter of Jewish Assn. for Servs. for Aged Community Guardian Program v Kramer*, 60 AD3d 531 [1st Dept 2009]). Such an explanation is particularly necessary in light of the issues raised by petitioners, for example, the fact that Scott, who acted as a general contractor in Nassau County, was not licensed as such (*see ENKO Constr. Corp. v Aronshtein*, 89 AD3d 676 [2d Dept 2011] [unlicensed contractor not entitled to recover]), and the principle that "the dollar value for nonlegal work performed by an attorney who is appointed a guardian ad litem . . . should not be enhanced just because an attorney does it" (*Alias v Olahannan*, 15 AD3d 424, 425 [2d Dept 2005] [internal quotation marks omitted]; *see also Matter of Marion B.*, 11 AD3d 222 [1st Dept 2004]). Scott contends that he was authorized to act as general contractor by the judicial hearing officer who was overseeing settlement efforts in this matter. However, petitioners contend that settlement talks were confidential; they also dispute Scott's version of the settlement talks.

If the court feels that it cannot decide the reasonableness of Scott's fees without a hearing, it may, of course, order one (*see e.g. Mars v Mars*, 19 AD3d 195, 196-197 [1st Dept 2005], *lv*

dismissed 6 NY3d 821 [2006]).

We note that, on appeal, Scott failed to dispute petitioners' argument that he is not entitled to reimbursement for expenses such as photocopying (*see Matter of Graham*, 238 AD2d 682, 687 [3d Dept 1997]).

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

ENTERED: JUNE 14, 2016

CLERK

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

1443 The People of the State of New York, Respondent, Ind. 1886N/09

-against-

Mariolis Santos, Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Alejandro B. Fernandez of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Patricia M. Nunez, J. at suppression motion; Anthony J. Ferrara, J. at plea; Ellen Coin, J. at sentencing), rendered July 20, 2010, convicting defendant of criminal sale of a controlled substance in the fifth degree, and sentencing him to a term of 1 year, unanimously affirmed.

Defendant had the practical ability to withdraw his plea before sentencing, and his challenges to the validity of his plea do not come within the narrow exception to the preservation requirement (*see People v Conceicao*, 26 NY3d 375, 381-382 [2015]). We decline to review these unpreserved claims in the interest of justice. As an alternative holding, we find that the plea was knowing, intelligent, and voluntary, including with regard to defendant's awareness of immigration consequences (*see*

People v Pellegrino, 26 NY3d 1063 [2015]; *People v Sougou*, 26 NY3d 1052 [2015]; *People v Brazil*, 123 AD3d 466, 467 [1st Dept 2014], *lv denied* 25 NY3d 1198 [2015]).

We also find that defendant made a valid general waiver of his right to appeal (*see People v Sanders*, 25 NY3d 337, 340-342 [2015]; *People v Lopez*, 6 NY3d 248, 257 [2006]), which encompasses his claim that the court should have granted his motion for a suppression hearing (*see People v Sears*, 57 AD3d 396 [1st Dept 2008], *lv denied* 12 NY3d 787 [2009]).

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

ENTERED: JUNE 14, 2016

CLERK

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

1446 The People of the State of New York, Ind. 3712/12
Respondent,

-against-

Delsio Hilario,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Elizabeth Isaacs of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Natalia Bedoya McGinn 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 (Juan M. Merchan, J.), rendered on October 4, 2013,

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: JUNE 14, 2016

CLERK

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

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

1447 Robert Ryan, Index 601678/97
Plaintiff-Respondent,

-against-

Sam Zherka,
Defendant-Appellant,

George Panaritis,
Defendant.

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Rex Whitehorn & Associates, P.C., Great Neck (Rex Whitehorn of counsel), for appellant.

Beattie Padovano, LLC, New York (Patrick J. Monaghan, Jr. of counsel), for respondent.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered August 24, 2015, which denied defendant Sam Zherka's motion pursuant to CPLR 5015(a)(2) and (3) to vacate a judgment, same court (Norman C. Ryp, J.), entered September 26, 2000, after a trial, or, in the alternative, for discovery and a hearing, unanimously affirmed, with costs.

The newly discovered evidence proffered by defendant to show that the judgment in plaintiff's favor was the result of a fraud upon the court is insufficient to warrant vacatur of the judgment with respect to the assault claim (*see* CPLR 5015[a][2], [3]; *Prote Contr. Co. v Board of Educ. of City of N.Y.*, 230 AD2d 32, 39 [1st Dept 1997]). While the new evidence contradicts

plaintiff's trial testimony that he did not contact law enforcement authorities after being assaulted by defendant, it does not refute the jury's essential finding that an assault occurred (*see Weinstock v Handler*, 251 AD2d 184 [1st Dept 1998], *lv dismissed* 92 NY2d 946 [1998]). The new evidence showing that plaintiff had previously identified defendant's brother, as opposed to defendant, as the man who held a gun to his head does not undermine the trial testimony that defendant punched and kicked plaintiff. Thus, even assuming plaintiff's trial testimony amounted to fraud, vacatur under CPLR 5015(a)(3) is not warranted because his misrepresentations were not material to the jury's verdict (*see Matter of Travelers Ins. Co. v Rogers*, 84 AD3d 469 [1st Dept 2011]).

Nor would the new evidence have resulted in a different outcome with respect to the breach of contract claim. Regardless of whether shares were issued to plaintiff, plaintiff's trial testimony and the new evidence regarding the issuance of shares both show that plaintiff had a verbal agreement to sell his interest in the nightclub to defendant and that defendant exercised dominion and control of the club shortly after paying a portion of the promised price. The new evidence that plaintiff

had the locks changed and retained an attorney to file for bankruptcy shows that he was attempting to regain the possession and control he had relinquished.

We perceive no basis for further discovery and a hearing.

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

ENTERED: JUNE 14, 2016

CLERK

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

1448 Herman Knox, Index 800165/10
Plaintiff-Appellant,

-against-

St. Luke's Hospital, et al.,
Defendants-Respondents.

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Law Office of Tedd Kessler, P.C., New York (Tedd Kessler of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Judy C. Selmeci of counsel), for St. Luke's Hospital, respondent.

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

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Order, Supreme Court, New York County (Lucy Billings, J.), entered February 19, 2015, which granted the motion of defendant Ronald Dreifuss, M.D. and the cross motion of defendant hospital to dismiss the complaint as time-barred, unanimously affirmed, without costs.

Plaintiff acknowledges that the catheter cuff, which was inserted into his chest to facilitate hemodialysis, was a fixation device, but argues that when it was inadvertently left in his chest after the catheter tube was removed, it became a "foreign object" (CPLR 214-a). Plaintiff's contention that the foreign-object toll applies is raised for the first time on appeal, and therefore is unpreserved for appellate review (*see*

Gonzalez v New York City Health & Hosps. Corp., 29 AD3d 369, 370 [1st Dept 2006]). In any event, the argument is unavailing because only objects temporarily used in the course of surgery qualify as foreign objects (*see LaBarbera v New York Eye & Ear Infirmary*, 91 NY2d 207, 212 [1998]). "A fixation device cannot be transformed into a foreign object merely because the continued presence of the fixation device is inadvertent" (*Newman v Keuhnelian*, 248 AD2d 258, 260 [1st Dept 1998], *lv denied* 92 NY2d 804 [1998]; *see Walton v Strong Mem. Hosp.*, 25 NY3d 554 [2015]).

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

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

ENTERED: JUNE 14, 2016

CLERK

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

1449 The People of the State of New York, Respondent, SCID 99005/15

-against-

Jimmie Bynum,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Jordan K. Hummel of counsel), for respondent.

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Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered on or about July 15, 2015, 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.

The court's upward departure was a proper exercise of discretion, based on clear and convincing evidence of an aggravating factor that was not otherwise adequately taken into account by the risk assessment guidelines, and which outweighed the mitigating factors cited by defendant (*see e.g. People v Poole*, 105 AD3d 654 [1st Dept 2013], *lv denied* 21 NY3d 863 [2013]). Although, defendant's recent, egregious crime of violence against his own mother was not a sex offense, its circumstances supported an inference of increased risk of sexual

recidivism.

The court was required, as a matter of law, to designate defendant a sexually violent offender, both because of the registration requirement of his out-of-state conviction (*see People v Macchia*, 126 AD3d 458, 462 [1st Dept 2015], *lv denied* 25 NY3d 910 [2015]), and also because the conduct underlying that conviction matched the essential elements of the corresponding New York offense (*see Matter of North v Board of Examiners of Sex Offenders of State of N.Y.*, 8 NY3d 745, 753 [2007]).

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

ENTERED: JUNE 14, 2016

CLERK

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

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

ENTERED: JUNE 14, 2016

CLERK

Corrected Order - July 21, 2016

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

1450 In re Barbara Hultay, etc., et al.,
Petitioners-Respondents,

-against-

Mei Wu **S.**,
Respondent-Appellant.

Index 500153/12

Storch Amini & Munves PC, New York (Steven G. Storch of counsel), for appellant.

Schulte Roth & Zabel LLP, New York (Marcy Ressler Harris of counsel), for respondents.

Order, Supreme Court, New York County (Laura Visitation-Lewis, J.), entered November 4, 2015, restraining respondent from any written, telephone, or in-person contact, howsoever initiated, with the incapacitated person, without first obtaining written consent from petitioners, and from publicly disclosing certain information concerning his health or finances, unanimously affirmed, without costs.

The record reflects that the guardianship order gave petitioners the authority to limit the incapacitated person's social environment, including who may contact him, as permitted by Mental Hygiene Law § 81.22(a)(2). Respondent admitted to visiting the incapacitated person at a hospital and joining him at restaurants when he was dining with his children, without

obtaining consent from his guardians. The record further reflects that the court-appointed counsel for the incapacitated person and others stated that he expressed the desire not to have contact with respondent, his ex-wife, which was upsetting to him, and that he was vulnerable to manipulation. An evidentiary hearing was not required because the relevant facts were admitted by respondent, who denied petitioner's authority to restrict her contact with the incapacitated person despite the clear provisions of the guardianship order, from which she did not appeal.

The court properly granted an injunction, which is permitted in these circumstances under Mental Hygiene Law § 81.23(b)(1). The confidentiality provisions of the order were appropriate in order to protect the incapacitated person's privacy and his business interests and in light of respondent's admitted refusal to consent to a confidentiality agreement.

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

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

ENTERED: JUNE 14, 2016

CLERK

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

1451 Jeremy Bates, Index 650452/13
Plaintiff-Appellant,

-against-

The Rector, et al.,
Defendants-Respondents.

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Jeremy C. Bates, New York, appellant pro se.

Patterson Belknap Webb & Tyler LLP, New York (Peter W. Tomlinson of counsel), for respondent.

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Order, Supreme Court, New York County (Shlomo Hagler, J.), entered on or about May 15, 2013, which granted defendant's motion to dismiss plaintiff's first three causes of action seeking a declaratory judgment in his favor, unanimously modified, on the law, to declare that a "majority of votes" is not required to elect wardens or vestryman of defendant church, that defendant is not required to count "no" votes or votes against nominees, and that defendant is not required to provide a ballot that has boxes for "no" votes or votes against nominees, and, as so modified, affirmed, without costs. The Clerk is directed to enter judgment accordingly.

The detailed election procedures contained in defendant's ordinances defeat plaintiff's claims that, pursuant to defendant's charter, wardens or vestrymen must be elected by a

"majority of votes" and that defendant must allow and count "no" votes or votes against nominees.

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

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

ENTERED: JUNE 14, 2016

CLERK

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

1452 Gregory Cross, et al., Index 309242/09
Plaintiffs-Respondents,

-against-

Supersonic Motor Messenger Courier, Inc., et al.,
Defendants,

Continental Courier, Inc.,
Defendant-Appellant,

Arturo Canini-Soto, et al.,
Defendants-Respondents.

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Rutherford & Christie, LLP, New York (Lauren E. Bryant of counsel), for appellant.

Rheingold, Valet, Rheingold, McCartney & Giuffra LLP, New York (Jeremy A. Hellman of counsel), for Gregory Cross and Jeanine Cross, respondents.

Morris Duffy Alonso & Faley, New York (Iryna S. Krauchanka and Andrea M. Alonso of counsel), for Arturo Canini-Soto and Elsa Toro Gutierrez, respondents.

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Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about May 22, 2015, which, to the extent appealed from as limited by the briefs, denied defendant Continental Courier, Inc.'s (Continental) motion for summary judgment, unanimously modified, on the law, to grant Continental's motion for summary judgment with respect to plaintiffs' claims based on ostensible agency, Vehicle and Traffic Law § 388, negligent hiring, and negligent supervision, and otherwise affirmed,

without costs.

Plaintiff Gregory Cross alleged that on November 13, 2008, he suffered injuries in the scope of his employment with Modell's Sporting Goods while unloading a delivery of supplies from defendant W.W. Grainger, Inc. from a Continental truck driven by defendant Arturo Canini-Soto, who was employed by Continental.

Drawing all reasonable inferences in the nonmovant's favor, questions of fact exist as to whether defendant Arturo Canini-Soto was an independent contractor or an employee of Continental's for which vicarious liability would attach (*Rodriguez v Parkchester South Condominium, Inc.*, 178 AD2d 231 [1st Dept 1991]). Although Canini-Soto worked for Continental pursuant to a contract for an independent contractor, he was required to maintain insurance in an amount dictated by Continental, his delivery process was controlled by the Continental dispatcher, he used Continental's forms, was required to wear a Continental shirt, and the truck he drove bore the Continental logo. In addition, among other things, Continental dictated the type of truck Canini-Soto could use, whether it was suitable for use on any given day, and paid him based on the deliveries he made (*see Anikushina v Moodie*, 58 AD3d 501 [1st Dept 2009], *lv denied* 12 NY3d 905 [2009]; *Araneo v Town Bd. for Town of Clarkstown*, 55 AD3d 516 [2d Dept 2008]).

Continental is entitled to summary judgment dismissing plaintiffs' claim that Canini-Soto was acting as Continental's ostensible agent, as there is no evidence that plaintiff Gregory Cross acted in reliance on the belief that Canini-Soto was a Continental employee, and the Continental logo on the truck and the forms are insufficient to demonstrate that Continental held out Canini-Soto as an employee (*Mondello v New York Blood Ctr.*, 80 NY2d 219 [1992], *citing Restatement (Second) of Torts* § 429; *Thurman v United Health Servs. Hosps., Inc.*, 39 AD3d 934, 935-936 [3d Dept 2007], *lv denied* 9 NY3d 807 [2007]).

Continental is entitled to summary judgment dismissing plaintiffs' claim pursuant to Vehicle and Traffic Law § 388 as it made a prima facie showing that it did not own the truck.

Finally, Continental is entitled to summary judgment dismissing plaintiffs' claims for negligent hiring and negligent supervision (*see Nelson v E&M 2710 Clarendon LLC*, 129 AD3d 568, 569-570 [1st Dept 2015]). Plaintiffs have not shown that

Continental had any reason to question Canini-Soto's qualifications, who had been working for Continental for nearly a year prior to the accident (*Maristany v Patient Support Servs.*, 264 AD2d 302, 303 [1st Dept 1999]).

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

ENTERED: JUNE 14, 2016

CLERK

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

1453N Manuel Sanchez, Index 261098/14
Plaintiff-Appellant,

-against-

Walden Terrace, Inc.,
Defendant-Respondent.

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Victor M. Serby, Woodmere, for appellant.

Goldstein & Greenlaw, LLP, Forest Hills (Steven R. Vaccaro of counsel), for respondent.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about February 5, 2015, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion to remove his action pending in Civil Court, Bronx County, to Supreme Court, Bronx County, unanimously affirmed, without costs.

Plaintiff commenced this action in 2008 seeking $5,000 in termination pay from defendant, his former employer. Plaintiff filed a notice of trial in 2013 stating that he was seeking about $17,000 in damages, and, after a jury was picked, moved in Civil Court for leave to amend the complaint to formally assert claims under the Labor Law, including claims for liquidated damages and attorney's fees. After leave to amend was granted, plaintiff moved in Supreme Court to have the case removed because his claims, including accrued attorney's fees, allegedly exceeded the

$25,000 jurisdictional limit of the Civil Court.

Supreme Court providently exercised its discretion in denying plaintiff's motion (*see* CPLR 325[b]), since plaintiff did not provide an evidentiary basis for determining the amount of reasonable attorney's fees incurred in prosecuting his claims or adequately explain the delay in making the motion (*see David v Astrologo*, 24 AD3d 251 [1st Dept 2005]; *compare Platt v Flesher*, 115 AD3d 468, 468-469 [1st Dept 2014] [motion to remove action should have been granted where the plaintiff established by affidavit of merit that her alleged damages exceeded Civil Court's jurisdictional maximum]).

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

ENTERED: JUNE 14, 2016

CLERK

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

1454N Manuel Mejia, Index 24173/14
Plaintiff-Appellant,

-against-

J. Crew Operating Corp., et al.,
Defendants-Respondents,

770 Broadway Owner LLC, et al.,
Defendants.

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

Law Offices of Joseph J. Rava, White Plains (Matthew F. Rice of counsel), for respondents.

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered July 8, 2015, which granted the motion of defendants J. Crew Operating Corp. and Global Facility Management & Construction to change venue from Bronx County to Richmond County, unanimously reversed, on the law and the facts, without costs, and the motion denied.

As an initial matter, Supreme Court erred by treating defendants' motion to change venue as of right under CPLR 510(1) as having been made under CPLR 510(3).

Unless otherwise prescribed, venue is properly laid in the county where one of the parties resides when the action is commenced (CPLR 503[a]). In making the motion under CPLR 510(1),

defendants, as movants, assumed the burden to establish that plaintiff improperly designated Bronx County as the venue (*see Fiallos v New York Univ. Hosp.*, 85 AD3d 678 [1st Dept 2011]). Defendants' proof indicates that when seeking treatment at Lincoln Hospital on April 10, 2014, plaintiff gave a Richmond County address. However, that evidence does not demonstrate where plaintiff resided when this action was commenced five months later, in September 2014 (*see id.*; *Corea v Browne*, 45 AD3d 623 [2d Dept 2007]).

In view of defendants' failure to meet their initial burden, it is unnecessary to consider the sufficiency of plaintiff's opposition to the motion (*see e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

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

ENTERED: JUNE 14, 2016

CLERK