SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 19, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

7913-
7913A — Index 150181/18

In re Patrolmen's Benevolent Association of the City of New York, Inc.,
Petitioner-Appellant,

-against-

Bill De Blasio, etc., et al.,
Respondents-Respondents.

- - - - -

Reporters Committee for Freedom of the Press, Hearst Corporation, The Associated Press, Inc., Buzzfeed, Inc., Cable News Network, Inc., The Center for Investigative Reporting, Daily News, LP, Dow Jones & Company, Inc., Gannett Company, Inc., Gizmodo Media Group, LLC, New York Public Radio, The New York Times Company, NYP Holdings, Inc., and Spectrum News NY1,
Amici Curiae.

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Kasowitz Benson Torres LLP, Pelham (Michael J. Bowe of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Aaron M. Bloom of counsel), for respondents.

Ballard Spahr LLP, New York (Thomas B. Sullivan of counsel), for amici curiae.

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Orders, Supreme Court, New York County (Shlomo Hagler, J.), entered May 7, 2018, which denied the petition and granted respondents' cross motion to dismiss the petition and complaint

in this hybrid CPLR article 78 proceeding to challenge the City's public release of police department body-worn-camera footage without a court order or the relevant officers' consent, pursuant to Civil Rights Law § 50-a, and denied petitioner's motion for a preliminary injunction, unanimously affirmed, without costs.

We affirm the denial of the petition and dismissal of the proceeding on grounds different from those of Supreme Court. The court held that petitioner could not maintain this hybrid action because there is no private right of action under Civil Rights Law § 50-a. We conclude that the fact that the statute does not provide a private right of action does not preclude review of petitioner's request for injunctive relief in an article 78 proceeding, because the statute creates protected rights (for police officers) and does not explicitly prohibit a private right of action or otherwise manifest a clear legislative intent to negate review (*see Matter of Dairylea Coop. v Walkley*, 38 NY2d 6, 10-11 [1975]; *Delgado v New York City Hous. Auth.*, 66 AD3d 607, 608 [1st Dept 2009]; *see also Matter of East Ramapo Cent. Sch. Dist. v King*, 29 NY3d 938 [2017]; *Patrolmen's Benevolent Assn. of the City of New York, Inc. v De Blasio*, 2015 NY Slip Op 32829[U] [Sup Ct, NY County 2015]).

Nevertheless, the petition must be denied. In order to determine whether something is a "personnel record" under Civil

Rights Law § 50-a, the "threshold criterion" is whether the documents (or a summary of the documents) are "of significance to a superior in considering continued employment or promotion" (*Matter of Luongo v Records Access Officer, Civilian Complaint Review Bd.*, 150 AD3d 13, 19 [1st Dept 2017], *lv denied* 30 NY3d 908 [2017], quoting *Matter of Prisoners' Legal Servs. Of N.Y. v New York State Dept. Of Correctional Servs.*, 73 NY2d 26, 32 [1988]).

The Court of Appeals has further clarified that whether a document "containing personal, employment-related information about a public employee," that is under the control of the agency, and "relied upon in evaluating the employee's performance," is covered by Civil Rights Law § 50-a "depends upon its nature and use in evaluating an officer's performance" (*Matter of Prisoners' Legal Servs.*, 73 NY2d at 32). Moreover, the Court of Appeals has held that, in the context of a FOIL disclosure of an officer's personnel records, preventing such disclosure requires more than merely demonstrating that the document "may be used" to evaluate performance (*id.* at 31).

Petitioner argues that the body-worn-camera was designed in part for performance evaluation purposes and is clearly "of significance" to superiors in considering employment or promotion. Petitioner also suggests that a finding that body-

worn camera footage is not a personnel record would result in an unprecedented invasion of privacy.

While we recognize petitioner's valid concerns about invasion of privacy and threats to the safety of police officers, we are tasked with considering the record's general "nature and use," and not solely whether it may be contemplated for use in a performance evaluation. Otherwise, that could sweep into the purview of § 50-a many police records that are an expected or required part of investigations or performance evaluations, such as arrest reports, stop reports, summonses, and accident reports, which clearly are not in the nature of personnel records so as to be covered by § 50-a.

We find that given its nature and use, the body-worn-camera footage at issue is not a personnel record covered by the confidentiality and disclosure requirements of § 50-a (*see Matter of Prisoners' Legal Servs. of N.Y. v New York State Dept. of Correctional Servs.*, 73 NY2d 26, 32 [1988]). The purpose of body-worn-camera footage is for use in the service of other key objectives of the program, such as transparency, accountability, and public trust-building.

Although the body-worn-camera program was designed, in part, for performance evaluation purposes, and supervisors are required, at times, to review such footage for the purpose of

evaluating performance, the footage being released here is not primarily generated for, nor used in connection with any pending disciplinary charges or promotional processes. *New York Civil Liberties Union v New York City Police Department*, __NY3d__, 2018 NY Slip Op 8423 [2018], which involved disciplinary matters, does not constrain this analysis. The footage, here, rather, is more akin to arrest or stop reports, and not records primarily generated for disciplinary and promotional purposes. To hold otherwise would defeat the purpose of the body-worn-camera program to promote increased transparency and public accountability.

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

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

ENTERED: FEBRUARY 19, 2019

CLERK

Sweeny, J.P., Gische, Kahn, Oing, Singh, JJ.

8014-
8015 Ind. 2373/14

The People of the State of New York,
Respondent,

-against-

Davon Pinkston,
Defendant-Appellant.

- - - - -

The People of the State of New York,
Respondent,

-against-

Alejandro Rivera,
Defendant-Appellant.

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Marianne Karas, Thornwood, for Davon Pinkston, appellant.

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for Alejandro Rivera, appellant.

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

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered November 4, 2015, convicting defendant Davon Pinkston, after a jury trial, of conspiracy in the first degree, conspiracy in the third degree (two counts), attempted murder in the second degree (three counts), assault in the first degree, attempted assault in the third degree (two counts), attempted gang assault in the first degree and criminal possession of a weapon in the second degree (six counts), and

sentencing him to an aggregate term of 54 years, 11 months and 22 days to life, unanimously affirmed. Judgment, same court and Justice, rendered November 23, 2015, convicting defendant Alejandro Rivera, after a jury trial, of conspiracy in the third degree (two counts), attempted gang assault in the first degree and attempted assault in the first degree, and sentencing him to an aggregate term of 19⅔ years, unanimously affirmed.

The verdicts were based on legally sufficient evidence and were not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Moreover, we find that the evidence against each defendant was overwhelming. There is no basis for disturbing the jury's credibility determinations. In addition to testimony from cooperating witnesses, there was extensive evidence including Facebook messages and recorded phone conversations.

The fact that defendants were in leg shackles during a brief portion of jury selection was harmless given the overwhelming evidence of guilt (*see People v Clyde*, 18 NY3d 145, 153-154 [2011], *cert denied* 566 US 944 [2012]).

Expert testimony on gang activity did not exceed the limitations outlined in *People v Inoa* (25 NY3d 466 [2015]). Among other things, an officer properly testified about his own observations, and the fixed meaning of gang code words (*see*

Matter of Dysean R., 137 AD3d 604 [1st Dept 2016] [officer properly permitted to identify and interpret gang activity through use of social media]; *People v Shan*, 276 AD2d 282 [1st Dept 2000], *lv denied* 96 NY2d 740 [2001] [proper exercise of discretion to admit expert testimony relating to gang activities]; *People v Hinton*, 178 AD2d 279 [1st Dept 1991], *lv denied*, 79 NY2d 948 [1992] [proper to admit officer's explanations of jargon associated with street drug trade]). There was no legal impediment to the officer providing testimony both as a fact witness and as an expert witness (*People v Singleton*, 270 AD2d 190 [1st Dept], *lv denied* 95 NY2d 858 [2000]; *People v Lamboy*, 228 AD2d 366 [1st Dept 1996], *lv denied* 88 NY2d 988 [1996]).

The circumstances also warranted testimony by the officer identifying defendants as persons depicted in videotapes (*see People v Russell*, 79 NY2d 1024, 1025 [1992]). Notwithstanding the fact that defendants had not changed their appearance subsequent to having been videotaped, the testimony was permissible, because "[the] testimony 'served to aid the jury in making an independent assessment regarding whether the [men] in the [video] [were] indeed the defendant[s]'" (*People v Montanez*, 135 AD3d 528 [1st Dept 2016], *lv denied* 27 NY3d 1072 [2016], quoting *Russell*, 79 NY2d *at* 1025). Furthermore, the

circumstances suggested that the jury would be less able than the officer to determine whether the defendants were seen in the videotapes, given the poor quality of the surveillance tapes, which showed groups of young men, mostly from a distance, thus rendering his testimony appropriate (*see People v Boyd*, 151 AD3d 641 [1st Dept], *lv denied* 29 NY3d 1124 [2017]; *People v Sanchez*, 95 AD3d 241, 249-250 [1st Dept 2012], *affd* 21 NY3d 216 [2013]). The trial court instructed the jurors that the officer's testimony concerning the identities of those seen on video was his opinion and that the ultimate identification determination belonged exclusively to the jury. Furthermore, none of the officer's testimony violated the hearsay rule or defendants' right of confrontation.

Pinkston's Confrontation Clause complaint about DNA evidence is likewise meritless. His claim that this evidence was irrelevant or lacking in probative value is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

Defendants did not preserve their complaints about the court's supplemental jury instructions, and we decline to review them in the interest of justice. As an alternative holding, we find that, as to each of the two defective instructions cited by defendants, the court corrected itself and sufficiently cured the

defects.

The various evidentiary and other trial rulings challenged by defendants were proper exercises of the court's discretion, and they did not deprive either defendant of a fair trial.

Rivera's complaints about the prosecutor's cross-examination and summation are likewise unavailing. Rivera did not preserve his contention that the court unfairly denigrated or unfairly treated his trial counsel, and we decline to review it in the interest of justice. As an alternative holding, we find that he has not shown that the court's admonitions were unwarranted or prejudicial.

In any event, we find that any errors regarding any of the issues raised by either or both defendants on appeal were harmless in light of the overwhelming evidence of each defendant's guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

The record does not establish that either defendant's

sentence was based on any improper considerations, and we perceive no basis for reducing the sentences.

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

ENTERED: FEBRUARY 19, 2019

CLERK

Renwick, J.P., Richter, Mazzarelli, Webber, Kern, JJ.

8245 Eli Hoffman, as Receiver to, and on Behalf of Cobalt Asset Management, L.P., Plaintiff-Respondent, Index 150620/16

-against-

RSM US LLP, etc., et al., Defendants-Appellants,

John Does 1-10, et al., Defendants.

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Arnold & Porter Kaye Scholer LLP, New York (Veronica E. Callahan and Kevin T. Sullivan of counsel), for appellants.

Nagel Rice LLP, New York (Bradley L. Rice of counsel), for respondent.

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Order, Supreme Court, New York County (Melissa Crane, J.), entered May 3, 2018, which, insofar as appealed from, denied defendants RSM US, LLP and Richard Nichols's motion to dismiss the cause of action for aiding and abetting fraud pursuant to CPLR 3211, unanimously modified, on the law, to grant the motion except as to the part of the claim based on defendants' advice to nonparty Charles Thompson to treat his defense costs in a prior proceeding as capital contributions to Cobalt Asset Management, L.P., and otherwise affirmed, without costs.

Plaintiff, as receiver to Cobalt Asset Management, L.P. (CAM), alleges that defendants, tax preparers/accountants for CAM

and its former general partner, nonparty Charles Thompson, aided and abetted Thompson's looting of CAM's assets for his personal benefit.

The motion court correctly declined to dismiss the aiding and abetting fraud claim on statute of limitations grounds, despite mistakenly ruling that defendant RSM's engagement letters required CAM to have actual knowledge of Thompson's fraud. In fact, the letters say that no claims may be brought by either party more than 24 months after the party "knows *or has reason to know"* that the claim has accrued (emphasis added) (*see Norddeutsche Landesbank Girozentrale v Tilton*, 149 AD3d 152, 161-162 [1st Dept 2017]). The court correctly accepted as true plaintiff's allegation that it was not until the summer of 2015, when defendants produced their work papers – as opposed to CAM's tax returns – and defendant Nichols was deposed, that plaintiff realized that defendants had aided and abetted Thompson's fraud (*see id.* at 158).

However, the aiding and abetting fraud claim is largely duplicative of the dismissed malpractice claim (*see e.g. Penner v Hoffberg Oberfest Burger & Berger*, 303 AD2d 249 [1st Dept 2003]). To the extent both the malpractice and aiding and abetting fraud claims allege that defendants ignored their professional duties, they are duplicative (*see id.*). To the extent both the

malpractice and aiding and abetting fraud claims are based on defendants' conflicts of interest, they are duplicative (*see Alphas v Smith*, 147 AD3d 557, 558-559 [1st Dept 2017]). To the extent both claims are based on nondisclosure, they are duplicative (*see Sage Realty Corp. v Proskauer Rose*, 251 AD2d 35, 39 [1st Dept 1998]).

Serio v PricewaterhouseCoopers LLP (9 AD3d 330, 331 [1st Dept 2004]) and *Houbigant, Inc. v Deloitte & Touche* (303 AD2d 92 [1st Dept 2003]) are distinguishable as the defendants in those cases were auditors whereas the defendants in the case at bar were acting as CAM's and Thompson's tax preparers and, as the complaint alleges, were not responsible for providing any opinion about CAM's financial statements.

However, to the extent the aiding and abetting fraud claim alleges that defendants gave Thompson specific advice that allowed him to perpetrate a fraud, it is not duplicative of the malpractice claim (*see Mitschele v Schultz*, 36 AD3d 249, 255 [1st Dept 2006]). The only specific advice alleged in the complaint is that Nichols, on behalf of RSM, decided or suggested that Thompson's costs to defend a prior proceeding be treated as capital contributions to CAM.

Additionally, most of the aiding and abetting claim should be dismissed on the ground that it fails to state a cause of

action as it fails to sufficiently allege substantial assistance in achievement of the fraud (*see Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472, 476 [1st Dept 2009], *lv denied* 13 NY3d 709 [2009]). Most of the claim is based on defendants' failure to protect CAM's limited partners. However, even if RSM owed a duty to CAM, its client, it did not owe a duty to CAM's limited partners (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 561-562 [2009]). Thus, to the extent the claim is based on allegations of inaction on defendants' part, the claim should be dismissed because such allegations are insufficient to support the claim of aiding and abetting fraud absent such a duty (*Stanfield*, 64 AD3d at 476).

To the extent the aiding and abetting fraud claim is based on allegations of defendants' affirmative conduct in continuing to file CAM's tax returns, the claim fails to state a cause of action because the conduct alleged is nothing more than the performance of routine business services (*see CRT Invs., Ltd. v BDO Seidman, LLP*, 85 AD3d 470, 472 [1st Dept 2011]). However, to the extent the aiding and abetting fraud claim is based on allegations that defendants specifically advised Thompson to treat his defense costs in a prior proceeding as capital

contributions to CAM, the claim is sufficiently pleaded as such conduct does not constitute the performance of routine business services.

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

ENTERED: FEBRUARY 19, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Kapnick, Gesmer, Oing, JJ.

8426 F.P.V., etc., et al., Index 350127/13
Plaintiffs-Respondents,

-against-

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

_____

Zachary W. Carter, Corporation Counsel, New York (Fay Ng of counsel), for appellants.

Greenberg & Stein, P.C., New York (Ian Asch of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about April 20, 2017, which, to the extent appealed from as limited by the briefs, denied the motion of defendants New York City Department of Education and New York City Board of Education (collectively DOE) for summary judgment dismissing the complaint, unanimously affirmed, without costs.

DOE satisfied its entitlement to judgment as a matter of law by submitting evidence showing that infant plaintiff's injury was caused while he was participating in a game of "Bulldog" in gym class when a fellow student suddenly and unexpectedly collided with him, which was a spontaneous act, and that no additional supervision could have prevented the injury (*see M.V. v City of New York*, 149 AD3d 641 [1st Dept 2017]; *Chynna A. v City of New York*, 143 AD3d 623 [1st Dept 2016]).

Under the circumstances, including how the game was played, the number of students and the size of the gym space, plaintiff established that there are issues of fact warranting a trial.

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

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

ENTERED: FEBRUARY 19, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Kapnick, Gesmer, Oing, JJ.

8427 & M-4168 Index 251751/14

In re James Pettus,
Petitioner-Appellant,

Charlene Thompson,
Petitioner,

-against-

Board of Directors, et al.,
Respondents-Respondents.

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James Pettus, appellant pro se.

Boyd Richards Parker & Colonnelli, P.L., New York (Bryan J. Mazzola of counsel), for respondents.

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Judgment (denominated an order), Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about March 28, 2017, striking the note of issue and dismissing with prejudice the proceeding brought pursuant to CPLR article 78 to annul respondent coop board's determination, dated December 9, 2014, which increased coop maintenance by 9%, unanimously affirmed, with costs.

The issues decided in the order on appeal, i.e., petitioner Pettus's standing to bring this proceeding and the application of the business judgment rule to the coop board's decision to raise the maintenance by 9%, were decided in a prior order of the same court and Justice, entered September 28, 2015, which was law of

the case and properly adhered to by the court (*see Mohamed v Defrin*, 45 AD3d 252 [1st Dept 2007], *lv dismissed* 11 NY3d 783 [2008]).

Petitioner's remaining arguments are without merit.

M-4168 - *Pettus v Board of Directors*

Motion granted to the extent of restraining and enjoining petitioners from filing any papers in this court that have any relation to this matter without prior leave of this Court. Any violation of this order may subject petitioners to an award of additional sanctions or attorneys fees.

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

ENTERED: FEBRUARY 19, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Gesmer, Oing, JJ.

8428 Ruth Kassover, etc., et al., Plaintiffs-Respondents, Index 602434/05

-against-

Prism Ventures Partners, LLC, et al., Defendants,

Allerand 675 Company, LLC, Intervenor-Appellant.

_____

Kucker & Bruh, LLP, New York (Catherine A. Helwig of counsel), for appellant.

Hahn & Hessen LLP, New York (Stephen J. Grable of counsel), for respondents.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered on or about September 12, 2017, which, to the extent appealed from, granted plaintiffs' motion pursuant to CPLR 5225 to direct defendant judgment debtors to turn over all cash and personalty, unanimously affirmed, with costs.

The motion court correctly engaged in a conflict of laws analysis, as the competing mechanics of Florida's and New York's laws of priority of judgment liens would yield differing results (*see Matter of Istim, Inc. v Chemical Bank*, 78 NY2d 342, 348 [1991]).

The court correctly found that New York had the superior interest in having its law applied (*see Schultz v Boy Scouts of*

Am., 65 NY2d 189, 197 [1985]; *Matter of Istim*, 78 NY2d at 348-349). The New York judgment at issue arose from a dispute over the merger of a New York business, among New Yorkers subject to New York law; Florida's interest is the result of one defendant's unilateral acts in moving one of the judgment debtors and its property to Florida.

Contrary to intervenor's contention, the Full Faith and Credit Clause of the US Constitution does not require the enforcement of its Florida judgment, because the judgment has not been domesticated pursuant to New York law (*see American Fid. Fire Ins. Co. v Paste-Ups Unlimited, Inc.*, 368 F Supp 219, 224 [SD NY 1973]).

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

ENTERED: FEBRUARY 19, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Kapnick, Gesmer, Oing, JJ.

8429 The People of the State of New York, Ind. 1062/15
Respondent,

-against-

Isaac Rozier,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Julia L. Chariott 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, Bronx County (John Moore, J.), rendered July 19, 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: FEBRUARY 19, 2019

CLERK

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

Richter, J.P., Manzanet-Daniels, Kapnick, Gesmer, Oing, JJ.

8430 Eleni Dritsas, etc., et al., Index 190276/15
Plaintiffs-Respondents,

-against-

Amchem Products, Inc., etc., et al.,
Defendants,

ITW Food Equipment Group, LLC, etc.,
Defendant-Appellant.

_____

Lynch Daskal Emery LLP, New York (Lawrence G. Lee of counsel), and Gary J. Saalman of the bar of the State of Ohio and the State of Texas, admitted pro hac vice, of counsel), for appellant.

Weitz & Luxenberg, P.C., New York (Pierre A. Ratzki of counsel), for respondents.

_____

Order, Supreme Court, New York County (Lucy Billings, J.), entered on or about May 7, 2018, which, to the extent appealed from as limited by the briefs, denied defendant ITW Food Equipment Group, LLC's motion for summary judgment dismissing as against it so much of the complaint as is predicated on a de facto merger, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff seeks to hold defendant liable, as a successor to the Vulcan-Hart Corporation, for the consequences of her decedent's exposure to asbestos between 1969 and 1988 arising from his work on ovens, grills and broilers manufactured by Vulcan-Hart. Vulcan-Hart's assets were purchased in 1986 by

Hobart Corporation pursuant to an asset purchase agreement, and defendant acquired Hobart Corporation's product lines and other assets in 2002.

Defendant established prima facie that there was no de facto merger between Hobart and Vulcan-Hart that would make Hobart responsible, contrary to the general rule, for Vulcan-Hart's preexisting liabilities (*see Fitzgerald v Fahnestock & Co.*, 286 AD2d 573, 574 [1st Dept 2001]), because there was no continuity of ownership between the two corporations (*see Matter of New York City Asbestos Litig.*, 15 AD3d 254, 258 [1st Dept 2005]; *Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 150 AD3d 490 [1st Dept 2017]; *New York v National Serv. Indus., Inc.*, 460 F3d 201, 215 [2d Cir 2006]; *but see Lippens v Winkler Backereitechnik GmbH*, 138 AD3d 1507, 1509-1510 [4th Dept 2016]). The asset purchase agreement stated that Hobart purchased Vulcan-Hart's assets for cash (*see Oorah, Inc. v Covista Communications, Inc.*, 139 AD3d 444, 445 [1st Dept 2016]).

In opposition, plaintiff failed to raise an issue of fact as to continuity of ownership. There is no evidence in the record that any other transaction took place in which Vulcan-Hart's shareholders obtained an interest in Hobart (*see Matter of New York City Asbestos Litig.*, 15 AD3d at 256).

Plaintiff failed to show that discovery on continuity of

ownership would be anything other than a fishing expedition (*see* *Auerbach v Bennett*, 47 NY2d 619, 636 [1979]; *Oorah*, 139 AD3d at 445).

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

ENTERED: FEBRUARY 19, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Kapnick, Gesmer, Oing, JJ.

8431- Ind. 3184/15
8431A The People of the State of New York, 5128/15
Respondent,

-against-

Lindsay Aailiyah,
Defendant-Appellant.

_____

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

_____

Judgments, Supreme Court, New York County (Bonnie Wittner, J.), rendered December 9, 2016, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

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

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

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

ENTERED: FEBRUARY 19, 2019

CLERK

Manzanet-Daniels, J.P., Kapnick, Gesmer, Oing, JJ.

8432-
8433 Index 450460/16

In re People of the State of New York, etc., et al.,
Petitioners-Respondents-Appellants,

-against-

Northern Leasing Systems, Inc., et al.,
Respondents-Appellants-Respondents,

Joseph I. Sussman, P.C., et al,
Respondents-Respondents.

_____

Cahill Gordon & Reindell LLP, New York (Thomas J. Kavaler of counsel), for appellants-respondents.

Barbara D. Underwood, Attorney General, New York (Ester Murdukhayeva of counsel), for respondents-appellants.

Rottenberg Lipman Rich, P.C., New York (Mark M. Rottenberg of counsel), for respondents.

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Orders, Supreme Court, New York County (Lucy Billings, J.), entered November 29, 2017, which granted respondents Northern Leasing Systems, Inc., Lease Finance Group LLC, MBF Leasing LLC, Lease Source-LSI, LLC, Golden Eagle Leasing LLC, Pushpin Holdings LLC, Jay Cohen, and Neil Hertzman's (collectively, Northern Respondents) motion to dismiss the Executive Law § 63(12) and CPLR 5015(c) claims as against them to the extent the claims are based on illegal conduct in violation of General Business Law § 349, and denied the motion as to the remainder of the Executive

Law § 63(12) and CPLR 5015(c) claims and the Business Corporation Law § 1101 claim, and granted respondents Joseph I. Sussman, P.C., Joseph I. Sussman, and Eliyahu R. Babad's (together, Attorney Respondents) motion to dismiss the petition as against them, unanimously modified, on the law, to deny the Attorney Respondents' motion except as to the General Business Law 349 claim, and otherwise affirmed, without costs.

The petition fails to state a cause of action based on violations of General Business Law 349, because the lessees and guarantors who were affected by the deceptive conduct are not alleged to be "consumers" within the meaning of the statute. There are no factual allegations that would show that the underlying transactions involve goods or services for "personal, family or household purposes" (*Cruz v NYNEX Info. Resources*, 263 AD2d 285, 289 [1st Dept 2000] [internal quotation marks omitted], citing, inter alia, General Business Law § 399-c).

The Executive Law § 63(12) claim is based on a type of fraud recognized in the common law, and therefore is governed by the six-year statute of limitations (CPLR 213[1]; *People v Credit Suisse Sec. [USA] LLC*, 31 NY3d 622, 634 [2018]).

The petition alleges that the Northern Respondents, via "Independent Sales Organizations" (ISO) sales representatives, knowingly made misrepresentations and omissions of fact to

merchants for the purpose of inducing them to enter into the predatory leasing agreements and that the merchants justifiably relied on those misrepresentations or omissions in entering into the agreements to their detriment (*see Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 31 NY3d 569, 578-579 [2018]; *see also Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486 [2008]). The Northern Respondents argue that they cannot be found liable for conduct attributable to the ISOs because the agreements between them and the ISOs, and the leases presented to the merchants, contain a disclaimer of agency which provides that the ISOs were acting as independent contractors, did not have the authority to bind the Northern Respondents, and were not authorized to act as the Northern Respondents' agents.

The Northern Respondents' reliance on *Shawmut Woodworking & Supply, Inc. v ASICS Am. Corp.* (162 AD3d 486, 487 [1st Dept 2018]) in support of this argument is, however, misplaced, because in that case, this Court specifically noted that the complaint failed to allege actual or apparent authority, or that the franchisor actually authorized its franchisee to enter into the subject contract on behalf of the franchisor. The *Shawmut* Court further pointed out that the complaint there failed to allege that the plaintiff relied on any representations or conduct by the franchisor that would give rise to the appearance

and belief that the franchisee possessed authority to enter into the contract in issue.

Here, contrary to the facts in *Shawmut*, the petition alleges that the ISO sales representatives acted as Northern Respondents' agents under a theory of actual authority (*see Greene v Hellman*, 51 NY2d 197, 204 [1980]). The allegations sufficiently demonstrate that the Northern Respondents trained the ISO representatives, provided them with the specific lease forms, offering detailed instructions and materials about how to complete the forms, and then ratified the representatives' deceptive acts by retaining the benefits of the acts with knowledge of the material facts (*see Northern Leasing Sys., Inc. v Kollars*, 56 Misc 3d 131[A], 2017 NY Slip Op 50878[U] [App Term, 1st Dept 2017]; *cf. Standard Funding Corp. v Lewitt*, 89 NY2d 546, 552 [1997]; *Matter of New York State Med. Transporters Assn. v Perales*, 77 NY2d 126, 131 [1990]). In view of the foregoing, we need not reach the issue of apparent authority.

The Northern Respondents' argument that, while there is no statute of limitations on CPLR 5015(c) claims, the Attorney General (on behalf of the administrative judge) is required to bring those claims within a reasonable period of time from the discovery of the deceptive acts is unpreserved. In any event, we disagree. The statute codifies the inherent power of the courts

to supervise its own processes, and that power is not subject to time limitations (*see Matter of Thompson v Lincoln Budget Corp.*, 88 Misc 2d 894, 896 [Civ Ct, NY County 1975], *affd* 89 Misc 2d 252 [App Term, 1st Dept 1976], *mod* 59 AD2d 683 [1st Dept 1977] [setting time limitation based on facts peculiar to case], *appeal dismissed* 44 NY2d 697 [1978]).

The petition adequately alleges that the Northern Respondents' conduct falls within the "sham exception" to the *Noerr-Pennington* doctrine (*see Professional Real Estate Invs., Inc. v Columbia Pictures Indus., Inc.*, 508 US 49, 60 [1993]; *Singh v Sukhram*, 56 AD3d 187, 192 [2d Dept 2008]; *see also Eastern R.R. Presidents Conference v Noerr Motor Freight, Inc.*, 365 US 127 [1961]; *United Mine Workers of Am. v Pennington*, 381 US 657 [1965]). The allegations that the Northern Respondents created legal obligations through misrepresentations and fraud, and then attempted to enforce those obligations through abusive pre-litigation and litigation practices sufficiently demonstrate that the Northern Respondents' debt-collection activities and procuring of default judgments were "objectively baseless" (*Professional Real Estate Invs.*, 508 US at 52; *see e.g. Sykes v Mel Harris & Assoc., LLC*, 757 F Supp 2d 413, 419-420, 429 [SD NY 2010]; *Shetiwy v Midland Credit Mgt.*, 980 F Supp 2d 461, 475-476 [SD NY 2013]).

Insofar as it is based on unconscionable contract terms, the Executive Law § 63(12) claim states a cause of action (*see Gillman v Chase Manhattan Bank*, 73 NY2d 1, 10 [1988]). The element of procedural unconscionability is sufficiently alleged given the assertions that the ISO sales representatives targeted vulnerable individuals – the elderly, disabled, and immigrants with limited fluency in English – and employed deceptive tactics to induce them to execute the leases (*see Dabriel, Inc. v First Paradise Theaters Corp.*, 99 AD3d 517, 520 [1st Dept 2012]). Although the challenged contract provisions are ordinarily enforceable, the element of substantive unconscionability is sufficiently stated by the allegations that the contract provisions are "unreasonably favorable" to the Northern Respondents as enforced by the Northern Respondents (*see Gillman*, 73 NY2d at 10).

The petition states a cause of action as against individual respondent Neil Hertzman, Northern Leasing's Vice President of Customer Service and Collections, who was responsible for addressing customer complaints. The allegations that in response to customer complaints Hertzman relied on the unconscionable contract terms and disclaimed responsibility for the ISO sales representatives' misrepresentations sufficiently demonstrate that he was aware of the fraud scheme and participated in it (*see*

People v Apple Health & Sports Clubs, 206 AD2d 266, 267 [1st Dept 1994], *lv dismissed in part, denied in part* 84 NY2d 1004 [1994]; *see also Polonetsky v Better Homes Depot*, 97 NY2d 46, 55 [2001]).

The petition adequately alleges that the Attorney Respondents' conduct falls within the sham exception to the *Noerr-Pennington* doctrine (*see Professional Real Estate Invs.*, 508 US at 60). The allegations that the Attorney Respondents continually engaged in a large-scale practice of bringing debt actions against numerous lessees and guarantors across a span of years, despite being aware of the same defenses raised by the lessees against the Northern Respondents, including fraud and misrepresentations, sufficiently allege that the Attorney Respondents knew that their litigation-related conduct was objectively baseless (*see id.*). The allegations sufficiently show a knowing participation in the scheme that justifies holding the Attorney Respondents liable under Executive Law § 63(12) (*see People v Law Offs. of Andrew F. Capoccia*, 289 AD2d 650 [3d Dept 2001]; *People v Boyajian Law Offs., P.C.*, 17 Misc 3d 1119[A], 2007 NY Slip Op 52077[U] [Sup Ct, NY County 2007]). The

allegations also support a finding of frivolous conduct (*see* 22 NYCRR 130-1.1).

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

ENTERED: FEBRUARY 19, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Kapnick, Gesmer, Oing, JJ.

8434 In re Dawn H. F.,
Petitioner-Appellant,

-against-

Marco J.,
Respondent-Respondent.

_____

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

Janet Neustaetter, The Children's Law Center, Brooklyn (Chai Park of counsel), for respondent.

_____

Order, Family Court, Bronx County (Jennifer S. Burtt, Referee), entered on or about August 9, 2017, which, inter alia, awarded joint legal custody of the subject child, with final authority to the father on major medical, dental, and therapeutic decisions, unanimously affirmed, without costs.

The joint custody arrangement crafted by the court was in the child's best interests and has a sound and substantial basis in the record (*Anonymous v Anonymous*, 107 AD3d 531, 532 [1st Dept 2013]). We decline to disturb the court's division of final authority for certain categories of major decisions, as the record establishes that each parent had successfully exercised good judgment in making major decisions related to their assigned categories (*Nimkoff v Nimkoff*, 74 AD3d 408, 408 [1st Dept 2010]). Moreover, the division of final authority in major decisions

would maintain the respective roles of each parent in the child's life (*id.*).

The determination of the mother's request for new counsel is not before this Court as the mother has not filed a notice of appeal from a decision on such motion and any decision would not be encompassed by the notice of appeal from the final custody determination.

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

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

ENTERED: FEBRUARY 19, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Kapnick, Gesmer, Oing, JJ.

8435 Deutsche Bank National Trust Company, etc., Plaintiff-Respondent, Index 32003/16E

-against-

Arshad Al Rasheed, etc., Defendant-Appellant,

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

_____

Petroff Amshen LLP, Brooklyn (Christopher Villanti of counsel), for appellant.

Shapiro, DiCaro & Barak, LLC, Rochester (Austin T. Shufelt of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered September 15, 2017, which, inter alia, granted plaintiff's motion for summary judgment on its foreclosure complaint against defendant Arshad Al Rasheed, unanimously affirmed, without costs.

Plaintiff made a prima facie showing of its right to foreclose by producing the mortgage documents, the unpaid note, and evidence of defendant's default (*see Red Tulip, LLC v Neiva*, 44 AD3d 204, 209 [1st Dept 2007], *lv dismissed* 10 NY3d 741 [2008]). It established prima facie that it had standing to foreclose as holder of the note by attaching a copy of the

indorsed note to the summons and complaint at the time the action was commenced (*see U.S. Bank N.A. v Saravanan*, 146 AD3d 1010 [2d Dept 2017]). It demonstrated its compliance with the notice requirements of RPAPL 1304 by submitting copies of the notices with an affidavit by an employee of the loan servicer stating, based on her review of the loan servicer's records, that the notice of default and a 90-day foreclosure notice were mailed to defendant in accordance with the provisions of the mortgage and RPAPL 1304, respectively (*see HSBC Bank USA, N.A. v Ozcan*, 154 AD3d 822, 826-827 [2d Dept 2017]).

In opposition, defendant failed to raise an issue of fact as to his affirmative defenses (*see Red Tulip*, 44 AD3d at 209).

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

ENTERED: FEBRUARY 19, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Kapnick, Gesmer, Oing, JJ.

8436 In re Suncica Reljic, et al., Index 650092/17
Petitioners-Appellants,

-against-

Tullett Prebon Financial Services, LLC,
Respondent-Respondent.

- - - - -

In re Tullett Prebon Americas Corp., et al.,
Counterclaim Petitioners-Respondents,

-against-

Suncica Reljic, et al.,
Counterclaim Respondents-Appellants.

_____

Winston & Strawn LLP, New York (Thomas P. Lane of counsel), for appellants.

Sheppard, Mullin, Richter & Hampton LLP, New York (John E. Kiley of counsel), for respondents.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered July 11, 2017, which denied the petition to vacate an arbitration award and granted respondent Tullett Prebon Financial Services, LLC's cross motion to confirm the arbitration award, unanimously affirmed, with costs.

In holding petitioners jointly and severally liable for compensatory damages, plus attorneys' fees and costs, the arbitrators did not act in manifest disregard of the law (*see Matter of Brown & Williamson Tobacco Corp. v Chesley*, 7 AD3d 368, 372 [1st Dept 2004]; *Duferco Intl. Steel Trading v T. Klaveness*

Shipping A/S, 333 F3d 383, 385 [2d Cir 2003] ["to vacate an arbitral award on the grounds of manifest disregard of the law ... we must be persuaded that the arbitrators understood but chose to disregard a clearly defined law or legal principle"]). Contrary to their contention, petitioners were not each held responsible for both a breach of contract and a tort; rather, they committed separate wrongs that resulted in a single injury (*see Spector v Torenberg*, 852 F Supp 201, 208-209 [SD NY 1994]). The fact that the arbitrators did not offer a more detailed explanation for the award is not a ground on which to set the award aside (*id.* at 390; *see also Matter of Israel Aircraft Indus. [DDY-Wing Aviation]*, 284 AD2d 281, 281 [1st Dept 2001]).

Nor did the arbitrators improperly hold petitioner Tradition Securities and Derivatives, Inc. liable for liquidated damages. Compensatory damages was one of several types of damages specifically requested, and the fact that the award only granted compensatory damages precludes a finding that the arbitrators

awarded any other type of requested relief (*see Roganti v Metropolitan Life Ins. Co.*, 786 F3d 201, 213-214 [2d Cir 2015]).

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

ENTERED: FEBRUARY 19, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Kapnick, Gesmer, Oing, JJ.

8437 In re John Joyce, Index 158793/16
Petitioner-Respondent,

-against-

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

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Zachary W. Carter, Corporation Counsel, New York (Nwamaka Ejebe of counsel), for appellants.

Eisner & Dictor, P.C., New York (Benjamin N. Dictor of counsel), for respondent.

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Judgment, Supreme Court, New York County (Manuel J. Mendez, J.), entered April 5, 2017, to the extent appealed from as limited by the briefs, vacating respondents' determination, dated June 21, 2016, which denied petitioner's request for rescission of resignation, and directing respondents to accept petitioner's request, unanimously affirmed, without costs.

On or about August 30, 2011, petitioner resigned his employment as a tenured social studies teacher with respondent New York City Department of Education (DOE). Less than a year later, on or about July 29, 2012, he submitted a request to DOE to rescind his resignation pursuant to Chancellor's Regulation C-205(29). Following an almost 4-year delay by respondents in acting on petitioner's request, and litigation between the

parties, and only after petitioner filed a motion for contempt, did respondent Chancellor finally respond to and deny the request. In her letter of June 21, 2016, the Chancellor cited petitioner's unsatisfactory year-end performance rating for the 2010-2011 academic year, a determination that was ultimately annulled by this Court by decision dated May 10, 2018 (*see Matter of Joyce v City of New York,* 161 AD3d 488 [1st Dept 2018]).

We find that good faith and fairness demand that a decision on a request for rescission of resignation pursuant to Chancellor's Regulation C-205(29) be made within a reasonable time. We reject respondents' suggestion that the Chancellor has the discretion to wait more than three years before making such a decision, without providing a reason for the delay. Supreme Court had directed DOE, in an order issued May 6, 2013, to follow its own stated procedure by accepting the rescission letter and reinstating petitioner (subject only to the Chancellor's

approval, pursuant to the regulation). Respondents' delay was unacceptably long and effectively operated to subvert the court's order.

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

ENTERED: FEBRUARY 19, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Kapnick, Gesmer, Oing, JJ.

8438 The People of the State of New York, Respondent, Ind. 2239/15

-against-

Fabian Soto,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Abigail Everett of counsel), and Arnold & Porter Kaye Scholer LLP, New York (Stephanna Szotkowski of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sabrina Margret Bierer of counsel), for respondent.

_____

Appeal from order, Supreme Court, New York County (Thomas Farber, J.), entered on or about September 21, 2017, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), held in abeyance, and the matter remanded for a further hearing consistent with this decision on defendant's request for a downward departure.

In *People v Gillotti* (23 NY3d 841 [2014]), the Court of Appeals outlined a three-step process for determining whether to grant a defendant's request for a downward departure. First, the hearing court is to determine whether alleged mitigating circumstances are "of a kind or degree not adequately taken into account by the guidelines" (*id*. at 861). If so, the court

applies a preponderance of the evidence standard (*id.* at 863) to determine whether the defendant has proven the existence of those circumstances (*id.* at 861). Finally, if the first two steps are satisfied, the court must "exercise its discretion by weighing the aggravating and mitigating factors to determine whether the totality of the circumstances warrants" a downward departure to avoid an overassessment of the defendant's dangerousness and risk of sexual reoffense (*id.*).

While not entirely clear on this point, the decision of the hearing court in this case suggests that, in this case of statutory rape, the court considered itself bound, as a matter of law, to conclude that the various details of the offense urged as mitigating circumstances by defendant were adequately accounted for by the guidelines. Thus, the court appeared to consider itself unable to engage in the discretionary weighing prescribed in *Gillotti*'s third step. To the extent that the court acted based on this reasoning, it operated on an inaccurate premise that is contradicted by numerous cases that have granted downward departures in a similar context (*see e.g. People v Carter*, 138 AD3d 706 [2d Dept 2016]), as well as the Guidelines themselves (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 9 [2006]).

"In cases of statutory rape, the Board has long recognized

that strict application of the Guidelines may in some instances result in overassessment of the offender's risk to public safety" (*Carter*, 138 AD3d at 708). Accordingly, the fact that in such a case the offender is not assessed any points for force or injury should not be the end of the discussion of whether to grant a downward departure.

Accordingly, we hold the appeal in abeyance and remand for further proceedings in accordance with this guidance.

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

ENTERED: FEBRUARY 19, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Kapnick, Gesmer, Oing, JJ.

8439- Index 150610/18
8439A Michelle Nappi,
Plaintiff-Appellant,

-against-

Community Access, Inc., et al.,
Defendants-Respondents.

_____

Michelle Nappi, appellant pro se.

Charles McMellon, New York, for Community Access, Inc., respondent.

Sperber Denenberg & Kahan, P.C., New York (Eric H. Kahan of counsel), for Eight Cooper Equities, LLC, respondent.

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Order and judgment (one paper), Supreme Court, New York County (Lynn R. Kotler, J.), entered July 25, 2018, which granted defendants' cross motions to dismiss the complaint, unanimously modified, on the law, to declare that plaintiff does not have individual rights to the subject apartment, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered July 3, 2018, which denied plaintiff's motion to stay a housing court proceeding and to enjoin her eviction, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Defendant Community Access, Inc. (Community Access) is a not-for-profit organization that enters into agreements with

government agencies to lease apartments from private landlords using government funding, to provide stipends for housing for its clients. Defendant Eight Cooper Equities, LLC (Eight Cooper) entered into a rent stabilized lease with Community Access for an apartment in its building. Plaintiff was a client of Community Access at the time, and lived in the Eight Cooper apartment pursuant to a sublease. The relationship between plaintiff and Eight Cooper subsequently deteriorated, and the landlord decided not to extend a renewal lease to Community Access. Plaintiff was offered an opportunity to relocate, pursuant to the housing program, but she declined. She was subsequently discharged from the program, with a right to be reinstated upon compliance with the program's minimum requirements.

Defendants demonstrated, as a matter of law that plaintiff has no established rights to the subject apartment, because the lease between Community Access and Eight Cooper did not name her, or specify that she, or any particular individual or group of individuals was intended to live in the subject apartment (*Manocherian v Lenox Hill Hosp.*, 229 AD2d 197, 204-205 [1st Dept 1997], *lv denied* 90 NY2d 835 [1997]). Further, Community Access was justified in terminating plaintiff's sublease based upon her failure to comply with the program's requirements and her failure to allow basic access by the landlord to the apartment for

necessary repairs and health-related inspections.

We modify that portion of the action seeking declaratory relief only to declare in defendants' favor (*see Lanza v Wagner*, 11 NY2d 317, 334 [1962], *cert denied* 371 US 901 [1962]).

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: FEBRUARY 19, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Kapnick, Gesmer, Oing, JJ.

8440 The People of the State of New York, Ind. 4395/13
Respondent,

-against-

Sidney Sass,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Vincent Rivellese 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 July 1, 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: FEBRUARY 19, 2019

CLERK

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

Richter, J.P., Manzanet-Daniels, Kapnick, Gesmer, JJ.

8441 Moon 170 Mercer, Inc., Index 155605/12
Plaintiff-Respondent,

-against-

Zachary Vella,
Defendant-Appellant.

_____

Steven Landy & Associates, PLLC, New York (David A. Wolf of counsel), for appellant.

Cordova & Schwartzman, LLP, Garden City (Jonathan B. Schwartzman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barry Ostrager, J.), entered December 18, 2017, which denied defendant guarantor's motion to vacate a judgment, entered January 23, 2017, pursuant to CPLR 5015(a)(5) and renew his opposition to plaintiff landlord's motion for summary judgment, unanimously reversed, on the law, without costs, the motion granted, and the judgment vacated, and the case remanded for further proceedings consistent with this decision, including a determination as to the amount of restitution, if any, owed to defendant guarantor.

Based on the reinstatement of the wrongful eviction claim asserted by the nonparty tenant against respondent landlord Moon 170 Mercer, Inc. in the related action of *Mephisto Mgmt., LLC v Moon 170 Mercer* (Index No. 658456/13) (*see* 151 AD3d 416 [1st Dept 2017]), the IAS court should have allowed the guarantor to avail

himself of a defense based on an alleged failure of consideration. New York law specifically preserves failure of consideration as a defense available to a guarantor, even under an unconditional guaranty (*see I Bldg, Inc. v Hong Mei Cheung*, 137 AD3d 478, 478 [1st Dept 2016] [guarantor cannot raise claims personal to principal, "unless it extends to a failure of consideration for the principal contract, and therefore for the guarantor's contract"]).

Further, the guarantor was not collaterally estopped from raising the defense because he did not have a full and fair opportunity to have the issue litigated and determined (*Singleton Mgt. v Compere*, 243 AD2d 213, 217 [1st Dept 1998]).

The guarantor should be afforded the opportunity to present evidence before the IAS court to determine 1) whether the facts and circumstances from which the alleged wrongful eviction arose prevented him from exercising his rights under the guaranty, and 2) the extent to which those facts and circumstances bear on the amounts due post-eviction under the guaranty.

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

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

ENTERED: FEBRUARY 19, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Kapnick, Gesmer, Oing, JJ.

8442N Brett Bossung, etc., et al., Index 162142/15
Plaintiffs-Appellants,

-against-

Rebaco Realty Holding Company, N.V., et al.,
Defendants-Respondents.

_____

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

Law offices of Arnold Stream, New York (Arnold Stream of counsel), for respondents.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered May 25, 2017, which denied plaintiffs' motion pursuant to CPLR 3025(b) to amend the complaint to add The Board of the Walton Condominium as a defendant, unanimously affirmed, without costs.

Although plaintiffs sought leave to amend the complaint before the applicable statute of limitations had expired, their motion did not toll the statute, because they failed to annex the supplemental summons to their papers (*see Karagiannis v North Shore Long Is. Jewish Health Sys., Inc.*, 80 AD3d 569, 569 [2d Dept 2011]). Nor did plaintiffs establish that their proposed amended complaint relates back to the date of service of the original complaint (*see* CPLR 203[b]; *Raymond v Melohn Props.*,

Inc., 47 AD3d 504, 504-505 [1st Dept 2008]). The record is devoid of any evidence that defendant Gumley-Haft LLC, the manager of the building in which the incident occurred, and the Board, which owns the building, are vicariously liable for one another's acts (*see Xavier v RY Mgt. Co., Inc.*, 45 AD3d 677, 679 [2d Dept 2007]) or that their defenses to the action would be the same, particularly because Gumley-Hart's defense that it was not the property owner and lacked exclusive control of the premises at the time of the incident is not available to the Board (*see Mangual v U.S.A. Realty Corp.*, 63 AD3d 493 [1st Dept 2009]). That the Board agreed to name Gumley-Hart as an additional insured under its policy does not establish that the two entities are united in interest for the purposes of the relation back doctrine (*see generally Cahn v Ward Trucking, Inc.*, 68 AD3d 491 [1st Dept 2009]).

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

ENTERED: FEBRUARY 19, 2019

CLERK

Richter, J.P., Manzanet, Kapnick, Gesmer, Oing, JJ.

8444N Paul Fiondella, Index 100594/14
Plaintiff-Appellant,

-against-

345 West 70th Tenants Corp.,
Defendant-Respondent.

_____

Charla R. Bikman, East Hampton, for appellant.

Marin Goodman, LLP, Harrison (Alexander J. Drago of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carmen Victoria St. George, J.), entered January 17, 2018, which denied plaintiff's motion to hold defendant in civil contempt for failing to comply with a lawful mandate of the court, to direct defendant to pay plaintiff's costs and expenses on the motion, and to impose sanctions, unanimously affirmed, without costs.

The motion court properly held that the order defendant allegedly violated was not sufficiently clear and unequivocal to justify a contempt finding or the imposition of sanctions (*see Richards v Estate of Kaskel*, 169 AD2d 111, 121 [1st Dept 1991], *lv dismissed in part, denied in part* 78 NY2d 1042 [1991]; *see also Oppenheimer v Oscar Shoes*, 111 AD2d 28 [1st Dept 1985]).

Plaintiff cannot prove by clear and convincing evidence that there was an intent on defendant's part to ignore a court order.

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

ENTERED: FEBRUARY 19, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Kapnick, Gesmer, Oing, JJ.

8445 In re Steven Mears, Ind. 4854/03
[M-6074] Petitioner, OP 167/18
M-495

-against-

Hon. A. Kirke Bartley, etc., et al.,
Respondents.

- - - - -

Cyrus R. Vance, Jr., District Attorney,
New York County,
Nonparty Respondent.

_____

Steven Mears, petitioner pro se.

Barbara D. Underwood, Attorney General, New York (Charles F. Sanders of counsel), for Hon. Kirke A. Bartley and Hon. Edward J. McLaughlin, respondents.

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

_____

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

M-495 Motion for change of venue denied.

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

ENTERED: FEBRUARY 19, 2019

CLERK