SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

AUGUST 20, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Friedman, Manzanet-Daniels, Gesmer, Singh, JJ.

9214N Racquel Lividini, Index 20675/18E
Plaintiff-Appellant,

-against-

Harold L. Goldstein, D.P.M.,
et al.,
Defendants-Respondents.

_____

Golomb & Longo, PLLC, New York (Frank A. Longo of counsel), for appellant.

Furman Kornfeld & Brennan LLP, New York (Jennie M. Lundman of counsel), for Harold L. Goldstein, D.P.M., respondent.

Garbarini & Scher, P.C., New York (William D. Buckley of counsel), for Vinai Prakash, D.P.M., respondent.

Heidell, Pittoni, Murphy & Bach, LLP, White Plains (Daryl Paxson of counsel), for Rye Ambulatory Surgery Center, L.L.C. and Westmed Medical Group, P.C., respondents.

_____

Order, Supreme Court, Bronx County (Joseph Capella, J.), entered July 26, 2018, which granted the motions of defendants Harold L. Goldstein D.P.M. (Dr. Goldstein), Rye Ambulatory Surgery Center, LLC (Rye) and Westmed Medical Group, P.C. (WestMed), and the cross motion of defendant Vinai Prakash,

D.P.M. to change the venue from Bronx County to Westchester County, reversed, on the law, without costs, and the motions and cross motion denied.

Defendant Dr. Goldstein failed to show that plaintiff's designation of Bronx as the venue at the commencement of the action was improper. It is a defendant's burden to show that venue was improperly placed, and not a plaintiff's, as the dissent appears to suggest. Plaintiff relied on documentary evidence to establish residency; Dr. Goldstein did not dispute this evidence, did not submit documentary evidence, and indeed admitted in his own affidavit that he maintains a regular practice in the Bronx.

Plaintiff commenced this medical malpractice action in Bronx County, alleging that defendants were negligent in rendering podiatric care and treatment to her between April and September 2016. Defendants moved and cross-moved to transfer venue to Westchester County. WestMed and Rye submitted an affidavit of their medical director averring that Dr. Goldstein was one of their employees in Westchester. Dr. Goldstein submitted an affidavit averring that he had offices in Bronx County and Westchester County. He indicated that Westchester County was where his principal place of business was located because that

was where he spent the majority of his time. However, he also averred that he maintained privileges at St. Barnabas Hospital and supervised podiatric residents at two St. Barnabas Hospital clinics where approximately 150 patients per month were seen. He averred that in addition he saw approximately 20-25 patients per week at a Bronx Park Medical pavilion located at 2016 Bronxdale Avenue in the Bronx.

To prevail on a motion to change venue, the movant bears the burden of demonstrating that plaintiff's choice of venue was improper and that a defendant's choice of venue is proper (*see* CPLR 510[1]; 511[b]). The dissent appears to assume that the burden rests with plaintiff; however, such is not the case. Defendants move pursuant to CPLR 510(1), which requires an affirmative showing by the movant, i.e., defendants, that plaintiff's choice of venue was improper. Then, and only then, is a court empowered to pass upon the propriety of the choice of venue proposed by the defendant.

Plaintiff is suing not only Westmed Medical Group, P.C. and Rye Ambulatory Surgery Center, LLC, but Dr. Goldstein individually. Since Dr. Goldstein is a party to the lawsuit, venue is proper in the county where he may be said to reside. CPLR 503(a) provides that the place of trial "shall be in the

county in which one of the parties resided when it was commenced," and, insofar as relevant here, "[a] party resident in more than one county shall be deemed a resident of each such county" (*id.*). Dr. Goldstein may also be viewed as an individually-owned business, and thus a resident of any county in which he has a principal office (CPLR 503[d]). Thus, an individually-owned business, much as a partnership, may be deemed a resident of the county where it has its principal office, as well as any county in which the individual owner being sued resides (*see* 2 NY Prac Comm Litig in NYS Courts, § 3:9 [4th ed 2015]). Siegel notes that the "principal office" county is an alternative; venue may still be based on the residence of natural-born parties (*see* Siegel, NY Prac § 119, at 250 [6th ed 2018]).[1]

Applying these principles, Dr. Goldstein's affidavit, attesting to residency in Westchester County but devoid of supporting documentation of residency, was insufficient to prove

[1]*DiCicco v Cattani* (5 AD3d 318 [1st Dept 2004]), relied on by the dissent, appears to rest on the erroneous presumption that it was incumbent on the plaintiff to refute the defendant's assertions that his principal office was in Richmond County such that venue was properly laid there. In any event, the plaintiff in that case relied on websites listing the location of the defendant's offices, not official filings, to refute the defendant's showing and establish residency elsewhere.

that plaintiff's designation of Bronx County as venue was improper (*see Singh v Empire Intl., Ltd.*, 95 AD3d 793 [1st Dept 2012]; *Fix v B&B Mall Assoc., Inc.*, 118 AD3d 477 [1st Dept 2014]; *Broderick v R.Y. Mgt. Co., Inc.*, 13 AD3d 197 [1st Dept 2004] [averment without documentary evidence insufficient to satisfy the defendants' burden, particularly where the plaintiff submitted evidence showing that the defendants maintained offices at two Bronx locations]). Notably, while defendants WestMed and Rye Ambulatory Surgery Center LLC submitted official documentation from the NYS Division of Corporations to establish residency, Dr. Goldstein did not.

Even assuming that defendants met their initial burden, we find that the motion court erred in finding that plaintiff's documentary evidence was insufficient to show that Goldstein had designated his Bronx address as his principal office. Contrary to defendants' arguments, a party's designation of its own place of business can be considered when determining a defendant's principal place of business (*see Fix*, 118 AD3d at 478 [in opposition to motion to change venue, plaintiff submitted documentary evidence that office in Bronx County was the defendant's principal place of business]; *accord Young Sun Chung v Kwah*, 122 AD3d 729, 730 [2d Dept 2014] [the evidence the

plaintiff submitted in opposition included the defendant's business letterhead, an internet search of the defendant's public profile, and his licensure information]). Here, plaintiff sufficiently rebutted defendants' proof by submitting Dr. Goldstein's New York State Education Department (NYSED) physician license registration (*see* Education Law § 6501-b [application with the NYSED must be certified or sworn as true]).

Dr. Goldstein's registered and up-to-date physician license with NYSED lists only a Bronx address. Plaintiff correctly points out that Education Law § 6502(5) requires that a licensee notify the NYSED of any change of address within 30 days of such change. Further, Goldstein confirms that information to be accurate, which shows that plaintiff was correct that Goldstein had designated Bronx County as his principal office (*see Young Sun Chung*, 122 AD3d at 730; *Fix*, 118 AD3d at 478). The dissent attempts to minimize such proof – a printout of Goldstein's license registration listing an address in the Bronx as well as an official letter from NYSED indicating an address at St. Barnabas Hospital in the Bronx – by asserting that "the only document submitted by plaintiff is a statutory requirement [sic] that Goldstein provide a mailing address to obtain a license to practice podiatry."

The rule articulated by the dissent would require a minitrial on venue questions. Certainly, the Legislature did not intend to create one workable rule for entities whose "principal place of business" is that designated in its filings with the Department of State, and another unwieldy and unworkable rule for individuals, partnerships, and individually-owned businesses. Dr. Goldstein, by his own admission, maintains a regular practice in the Bronx and listed the Bronx as his place of business in his license registration. The dissent in effect sits as factfinder in disregarding this proof and supplanting it with its own determination that the Bronx is not his principal place of business. This is a determination it is not our province to make, all the more so since Dr. Goldstein was individually named, obviating such questions.

Alternatively, in seeking a change of venue to Westchester County for the convenience of material witnesses under CPLR 510(3), defendants' initial moving papers were deficient in not setting forth the identity of nonparty witnesses who would be willing to testify, the nature and materiality of their anticipated testimony, and the manner in which they would be inconvenienced by a trial in New York County (*see Job v Subaru Leasing Corp.*, 30 AD3d 159 [1st Dept 2006]; *Leopold v Goldstein*,

283 AD2d 319, 320 [1st Dept 2001]). Defendants only provided a mere general statement that a witness would be inconvenienced because the medical services were rendered in Westchester County. We reject defendants' argument that an assumption can be made as to whether a change of venue is proper because it would serve the convenience of material witnesses. We find that defendants failed to meet their burden that the distance from Westchester to Bronx County would inconvenience the unidentified witnesses (*see Timan v Sayegh*, 49 AD3d 274, 274-275 [1st Dept 2008]).

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

All concur except Friedman, J.P. and Singh, J. who dissent in a memorandum by Singh, J. as follows:

Singh, J. (dissenting)

I dissent and would affirm, as Supreme Court providently exercised its discretion in granting defendants' motion to transfer this action from Bronx County to Westchester County. Plaintiff and defendants reside in Westchester County, the alleged medical malpractice occurred in Westchester County and the individual defendants are sued based on their actions as employees of corporations having their principal place of business in Westchester County.

Plaintiff commenced this medical malpractice action against defendants Harold Goldstein DPM, Vinai Prakash DPM, Rye Ambulatory Surgery Center, LLC (Rye) and WestMed Medical Group PC (WestMed) in Bronx County. Plaintiff's complaint states that the alleged malpractice arose from medical services rendered by the individual defendants as "agent, servant and/or employee of" the corporate defendants WestMed and/or Rye in Westchester County. Plaintiff, a resident of Westchester County, designated venue in Bronx County on the basis of the "defendants' principal place of business." Goldstein moved to change venue to Westchester County under CPLR 503, 510 and 511, arguing that venue was improper in Bronx County. Plaintiff opposed.

Supreme Court granted defendants' motion to transfer the

action to Westchester County. The court observed that while the summons alleged that venue was based on "defendants' principal place of business," Goldstein's affidavit sufficiently established that plaintiff's choice of venue was improper as the evidence demonstrated that while Goldstein was affiliated with St. Barnabas Hospital in Bronx County, his principal place of business was Westchester County.

As an initial matter, a decision to transfer venue lies within the discretion of a trial court and should not be disturbed absent a showing that such discretion has been abused or improvidently exercised (*see Paddock Constr. v Thomason Indus. Corp.*, 133 AD2d 20 [1st Dept 1987]; *Vered v Wittenberg*, 138 AD3d 646 [1st Dept 2016]).

The majority argues that venue is properly designated in Bronx County pursuant to CPLR 503(a). I disagree. CPLR 503(a) cannot provide the basis for designating Bronx County as venue as even plaintiff does not dispute that none of the parties reside in Bronx County. Goldstein is a resident of Westchester County. Moreover, the alleged malpractice at issue occurred in Westchester County where WestMed and Rye have their principal places of business.

Relying on *Young Sun Chung v Kwah* (122 AD3d 729, 730 [2d

Dept 2014]), the majority contends that venue is properly placed in Bronx County because CPLR 503(a) provides that "[a] party resident in more than one county shall be deemed a resident of each such county" and that as an individually-owned business, Goldstein is "a resident of any county in which he has a principal office."

This argument appears to conflate residence and principal place of business. In *Young Sun Chung*, the Second Department found that "[u]nder CPLR 503(d), the county of an individual's principal office is a proper venue for claims arising out of that business" (122 AD3d at 730). In support of this principle, the Second Department cites to Professor Siegel, who explains that "[p]rofessionals like physicians and lawyers are deemed an individually owned business under [CPLR 503(d)], because when they offer services to the public they are engaged in a business" (Siegel, NY Prac § 119 at 250 [6th ed 2018]).

Here, the record contains no evidence that Goldstein has his individual residence in Bronx County. Rather, on this record, it is uncontroverted that Goldstein resides in Westchester County, and plaintiff expressly states in her complaint that Goldstein is sued for his conduct in Westchester County as "an agent, servant and/or employee of" the corporate defendants WestMed and Rye,

both of which have their principal places of business in Westchester County. Further, there is no indication in the record that Goldstein is being sued as an individually-owned business, nor is there any evidence in the record that, if Goldstein owns such a business, any such business has its principal place of business in Bronx County.

Plaintiff's argument that Bronx County is a proper venue because Goldstein listed a Bronx County address on his license registration filing with the New York State Education Department is without merit. Education Law article 130 regulates the admission and practice of certain professions, including medicine. Section 6502 governs the duration and registration of licenses. Section 6502(5) requires a licensee to notify the department of "any change of name or mailing address." Notably, the statute does not mention a licensee's principal place of business or even a place of business. The majority does not cite case law that supports this position. Merely listing a mailing address with a regulatory agency in order to obtain a license to practice medicine in New York is not proof of a licensee's principal place of business.

The case law cited by the majority is distinguishable. In those cases, plaintiff sufficiently rebutted defendants' proof by

submitting probative documents (*see Singh v Empire Intl. Ltd.*, 95 AD3d 793 [1st Dept 2012] [police report showed that all parties had addresses outside of New York state for a CPLR 503(a) claim]; *Fix v B&B Mall Assoc., Inc*, 118 AD3d 477 [1st Dept 2014] [Department of State records established that defendant designated Bronx County as its principal place of business]; *Broderick v R.Y. Mg. Co., Inc.*, 13 AD3d 197 [1st Dept 2004] [documentary evidence adduced by plaintiff that defendants maintained two offices in the Bronx]).

Here, in contrast, the only document submitted by plaintiff is a letter from the New York State Education Department confirming that Goldstein holds a license to practice podiatry and that the address the agency has on file for him is at St. Barnabas Hospital in the Bronx. Notably, the letter does not state that Bronx County is Goldstein's principal place of business.

Nor do I agree with the majority's contention that our decision in *DiCicco v Cattani* (5 AD3d 318 [1st Dept 2004]) was wrongly decided. In *DiCicco*, we did not discuss the burden of proof. Rather, we found that the defendant's affidavit sufficiently demonstrated that his principal office was located in Staten Island where the alleged malpractice occurred despite

the New York State Directory of Physicians providing a Manhattan address for him (*see also Kielczewski v Pinnacle Restoration Corp.*, 226 AD2d 211 [1st Dept 1996][although defendant general partnership's business certificate lists its office "c/o" a Bronx County address, Supreme Court properly considered the affidavits of the general partners that the partnership's principal office has always been in New Jersey or Westchester County, in finding that none of the parties reside in Bronx County]).

Similarly, here, Goldstein's affidavit establishes that his principal place of business is Westchester County. He derives 75% of his income in Westchester County. The bulk of his practice is in Westchester County where he sees approximately 350-400 patients at WestMed. He spends 1-2 days a week in Bronx County at St. Barnabas supervising podiatry residents and sees approximately 20-25 patients at Bronx Park Pavilion. These factual statements are undisputed.

Finally, I note that Bronx County has no nexus with this dispute and does not qualify as proper venue (*see Koschak v Gates Constr. Corp.*, 225 AD2d 315, 316 [1st Dept 1996] [It does not advance the integrity of the judicial process to permit a party

to obtain what is perceived to be an advantageous forum by rank manipulation of the rules for setting venue or forum shop]).

In sum, Supreme Court properly found that defendants met their burden of proving that Bronx County was an improper venue.

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

ENTERED: AUGUST 20, 2019

Margaret Saval

DEPUTY CLERK

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

9304 In re Aura Chacon, Index 101644/16
Petitioner-Respondent,

-against-

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

_____

Zachary W. Carter, Corporation Counsel, New York (Ellen Ravitch of counsel), for appellants.

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

_____

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered August 25, 2017, annulling the determination of respondent Board of Trustees, dated June 8, 2016, which denied petitioner's application for accidental disability retirement, and remanding the matter to the Board, unanimously reversed, on the law, without costs, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed.

Because the Board of Trustees's denial of petitioner's application for accident disability retirement was the result of a tie vote, the issue for the reviewing court was whether there was any credible evidence of lack of causation, i.e., evidence that the disability was not the natural and proximate result of the 1996 service-related accident (*see Matter of Meyer v Board of*

Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund, 90 NY2d 139, 144-145 [1997]; *Matter of Baudille v Kelly*, 95 AD3d 415, 415 [1st Dept 2012]). In this record there is some credible evidence of lack of causation, namely, the conservative treatment petitioner received after the accident and petitioner's return to full duty for approximately 14 years before seeking further treatment (*see Matter of Doyle v Kelly*, 8 AD3d 125 [1st Dept 2004]; *Matter of Baudille*, 95 AD3d 415). Moreover, neither the Medical Board nor petitioner's physician were able to explain why the purported disabling injury did not prevent her from returning to full time duty for 14 years without further complaint.

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

ENTERED: AUGUST 20, 2019

Margaret Soval

DEPUTY CLERK

Sweeny, J.P., Renwick, Tom, Kapnick, Oing, JJ.

9379 In re Barry H.,
Petitioner-Appellant,

-against-

Veronica S.,
Respondent-Respondent.

_____

Anne Reiniger, New York, for appellant.

Diaz & Moskowitz, PLLC, New York (Hani Moskowitz of counsel), for respondent.

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

_____

Appeal from order, Family Court, Bronx County (Rosanna Mazzotta, Referee), entered on or about May 2, 2018, which, after a hearing, dismissed with prejudice the father's petition for modification of a 2015 custody order concerning the parties' daughter, held in abeyance, and the matter remitted for further proceedings to address the best interest of the child in accordance with this order.

The subject child was born on May 7, 2009. The parties entered a custody order, on consent, in July 2015, which granted joint legal custody to the father and mother, with primary residential custody to the mother, and visitation to the father. The child was six years old at the time the parties entered into

the custody order.

In January 2017, the father filed a petition for a modification of the parties' custody order. The father claimed there had been a change in circumstances in that the child would have a better home environment and be in a better school if he had primary residential custody, and that he is better able to provide for her needs. After a two-day hearing in which the Referee focused on whether the father sufficiently demonstrated a change in circumstances, the mother made an oral motion to dismiss the petition for failure to establish a prima facie case. The court issued its decision on the record finding that the father failed to demonstrate "a sufficient change in circumstances to merit a modification of the . . . [2015 custody] order." The Referee determined that the father's "allegations of corporal punishment upon the child by the mother were unfounded and not corroborated," and the fact that the mother had relocated several times did not constitute a change in circumstances because she was living in a shelter at the time the parties entered the 2015 custody order. The Referee did not issue a written finding of fact, and dismissed the petition with prejudice.

The ultimate consideration in determining custody is always

the best interests of the child (*see Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]; *Friederwitzer v Friederwitzer*, 55 NY2d 89, 95 [1982]). A custody order may be modified based on a change in the parties' circumstances which requires modification to ensure the child's best interests (*Matter of Christopher H. v Taiesha R.*, 166 AD3d 548 [1st Dept 2018]). The decision to modify a custody order is usually left to the discretion of the trial court, and will only be reversed if it lacks a sound and substantial basis in the record (*id.*).

The court based its decision on the limited findings that the father's claims of corporal punishment were not credible, and that the mother's numerous residential relocations did not constitute a change in circumstances because she was living in a shelter at the time of the 2015 custody order. We find, however, that the record sufficiently demonstrates a change in circumstances requiring a full hearing to "determine whether the totality of the circumstances warrant modification in the best interests of the child" (*Gant v Higgins*, 203 AD2d 23, 24 [1st Dept 1994]).

The child's certified third grade attendance report, report card, and mid-year progress report for the 2017-2018 school year, up to February 15, 2018, were admitted into evidence. The report

card showed she received a grade of "1", which was "well below standards", in 32 of 38 categories including reading, writing, academic and personal behaviors, and social-emotional development. Her attendance report showed she was late or absent from school 49.5% of the school days between September 2017 and mid-February 2018. This absenteeism and tardiness was already an increase from the 2016-2017 full academic year when she was absent or late 40.9% of school days.

We also find the Referee's oral decision did not demonstrate adequate consideration of other relevant claims made by the father, such as the child's dental health and the mother's inability to maintain stable housing.

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

ENTERED: AUGUST 20, 2019

Margaret Soval

DEPUTY CLERK

Renwick, J.P., Manzanet-Daniels, Kahn, Kern, Moulton, JJ.

9394- Ind. 2684/14
9395- 682/16
9396 The People of the State of New York,
Respondent,

-against-

Robin Hamilton,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered December 1, 2015, convicting defendant, after a jury trial, of tampering with physical evidence, and sentencing her, as a second felony offender, to a term of two to four years, unanimously affirmed. Judgment, same court (Arlene D. Goldberg, J. at motion to conduct conditional examination; James M. Burke, J. at motions to introduce conditional examination and for consolidation; Edward J. McLaughlin, J. at jury trial and sentencing), rendered July 12, 2016, as amended July 18 and October 25, 2016, convicting defendant of robbery in the first degree, robbery in the second degree (two counts), kidnapping in the second degree, burglary in the second degree

and criminal possession of stolen property in the fourth degree, and sentencing her, as a persistent violent felony offender, to an aggregate term of 50 years to life, concurrent with the sentence imposed on the prior judgment, unanimously modified, on the law, to the extent of remanding for resentencing, and otherwise affirmed.

Although the court should have permitted defendant to introduce expert testimony on cross-racial identifications, we find that any error in this regard was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). The identification made by one of the robbery victims was only a small component of the People's overwhelming case, which included extensive circumstantial evidence of various kinds. Even if some pieces of circumstantial proof could be viewed in isolation as equivocal, when the evidence is viewed as a whole it permits no rational conclusion other than defendant's guilt.

The court providently exercised its discretion in admitting evidence of uncharged robberies committed in Queens as part of a closely connected series of crimes, including the charged crimes, that occurred over several days and involved the same participants. Details of the uncharged crimes, such as the involvement of certain cars associated with defendant, and the

participation of the same accomplices, provided circumstantial evidence of identity (*see e.g. People v Whitley*, 14 AD3d 403, 405 [1st Dept 2005], *lv denied* 4 NY3d 892 [2005]). Moreover, defendant made a confession that directly admitted one of the Queens crimes but could reasonably be viewed as admitting the entire series of robberies. The probative value of the evidence at issue outweighed its prejudicial effect. We have considered and rejected defendant's related challenge to the court's jury instructions.

The respective courts providently exercised their discretion in granting the People's motion to conduct a conditional examination of the above-discussed identifying witness while she was briefly in the United States, and in admitting a video recording of the examination at trial pursuant to CPL 670.10. The People established that at the time of trial, "the witness was outside the country and could not with due diligence be brought before the court" (*People v Carracedo*, 228 AD2d 199, 200 [1st Dept 1996], *affd* 89 NY2d 1059 [1997]). The same defense counsel "had the opportunity for full cross-examination of the witness" at the videotaped examination, and "there is no evidence that the People's failure to produce the witness was in any way due to indifference or strategic preference" (*id.* at 199).

Furthermore, the record establishes that the People met their burden under *People v Diaz* (97 NY2d 109, 117 [2001]) of diligently attempting to convince a witness beyond the subpoena power of the United States to voluntarily return. In any event, any error as to the conditional examination was harmless.

Defendant was not deprived of her right to be present at the discussion of legal issues, since she had an opportunity to provide input on some of those issues, and otherwise would have been unlikely to offer input that could have affected the outcome (*see People v Roman*, 88 NY2d 18, 25-26 [1996]; *People v Acevedo*, 112 AD3d 454, 454 [1st Dept 2013], *lv denied* 23 NY3d 2017 [2014] *People v Liggins*, 19 AD3d 324 [1st Dept 2005], *lv denied* 5 NY3d 853 [2005]).

We reject defendant's argument that the kidnapping conviction was against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). An accomplice's display of an apparent firearm in the course of a robbery in a car operated as an implicit threat to use deadly force during the ensuing kidnapping, in which the victim was restrained in the car for about half an hour to an hour after the taking of her purse, and this threat clearly prevented her from attempting to leave (*see People v Dodt*, 61 NY2d 408, 411 [1984]). Defendant's similar

argument that the court should have charged second-degree unlawful imprisonment as a lesser included offense of second-degree kidnapping is also unavailing, because there is no reasonable view of the evidence that she committed the lesser included offense but not the greater (*see generally People v Rivera*, 23 NY3d 112, 120 [2014]).

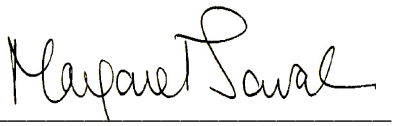
Defendant failed to preserve her contentions that separate incidents were improperly joined, that the kidnapping count should have been dismissed under the merger doctrine, that uncharged crimes evidence was unsealed in violation of CPL 160.50(1)(d), that she was deprived of her right to a speedy trial, and that the court's inquiry into an issue involving a juror was inadequate, and we reject defendant's arguments on preservation-related matters. We decline to review any of these unpreserved claims in the interest of justice. As an alternative holding, we find them unavailing.

The resentencing court's statement that consecutive terms of 25 years to life should be imposed on first-degree robbery as to one incident, and second-degree kidnapping as to another incident, was inconsistent with both the sentence and commitment sheet and the fact that defendant's convictions of those offenses

arose from the same incident. Accordingly, the court's intended sentence is unclear. Inasmuch as the sentencing Justice has retired, we conclude that a full de novo sentencing proceeding would be appropriate, and we remand for that purpose.

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

ENTERED: AUGUST 20, 2019



DEPUTY CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Dianne T. Renwick, J.P.
Judith J. Gische
Barbara R. Kapnick
Ellen Gesmer
Peter H. Moulton, JJ.

8291
Index 110344/10

_____x

Diane I. Dua, et al.,
Plaintiffs-Respondents,

-against-

New York City Department of Parks
and Recreation, et al.,
Defendants-Appellants.

_____x

Defendants appeal from the order and judgment (one paper) of the Supreme Court, New York County (Lucy Billings, J.), entered October 11, 2017, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment granted plaintiffs' cross motion for summary judgment, with respect to the fifth cause of action and issued an injunction against defendants, and granted plaintiffs' cross motion for leave to amend the complaint.

Zachary W. Carter, Corporation Counsel, New York (Julie Steiner and Claude S. Platton of counsel), for appellants.

Phillips Nizer LLP, New York (Elizabeth Adinolfi and Kevin B. McGrath of counsel), for respondents.

KAPNICK, J.

Plaintiffs, several visual artists, as well as an unincorporated association of which some of them are members, challenge the New York City Department of Parks and Recreation's (DPR) "Expressive Matter Vending Rules" (EMV Rules) set forth in 56 RCNY § 1-05(b)(2)-(8) as invalid because they are inconsistent with the declared intent of Administrative Code of City of New York § 20-473 as set forth in Local Law No. 33 (1982), violate plaintiffs' free speech and equal protection rights under the New York Constitution (NY Const, art I, §§ 8, 11) and have a discriminatory effect on some vendors in violation of the New York State and City Human Rights Laws (Executive Law § 296[2]; Administrative Code § 8-107[4], [9]). We conclude that the EMV Rules are valid and that defendant is entitled to summary judgment dismissing all of plaintiffs' claims.

BACKGROUND

In New York City, the General Vendors Law, enacted in 1977, requires that all general vendors acquire licenses before selling nonfood goods or services in public spaces, such as City streets, sidewalks and parks (Administrative Code § B32-491.0; Administrative Code § 20-452 *et seq.*). Certain exceptions to those rules have been adopted, including exceptions for artists and other expressive matter vendors (EMVs). Expressive matter is

defined as "materials or objects with expressive content, such as newspapers, books or writings, or visual art such as paintings, prints, photography, sculpture, or entertainment" (56 RCNY § 1-02).[1]

Administrative Code § 20-473 provides that while EMVs are exempt from licensing requirements applicable to general vendors, "nothing herein shall be construed to deprive the commissioner of the department of parks and recreation [DPR] of the authority to regulate [EMVs] in a manner consistent with the purpose of the parks and the declared legislative intent of this subchapter." With regard to legislative intent, the City Council has declared:

> "[I]t is consistent with the principles of free speech and freedom of the press to eliminate as many restrictions on the vending of written matter[2] as is consistent with the

---

[1] When plaintiffs commenced this lawsuit in 2010, "entertainment" was not included in the definition of expressive matter. The definition was amended effective May 8, 2013 to include "entertainment."

[2]Local Law No. 33 exempted only vendors of written material. After artists challenged the failure to include them in the exemption on constitutional grounds and the Second Circuit held that the failure to exempt the artists from the licensing requirement violated their First Amendment rights and the Equal Protection Clause (*Bery v City of New York*, 97 F3d 689 [2d Cir 1996], *cert denied* 520 US 1251 [1997]), the City of New York consented to a permanent injunction prohibiting the enforcement of § 20-473 against any person who "hawks, peddles, sells, leases or offers to sell or lease, at retail, any paintings, photographs, prints and/or sculpture, either exclusively or in conjunction with newspapers, periodicals, books, pamphlets or other similar written matter, in a public space" (Permanent

> public health, safety and welfare. The council further finds and declares that general vendors who exclusively vend written matter should be free from licensing requirements. It is further found and declared that general vendors who exclusively vend written matter with the aid of small portable stands should be exempted from restrictions on the time, place and manner of their vending activity insofar as such exemption does not constitute a threat[3] to the public health, safety or welfare" (Local Laws, 1982, No. 33 of City of New York § 1).

Following the enactment of Local Law No. 33, DPR has, at times, promulgated rules, other than the forbidden licensing requirement, for the purpose of regulating EMVs selling their wares in City parks. In the 1990s, DPR promulgated 56 RCNY § 1-05(b), prohibiting vendors, including EMVs, from operating without a "permit" within the parks. That permitting scheme was struck down as inconsistent with the statement of legislative intent in Local Law No. 33, which provides that EMVs should be free from licensing requirements (*see Lederman v Giuliani*, US Dist Ct, SD NY, 98 Civ 2024, McKenna, J., 2001, *affd* 70 Fed Appx 39 [2d Cir 2003]).

As relevant here, in March 2010, DPR published proposed

Injunction on Consent dated Oct. 21, 1997, *Bery v City of New York*, No. 94 Civ. 4253 (MGC) [SD NY Oct. 30, 1997]). 56 RCNY § 1-02 was amended to include "visual art such as paintings, prints, photography, sculpture, or entertainment" in the definition of expressive matter.

[3]The word "threat" is found in Local Law No. 33, but not in Administrative Code § 20-473.

revisions to the rules applicable to EMVs. It held a public hearing, and based on comments at the hearing as well as written comments, revised the proposed rules. The new rules became effective on July 19, 2010. Under the revised EMV Rules, while EMVs may sell in almost all City parks if they comply with certain requirements,[4] they are restricted in Union Square Park, Battery Park, High Line Park, and portions of Central Park below 86th Street, where they may only sell their items, on a first-come, first-serve basis, in certain designated areas, and only one vendor is allowed to sell at each spot. The EMVs may always sell in the nonenumerated areas, including other City parks and sidewalks. The designated spots are as follows:

> "Expressive matter vendors may not vend in the following general areas unless they vend at the specifically designated spots for such vending on the accompanying maps and in compliance with all other applicable Department rules:
>
> "(i) Central Park at the following locations: (A) the perimeter of the park between East 85th Street and East 60th Street, including all sidewalks and plazas (B) the perimeter of the park between West 86th Street and West 60th Street, including all sidewalks and plazas (C) all of Central Park South, including all sidewalks and

[4] Those requirements include the following: display stands must allow a clear pedestrian path and must be five feet away from a tree, street, or park furniture and 50 feet away from a monument; a vendor's goods cannot lean against any park furniture or plants; and the vending activity cannot block anyone from using park furniture or take place over any ventilation grill, manhole, or subway access grating (56 RCNY § 1-05[b][4]-[8]).

> plazas (D) Wien Walk and Wallach Walk, (E) pedestrian pathways parallel to East Drive between Grand Army Plaza and the Center Drive, (F) Grand Army Plaza, (G) Pulitzer Plaza, and (H) Columbus Circle.
>
> "(ii) Battery Park, including all perimeter sidewalks.
>
> "(iii) Union Square Park, including all perimeter sidewalks.
>
> "(iv) Elevated portions of High Line Park." (56 RCNY 1-05 [b][3]).

The "accompanying maps" referenced in section 1-05(b)(3) detail the designated spots. For example, there are 68 spots for EMVs in the designated portions of Central Park (including 28 outside of the Metropolitan Museum of Art); nine spots for EMVs in Battery Park; 18 spots for EMVs in Union Square Park and five spots on the High Line. In addition, during the review process prior to adoption of the EMV Rules, and in response to submitted comments, the Parks Department added 40 spots in Union Square Park for EMVs, which are available on Sundays, Tuesdays and Thursdays, days that the longstanding Greenmarket is not operating there.

Soon after the EMV Rules were announced, artists who are EMVs in City parks, including some of the plaintiffs in this case, brought two actions in federal court seeking to enjoin enforcement of the rules on constitutional grounds. Because the cases were related, they were decided together under *Lederman v New York City Dept. of Parks & Recreation* (US Dist Ct, SD NY, 10

Civ 4800, Sullivan, J., 2010). In its memorandum and order, the federal court denied the plaintiffs' motions for a preliminary injunction, finding that the revisions "appear to be reasonable, content-neutral restrictions on time, place, and manner that are narrowly tailored to advance a significant government interest while leaving open ample alternative channels for the expressive activity" (*id.*). On August 4, 2010, plaintiffs commenced this declaratory judgment action, which alleges that the EMV Rules violate their free speech and equal protection rights under the New York Constitution; are inconsistent with the declared legislative intent underlying Administrative Code § 20-473; and that the spot designations have a discriminatory effect on those vendors for whom it is difficult, whether due to age, gender, or disability, to compete to secure a spot, in violation of the State and City Human Rights Laws. They also sought preliminary injunctive relief.

In a December 2010 order, Supreme Court denied plaintiffs' motion for a preliminary injunction, finding the EMV Rules "to be a reasonable content-neutral restriction on time, place and manner that are narrowly tailored to support a rational basis for the Legislative action" (*Dua v New York City Dept. of Parks & Recreation*, 2010 NY Slip Op 33666[U], *7-8 [Sup Ct, New York County 2010]). In May 2011, this Court affirmed that order,

finding that the rules were content neutral, part of a comprehensive scheme governing time, place, and manner for all vendors, and that they addressed the City's significant interest in preserving and promoting the scenic beauty of its parks, providing sufficient areas for recreational uses, and preventing congestion in park areas and on perimeter sidewalks, in response to valid concerns relating to the increase in the number of such vendors (84 AD3d 596 [1st Dept 2011]).

In February 2012, the City moved for summary judgment, arguing that, as found in the earlier preliminary injunction orders, the EMV Rules are valid time, place, and manner restrictions, and thus not constitutionally infirm; that the rules are not prohibited by Administrative Code § 20-473; and that they do not implicate the State or City Human Rights Laws. While that motion was pending, the City was granted summary judgment dismissing the complaint in the federal *Lederman* action, with the district court concluding that the EMV Rules are constitutional (901 F Supp 2d 464 [SD NY 2012]). That decision was affirmed by the Second Circuit (731 F3d 199 [2d Cir 2013], *cert denied* 571 US 1237 [2014]).

In July 2014, having received lengthy adjournments from the court, plaintiffs opposed defendants' summary judgment motion, and cross-moved for summary judgment on their claims and for

leave to amend their complaint to add a separation of powers claim.

By order dated September 20, 2017 (59 Misc 3d 633 [Sup Ct, NY County 2017]), the court granted defendants' motion only to the extent of dismissing the sixth cause of action alleging that the EMV Rules are unconstitutionally vague, and otherwise denied the motion. It granted plaintiffs' cross motion for summary judgment to the extent of declaring that the EMV Rules violate Administrative Code § 20-473, and thus enjoined enforcement of the Rules. The court also denied both motions for summary judgment on plaintiffs' free speech, equal protection, and discrimination claims, and granted plaintiffs leave to amend the complaint to add a separation of powers claim.

Supreme Court held that the EMV Rules are inconsistent with the declared legislative intent of Local Law No. 33 to eliminate as many restrictions as possible on vending expressive matter, because defendants have not claimed that the regulations were intended to promote health, safety or welfare, and that the rules add restrictions on EMVs rather than eliminating them (59 Misc 3d at 644). With respect to the free speech claim, the court found that although the City has a significant interest in addressing concerns about congestion, aesthetics, and competing park uses, "defendants present no evidence that EMVs impacted those concerns

to justify regulation" (*id.* at 639). While the court then addressed the evidence that had been presented by the City to demonstrate congestion in the regulated parks, it concluded that even accepting the City's accounts of increased park congestion, it presented "no evidence of EMVs' impact on park aesthetics or interference with conflicting uses of park space" (*id.* at 640). However, the court also denied plaintiffs' crossmotion for summary judgment on the free speech claim, finding that their evidence failed to establish defendants' lack of a substantial interest in implementing the EMV Rules (*id.* at 641).

With respect to the claim alleging that the EMV Rules facially violate equal protection guarantees because they limit the number of EMVs in particular areas, the court found that the regulation's classification of this group is impermissible if it does not "further a legitimate, articulated governmental purpose" (*id.* at 642). It concluded that defendants' evidence does not support their concerns about EMVs (*id.*), but also found that plaintiffs' evidence failed to establish "defendants' lack of a legitimate or compelling governmental interest" (*id.*). It denied both defendants' motion and plaintiffs' cross motion on that issue.

Regarding plaintiffs' contention that the regulations are void for vagueness, the court noted that this Court has already

rejected that claim in the appeal of the denial of plaintiffs' motion for a preliminary injunction (84 AD3d at 598), and that the same factual record that was before this Court was presented on the motions for summary judgment. Thus, the motion court reasoned that this Court's holding was controlling precedent.

Supreme Court denied both motions for summary judgment on the violation of the State and City Human Rights Laws claims, finding that although plaintiffs did not offer any opposition to dismissal of those claims, defendants had failed to show that plaintiffs have not been denied a public accommodation for discriminatory reasons (*id.* at 645).[5]

Finally, with respect to plaintiffs' cross motion to amend their complaint to add a violation of separation of powers claim, the court found that plaintiffs had demonstrated merit to the claim under the factors set forth in *Boreali v Axelrod* (71 NY2d 1 [1987]) and its progeny, and permitted plaintiffs to amend their pleading (*id.* at 645-648).

DISCUSSION

I. The EMV Rules do not conflict with the City Council's legislative intent, as expressed in Local Law No. 33 of 1982.

Supreme Court erred in declaring that the EMV Rules conflict

[5] The court noted record evidence that "at least one plaintiff is over age 40 and several are women" (*id.* at 645).

with the City Council's intent regarding expressive matter. The Council has granted authority to DPR to regulate expressive matter vending consistent with public health, safety and welfare. The EMV Rules promote those concerns because they advance the City's significant interest in preserving the parks' scenic beauty, permitting the recreational use of parks for strolling and other activities and preventing congestion. We reject the notion adopted by the Supreme Court that the EMV Rules conflict with the City Council's legislative intent to eliminate as many restrictions as possible for EMVs simply because there are some restrictions placed on EMVs in specific, discrete areas where DPR has determined those restrictions to be necessary. To the contrary, the City Council has itself required that EMVs comply with general restrictions relating to the size and placement of their vending tables (*see* Administrative Code §§ 20-465(a)-(f),(k)-(q), 20-473). The City Council has expressly recognized that DPR may further regulate expressive matter on park property (Administrative Code § 20-473) consistent with DPR's mandate under the City Charter to manage and care for the parks, and to maintain their beauty and utility (*see* New York City Charter § 533).

Furthermore, the EMV Rules are in stark contrast to the previous licensing requirement that, as noted by the Second

Circuit, was "a *de facto* bar preventing visual artists from exhibiting and selling their art in public areas in New York (*Bery*, 97 F3d at 697). There is no such bar here. Rather, defendants have demonstrated that the EMV Rules' carefully targeted limitations were properly enacted based on observations, experience and judgment in how the increase of expressive matter vending has affected parkland. Supreme Court incorrectly rejected the proof proffered by defendants to show that the EMV Rules are a valid exercise of DPR's management of the parks in response to the rapid proliferation of expressive matter vending in certain areas.

The Declaration of former DPR Assistant Commissioner Jack Linn details the specific conditions necessitating the spot designations in each park. For example, Linn explains that the 68 designated vending spots in Central Park below 86th Street were chosen by the Parks Department after considering the volume of visitors to Central Park each year (over 37 million, more than 70 percent of whom enter the park at or below 86th Street); and the need to maintain the aesthetic integrity of, and access to, park features, including numerous historical monuments and public art exhibits, the subway entrances in the Park near Grand Army Plaza and Columbus Circle, and the numerous benches and trees along the park side of the perimeter sidewalk.

Similarly, Union Square Park's specific vending locations were designated by the Parks Department after consideration of the volume of visitors to the Park (up to 200,000 on a summer day); and the need to maintain the aesthetic integrity of, and access to, park features including subway entrances, the "Spanish Steps," monuments and sculptures; allow the operation of the farmer's market; and maintain space for political rallies and other special events.

Likewise, Battery Park's vending locations take into account the over four million people who visit Battery Park every year; the bus, subway and ferry stops located in and around the park; the numerous monuments in the park, including the historic Castle Clinton; and the locations where vendors have attempted to sell in the past.

Moreover, the designated vending locations in High Line Park are situated so as to not unduly interfere with the flow of visitors, viewing areas and plants in that narrow, elevated, heavily landscaped park.

In sum, defendants have demonstrated that the EMV Rules are consistent with Local Law No. 33 and Administrative Code § 20-473 in that they promote the public health, safety and welfare in the designated parks.

II. The EMV Rules do not violate vendors' rights under the

New York Constitution

As we noted in the prior appeal, plaintiffs failed to show a likelihood of success on the merits of their constitutional challenges:

> "The [R]evised [R]ules respond to Parks Department concerns that, since 2001, expressive matter vendors have tripled. The general restrictions applicable to all vendors were no longer sufficient to balance the vending of expressive matter with the use of parks by the general public. The [R]evised [R]ules provide open, ample alternative means of communication since they only apply to four parks. Expressive matter vendors may operate at any other city park, subject only to general restrictions. Thus, the [R]evised [R]ules satisfy the narrow tailoring requirement of promoting a substantial government interest that would be achieved less effectively absent the regulation" *Dua*, 84 AD3d at 597-598 [internal citations and quotation marks omitted]).

Concerning the protection of free speech afforded by the New York Constitution (art I, § 8), the EMV Rules are content-neutral restrictions, in that "they are justified without reference to the content of the regulated speech and relat[e] only to the time, place, and manner of expression" (*Matter of Town of Islip v Caviglia*, 73 NY2d 544, 557 [1989]). Thus, they "are valid if the governmental interest to be achieved outweighs the resulting interference with free expression" (*id.*). Defendants have shown that the EMV Rules are "'no broader than needed' for the intended purpose" (*id.* at 560, quoting *People ex rel. Arcara v Cloud Books*, 68 NY2d 553, 558 [1986]) and that there are ample

alternative means for EMVs to sell their wares (*Islip* at 560; *see also Matter of Rogers v New York City Tr. Auth.*, 89 NY2d 692, 701 [1997]; *Dua*, 84 AD3d at 597).

The record, which is not meaningfully different now than when it was last before this Court in 2011, establishes that the EMV Rules are an appropriate response to demonstrated concerns about expressive matter vending in specific city parks. As the federal court held in *Lederman,* the EMV Rules "bear the hallmarks of a carefully considered attempt to advance the significant government interest without placing undue burdens on expressive matter vendors" (901 F Supp 2d at 477 [internal quotation marks omitted]).

While plaintiffs are correct that the language of the New York Constitution's free speech clause is more expansive than that contained in the First Amendment of the US Constitution (*see e.g. Immuno AG. v Moor-Jankowski*, 77 NY2d 235, 249 [1991] [the protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by the Federal Constitution]), that does not automatically mean that the New York Constitution will necessarily be interpreted to confer greater rights than those conferred by the First Amendment in every case (*see e.g. Courtroom Tel. Network LLC v State of New York,* 5 NY3d 222, 231

[2005] [no right under either the First Amendment or article I, § 8 to televise a trial - - "[w]hile we have in certain circumstances interpreted article I, § 8 more broadly than its federal counterpart . . . we decline to do so here."]; *Matter of Johnson Newspaper Corp. v Melino*, 77 NY2d 1, 8 [1990] [no public right to attend professional disciplinary hearing under either the Federal or State Constitution]).

Defendants have shown that the protection of free speech contained in the New York Constitution is not violated by the EMV Rules, and plaintiffs have not raised any issue of fact in that regard. While plaintiffs argue that it is purely commercial activities, such as the Greenmarket and the Winter Village, and not the EMVs, that contribute to congestion in the parks, we agree with the assessment of the federal court on this argument:

> "That the City tolerates heightened congestion in some circumstances neither requires it to tolerate such congestion at all times nor suggests that its other congestion-reducing measures are pretextual. Furthermore, the Revisions were promulgated not only to reduce congestion, but also to address aesthetic concerns, to prevent interference with other users' enjoyment of the parks, and to allow for an array of activities to take place in the parks"
> (*Lederman v NY City Dept. of Parks & Rec.*, 901 F Supp 2d at 476 [internal citations and quotation marks omitted]).

While "[a]rguments can be advanced that different techniques should be used to address the problem, . . . that is not to say that they are constitutionally required", and suggesting

alternatives "amounts to nothing more than a disagreement . . . over how much corrective action is wise and how best it may be achieved" (*Town of Islip*, 73 NY2d at 560). Thus, we conclude that defendants are entitled to summary judgment on the free speech claim.

Similarly, there is no issue of fact as to whether the EMV Rules violate plaintiffs' equal protection rights. As noted by the federal court in *Lederman*, which had substantially the same record before it:

> "[T]he Court finds that the Revisions fall well within the parameters of the First Amendment. Accordingly, the Revisions are subject only to rational basis review for equal protection purposes. Under rational basis review, Plaintiffs' Equal Protection claims must fail as a matter of law, because Defendants have met the low bar in establishing that the Revisions are 'rationally related to a legitimate government interest,' namely, promoting the use and enjoyment of public parks" (901 F Supp 2d at 480).

Plaintiffs' equal protection claim centers around their assertion, disputed by defendants, that the setback rules impose greater restrictions than permits issued by the Parks Department to pure commercial park vendors, such as food and souvenir vendors. However, as explained by defendants, the EMV Rules, including the setback rules, are necessary for the very reason that, unlike food and souvenir vendors, EMVs do not need to

obtain permits from DPR, whereas the general vendors must obtain permits that specify a location where the activity can occur and the specific size of the cart which may be used. Plaintiffs only have to comply with generally applicable setback requirements. There is no proof that they are treated disparately. In fact, as this Court noted in the prior appeal:

> "While the Revised Rules allow expressive matter vending at sites and times when food or general vending is allowed, the record reveals that the Parks Department designated 68 sites for expressive matter vending in and around Central Park below 86th Street and authorized only 36 food and souvenir carts to operate in that area" (*Dua*, 84 AD3d at 598).

In sum, the record supports defendants' contention that there are many more opportunities for expressive matter vending than food and souvenir vending in the designated City parks. There are no triable issues of fact as to whether the EMV Rules deny plaintiffs equal protection rights.

III. Defendants are entitled to summary judgment dismissing the discrimination claims under the State and City Human Rights Law

Supreme Court held that plaintiffs' cross motion for summary judgment presented no support for these discrimination claims and that plaintiffs did not offer any opposition to defendants' motion for dismissal of those claims. Yet, the court declined to grant summary judgment to either plaintiffs or defendants.

Plaintiffs have not appealed that determination. Defendants, in appealing, point out that although this Court indicated on the prior appeal that the record was not sufficiently developed regarding the discrimination claims (84 AD3d at 598), the discovery process since has not yielded any evidence to support plaintiffs' claims of disparate treatment. They also assert that even if plaintiffs could demonstrate that the EMV Rules have a disparate impact on women, older vendors, or disabled individuals, their claims would still fail because under both the City and State Human Rights laws, which employ a burden-shifting analysis, defendants have demonstrated a legitimate, nondiscriminatory reason for the EMV Rules and plaintiffs have not shown those reasons to be false or pretextual (*see e.g. Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 35-36 [1st Dept 2011] *lv denied* 18 NY3d 811 [2012] [City Human Rights Law]; *Ferrante v American Lung Assn.*, 90 NY2d 623, 629 [1997] [State Human Rights Law]). Plaintiffs have not addressed or contested in this appeal defendants' position regarding the discrimination claims. Accordingly, those claims should be dismissed.

IV. Supreme Court erred in granting plaintiffs leave to amend to add a separation of powers claim

Although leave to amend is within the discretion of the court, where the proposed amendment lacks merit, leave should be

denied (*see Britz v Grace Indus., LLC*, 156 AD3d 533 [1st Dept 2017], *lv dismissed* 32 NY3d 946 [2018]; *Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009], *lv dismissed* 12 NY3d 880 [2009]). The EMV Rules, which are directly related to the management of the City's parks, fall squarely within DPR's broad rulemaking authority, and DPR's exercise of its delegated authority in adopting the EMV Rules does not run afoul of any of the factors set forth in *Boreali v Axelrod* (71 NY2d 1 [1987], *supra*). The EMV Rules were promulgated based solely on considerations of park management and not any impermissible economic or social factors (*id.* at 11-12); they filled in details of a broad policy rather than writing "on a clean slate, creating [a] comprehensive set of rules without benefit of legislative guidance" (*id.* at 13); DPR did not intrude on legislative prerogatives regarding policy matters (*id.*); and the EMV Rules were promulgated based on DPR's specialized expertise in managing the parks (*id.* at 14).

As the Court of Appeals noted in *Greater N.Y. Taxi Assn. v New York City Taxi & Limousine Commn.* (25 NY3d 600, 612 [2015]) "[the *Boreali*] factors are not mandatory, need not be weighed evenly, and are essentially guidelines for conducting an analysis of an agency's exercise of power." Here, as in that case, we conclude that DPR "engaged in proper rulemaking, rather than

improper legislating" (*id.* at 613). Thus, plaintiffs should not have been permitted to amend their complaint.

Accordingly, the order and judgment (one paper) of the Supreme Court, New York County (Lucy Billings, J.), entered October 11, 2017, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment, granted plaintiffs' cross motion for summary judgment with respect to the fifth cause of action and issued an injunction against defendants, and granted plaintiffs' motion for leave to amend the complaint, should be reversed, on the law, without costs, plaintiffs' cross motion to amend the complaint and for summary judgment on the fifth cause of action denied, defendants' motion for summary judgment dismissing the complaint granted, and the injunction vacated. The Clerk is directed to enter judgment accordingly.

All concur.

Order and judgment (one paper), Supreme Court, New York County (Lucy Billings, J.), entered October 11, reversed, on the law, without costs, plaintiffs' cross motion to amend the complaint and for summary judgment on the fifth cause of action denied, defendants' motion for summary judgment dismissing the

complaint granted, and the injunction vacated. The Clerk is directed to enter judgment accordingly.

Opinion by Kapnick, J. All concur.

Renwick, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

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

ENTERED: AUGUST 20, 2019

DEPUTY CLERK