SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 13, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Gische, Kapnick, Kahn, Kern, JJ.

7857 The People of the State of New York, Respondent, Ind. 1694/11

-against-

Davon Nuckols,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Paul A. Andersen of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Margaret L. Clancy, J.), rendered April 15, 2014, convicting defendant, after a jury trial, of rape in the third degree, and sentencing him, as a second felony offender, to a term of two 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. The evidence supports the conclusion that the victim unmistakably expressed her lack of

consent, within the meaning of Penal Law § 130.05(2)(d). The fact that the jury acquitted defendant of other sex offenses does not warrant a different conclusion, because although in performing our weight of the evidence review, we may consider an alleged factual inconsistency in a verdict (*see People v Rayam*, 94 NY2d 557, 563 n [2000]), we nevertheless find it "imprudent to speculate concerning the factual determinations that underlay the verdict" (*People v Horne*, 97 NY2d 404, 413 [2002]; *see also People v Hemmings*, 2 NY3d 1, 5 n [2004]).

The court properly granted the prosecution's application pursuant to *Batson v Kentucky* (476 US 79 [1986]) regarding defense counsel's exercise of a peremptory challenge. The record supports the court's finding that the reasons proffered by defense counsel for the challenge in question were pretextual, and there is no basis for disturbing the court's determination, which essentially involved a credibility assessment of defense counsel (*see People v Hernandez*, 75 NY2d 350, 356-367 [1990], *affd* 500 US 352 [1991]). "Although defense counsel claimed that the juror's pregnancy could have made her emotional" and potentially preclude her, for medical reasons, from fully participating in the trial, "counsel never questioned the juror about the effects of her pregnancy" (*People v Young*, 35 AD3d 324, 325 [1st Dept 2006], *lv denied* 8 NY3d 992 [2007]; *see also People*

v Kendall, 27 AD3d 355, 356 [1st Dept 2006], *lv denied* 6 NY2d 895 [2006]; *People v McNair*, 26 AD3d 245, 246 [1st Dept 2006], *lv denied* 6 NY3d 896 [2006]), or even whether the juror was, in fact, pregnant.

The court meaningfully responded to a jury note requesting a readback of testimony (*see People v Almodovar*, 62 NY2d 126, 131 [1984]; *People v Malloy*, 55 NY2d 302 [1982], *cert denied* 459 US 847 [1982]). The court was not obligated to read back testimony that fell outside of the jury's specific request. Moreover, there is no indication that the court's denial of defendant's request to read back additional testimony caused any prejudice (*see People v Lourido*, 70 NY2d 428, 435 [1987]; *People v Ingram*, 3 AD3d 437 [1st Dept 2004], *lv denied* 2 NY3d 801 [2004]).

The court providently exercised its discretion in declining to replace a deliberating juror with an alternate on the ground of misconduct. Even assuming that, as observed by defense counsel, the juror gestured to other jurors at a critical point in the readback of testimony and mouthed the word "rape," this was not "misconduct of a substantial nature" (CPL 270.35[1]). Jurors' natural spontaneous reactions during readbacks, such as gesturing to each other after hearing significant information, fall far short of constituting in-court deliberations in violation of CPL 310.10(1). Defendant, who asked only for the

juror's replacement, did not preserve his claim that the court should have conducted an inquiry of the juror, and we decline to review it in the interest of justice. As an alternative holding, we find that the innocuous circumstances did not require an inquiry.

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

ENTERED: DECEMBER 13, 2018

CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Kern, JJ.

7858 Nuris Blanco, Index 300900/16
Plaintiff-Respondent,

-against-

866 Morris Park Realty Management, LLC,
Defendant-Appellant.

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Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for appellant.

Peña & Kahn, PLLC, Bronx (Diane Welch Bando of counsel), for respondent.

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Order, Supreme Court, Bronx County (Joseph E. Capella, J.), entered on or about February 21, 2018, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant failed to establish entitlement to judgment as a matter of law in this action where plaintiff alleges that she was injured when she slipped and fell while descending a staircase in defendant's building, which was wet with ice and melting ice that plaintiff believed had been tracked in from outside. Defendant failed to demonstrate its lack of constructive notice of the wet condition of the steps, since it offered only the testimony of its building manager, who could not say when the stairs were last cleaned or inspected, or whether the handyman had cleared snow outside the building at any time before the accident (*see e.g.*

Gautier v 941 Intervale Realty LLC, 108 AD3d 481 [1st Dept 2013]; *Aviles v 2333 1st Corp.*, 66 AD3d 432 [1st Dept 2009]). Defendant also offered no evidence of when the weekly cleaning of the stairs occurred before the accident (*see Modzelewska v City of New York*, 31 AD3d 314 [1st Dept 2006]).

In view of defendant's failure to meet its prima facie burden, plaintiff's opposition papers need not be considered (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

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

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

ENTERED: DECEMBER 13, 2018

CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Kern, JJ.

7859-
7860- In re Anthony B.,
Petitioner-Appellant,

-against-

Judy M.,
Respondent-Respondent.

- - - - -

Judy M.,
Petitioner-Appellant,

-against-

Anthony B.,
Respondent-Respondent.

_____

Andrew J. Baer, New York, for Anthony B., appellant/respondent.

Geoffrey P. Berman, Larchmont, for Judy M., respondent/appellant.

_____

Order of fact-finding and disposition (one paper), Family Court, New York County (Carol Goldstein, J.), entered on or about November 8, 2017, which determined after a hearing that Judy M. committed the family offense of harassment in the second degree and suspended the judgment against Judy M., unanimously affirmed, without costs. Order, same court and Judge, entered on or about November 8, 2017, which, after a hearing, dismissed Judy M.'s petition seeking an order of protection against Anthony B. for failure to establish a prima facie case, unanimously affirmed, without costs.

Anthony B. established by a fair preponderance of the evidence that Judy M.'s actions constituted the family offense of harassment in the second degree (*see* Family Ct Act § 832; Penal Law § 240.26[3]) because her actions served no legitimate purpose and established a course of conduct that was taken with the intent of seriously annoying or alarming him (*see Matter of Kritzia B. v Onasis P.*, 113 AD3d 529, 529 [1st Dept 2014]).

Anthony B.'s appeal lacks merit, because Family Court appropriately exercised its discretion in ordering a suspended sentence, which is permitted under FCA § 841.

The Family Court properly dismissed Judy M.'s petition for failure to establish a prima facie case that Anthony B.'s actions constituted the family offense of harassment in the second degree because her testimony failed to establish that he engaged in a course of conduct that was intended to harass, annoy or alarm her, that she was alarmed or seriously annoyed by his conduct, and that his conduct served no legitimate purpose (Penal Law § 240.26[3]; *Matter of Kirsten G. v Melvin G.*, 143 AD3d 614 [1st Dept 2016]). Contrary to Judy M.'s contention, her testimony

did not establish a prima facie case that his actions constituted disorderly conduct, stalking or any other family offense.

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

ENTERED: DECEMBER 13, 2018

CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Kern, JJ.

7862 Robert A. Cardali, et al., Index 111546/11
Plaintiffs-Appellants,

-against-

Richard Slater,
Defendant-Respondent,

Winsbert Spence,
Defendant.

_____

Robert A. Cardali & Associates, LLP, New York (Robert A. Cardali of counsel), for appellants.

Stephens, Baroni, Reilly & Lewis, LLP, White Plains (Stephen R. Lewis of counsel), for respondent.

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Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered May 23, 2017, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for summary judgment as to the first cause of action for libel per se, and granted defendant Richard Slater's cross motion for summary judgment dismissing the claim, unanimously affirmed, with costs.

Plaintiff Robert A. Cardali is an attorney and the principal of plaintiff law firm (the Cardali Firm). Defendant Richard Slater was employed as an attorney at the Cardali Firm from 2003 until he was terminated in 2010. Following his termination, Slater became aware of an issue in the way the Cardali Firm billed certain clients. Slater reported this issue to the

Departmental Disciplinary Committee (the DDC), which determined that the Cardali Firm's billing practices were in violation of the Rules of Professional Conduct (RPC) (22 NYCRR 1200.0). While the DDC's investigation was pending, Slater made certain statements about Cardali to his former colleagues at the Cardali Firm.

The libel per se claim was properly dismissed because Slater's statement that Cardali was "really nothing more than a common criminal" is a nonactionable statement of opinion (*see generally Mann v Abel*, 10 NY3d 271, 276 [2008], *cert denied* 555 US 1170 [2009]). The phrase has an imprecise meaning that is not capable of being proven true or false and, when read in context, no reasonable reader would understand it to be accusing Cardali of having been charged with or convicted of an actual crime (*see Melius v Glacken*, 94 AD3d 959, 960 [2d Dept 2012]*; see also Galasso v Saltzman*, 42 AD3d 310, 311 [1st Dept 2007]; *Lacher v Engel*, 33 AD3d 10, 16 [1st Dept 2006]).

In view of the dismissal of the libel per se claim, we need not address plaintiffs' request that the matter be assigned to a new justice.

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

ENTERED: DECEMBER 13, 2018

CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Kern, JJ.

7864 The People of the State of New York, Respondent, Ind. 2086/10

-against-

Allen Jones, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

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Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered May 15, 2014, convicting defendant, after a jury trial, of manslaughter in the first degree and gang assault in the first degree, and sentencing him, as a second violent felony offender, to an aggregate term of 18 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]). By itself, a surveillance videotape depicting defendant's continuing aggressive conduct toward the victim was enough to warrant the conclusion that defendant shared his companions' intent to at least cause the victim serious physical injury (*see* Penal Law § 20.00). The jury's mixed verdict does not warrant a different conclusion (*see People v*

Rayam, 94 NY2d 557 [2000]; *see also People v Horne*, 97 NY2d 404, 413 [2002]; *People v Hemmings*, 2 NY3d 1, 5 n [2004]).

Defendant's arguments concerning a witness who invoked his Fifth Amendment privilege as to certain matters on cross-examination are similar to arguments this Court rejected on a codefendant's appeal (*People v Thompson*, 153 AD3d 433 [1st Dept 2017], *lv denied* 30 NY3d 984 [2017]), and we find no basis to reach a different result. Although the witness's testimony was more damaging to defendant than to the codefendant, the excluded matters were still collateral, and defendant still had a full opportunity to impeach the witness and cross-examine him on all matters related to the shooting. Accordingly, there was no violation of defendant's right of confrontation.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 13, 2018

CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Kern, JJ.

7865 The People of the State of New York, Respondent, Ind. 622/16 2606/16

-against-

Kaseem Wilson, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Eric Del Pozo of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered April 18, 2017, as amended August 1, 2017, convicting defendant, upon his plea of guilty, of attempted murder in the second degree and conspiracy in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 15 years and 8 months, unanimously affirmed.

Defendant forfeited appellate review of his motion to controvert a search warrant that permitted retrieval of potential evidence from defendant's cell phones, because he pleaded guilty before the court issued an order finally denying any part of his suppression motion (*see People v Fernandez*, 67 NY2d 686, 688 [1986]). Even if the court's order can be viewed as deciding the particular issue defendant seeks to raise on appeal, by its express terms the order did not constitute "[a]n order finally

denying a motion to suppress evidence" (CPL 710.70[2]), because it was contingent on the outcome of a hearing into the legality of defendant's arrest, which would have affected the legality of the ensuing search warrant. However, defendant pleaded guilty before the hearing was held. In any event, regardless of whether defendant forfeited his challenge to the search warrant, we find that the application for the warrant established probable cause.

Defendant's claim of a technical defect in his restructured sentence is unreviewable because defendant was not "adversely affected" (CPL 470.15[1]) when his sentence was reduced at his own request, for his benefit, to resolve a matter relating to credit for time served on another sentence (*see People v McNeil*, 164 AD3d 1106 [1st Dept 2018]; *People v Francis*, 164 AD3d 1108 [1st Dept 2018]).

We perceive no basis for a reduction in sentence.

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

ENTERED: DECEMBER 13, 2018

CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Kern, JJ.

7866 The People of the State of New York, Respondent, Ind. 1463/14

-against-

Rafael Perez, Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Samuel E. Steinbock-Pratt of counsel), for appellant.

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

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Judgment, Supreme Court, Bronx County (John W. Carter, J. at motion to dismiss; Ralph Fabrizio, J. at plea and sentencing), rendered September 8, 2015, as amended September 24, 2015, convicting defendant of criminal possession of a firearm, and sentencing him, as a second felony offender, to a term of two to four years, unanimously affirmed.

Under the circumstances of the case, the indictment under which defendant pleaded guilty was defective because the People failed to seek judicial permission before re-presenting the case to another grand jury (*see* CPL 190.75[3]).

Where, as here, an indictment is defective, the judgment must ordinarily be reversed, defendant's plea vacated and the indictment dismissed with leave granted to the People to apply for an order permitting resubmission of the charges to another

grand jury. However, defendant requests that the indictment be dismissed with prejudice, and, if that relief is not available, he requests an affirmance. Since we are not prepared to dismiss the indictment with prejudice as requested by defendant, we affirm.

Defendant's other challenge to the indictment is without merit in any event.

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

ENTERED: DECEMBER 13, 2018

CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Kern, JJ.

7867 Tomer Shohat, Index 151446/14
Plaintiff-Respondent,

-against-

Benzion Suky, et al.,
Defendants-Appellants,

Eric Patino, et al.,
Defendants.

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Ishimbayev Law Firm, P.C., New York (Dmitriy Ishimbayev of counsel), for appellants.

Jaroslawicz & Jaros, PLLC, New York (David Tolchin of counsel), for respondent.

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Order, Supreme Court, New York County (James E. d'Auguste, J.), entered May 30, 2017, which granted plaintiff's motion to strike defendants Benzion Suky, 440 West 41st LLC and Eran Suki's answer, and granted judgment as to liability in favor of plaintiff and against said defendants, unanimously affirmed, with costs.

Defendants engaged in willful and contumacious conduct warranting the penalty of striking their answer (*see* CPLR 3126; *McHugh v City of New York*, 150 AD3d 561 [1st Dept 2017]). They failed to comply with several court orders directing compliance

with outstanding discovery requests by dates certain. The discovery responses they served only after plaintiff moved to strike consisted almost entirely of objections.

Defendants' remaining arguments are without merit.

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

ENTERED: DECEMBER 13, 2018

CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Kern, JJ.

7868 Soma Brasil Representacões Comerciais LTDA,
Plaintiff,

Endeavor Group Realty, et al.,
Plaintiffs-Appellants-Respondents,

-against-

JHSF Participacô S.A., et al.,
Defendants-Respondents-Appellants.

Index 651886/15

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Law Office Stephen N. Preziosi, P.C., New York (Stephen N. Preziosi of counsel), for appellants-respondents.

Schlam Stone & Dolan LLP, New York (Niall D. O'Murchadha of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered November 3, 2016, which granted defendants' pre-answer motion to dismiss the complaint, unanimously affirmed, with costs.

The motion court properly dismissed the complaint based on the documentary evidence (*see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 433 [1st Dept 2014]). At the heart of this appeal is an authorization agreement between Soma and JHSF, which clearly pertained to properties presented to JHSF that were "not listed in real estate companies" as well as the fact that JHSF would determine "in its sole discretion" any right to payment to Soma. The only rational way to construe the

authorization is that JHSF was looking for New York unlisted opportunities, and that a fee would be negotiated if JHSF bought one through plaintiffs. Contrary to plaintiffs' assertion, the motion court did not narrowly construe the documentary evidence when it relied on a New York Post article, dated March 12, 2013, announcing that the owner was selling the property, and the exclusive agency agreement between the owner and another broker, to determine that the subject transaction was public, not private.

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

ENTERED: DECEMBER 13, 2018

CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Kern, JJ.

7869- Index 151025/17
7870-
7871 Philip R. Shawe,
Plaintiff-Appellant,

-against-

Kramer Levin Naftalis &
Frankel LLP, et al.,
Defendants-Respondents.

_____

Rodney A. Smolla, Wilmington, DE, of the bar of the State of Illinois, the State of Virginia and the State of Delaware, admitted pro hac vice, of counsel, for appellant.

Cahill Gordon & Reindel LLP, New York (Floyd Abrams of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered March 5, 2018, dismissing the complaint with prejudice, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered February 20, 2018, which granted defendants' motion to dismiss the complaint, unanimously dismissed, without costs, as subsumed in the appeal from the judgment. Order, same court and Justice, entered April 23, 2018, which denied plaintiff's motion for leave to renew defendants' motion, unanimously affirmed, with costs.

Plaintiff alleges, inter alia, that he was defamed by defendants in interviews with journalists, an article, and press releases in which defendants made comments about litigation

between him and Elizabeth Elting, whom they represented. Plaintiff and Elting co-founded a Delaware company and had litigated for years over control of the company. Most recently, a Delaware court had granted Elting's petition for the appointment of a custodian to sell the company to resolve the deadlock between her and plaintiff. In its August 13, 2015 post-trial decision, the court mentioned Elting's pending motion for sanctions against plaintiff, which the court said "raises very serious issues of spoliation and discovery abuse." In its July 20, 2016 decision on the sanctions motion, the Delaware court imposed sanctions against plaintiff equal to Elting's costs on the sanctions motion and one third of her litigation costs for the entire case, a total of more than $7 million.

Plaintiff failed to demonstrate that Supreme Court did not apply the correct standard on this motion to dismiss pursuant to CPLR 3211(a)(7). Moreover, he failed to mention that the motion was also made under CPLR 3211(a)(1). Supreme Court correctly evaluated the documentary evidence annexed to the motion.

Plaintiff's motion for leave to renew was not supported by new facts not previously offered that would "change the prior determination" (CPLR 2221[e][2]). Plaintiff relied on a February 15, 2018 order of the Delaware Chancery Court that approved his bid to buy the company. However, that order did not absolve

plaintiff of the misconduct described in the court's post-trial and sanctions decisions, which were the basis for Supreme Court's determination of defendants' motion to dismiss.

Although the February 15, 2018 order showed that certain of defendants' predictions about the decision on the sanctions motion pending at the time did not come to pass, the predictions are not actionable as defamation (*see Immuno AG. v Moor-Jankowski*, 77 NY2d 235, 255 [1991], *cert denied* 500 US 954 [1991]). Moreover, the recounting of a judicial proceeding is not actionable simply because of later developments in the proceeding (*Panghat v New York State Div. of Human Rights*, 89 AD3d 597 [1st Dept 2011], *lv denied* 19 NY3d 839 [2012], *cert denied* 568 US 943 [2012]); *Lacher v Engel*, 33 AD3d 10, 14 [1st Dept 2006]).

Defendants' comment about plaintiff's "massive spoliation" or "spoliation in droves" is protected under Civil Rights Law § 74 as a fair and true report, even if the Delaware Chancery Court did not use defendants' exact words in its decision (*see Holy Spirit Assn. for Unification of World Christianity v New York Times Co.*, 49 NY2d 63, 67 [1979]; *see also Russian Am. Found., Inc. v Daily News, L.P.*, 109 AD3d 410 [1st Dept 2013], *lv denied* 22 NY3d 856 [2013]). The court concluded that plaintiff had intended and attempted to destroy "a substantial amount of

information," and detailed plaintiff's responsibility for the deletion, in violation of court order, of approximately 41,000 files from his computer. Plaintiff argues that defendants overstated the matter, because his spoliation proved largely reversible. Indeed, of the 41,000 files deleted, 1,000 were permanently destroyed. However, plaintiff did not cause the recovery of the data; rather, it occurred in spite of him. Moreover, he lied under oath about his spoliating conduct. As the court observed, an unsuccessful spoliator is still a spoliator (*see TR Invs., LLC v Genger*, 2009 WL 4696062, *9, 2009 Del Ch LEXIS 203, *28 [Del Ch 2009], *affd* 26 A3d 180 [Del 2011]; *see also Victor Stanley v Creative Pipe, Inc.*, 269 FRD 497 [D Md 2010]).

Defendants' comment that plaintiff was "holding Elting hostage" is protected under Civil Rights Law § 74. During the interviews at issue, defendants cited the section of the post-trial decision in which the court used similar language in summarizing Elting's position (*see Greenberg v Spitzer*, 155 AD3d 27, 52 [2d Dept 2017]). Defendants' statement that "no rational person would ever want to partner with [plaintiff]," which is nearly a verbatim quotation from the court's decision, is protected under the statute.

Plaintiff argues that defendants' comment that "[s]ome of

the stuff, which I'm not at liberty to share with you, is so egregious that it really makes the jaw drop" should not have been found to be nonactionable opinion (*see Sprecher v Thibodeau*, 148 AD3d 654, 656 [1st Dept 2017] ["comments made to the media by a party's attorney regarding an ongoing lawsuit constitute nonactionable opinions"]), because it suggests that the comment is based on undisclosed defamatory facts (*see e.g.* Restatement [Second] of Torts § 566]). However, the complaint does not allege, as required, that the words of which plaintiff complains are defamatory (*see* CPLR 3016[a]). In any event, in context, the comment can reasonably be read as part of defendants' nonactionable prediction about the sanctions decision. Moreover, it is largely nonactionable hyperbole.

Supreme Court correctly dismissed the tortious interference with prospective business relations claim because the complaint fails to allege that plaintiff had a relationship with Bank of America with which defendants interfered. It contains conclusory allegations about a potential relationship, which is insufficient (*BDCM Fund Advisor, L.L.C. v Zenni*, 103 AD3d 475, 478 [1st Dept 2013]). Nor does the complaint allege, as required, that but for defendants' conduct plaintiff would have had an economic

relationship with the bank (*Vigoda v DCA Prods. Plus*, 293 AD2d 265 [1st Dept 2002]).

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: DECEMBER 13, 2018

CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Kern, JJ.

7872 The People of the State of New York, Ind. 3781/12
Respondent,

-against-

Daulin Rosario,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Stephen Kress 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 (Jill Konviser, J.), rendered June 16, 2015,

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

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

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

ENTERED: DECEMBER 13, 2018

CLERK

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

Friedman, J.P., Gische, Kapnick, Kahn, Kern, JJ.

7873 The People of the State of New York, Ind. 2334/15
Respondent,

-against-

Tiffany Murdaugh,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Noreen Stackhouse 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 (Gregory Carro, J.), rendered August 3, 2016,

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

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

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

ENTERED: DECEMBER 13, 2018

CLERK

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

Friedman, J.P., Gische, Kapnick, Kahn, Kern, JJ.

7874 Doron Avgush, Index 20734/12E
Plaintiff-Appellant,

-against-

Jerry Fontan, Inc., et al.,
Defendants-Respondents.

_____

Doron Avgush, appellant pro se.

Abrams, Gorelick, Friedman & Jacobsen, LLP, New York (Jay S. Gunsher of counsel), for respondent.

_____

Appeal from order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered August 26, 2016, which granted defendants' motion for summary judgment dismissing the complaint based on plaintiff's inability to establish a serious injury within the meaning of Insurance Law § 5102(d), unanimously dismissed, without costs, as untimely.

A notice of appeal must be filed and served within 30 days after service by a party of the order and written notice of entry (*see* CPLR 5513[a], 5515[1]). Here, defendants properly electronically served the order on appeal with notice of entry on August 30, 2016, via the New York State Courts Electronic Filing (NYSCEF) system (*see* 22 NYCRR 202.5-b[b]). At that time, plaintiff was represented by counsel who had not withdrawn or moved to be relieved in the manner prescribed by CPLR 321(b). In

a letter dated August 29, 2016, plaintiff's counsel informed him that the law firm would not represent him on any appeal. In a letter dated August 31, 2016, the same counsel informed plaintiff that he was required to file a notice of appeal by September 29, 2016, or his right to appeal would be lost. Since plaintiff neither served nor filed a notice of appeal by that deadline, his appeal is untimely.

As "[t]he time period for filing a notice of appeal is nonwaivable and jurisdictional" (*Jones Sledzik Garneau & Nardone, LLP v Schloss*, 37 AD3d 417, 417 [2d Dept 2007]), it does not matter that plaintiff served and filed his notice of appeal just one day late.

Plaintiff's claim that the clerk's office refused to accept his notice of appeal when he brought it to court on the deadline day, September 29, 2016, is unsupported by any evidence, including his notice of appeal, preargument statement, and affidavit of service, which are all dated September 30, 2016. In any event, an appeal is taken once the notice of appeal is both filed *and* served (*see* CPLR 5515[1]). There was no impediment to plaintiff's timely serving the notice of appeal notwithstanding the clerk's ostensible refusal to accept the paper for filing, or electronically filing the notice of appeal. A litigant's "*pro se* status does not relieve him of the obligation to comply with the

time requirements for taking an appeal" (*Matter of Pravda v New York State Dept. of Motor Vehs.*, 286 AD2d 838, 839 [3d Dept 2001]).

Had the appeal not been dismissed as untimely, we would affirm the order at issue. Plaintiff alleges he developed dystonia causing dysphonia and chronic hoarseness as a result of the subject motor vehicle accident in 2011, but failed to disclose that he previously brought a lawsuit alleging he suffered the same permanent injuries after a 1996 accident. In opposition to defendants' prima facie showing that plaintiff had no objective signs of injury and that his claimed injuries were not causally related to the 2011 accident, plaintiff failed to submit any medical evidence raising a triable issue of fact as to whether he sustained any serious injury causally related to the subject accident (*see Aquino v Alvarez*, 162 AD3d 451 [1st Dept 2018]; *Perez v Rodriguez*, 25 AD3d 506, 509 [1st Dept 2006]; *Turner v Benycol Transp. Corp.*, 78 AD3d 506, 507 [1st Dept 2010]).

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: DECEMBER 13, 2018

CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Kern, JJ.

7875 The People of the State of New York, Ind. 536/14
Respondent,

-against-

Raul Diaz,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Samuel L. Yellen of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Nicholas Iacovetta, J.), rendered July 17, 2014,

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

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

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

ENTERED: DECEMBER 13, 2018

CLERK

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

Friedman, J.P., Gische, Kapnick, Kahn, Kern, JJ.

7878 The People of the State of New York, Ind. 1143/15
Respondent,

-against-

Christopher Santana,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes 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 (Gregory Carro, J.), rendered June 21, 2017,

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

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

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

ENTERED: DECEMBER 13, 2018

CLERK

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

Friedman, J.P., Gische, Kapnick, Kahn, Kern, JJ.

7879N U.S. Bank National Association, etc., Index 651951/10
Plaintiff-Appellant,

-against-

Lightstone Holdings LLC, et al.,
Defendants.

- - - - -

Cadwalader, Wickersham & Taft LLP,
Nonparty Respondent.

_____

Venable LLP, New York (Gregory A. Cross of counsel), for appellant.

Cadwalader, Wickersham & Taft, LLP, New York (Ellen M. Halstead of counsel), for respondent.

_____

Order, Supreme Court, Supreme Court, New York County (Barry R. Ostrager, J.), entered September 5, 2017, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for an order rejecting a portion of the referee's report which found that certain documents were privileged and shielded from discovery, unanimously affirmed, with costs.

The motion court properly found that no subject matter waiver of the privilege had occurred. Although the privileged information sought by plaintiff is likely relevant to its claim of entitlement to priority to the guarantee pool money (*U.S. Bank Natl. Assn. v Lightstone Holdings LLC*, 103 AD3d 458, 459 [1st Dept 2013]), defendant Wachovia did not place the communications

with its counsel "at issue," and plaintiff fails to show that the privileged information is necessary to determine the validity of its claims (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 107 AD3d 451 [1st Dept 2013]; *Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 62 AD3d 581 [1st Dept 2009]; *Veras Inv. Partners, LLC v Akin Gump Strauss Hauer & Feld LLP*, 52 AD3d 370 [1st Dept 2008]).

The motion court also properly found the defendant did not waive the privilege by its selective disclosure of certain nonprivileged documents related to the same issues (*see BEW Parking Corp. v Apthorp Assoc. LLC*, 141 AD3d 425 [1st Dept 2016]; *Deutsche Bank Trust Co. of Ams. v Tri-Links Inv. Trust*, 43 AD3d 56 [1st Dept 2007]). There is also no basis to invade the attorney client privilege of nonparty JP Morgan, and permit discovery of communications with its counsel, issued during the pendency of the related bankruptcy proceeding, years after the agreement at issue in this litigation was drafted.

Lastly, there is no evidence in the record to support plaintiff's contention that the referee did not conduct a proper review of the documents at issue, or that the motion court improvidently exercised its discretion or issued rulings inconsistent with those of the previously assigned judge. Moreover, plaintiff has not arranged for the documents at issue

to be available for this Court to review in camera *(see generally Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 381 [1991]).

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: DECEMBER 13, 2018

CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Kern, JJ.

7880N Rakim Spivey, Index 154249/14
Plaintiff-Appellant,

-against-

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

_____

Tracie A. Sundack & Associates, L.L.C., White Plains (Tracie A. Sundack of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Kathy C. Park of counsel), for respondents.

_____

Order, Supreme Court, New York County (James E. d'Auguste, J.), entered January 27, 2017, which denied plaintiff's motion pursuant CPLR 5015(a)(1) to vacate a prior order, same court and Justice, entered on or about April 25, 2016, dismissing the complaint, on default, for failing to respond to defendants' CPLR 3126 motion to dismiss the complaint, unanimously affirmed, without costs.

Supreme Court properly exercised its discretion to deny plaintiff's motion to vacate the prior order dismissing his complaint on default. The default on which the dismissal was based — plaintiff's failure to respond to a motion to dismiss under CPLR 3126, allegedly due to his counsel's mis-calendaring of the return date — was not an isolated mistake but part of a pervasive pattern of neglect in prosecuting this action evident

from the record, including his persistent failure to satisfy discovery obligations for about a year and a half. As part of a pattern of "intentional[] and repeated[] fail[ure] to attend to [his obligations]" (*Imovegreen, LLC v Frantic, LLC*, 139 AD3d 539, 540 [1st Dept 2016]), the law-office failure leading to the default was not excusable.

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

ENTERED: DECEMBER 13, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Tom, Webber, Gesmer, JJ.

7881- Ind. 211/16
7881A The People of the State of New York, 622/16
Respondent,

-against-

Carlos Falu,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Kyle R. Silverstein of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, Bronx County (George Villegas, J. at first plea; Richard Lee Price, J. at second plea and sentencing), rendered April 28, 2016,

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 judgments so appealed from be and the same are hereby affirmed.

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

ENTERED: DECEMBER 13, 2018

CLERK

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

Richter, J.P., Manzanet-Daniels, Tom, Webber, Gesmer, JJ.

7882-
7883-
7884 In re Adam C.,

A Child Under Eighteen Years
of Age, etc.,

Charles R.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Barbara Graves-Poller of counsel), for respondent.

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

_____

Order, Family Court, Bronx County (Michael R. Milsap, J.), entered on or about July 21, 2017, which, inter alia, determined that respondent was a person legally responsible for the subject child, and neglected the child, unanimously affirmed, without costs.

The evidence supports the finding that respondent, who had been in a six-year relationship with the child's mother, was a person legally responsible for the child within the meaning of Family Ct Act § 1012(g). The record shows that the child referred to respondent as his stepfather, that respondent picked

the child up from school when the mother was working late, and that the child and the mother regularly visited and stayed overnight at respondent's home (*see Matter of Yolanda D.*, 88 NY2d 790, 796-797 [1996]; *Matter of Keniya G. [Avery P.]*, 144 AD3d 532 [1st Dept 2016]; *Matter of Keoni Daquan A. [Brandon W.-April A.]*, 91 AD3d 414, 415 [1st Dept 2012]). There exists no basis to disturb the court's credibility determinations (*see Matter of Irene O.*, 38 NY2d 776, 777 [1975])

A preponderance of the evidence supports the finding that respondent neglected the child by engaging in an act of domestic violence, which involved pulling the mother's hair, throwing her to the ground, and punching her, in the presence of the child, who saw his mother bleeding and called 911 (*see Matter of Isabella S. [Robert T.]*, 154 AD3d 606 [1st Dept 2017]; *Matter of Allyerra E. [Alando E.]*, 132 AD3d 472 [1st Dept 2015], *lv denied* 26 NY3d 913 [2015]).

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

ENTERED: DECEMBER 13, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Tom, Webber, Gesmer, JJ.

7885 John Slawsky, Index 155051/14
Plaintiff-Respondent,

-against-

Turner Construction Company, et al.,
Defendants-Appellants.

_____

Wood Smith Henning & Berman LLP, New York (David H. Larkin of counsel), for appellants.

Kazmierczuk & McGrath, Forest Hills (Katherine M. McGrath of counsel), for respondent.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered October 23, 2017, which, to the extent appealed from, denied defendants' motion for summary judgment dismissing plaintiff's claims pursuant to Labor Law § 240(1), unanimously affirmed, without costs.

The motion court correctly found that plaintiff adduced sufficient evidence that he was exposed to an elevation-related hazard supporting a claim pursuant to Labor Law § 240(1) (*see Wilinksi v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1 [2011]; *Bonaerge v Leighton House Condominium*, 134 AD3d 648 [1st Dept 2015]; *Harris v City of New York*, 83 AD3d 104, 110 [1st Dept 2011]). That the glass partition may have only traveled a short distance does not warrant dismissal in light of the partition's weight of between 300 and 400 pounds (*see Marrero v 2075 Holding*

Co. LLC, 106 AD3d 408 [1st Dept 2013]). Moreover, plaintiff adduced evidence that the lifting device provided had an insufficient maximum vertical lift load, and thus did not provide proper protection (*see Harris, supra*). We have considered defendants' remaining contentions and find them unavailing.

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

ENTERED: DECEMBER 13, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Tom, Webber, Gesmer, JJ.

7886 David W. Bradley, Index 350035/14
Plaintiff-Respondent-Appellant,

-against-

Bershan Shaw Bradley,
Defendant-Appellant-Respondent.

_____

Law Offices of Howard Benjamin, New York (Howard Benjamin of counsel), for appellant-respondent.

Cohen Clair Lans Greifer Thorpe & Rottenstreich, LLP, New York (Robert S. Cohen of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Matthew F. Cooper, J.), entered August 17, 2017, which denied defendant wife's motion to vacate the judgment of divorce and stipulation of settlement, and denied plaintiff husband's cross motion for counsel fees and sanctions, unanimously affirmed, with costs to be paid by defendant wife.

The court properly denied the wife's motion to set aside the open-court stipulation of settlement in the absence of fraud, overreaching, mistake or duress (*see Hallock v State of New York*, 64 NY2d 224, 230 [1984]). The wife was represented by able and experienced counsel, had been involved in negotiations for a period of time, came close to an agreement two weeks prior to reaching settlement, and spent the entire day negotiating the final terms of the settlement. At that time, the court conducted

a proper allocution of the wife, who represented that she understood the terms of the stipulation, and was entering into it voluntarily, knowingly, and of her own free will. Her submission of two unsworn letters from physicians was insufficient to establish that she was so incapacitated as to warrant setting aside the stipulation, particularly where she was observed by the court to be fully engaged in the negotiations and testified emphatically during the allocution (*see Klauer v Abeliovich*, 120 AD3d 1114, 1115 [1st Dept 2014]).

Furthermore, the record shows that the wife has since ratified the stipulation of settlement by seeking disbursements in accordance with its terms (*see Markovitz v Markovitz*, 29 AD3d 460, 461 [1st Dept 2006]). Because she did not raise any triable issue of fact, the wife was not entitled to an evidentiary hearing (*see Richardson v Richardson*, 142 AD2d 563 [2d Dept 1988], *lv dismissed* 73 NY2d 872 [1989]).

As for the husband's cross appeal, the denial of sanctions as against the wife and her former counsel was a provident exercise of the court's discretion. The husband failed to show that the challenged conduct, while without legal merit, was "so egregious as to constitute frivolous conduct within the meaning of 22 NYCRR 130-1.1" (*Carson v Hutch Metro Ctr., LLC*, 110 AD3d 468, 469 [1st Dept 2013] [internal quotation marks omitted]).

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: DECEMBER 13, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Tom, Webber, Gesmer, JJ.

7887 The People of the State of New York, SCI 2348/14
Respondent,

-against-

Jerry Turner,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Kyle R. Silverstein of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (George R. Villegas, J. at plea; Raymond L. Bruce J. at sentencing), rendered October 8, 2015,

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

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

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

ENTERED: DECEMBER 13, 2018

CLERK

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

Richter, J.P., Manzanet-Daniels, Tom, Webber, Gesmer, JJ.

7888 David H. Ostad, Index 650460/10
Plaintiff-Respondent,

-against-

Behzad Nehmadi, et al.,
Defendants-Appellants.

_____

Rivkin Radler LLP, New York (Cheryl Korman of counsel), for appellants.

Law Office of D. Paul Martin PLLC, New York (D. Paul Martin of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered September 28, 2017, which, inter alia, denied defendants' motion to dismiss the complaint pursuant to CPLR 3212 and 3211(7), unanimously affirmed, with costs.

Fact issues precluded summary judgment as to whether the transaction at issue took place, and whether plaintiff had a confidential relationship of trust with defendants. Moreover, the IAS court applied the correct standard to the motion. Regardless of the burden of proof at trial, the party opposing summary judgment need only raise an issue of fact, not an issue of fact as to clear and convincing evidence or some other burden of proof (*see Platinum Equity Advisors, LLC v SDI, Inc.*, 51 Misc3d 1230[A], *3 [Sup Ct, NY County 2016]).

Factual issues also precluded summary judgment on the issue

of the applicability of the statute of frauds. Plaintiff raised a triable issue of fact as to whether the alleged oral agreement was one for a partnership or joint venture to invest in real property (*see Retter v Zyskind*, 138 AD3d 496 [1st Dept 2016]).

Further, if plaintiff's version of the facts is accepted, the claims did not accrue until 2008, when defendants denied his interest in the venture *(see Maric Piping v Maric*, 271 AD2d 507, 508 [2d Dept 2000]).

Defendants' argument as to unclean hands was raised for the first time at oral argument on the motion. Given that there was no briefing on the issue below, and that starkly contrasting versions of plaintiff's motive for the transaction were given in the record below, the IAS court appropriately deferred resolution of the defense until trial.

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

ENTERED: DECEMBER 13, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Tom, Webber, Gesmer, JJ.

7889-
7890 GEM Holdco, LLC, et al., Index 653694/15
Plaintiffs-Respondents,

-against-

RDX Technologies Corp., et al.,
Defendants-Appellants.

_____

Catafago Fini LLP, New York (Tom M. Fini of counsel), for appellants.

Schlam Stone & Dolan LLP, New York (Bradley J. Nash of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered June 2, 2017, in favor of plaintiff GEM Holdco, LLC, against defendants, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered on or about April 6, 2017, which granted GEM's motion for summary judgment in lieu of complaint, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Pursuant to a settlement agreement resolving GEM's claims against defendants in a prior action, defendant RDX Technologies Corp. was to make certain installment payments to GEM. The agreement provided that its terms were "subject to and expressly conditioned upon final approval by the Toronto Venture Exchange (the 'Exchange') within three business days of the full execution

of this Agreement" and that, if such approval was not received by RDX "within three business days of the execution of this Agreement, the Agreement shall be null and void."

It is undisputed that, although Exchange approval was not obtained within three days, defendants made the first five installment payments required by the agreement. When trading in RDX shares was halted, GEM agreed that RDX's next installment payment could be deferred for one month, and the parties confirmed that the agreement otherwise remained "in full force and effect." It is also undisputed that RDX thereafter stopped making installment payments and filed for bankruptcy, which constituted a default under the agreement.

Defendants waived the right to enforce the Exchange-approval condition by ratifying the agreement (*see Allen v Reise Org., Inc.*, 106 AD3d 514, 517 [1st Dept 2013]; *Kenyon & Kenyon v Logany, LLC*, 33 AD3d 538, 539 [1st Dept 2006]). They failed to act promptly to repudiate the agreement, only seeking to enforce the condition two years after the approval was required to have been received, and they accepted the benefit of the agreement, i.e., they did not have to litigate the claims asserted against them in the prior action, which was discontinued against them with prejudice, and they obtained a release of those claims.

A reading of the settlement agreement as a whole, including

the referenced affidavit of confession of judgment executed by defendant Danzik and the provision that defendants would be jointly and severally liable in the event of nonperformance, demonstrates that the parties intended to hold Danzik personally liable (*see Beal Sav. Bank v Sommer*, 8 NY3d 318, 324-25 [2007]). The fact that the affidavit of confession of judgment that was executed by Danzik in connection with the settlement agreement was found to be technically unenforceable in the prior action does not mean that Danzik was absolved of all liability. The settlement agreement does not provide that enforcement of the confession of judgment is the "sole remedy" against him (*see Ambac Assur. Corp. v EMC Mtge. LLC*, 121 AD3d 514, 519 [1st Dept 2014]). GEM may seek the usual damages recoverable on a breach of contract claim.

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

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

ENTERED: DECEMBER 13, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Tom, Webber, Gesmer, JJ.

7891-
7892 Index 850023/16

AS Helios LLC,
Plaintiff-Respondent,

-against-

Pushpa Chauhan, et al.,
Defendants-Appellants,

M&T Bank, etc., et al.,
Defendants.

_____

Lanin Law P.C., New York (Scott L. Lanin of counsel), for appellants.

Friedman Vartolo LLP, New York (Chad Harlan of counsel), for respondent.

_____

Appeal from orders, Supreme Court, New York County (Carol Edmead, J.), entered on or about April 13, 2017, which granted plaintiffs' summary judgment motion for foreclosure, dismissing defendants' affirmative defenses and counterclaims, and appointing a referee to compute the amount due plaintiff, deemed appeal from judgment, same court and Justice, entered July 24, 2017 (CPLR 5501[c]), and, so considered, said judgment unanimously reversed, without costs, on the law, the judgment vacated, and plaintiffs' motion denied.

The borrower raised a meritorious standing defense based on questions as to the sufficiency of the content of the conclusory lost note affidavit, which does not state that a thorough and

diligent search was made based on a review of the business records or anything else, does not state that any search was made or by whom, and does nothing to indicate when approximately the note was lost (*see US Bank N.A. v Richards*, 155 AD3d 522 [1st Dept 2017]; *Deutsche Bank Natl. Trust Co. v Anderson*, 161 AD3d 1043 [2d Dept 2018]).

The borrower also raised a plausible notice defense regarding plaintiff's service of the requisite 90-day notice under RPAPL 1304 (*see HSBC Bank USA v Rice*, 155 AD3d 443 [1st Dept 2017]).

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

ENTERED: DECEMBER 13, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Tom, Webber, Gesmer, JJ.

7893 The People of the State of New York, Respondent, Ind. 307/13

-against-

Darryl Tunstall,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Michael J. Obus, J. at colloquy on new counsel; Juan M. Merchan, J. at nonjury trial and sentencing), rendered May 17, 2016, convicting defendant of murder in the second degree, and sentencing him, as a second violent felony offender, to a term of 22 years to life, unanimously modified, on the law, to the extent of vacating the second violent felony offender adjudication and remanding for resentencing, and otherwise affirmed.

The verdict was not against the weight of the evidence (*see People v. Danielson*, 9 NY3d 342, 348–349 [2007]). There is no basis for disturbing the court's credibility determinations. The evidence established that defendant's claimed reason for using force against the victim was not credible, and that defendant was not justified in using any amount of force.

Defendant's claim that the court applied the incorrect justification standard is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The court, as trier of fact, is presumed to have decided the case "based upon appropriate legal criteria" (*People v Moreno*, 70 NY2d 403, 406 [1987]; *see also People v Wachulewicz*, 295 AD2d 169 [1st Dept 2002], *lv denied* 98 NY2d 732 [2002]).

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve factual and strategic matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713–714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

The calendar court conducted a sufficient inquiry into defendant's request for new counsel, when it gave defendant an opportunity to air his grievances against counsel, and ascertained that defendant and his counsel had resolved their

differences (*see People v Porto*, 16 NY3d 93, 100-101 [2010]).

As the People concede, defendant should not have been adjudicated a second violent felony offender. A defendant whose *present* conviction is an A-I felony, such as murder, may not be adjudicated a predicate felon, although the A-I conviction may itself serve as a predicate felony in the event of a *future* conviction. The circumstances warrant a remand for resentencing, because, although the second violent felony offender adjudication was essentially surplusage, the record does not clearly establish that it did not affect the sentence imposed by the court.

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

ENTERED: DECEMBER 13, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Tom, Webber, Gesmer, JJ.

7894 In re VSA Architectural Consultants, P.C., Petitioner, Index 100401/17

-against-

State of New York Division of Human Rights, et al., Respondents.

_____

Bierman & Associates, New York (Mark H. Bierman of counsel), for petitioner.

Caroline J. Downey, New York State Division of Human Rights, Bronx (Toni Ann Hollifield of counsel), for State of New York Division of Human Rights respondent.

_____

Petition to annul a final determination of respondent State of New York Division of Human Rights, dated February 3, 2017 (transferred to this Court by order of Supreme Court, New York County [Arlene P. Bluth, J.], entered July 12, 2017), dismissing the discrimination complaint of respondent Isabel Payano, unanimously dismissed, without costs, as brought by a nonaggreieved party.

Since petitioner "successfully obtained a[n]. . .order in [its] favor" before the agency, it "is not aggrieved by it, and, consequently, has no need and, in fact, no right to" challenge the order (*Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 544 [1983]; *see* Executive Law § 298; *Matter of*

Westchester County Police Officers Benevolent Assn. v Public Empl. Relations Bd. of State of N.Y., 97 NY2d 692 [2002]). Given the procedural posture of this appeal, we cannot address the validity of the Agency's jurisdictional analysis.

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

ENTERED: DECEMBER 13, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Tom, Webber, Gesmer, JJ.

7895 In re Michael G.,
Petitioner-Respondent,

-against-

Katherine C.,
Respondent-Appellant.

_____

Robert Schnapp, New York (Anna V. Boudakova of counsel), for appellant.

Philip A. Greenberg, P.C., New York (Philip A. Greenberg of counsel, for respondent.

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

_____

Order, Family Court, New York County (Machelle Sweeting, J.), entered on or about December 11, 2017, which granted the father's petition for modification of custody and awarded him sole legal and physical custody of the subject child, suspended respondent mother's access to the child for a year, and prohibited the mother from filing any modification petitions for a period of one year, unanimously modified, on the law, to strike that portion of the order which prohibited the mother access to the child for a period of one year, and remand the matter for further proceedings consistent with this order, and otherwise affirmed, without costs.

There were adequate allegations before the Family Court to

support a finding of changed circumstances, triggering an inquiry into what modification of the parties' so-ordered custody and visitation agreement would best serve the child's best interests. These include the father's sworn statement that the mother had unilaterally prevented him from exercising his visitation under the parties' so-ordered custody agreement (*see Matter of Ruiz v Sciallo*, 127 AD3d 1205, 1206 [2d Dept 2015]), the statement by counsel for the Administration for Children's Services (ACS) that a report that the father had abused the child was unfounded, and the concerns raised by the father and the child's attorney that the mother had coached the then three-year-old child to make false allegations against the father. Those allegations were sufficient to support the entry of a temporary order transferring physical and legal custody to the father until such time as the court could hold the necessary evidentiary hearing and enter a final order determining custody.

However, the court erred when, without holding an evidentiary hearing, it made a final order transferring physical and legal custody to the father and suspending all contact between the mother and the child for a year. Determination of the child's best interests requires examination of the totality of the circumstances (*Eschbach v Eschbach*, 56 NY2d 167, 172 [1982]). We have consistently held that "an evidentiary hearing

is necessary before a court modifies a prior order of custody or visitation," even where the court is familiar with the parties and child, and particularly where there are facts in dispute (*Matter of Santiago v Halbal*, 88 AD3d 616, 617 [1st Dept 2011]). Furthermore, while we have stated that a hearing on modification of a custody arrangement in the child's best interests

> "may be 'as abbreviated, in the court's broad discretion, as the particular allegations and known circumstances warrant. . . ,' it must include an opportunity for both sides, and the children's attorney when there is one, to present their respective cases, and the 'factual underpinnings of any temporary order [must be] made clear on the record'" (*Shoshanah B. v Lela G.*, 140 AD3d 603, 607 [1st Dept 2016] [internal citations omitted]).

Here, the court made a final determination without taking any testimony or entering any documents into evidence. The court's reliance on statements made by the ACS caseworker during a court conference was inappropriate, since the mother's attorney had requested, but was denied, a full hearing at which counsel could have cross-examined the caseworker. There is no indication in the record that the court possessed sufficient information to determine how to modify the custody and visitation arrangement in order to best serve the child's interests. In particular, there was no evidence about whether the mother held a genuine belief that the father had harmed the child, as she asserted, or about

whether she was presently willing and able to support the relationship between the child and his father, nor was she given an opportunity to make such a showing.

Moreover, there is no basis in the record for the court's determination that it was in the best interests of the parties' young child that he have no contact with his mother for a year, particularly since the mother had been the child's primary caretaker, and both the father and the child's attorney had asked that the mother have supervised visitation with the child.

Accordingly, the matter is remanded to the court for immediate further proceedings to reinstate access between the mother and child, which may include supervised and/or therapeutic visitation, and for a full hearing on a modified custody and visitation plan that will serve the best interests of the child.

The court also erred in prohibiting the mother from filing any future petitions for custody or visitation without leave of court for a period of one year when neither the father nor the child's attorney sought this relief. "[P]ublic policy mandates free access to the courts" (*Board of Educ. of Farmingdale Union Free School Dist. v Farmingdale Classroom Reachers Assn., Local 1889, AFT AFL-CIO*, 38 NY2d 397, 404 [1975]). We have held that, in an appropriate case, a court may enjoin a party from continuing to litigate certain claims without prior approval of

the court "to prevent use of the judicial system as a vehicle for harassment, ill will and spite" (*Matter of Sud v Sud*, 227 AD2d 319, 319 [1st Dept 1996]; *see also Komolov v Segal*, 96 AD3d 513, 514 [1st Dept 2012]). However, here, there is no evidence that the mother had a history of relitigating the same claim or otherwise engaging in frivolous litigation against the father that might have made such a ruling appropriate (*see also Matter of Sullivan v Sullivan*, 40 AD3d 865, 867 [2d Dept 2007] [Family Court properly declined to enjoin father from filing further petitions where there was no showing that his earlier petitions were not based on his genuine concern for the child's welfare]).

We have considered the mother's other claims, and find them unavailing.

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

ENTERED: DECEMBER 13, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Tom, Webber, Gesmer, JJ.

7896 The People of the State of New York, Respondent, Ind. 2386/15

-against-

Hector Ceballos, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Abraham Clott, J.), rendered January 6, 2016, convicting defendant, after a jury trial, of grand larceny in the fourth degree (three counts) and theft of services, and sentencing him, as a second felony offender, to an aggregate term of 1½ to 3 years, unanimously affirmed.

The court providently exercised its discretion in denying defendant's request to substitute retained counsel as the trial was about to begin (*see People v O'Daniel*, 24 NY3d 134, 138 [2014]; *People v Arroyave*, 49 NY2d 264, 270 [1980]). "Defendant, who had been represented by assigned counsel for several months without any indication of a problem with the representation, did not establish compelling circumstances to warrant a delay" (*People v Bolar*, 62 AD3d 537, 537 [1st Dept 2009], *lv denied* 12

NY3d 923). Although defendant claimed his family was in the process of hiring private counsel, there was no indication that the unnamed attorney, who did not appear, would be ready to try the case without undue delay. Furthermore, defendant's conclusory remarks that he lacked confidence in his assigned counsel did not constitute compelling circumstances, and the record fails to support defendant's assertion on appeal that counsel's performance in plea negotiations was "apparently" deficient.

Defendant's legal sufficiency claim relating to the larceny convictions is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence established the

required exercise of dominion and control by defendant over the victim's property (*see People v Olivo*, 52 NY2d 309, 317 n6 [1981]; *People v Alamo*, 34 NY2d 453, 457 [1974]).

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

ENTERED: DECEMBER 13, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Tom, Webber, Gesmer, JJ.

7897 The People of the State of New York, Ind. 3870/09
Respondent,

-against-

Navindra Ramudit,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Laura Lieberman Cohen of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Waleska Suero Garcia of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (John W. Carter, J.), rendered October 12, 2011, convicting defendant, after a jury trial, of bail jumping in the first degree, and sentencing him to a term of one to three years, unanimously modified, on the law, to the extent of reducing the conviction to bail jumping in the second degree and remanding for resentencing, and otherwise affirmed.

As the People concede, the evidence only established second-degree bail jumping because no indictment was pending when defendant was released from custody (*see* Penal Law § 215.57).

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

ENTERED: DECEMBER 13, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Tom, Webber, JJ.

7898 Jocelyn Nolte, Index 160321/14
Plaintiff-Respondent-Appellant,

-against-

Bridgestone Associates LLC,
Defendant-Appellant-Respondent.

_____

Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., New York (Andrew I. Bart of counsel), for appellant-respondent.

Himmelstein, McConnell, Gribben, Donoghue & Joseph LLP, New York (Ronald S. Languedoc of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered October 5, 2017, which, insofar as appealed from as limited by the briefs, declared that plaintiff is the rent-stabilized tenant of the subject apartment and is entitled to money damages, including treble damages, for a rent overcharge, and imposed a freeze on the rent determined as the base date rent until corrected registration statements were filed with the Division of Housing and Community Renewal (DHCR), unanimously affirmed, with costs.

The court properly examined the rental history of the subject apartment beyond the four-year statutory limitations period (CPLR 213-a) upon finding that defendant was engaged in a fraudulent scheme to deregulate apartments (*see Matter of Park v New York State Div. of Hous. & Community Renewal*, 150 AD3d 105,

114-115 [1st Dept 2017], *lv dismissed* 30 NY3d 961 [2017]). The record shows that defendant failed to promptly register the apartment and 30 other apartments in the building as rent-stabilized in March 2012, when the applicability of *Roberts v Tishman Speyer Props., L.P.* (13 NY3d 270 [2009]) was clear (*see Matter of Park*, 150 AD3d at 110).

Moreover, defendant failed to raise an issue of fact as to whether the rent was improperly increased between 1999 and 2000 based on false claims of individual apartment improvements. While defendant was not the owner at that time, it submitted no evidence that controverted plaintiff's expert's affidavit stating that there was no evidence of such improvements.

Defendant argues that its conduct was not willful, because DHCR failed to issue revised policy guidelines for several years following the *Roberts* decision, and that therefore treble damages are not warranted. However, as indicated, the court correctly found that defendant had engaged in fraud (*see Altschuler v Jobman 478/480, LLC.*, 135 AD3d 439, 441 [1st Dept 2016], *lv denied* 29 NY3d 903 [2017]).

Defendant contends that the court improperly froze plaintiff's rent at the rent it determined as the base date rent until such time as revised registrations were filed with DHCR. However, Rent Stabilization Code (RSC) (9 NYCRR) § 2528.4

provides that an owner who filed an improper rent registration is barred from collecting rent in excess of the base date rent, and is retroactively relieved of that penalty upon the filing of a proper registration only when the increases were lawful except for the failure to file a timely registration (*see Matter of 215 W 88th St. Holdings LLC v New York State Div. of Hous. & Community Renewal*, 143 AD3d 652, 653 [1st Dept 2016], *lv dismissed* 30 NY3d 1016 [2017]). That is not the case here.

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

Plaintiff argues, citing certain 2014 amendments to the RSC, that the legal regulated rent should be based on the rent for a comparable rent-stabilized apartment on the date on which she became the tenant, rather than on the base date. She offers no authority for adopting this new formulation.

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

ENTERED: DECEMBER 13, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Tom, Webber, Gesmer, JJ.

7900 The People of the State of New York, Ind. 2125/14
Respondent,

-against-

Patrick Abdalla,
Defendant-Appellant.

_____

Justine M. Luongo, The Legal Aid Society, New York (Susan Epstein of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Kristian D. Amundsen of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered April 29, 2015,

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

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

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

ENTERED: DECEMBER 13, 2018

CLERK

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

Richter, J.P., Manzanet-Daniels, Tom, Webber, Gesmer, JJ.

7901-
7902 The People of the State of New York, Respondent,

-against-

Robert Camarano, Defendant-Appellant.

Ind. 3914/08
2918/08

_____

Feldman and Feldman, Uniondale (Steven A. Feldman of counsel), for appellant.

Robert Camarano, appellant pro se.

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

_____

Judgments, Supreme Court, New York County (Carol Berkman, J.), rendered June 21, 2010, as amended July 2, 2010, convicting defendant, after a jury trial, of murder in the second degree and criminal mischief in the third degree, and sentencing him, as a second violent felony offender, to consecutive terms of 25 years to life and 2 to 4 years, unanimously affirmed.

The court properly permitted defendant to proceed pro se after a thorough colloquy at which the court ensured that he was aware of the risks and disadvantages of representing himself and of the important role of a lawyer (*see People v Crampe*, 17 NY3d 469, 481-482 [2011]; *People v Providence*, 2 NY3d 579, 583 [2004]).

We perceive no basis for reducing the sentence.

Defendant's pro se claims, including his claim that his ability to represent himself was impaired by drugs, are unreviewable on direct appeal because they rest on factual claims outside the record. In any event, we have considered defendant's constitutional claims regarding delays in the perfection of his appeal, and we find them without merit.

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

ENTERED: DECEMBER 13, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Tom, Webber, Gesmer, JJ.

7903 The People of the State of New York, Ind. 811/12
Respondent,

-against-

Scott Silverstein,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Jacqueline A. Meese-Martinez of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Victoria Muth 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 (James M. Burke, J.), rendered July 27, 2016,

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

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

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

ENTERED: DECEMBER 13, 2018

CLERK

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

Richter, J.P., Manzanet-Daniels, Tom, Webber, Gesmer, JJ.

7904N Duane Reaves, Index 150350/12
Plaintiff-Respondent,

-against-

Lakota Construction Group, Inc.,
et al.,
Defendants,

214-27 Northern Boulevard LLC,
Defendant-Appellant.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Arlene Bluth, J.), entered on or about June 6, 2018,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated November 26, 2018,

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

ENTERED: DECEMBER 13, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Tom, Webber, Gesmer, JJ.

7905N Edison Suarez, Index 155169/15
Plaintiff-Respondent,

-against-

Dameco Industries, Inc.,
Defendant-Appellant,

33rd Street, LLC, et al.,
Defendants.

- - - - -

[And A Third-Party Action]

_____

Gottlieb Siegel & Schwartz, LLP, New York (Lauren M. Solari of counsel), for appellant.

Law Office of Lawrence Perry Biondi, P.C., Garden City (Lisa M. Comeau of counsel), for respondent.

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Order, Supreme Court, New York County (Robert R. Reed, J.), entered on or about April 24, 2017, which granted plaintiff's motion to strike the answer of defendant Dameco Industries, Inc. (Dameco), unanimously affirmed, without costs.

The motion court providently exercised its discretion in granting plaintiff's motion to strike Dameco's answer for willful failure to comply with discovery orders (*see* CPLR 3126). Dameco's counsel offered a barebones affirmation disclosing that Dameco was now defunct and claiming that counsel's attempts to contact unnamed former officers of Dameco through an investigative service had been unsuccessful, which was

insufficient to establish good-faith efforts to comply (*see Cavota v Perini Corp.*, 31 AD3d 362, 364 [2d Dept 2006]; *Hutson v Allante Carting Corp.*, 228 AD2d 303 [1st Dept 1996]; *see also Reidel v Ryder TRS, Inc.*, 13 AD3d 170, 171 [1st Dept 2004]; *compare Lee v 13th St. Entertainment LLC*, 161 AD3d 631 [1st Dept 2018]). Although Dameco was apparently still in business when the action was commenced, defense counsel provided no explanation for Dameco's failure to preserve any records relating to its repair, service, and maintenance of the elevator that allegedly caused plaintiff's injuries, including inspection records that Dameco was statutorily required to prepare. In light of plaintiff's showing of willful failure to comply, and since the complete absence of records impedes plaintiff's ability to prove his case, the sanction of striking Dameco's answer was appropriate under the circumstances.

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

ENTERED: DECEMBER 13, 2018

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Dianne T. Renwick, J.P.
Rosalyn H. Richter
Sallie Manzanet-Daniels
Judith J. Gische
Peter Tom, JJ.

7536
Index 22509/14

_____x

Thomas Quigley, et al.,
Plaintiffs-Appellants-Respondents,

-against-

Port Authority of New York and New Jersey, et al.,
Defendants-Respondents-Appellants.
_____x

Cross appeals from an order of the Supreme Court, Bronx County (Ben R. Barbato, J.), entered March 13, 2017, which, insofar as appealed from, as limited by the briefs, denied plaintiffs' cross motion for summary judgment on the Labor Law § 241(6) claim, granted that part of defendants' motion for summary judgment seeking dismissal of the Labor Law § 241(6) claim predicated on Industrial Code 12 NYCRR 23-1.7(d) and (e)(1), and denied that part of defendants' motion seeking dismissal of the § 241(6) claim predicated on 12 NYCRR 23-1.7(e)(2) and the common-law negligence and Labor Law § 200 claims.

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel) for appellants-respondents.

Gerber Ciano Kelly Brady, LLP, Buffalo (Patrick B. Omilian of counsel), for respondents-appellants.

TOM, J.

Plaintiff Thomas Quigley was injured when he slipped on a pile of snow-covered pipes located directly outside the entrance door of his employer's work site shanty. The Labor Law § 241(6) claim predicated on a violation of 12 NYCRR 23-1.7(d) should not have been dismissed because there was an issue of fact as to whether the accident occurred in a walkway. There were conflicting accounts of whether the pipes were located in a manner that impeded ingress and egress into the shanty.

12 NYCRR 23-1.7(e)(1) is inapplicable to Quigley's accident. "Although the regulations do not define the term 'passageway' ..., courts have interpreted the term to mean a defined walkway or pathway used to traverse between discrete areas as opposed to an open area" (*Steiger v LPCiminelli, Inc.*, 104 AD3d 1246, 1250 [4th Dept 2013]; *see Meslin v New York Post*, 30 AD3d 309, 310 [1st Dept 2006]).

However, in contrast to 12 NYCRR 23-1.7(d) which pertains to slipping hazards on a "floor, passageway, walkway, scaffold, platform or other elevated working surface," 12 NYCRR 23-1.7(e)(1) is limited to passageways. A "passageway" is commonly defined and understood to be "a typically long narrow way connecting parts of a building" and synonyms include the words corridor or hallway (*see* Merriam-Webster's online Thesaurus). In

other words, it pertains to an interior or internal way of passage inside a building.

Indeed, *McCullough* and *Thomas*, in which we found doorways and the areas immediately adjacent to them to constitute passageways, both involved accidents that occurred in the interiors of buildings. In *Thomas*, the plaintiff was working on the interior of the 42d floor of a building when he walked through a corridor and tripped on material in front of a doorway leading to a deck. In *McCullough*, the plaintiff's accident occurred "while he was passing from an exterior roof on a construction site to an interior room, moved his left foot across an approximately one- or two-foot-high threshold in a doorway, and stepped into an uncovered 'drain hole' in the floor directly behind the threshold, causing him to fall to the floor" (132 AD3d at 492). The accident involved in this case, caused by pipes in an outdoor area near the shanty door, is entirely distinguishable from an accident occurring in an internal hallway or interior side of a doorway. Thus, the Labor Law § 241(6) claim based on 12 NYCRR 23-1.7(e)(1) was properly dismissed.

The court properly denied defendant's motion as to the claim predicated on 12 NYCRR 23-1.7(e)(2). The workers "at the site routinely traversed th[e area adjacent to the shanty] as their only access to equipment. . .[which made] it arguably an integral

part of the work site." Given the proximity of the pipes to the shanty, it is submitted that there is a triable issue "as to whether the spot where [Quigley's] fall occurred was a 'working area' within the meaning of 12 NYCRR 23-1.7(e)(2)" (*Smith v Hines GS Props., Inc.*, 29 AD3d 433, 433 [1st Dept 2006]; *see also Maza v University Ave. Dev. Corp.*, 13 AD3d 65, 66 [1st Dept 2004]).

Although unaddressed by the motion court, there is also an issue of fact regarding whether the pipes were safely stored, pursuant to 12 NYCRR 23-2.1(a)(1) (*see Rodriguez v DRLD Dev., Corp.*, 109 AD3d 409, 410 [1st Dept 2013]).

Finally, the court properly denied defendants' motion seeking dismissal of the common-law negligence and Labor Law § 200 claims because they did not satisfy their initial burden of showing that they did not create or have knowledge of the dangerous condition that caused the accident (*see Muqattash v Choice One Pharm. Corp.*, 162 AD3d 499, 500 [1st Dept 2018]). The evidence did not establish who left the pipes in front of the shanty for several weeks prior to the accident, and defendants did not provide any evidence to show the last time they inspected the work site (*see Ladignon v Lower Manhattan Dev. Corp.*, 128 AD3d 534, 535 [1st Dept 2015]). Defendants focus almost exclusively on the snow that covered the pipes when arguing that they did not have notice of the dangerous condition — ignoring

testimony suggesting that the pipes themselves, and their placement adjacent to the shanty, was the dangerous condition that caused the accident.

Accordingly, the order of the Supreme Court, Bronx County (Ben R. Barbato, J.), entered March 13, 2017, which, insofar as appealed from as limited by the briefs, denied plaintiffs' cross motion for summary judgment on the Labor Law § 241(6) claim, granted that part of defendants' motion for summary judgment seeking dismissal of the Labor Law § 241(6) claim predicated on Industrial Code 12 NYCRR 23-1.7(d) and (e)(1), and denied that part of defendants' motion seeking dismissal of the § 241(6) claim predicated on 12 NYCRR 23-1.7(e)(2) and the common-law negligence and Labor Law § 200 claims, should be modified, on the law, to deny defendants' motion as to the claim predicated on 12 NYCRR 23-1.7(d), and otherwise affirmed, without costs.

All concur.

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered March 13, 2017, modified, on the law, to deny defendants' motion as to the claim predicated on 12 NYCRR 23-1.7(d), and otherwise affirmed, without costs.

Renwick, J.P., Richter, Manzanet-Daniels, Gische, Tom, JJ.

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

ENTERED: DECEMBER 13, 2018

CLERK