SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 7, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Renwick, Manzanet-Daniels, Webber, Kahn, JJ.

8075 Trena Carthen, Index 155160/14
Plaintiff-Respondent,

-against-

Scott Sherman,
Defendant-Appellant,

Candis Jackson, et al.,
Defendants-Respondents.

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Morris Duffy Alonso & Faley, New York (Iryna S. Krauchanka and Andrea Alonso of counsel), for appellant.

Morton Povman, P.C., Forrest Hills (Morton Povman of counsel), for Trena Carthen, respondent.

Russo & Tambasco, Melville (Yamile Al-Sullami of counsel), for Candis Jackson and Gilbert Burghardt, respondents.

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Order, Supreme Court, New York County (Adam Silvera, J.), entered on or about March 2, 2018, which denied defendant Scott Sherman's motion for summary judgment dismissing the complaint and all cross claims as against him, reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

In support of his motion, Sherman submitted his own deposition testimony, deposition testimony of defendant Candis Jackson, and the police report, all showing that Jackson merged from the right lane of the Henry Hudson Parkway into Sherman's middle lane. Sherman also pointed to plaintiff's deposition testimony, in which she admitted that she never saw his car until after the impact, thus indicating that she did not see how the accident occurred. Sherman further testified that, upon seeing that Jackson was moving directly towards him, he braked and swerved to the left, away from her. By the foregoing, Sherman made out a prima facie showing of entitlement to summary judgment based upon Jackson's violation of Vehicle and Traffic Law § 1128(a) and Sherman's own freedom from comparative negligence (*see McDaniel v Codi Transp., Ltd.*, 149 AD3d 595, 595 [1st Dept 2017]; *Coaker v Mulet*, 144 AD3d 499, 499 [1st Dept 2016]).

The opposition failed to raise any triable issues of fact. Plaintiff Trena Carthen's internally contradictory deposition testimony, in which, after initially stating that she never saw the impact, she repeatedly claimed that Jackson was driving in the middle lane, and Sherman swerved into them *from the right*, is demonstrably false and incredible as a matter of law (*see Finley v Erie & Niagara Ins. Assn.*, 162 AD3d 1644, 1645-1646 [4th Dept

2018]; *see also MRI Broadway Rental v United States Min. Prods. Co.*, 242 AD2d 440, 443 [1st Dept 1997], *affd* 92 NY2d 421 [1998]), as it contradicts every other piece of evidence in the record indicating that Jackson moved into Sherman from the right, including photographs showing that Sherman's front right fender was damaged, which could not have occurred if, as plaintiff claimed, he had struck Jackson from the right. Those photographs are in turn corroborated by the police report, which shows damage only to Sherman's front right fender and Jackson's rear left side.

Although we agree with the dissent that as a general premise "the contradictions in the testimony of the respective parties raise issues of credibility for the trier of fact to resolve," there are rare instances where credibility is properly determined as a matter of law (*see e.g. Finley v Erie & Niagara Ins Assn.*, 162 AD3d at 1654-1646; *Loughin v City of New York*, 186 AD2d 176, 177 [2d Dept 1992]). This Court is not "required to shut its eyes to the patent falsity of a [claim]" (MRI Broadway Rental v United States Min. Prods. Co., 242 AD2d 440, 443 [1st Dept 1997], affd 92 NY2d 421 [1998]). Here, for the reasons explained before, we conclude that plaintiff's deposition testimony was demonstrably false and should be rejected as incredible as a

matter of law, permitting summary judgment in favor of defendant.

Moreover, even assuming it constitutes evidence of his "consciousness of liability" (*see Miller v Lewis*, 40 Misc 3d 499 [Sup Ct, Kings County 2013]), Sherman's apparent violation of Vehicle and Traffic Law 600(1)(a) (by driving some two miles after the accident before stopping) cannot alone generate a triable issue of fact on liability, particularly, where all of the credible direct evidence — testimonial and photographic — establishes that he was free from fault in causing the accident (*see Cabrera v Bais Fruma Primary School*, 17 Misc 3d 591, 593 [Sup Ct, Kings County 2007] [criminal conviction for violation of § 600 does not ipso facto "establish proximate causation in accordance with the principles applicable to the law of torts"] [internal quotation marks omitted]).

All concur except Acosta, P.J. and Manzanet-Daniels, J. who dissent in a memorandum by Manzanet-Daniels, J. as follows:

MANZANET-DANIELS, J. (dissentng)

I respectfully dissent and would affirm the order. It is not our job in evaluating a motion for summary judgment to adjudge the relative merits of the parties' cases, but merely to determine whether the parties have met their respective burdens. Plaintiff's testimony that defendant "cut us off" and "sideswiped" the car in which she was a passenger and "hit the rear," in my view, suffices to raise a triable issue of fact warranting trial. The majority's assertion that plaintiff's testimony was "internally contradictory" entails a credibility determination we are not empowered to make. The EBT transcript is, admittedly, confusing, with time frames being unclear and even the distinction between "left" and "right" at times muddied. Thus, while defendant alights on isolated testimony that plaintiff did not see defendant's vehicle prior to impact, plaintiff also unequivocally testified that defendant cut off the vehicle in which she was traveling. She testified that the driver of her vehicle was not in the process of switching lanes when the vehicle was hit, in direct contradistinction to the account of defendant driver. Indeed, the fact that the driver of her vehicle had to chase down defendant after the impact in order to exchange insurance information arguably undercuts defendant's

assertions concerning culpability for the accident. The contradictions in the testimony of the respective parties raise issues of credibility for the trier of fact to resolve (*see Medina-Ortiz v Seda*, 157 AD3d 499 [1st Dept 2018]).

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

ENTERED: FEBRUARY 7, 2019

CLERK

Acosta, P.J., Gische, Kapnick, Gesmer, Singh, JJ.

8328 The People of the State of New York, Ind. 243/14
Respondent,

-against-

Fermin Flores,
Defendant-Appellant.

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Christina A. Swarns, Office of the Appellate Defender, New York (Stephen R. Strother of counsel), for appellant.

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

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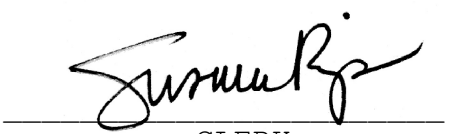
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Larry Stephen, J.), rendered April 14, 2015,

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

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

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

ENTERED: FEBRUARY 7, 2019



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

Acosta, P.J., Gische, Kapnick, Gesmer, Singh, JJ.

8329 In re Kaiyeem C., and Others,

Dependent Children Under the Age
of Eighteen Years, etc.,

Ndaka C.,
Respondent-Appellant,

Abbott House, et al.,
Petitioners.

_____

Larry Bachner, New York, for appellant.

Dawne A. Mitchell, The Legal Aid Society, New York (Diane Pazar of counsel), attorney for the children.

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Order, Family Court, New York County (Emily M. Olshansky, J.), entered on or about December 12, 2017, which, upon a finding that respondent mother suffers from a mental illness, terminated her parental rights to the subject children, unanimously affirmed, without costs.

Application by the mother's assigned 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 the record and agree with assigned counsel that there are no nonfrivolous issues which could be raised on this appeal.

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

ENTERED: FEBRUARY 7, 2019

CLERK

Acosta, P.J., Gische, Kapnick, Gesmer, Singh, JJ.

8330 Calvain Lopez, Index 26094/14
Plaintiff-Respondent,

-against-

Hector Guillen, et al.,
Defendants-Appellants,

Pepsi-Cola Company,
Defendant.

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Picciano & Scahill, P.C., Bethpage (Andrea E. Ferrucci of counsel), for Hector Guillen and Chanison Disla Abreu, appellants.

Litchfield Cavo LLP, New York (Lyndsey C. Bechtel of counsel), for 4JS Beverage Inc. and Eugenio Ruiz, appellants.

Hach & Rose, LLP, New York (Robert F. Garnsey of counsel), for respondent.

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Order, Supreme Court, Bronx County (Lizbeth González, J.), entered July 6, 2017, which denied defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff was injured when, after exiting a delivery truck owned by defendant 4JS Beverage Inc. and operated by its employee defendant Ruiz, he was struck by a vehicle owned by defendant Guillen and operated by defendant Abreu as he started to cross the street.

The court properly denied 4JS Beverage and Ruiz's motion for summary judgment because there is a triable issue of fact as to whether Ruiz breached his duty to provide plaintiff with a safe place to alight from the delivery truck. Plaintiff and Abreu's testimony that there was no sidewalk at the location conflicted with Ruiz's testimony that plaintiff exited the truck onto a sidewalk before the accident (*see Liebman v Heiss*, 256 AD2d 449 [2d Dept 1998]*; see also Bruno v Heinrich*, 202 AD2d 256 [1st Dept 1994]).

The court also properly denied Guillen and Abreu's motion for summary judgment. The record shows that there is a triable issue of fact as to whether Abreu exercised due care to avoid the accident, because he testified that he kept his foot on the gas pedal and did not press the brake until after he heard the impact despite seeing plaintiff's coworker in his lane about five feet ahead of his vehicle running across the street seconds before his

front driver's side fender struck plaintiff (*see* Vehicle and Traffic Law § 1146[a]; *Rodriguez v CMB Collision Inc.* 112 AD3d 473 [1st Dept 2013]; *Dorismond v Knox*, 103 AD3d 830, 831 [2d Dept 2013]).

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

ENTERED: FEBRUARY 7, 2019

CLERK

Acosta, P.J., Gische, Kapnick, Gesmer, Singh, JJ.

8331 Sander Palaj, et al., Index 307855/09
Plaintiffs-Respondents,

-against-

Marion Scott Real Estate, Inc.,
Defendant-Appellant,

Paulino Valenzuela,
Defendant.

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Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York (Vanessa M. Corchia of counsel), for appellant.

Jasne & Florio, L.L.P., White Plains (Hugh G. Jasne of counsel), for respondents.

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Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered on or about March 8, 2017, which denied defendant Marion Scott Real Estate, Inc.'s motion for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff Sander Palaj, and his wife suing derivatively, commenced this action to recover for personal injuries he allegedly sustained when he was shot outdoors in the co-operative complex known as Co-op City, which was managed by defendant Marion Scott Real Estate, Inc. at the time. However, a

landowner's duty to take minimal security precautions does not extend to exterior public areas, such as walkways and vestibules (*see e.g. Wong v Riverbay Corp.*, 139 AD3d 440 [1st Dept 2016]; *Ward v New York City Hous. Auth.*, 18 AD3d 391, 392 [1st Dept 2005]; *Leyva v Riverbay Corp.*, 206 AD2d 150 [1st Dept 1994]).

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

ENTERED: FEBRUARY 7, 2019

CLERK

Acosta, P.J., Gische, Kapnick, Gesmer, Singh, JJ.

8332- Ind. 1887/15
8333 The People of the State of New York, SCI 3194/16
Respondent,

-against-

Anonymous,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Beth R. Kublin of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, Bronx County (Michael Gross, J. at plea under indictment 1887/15; Barbara F. Newman, J. at plea under SCI 3194/16; Steven L. Barrett, J. at sentencing), rendered December 8, 2016,

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

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

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

ENTERED: FEBRUARY 7, 2019

CLERK

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

Acosta, P.J., Gische, Kapnick, Gesmer, Singh, JJ.

8334 Marlene Henry, Index 805239/15
Plaintiff-Appellant,

-against-

Karen Duncan, et al.,
Defendants-Respondents.

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Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Janet L. Zaleon of counsel), for respondents.

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Order, Supreme Court, New York County (George J. Silver, J.), entered February 14, 2018, which granted defendants' motion for summary judgment dismissing the complaint sounding in medical malpractice, unanimously affirmed, without costs.

Plaintiff alleged personal injuries resulting from defendants' negligence in the performance of a pelvic surgery. Defendants established their entitlement to judgment as a matter of law by submitting evidence showing that plaintiff's injury was not a result of a departure from the accepted standard of medical practice, but rather due to a known risk that may occur despite competent surgical care having been provided (*see Alvarado v Miles*, 32 AD3d 255 [1st Dept 2006], *affd* 9 NY3d 902 [2007]).

In opposition, plaintiff failed to raise a triable issue of fact. The evidence plaintiff submitted was speculative, conclusory, and insufficient to raise an issue of fact as to whether defendants departed from the standard of care or whether such alleged departures were a proximate cause of her alleged injuries (*see Jackson v Montefiore Med. Center/The Jack D. Weiler Hosp. of the Albert Einstein Coll. of Medicine*, 146 AD3d 572 [1st Dept 2017]). The injury itself cannot be the only basis to conclude that a departure occurred (*Montilla v St. Luke's-Roosevelt Hosp.*, 147 AD3d 404, 407 [1st Dept 2017]).

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

ENTERED: FEBRUARY 7, 2019

CLERK

Acosta, P.J., Gische, Kapnick, Gesmer, Singh, JJ.

8335- Index 652251/17
8335A Starr Russia Investments III B.V.,
Plaintiff-Respondent,

-against-

Deloitte Touche Tohumatsu Limited,
et al.,
Defendants-Appellants.

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Hughes Hubbard & Reed LLP, New York (William R. Maguire of counsel), for Deloitte Touche Tohmatsu Limited, appellant.

Kramer Levin Naftalis & Frankel LLP, New York (Michael J. Dell of counsel), for Deloitte LLP, Deloitte CIS Limited and Deloitte CIS Holdings Limited, appellants.

Sidley Austin LLP, Chicago, IL (David A. Gordon of the bar of the State of Illinois, admitted pro hac vice, of counsel), for ZAO Deloitte & Touche CIS, appellant.

Boies Schiller Flexner LLP, New York (Nicholas A. Gravante, Jr. of counsel), for respondent.

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Orders, Supreme Court, New York County (Charles E. Ramos, J.), entered May 24, 2018 and July 2, 2018, which denied defendants' motions to dismiss the amended complaint, unanimously modified, on the law, to grant the motion as to the claims alleging fraudulent inducement of plaintiff's 2008 investment as against defendants Deloitte LLP, Deloitte CIS Limited, and Deloitte CIS Holdings Limited (collectively, the UK Deloitte defendants), to order jurisdictional discovery as to the UK

Deloitte defendants with respect to the claim regarding conduct from 2010, to grant the motion as to the claims against Deloitte Touche Tohumatsu Limited premised on an agency theory, and otherwise affirmed, without costs.

Plaintiff has standing to pursue its claims based on allegations that it was fraudulently induced to invest in and maintain its investment in the Russian Investment Trade Bank (ITB), as these claims allege direct rather than derivative harm, i.e., injuries to plaintiff, rather than to ITB (*see Accredited Aides Plus, Inc. v Program Risk Mgt., Inc.*, 147 AD3d 122, 135 [3d Dept 2017]; *Anwar v Fairfield Greenwich Ltd.*, 728 F Supp 2d 372, 401 [SD NY 2010]).

Defendants failed to meet their heavy burden of establishing, for purposes of obtaining dismissal on forum non conveniens grounds, that New York is an inconvenient forum and that a substantial nexus between New York and this action is lacking (*see Kuwaiti Eng'g Group v Consortium of Intl. Consultants, LLC*, 50 AD3d 599, 600 [1st Dept 2008]; *see also Bokara Rug Co., Inc. v Kapoor*, 93 AD3d 583 [1st Dept 2012]).

The court has personal jurisdiction over defendant ZAO Deloitte & Touche CIS under CPLR 302(a)(2) with respect to all the claims. It does not have jurisdiction over the UK Deloitte

defendants with respect to the alleged fraudulent inducement of plaintiff's 2008 investment, because the complaint does not adequately allege that these defendants dominated ZAO as its alter egos in connection with that claim (*see GEM Advisors, Inc. v Corporacion Sidenor, S.A.*, 667 F Supp 2d 308, 319 [SD NY 2009]). However, plaintiff has made a sufficient showing that there are facts that might give rise to alter ego jurisdiction (*see Avilon Automotive Group v Leontiev*, __ AD3d __, 2019 NY Slip Op 00058 [1st Dept 2019]), and that its position is not frivolous (*see Peterson v Spartan Indus.*, 33 NY2d 463 [1974]), such that jurisdictional discovery as to the UK Deloitte defendants with respect to the claim that plaintiff did not exercise its exit option after 2010 based on misrepresentations is warranted.

The court correctly declined to dismiss the claims asserted against defendant Deloitte Touche Tohumatsu Limited that are

premised on allegations of its direct role in fraudulently inducing investment. However, the claims that are premised on an agency theory are dismissed (*McBride v KPMG Intl.*, 135 AD3d 576 [1st Dept 2016]).

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

ENTERED: FEBRUARY 7, 2019

CLERK

Acosta, P.J., Gische, Kapnick, Gesmer, Singh, JJ.

8336- Index 159778/15
8337 Matthew Alvarado,
Plaintiff-Appellant,

-against-

City of New York,
Defendant-Respondent.

_____

The Law Offices of Anthony Iadevaia, New York (Susan Davis of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Dona B. Morris of counsel), for respondent.

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Order, Supreme Court, New York County (Alexander M. Tisch, J.), entered October 16, 2017, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered June 28, 2018, which, upon reargument, adhered to its original determination, unanimously dismissed, without costs, as academic.

Defendant made a prima facie showing of its entitlement to judgment as a matter of law, by submitting evidence that plaintiff frequently played basketball on the subject outdoor basketball court, which has an open and obvious crack which runs the length of the court and has a marked tar surface (*Wallace v*

City of New York, 138 AD3d 509 [1st Dept 2016], *lv denied* 27 NY3d 911 [2016]). The court correctly rejected plaintiff's contention that grass growing out of the crack concealed its depth, finding instead that the grass served to highlight the defect, which was also one of the risks assumed by plaintiff when he chose to play basketball at this location (*see Trupia v Lake George Cent. School Dist.*, 14 NY3d 392 [2010]).

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

ENTERED: FEBRUARY 7, 2019

CLERK

Acosta, P.J., Gische, Kapnick, Gesmer, Singh, JJ.

8338- Index 650973/17
8339 Talking Capital LLC, etc., et al.,
Plaintiffs-Respondents,

-against-

Rodney Omanoff, et al.,
Defendants-Appellants,

Christopher Lara, et al.,
Defendants.

_____

McCarter & English, LLP, New York (Edward T. McDermott of counsel), for Rodney Omanoff, Omanoff America Telecom, LLC, Mark Proto, Mudmonth, LLC, Joseph Rahman, VoIP Guardian Partners I LLC and VoIP Guardian LLC, appellants.

Kasowitz Benson Torres LLP, New York (Christian Becker of counsel), for Brendan Ross, DLI TC, LLC, Direct Lending Investments, LLC, and Direct Lending Income Fund, L.P., appellants.

Bowels Liberman & Newman LLP, New York (David K. Bowles of counsel), for respondents.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered March 29, 2018, which, to the extent appealed from, denied defendants DLI TC, LLC, Direct Lending Investments, LLC, Direct Lending Income Fund, L.P., and Brendan Ross's (the DLI defendants) motion to dismiss the breach of the restrictive covenant in the Master Receivables Purchasing and Servicing Agreement (MRPS) and the aiding and abetting breach of

fiduciary duty claims as against them, and denied defendants Rodney Omanoff, Omanoff America Telecom, LLC (OAT), Mark Proto, Mudmonth, LLC, Joseph Rahman, VoIP Guardian LLC, and VoIP Guardian Partners I, LLC's (the Omanoff defendants) motion to dismiss the derivative claims, the breach of fiduciary duty claim as against OAT and Mudmonth, the breach of fiduciary duty claim as against Omanoff, Proto and Rahman, the misappropriation claim, and all claims against VoIP Guardian Partners I, LLC and VoIP Guardian LLC, unanimously modified, on the law, to grant the motion as to the breach of fiduciary duty claims against defendants OAT and Mudmonth and all claims against VoIP Guardian Partners I, LLC and VoIP Guardian LLC, and otherwise affirmed, without costs.

While a Delaware limited liability company may include terms in its operating agreement that are at variance with those in the Delaware LLC Act (*see Elf Atochem N. Am., Inc. v Jaffari*, 727 A2d 286, 290 [Del 1999]), plaintiff Talking Capital LLC's (the Company) operating agreement does not provide for a waiver by the members of any right to bring a derivative action. In contrast to operating agreements that expressly vary the rights of members, the instant operating agreement, at most, would do so by implication (*cf. LNYC Loft, LLC v Hudson Opportunity Fund I, LLC*,

154 AD3d 109 [1st Dept 2017] [enforcing unambiguous operating agreement provision]).

Defendants OAT and Mudmonth, as mere members, not managers, of the Company, owe no fiduciary duty either to the Company or to its subsidiaries (*see Coventry Real Estate Advisors, L.L.C. v Developers Diversified Realty Corp.*, 84 AD3d 583, 584 [1st Dept 2011]).

However, the fiduciary duty claims brought derivatively on behalf of the subsidiaries against the managers of the Company are viable. While the managers of a parent do not necessarily owe fiduciary duties to the subsidiaries by virtue of their office (*see Anadarko Petroleum Corp. v Panhandle Eastern Corp.*, 545 A2d 1171, 1174 [Del 1988]), the role of the particular defendant managers here in the management of the subsidiaries gives rise to issues of fact as to whether they owed such duties.

The complaint sufficiently alleges that the Company could have taken advantage of the corporate opportunities allegedly misappropriated by the manager defendants (*see Broz v Cellular Info. Sys., Inc.*, 673 A2d 148, 154 [Del 1996]).

The only claim asserted against defendants VoIP Guardian Partners I, LLC and VoIP Guardian LLC is a claim for "permanent injunction," which is a remedy for an underlying wrong, not a

cause of action (*see Reuben H. Donnelley Corp. v Mark I Mktg. Corp.*, 893 F Supp 285, 293 [SD NY 1995]).

The DLI defendants failed to show as a matter of law that the Company or its subsidiary breached the restrictive covenant in the MRPS. The purported contradiction between the original complaint and the amended complaint is not a basis for dismissal. Rather, the original allegations are simply informal judicial admissions, entitled to evidentiary weight but not dispositive (*see Bogoni v Friedlander*, 197 AD2d 281, 293 [1st Dept 1994], *lv denied* 84 NY2d 803 [1994]). Further, the documentary evidence consisting solely of the certificate of formation of a subsidiary of the Company is not evidence that the subsidiary was used to breach the covenant of good faith and fair dealing.

Given the DLI defendants' intimate relationship with the Company, the complaint sufficiently alleges that these defendants had reason to believe that they were aiding and abetting the

manager defendants' breach of fiduciary duty in funding the new competing business (*see Trenwick Am. Litig. Trust v Ernst & Young, L.L.P.*, 906 A2d 168, 215 [Del Ch 2006], *affd* 931 A2d 438 [2007]).

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

ENTERED: FEBRUARY 7, 2019

CLERK

Acosta, P.J., Gische, Kapnick, Gesmer, Singh, JJ.

8340 In re Anthony S.,

A Person Alleged to be a
Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency.

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Dawne A. Mitchell, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Deborah E. Wassel of counsel), for presentment agency.

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Order, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about January 11, 2018, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of sexual abuse in the first and third degrees and forcible touching, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-49 [2007]). There is no basis for disturbing the court's credibility determinations.

The court providently exercised its discretion in adjudicating appellant a juvenile delinquent and imposing a

one-year period of probation, which was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). In light of the seriousness of the underlying sexual conduct, as well appellant's school problems and other relevant background factors, an adjournment in contemplation of dismissal would not have provided sufficient supervision.

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

ENTERED: FEBRUARY 7, 2019

CLERK

Acosta, P.J., Gische, Kapnick, Gesmer, Singh, JJ.

8341 The People of the State of New York, Respondent, Ind. 3350/14

-against-

Juan Ramos, Defendant-Appellant.

_____

Barry A. Weinstein, Bronx, for appellant.

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered May 5, 2015, convicting defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the second degree, and sentencing him to a term of six years, unanimously affirmed.

Defendant's claim that his counsel provided him with ineffective assistance regarding the immigration consequences of his plea (*see Padilla v Kentucky*, 559 US 356 [2010]) is unreviewable on direct appeal because it involves matters not

reflected in the record, and thus requires a CPL 440.10 motion (*see People v Pastor*, 28 NY3d 1089, 1091 [2016]). Defendant's assertion that a *Padilla* claim may be established by the *absence* of any record evidence of counsel's immigration advice is contrary to law.

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

ENTERED: FEBRUARY 7, 2019

CLERK

Acosta, P.J., Gische, Kapnick, Gesmer, Singh, JJ.

8342 In re 449 W. 37th Realty, LLC, Index 155365/17
Petitioner-Appellant,

-against-

New York City Office of Administrative Trials and Hearings,
Respondent-Respondent.

_____

Sperber Denenberg & Kahan, P.C., New York (Steven B. Sperber of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Scott Shorr of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered January 29, 2018, denying the petition to vacate petitioner's defaults before respondent New York City Office of Administrative Trials and Hearings (OATH), and dismissing the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, the petition granted, and the matter remanded to respondent for further proceedings.

The inspector's attempt to serve the NOVs did not satisfy

the "reasonable attempt" requirement set forth in section 1049-a(d)(2)(b) of the New York City Charter. Respondent should have granted petitioner's requested relief to vacate its default and rescheduled a new hearing to address the NOVs on the merits.

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

ENTERED: FEBRUARY 7, 2019

CLERK

Acosta, P.J., Gische, Kapnick, Gesmer, Singh, JJ.

8344 Art Capital Bermuda Ltd., et al., Index 650082/17
Plaintiffs-Appellants,

-against-

The Bank of N.T. Butterfield & Son Limited,
Defendant-Respondent.

- - - - -

The Bank of N.T. Butterfield & Son Limited,
Counterclaim Plaintiff-Respondent,

-against-

Ian S. Peck, et al.,
Counterclaim Defendants-Appellants.

_____

Peter M. Levine, New York, for appellants.

Tarter Krinsky & Drogin LLP, New York (Joel H. Rosner and Charles M. Miller of counsel), for respondent.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about May 17, 2018, which, to the extent appealed from as limited by the briefs, denied counterclaim defendants' motion to dismiss the counterclaims as against Ian S. Peck pursuant to CPLR 3211(a)(1) and (7), unanimously reversed, on the law, without costs, and the motion granted, without prejudice.

Counterclaim plaintiff (the Bank) seeks to pierce the corporate veils of counterclaim defendants Art Capital Bermuda

Ltd. and Bluefin Servicing Ltd. to hold counterclaim defendant Peck, a director of the companies, liable in his individual capacity for the companies' alleged breaches of contract.

The Bank's allegations are inadequate to warrant piercing the corporate veils.

The Bank does not allege particularized facts showing that Peck did business in his individual capacity, shuttling his personal funds in and out of Art Capital and Bluefin without regard to formality and to suit his immediate convenience (*see Walkovszky v Carlton*, 18 NY2d 414, 420 [1966]. The closest the Bank comes to alleging particularized facts is with respect to commingling: it alleges that Peck, through Art Capital and Bluefin, directed a borrower to repay money not to Art Capital (the lender) or Bluefin (the servicer of the loan), but to other Peck-controlled companies. However, while this might provide a basis for the Bank to sue the Peck-controlled companies, it does not warrant piercing Art Capital's and Bluefin's corporate veils to reach Peck (*see Walkovszky*, 18 NY2d 418-419 [distinguishing between piercing corporate veil to reach another corporation and piercing corporate veil to reach an individual]). Nor does the Bank plead abuse of the corporate privilege by alleging that Art Capital and Bluefin were "created for an improper purpose" or

engaged in illegitimate business (*Joseph Kali Corp. v A. Goldner, Inc.*, 49 AD3d 397, 399 [1st Dept 2008]).

The Bank repeatedly alleges that Peck caused Art Capital and Bluefin to breach their contractual obligations in bad faith. However, this allegation is insufficient (*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 16 NY3d 775, 776 [2011]).

The fact that Art Capital and Bluefin might not have sufficient assets to satisfy the judgment that the Bank might obtain against them does not warrant piercing the corporate veil (*see e.g. Walkovszky*, 18 NY2d at 419).

The fact that the Bank had not had discovery at the time of the motion does not excuse its failure to plead more than conclusory allegations (*see e.g. East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 128-129 [2d Dept 2009], *affd* 16 NY3d 775 [2011]). However, the Bank claims that discovery following the denial of counterclaim defendants' motion has revealed facts supporting its veil-piercing claims against Peck. Therefore, our dismissal is without prejudice, so that the Bank – if so advised – can make a properly supported motion for leave to amend (*see* CPLR 3025[b]).

Contrary to the motion court, we do not find that

counterclaim defendants violated Commercial Division Rule 17; their reply brief merely elaborated on arguments they had already made in their opening brief (*see DiGregorio v MTA Metro-N. R.R.*, 140 AD3d 530, 531 [1st Dept 2016]).

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

ENTERED: FEBRUARY 7, 2019

CLERK

Acosta, P.J., Gische, Kapnick, Gesmer, Singh, JJ.

8345-		Ind. 1760/12
8346-		2446/13
8346A-		1469/13
8346B-		1454/14
8346C	The People of the State of New York, Respondent,	1455/14
	-against-	
	Ramon Alfonso, Defendant-Appellant.	

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

Darcel D. Clark, District Attorney, Bronx (Shera Knight of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, Bronx County (John S. Moore, J.), rendered June 6, 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 judgments so appealed from be and the same are hereby affirmed.

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

ENTERED: FEBRUARY 7, 2019

CLERK

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

Acosta, P.J., Gische, Kapnick, Gesmer, Singh, JJ.

8347 In re HYK-273 W. 138th Street LLC, et al.
Petitioners-Appellants,

-against-

The New York State Division of Housing and Community Renewal,
Respondent-Respondent,

Emily Sherman,
Respondent.

Index 101554/15

Alter & Barbaro, Brooklyn (Stephen V. Barbaro of counsel), for appellants.

Mark F. Palomino, New York (Sandra A. Joseph of counsel), for respondent.

Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered June 3, 2016, denying the petition to annul a determination of respondent Division of Housing and Community Renewal (DHCR), dated July 8, 2015, which, inter alia, found that petitioners violated Administrative Code of City of NY (Rent Control) §§ 26-412(d) and 26-413(b)(3)(a) and Emergency Housing Rent Control Law (9 NYCRR) §§ 2205.1(b) and 2206.5 by harassing tenants, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

DHCR's determination that petitioners violated

Administrative Code §§ 26-412(d) and 26-413(b)(3)(a) and 9 NYCRR 2205.1(b) and 2206.5 by harassing tenants with the aim of causing them to vacate the premises has a rational basis in the record and is not arbitrary and capricious (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]).

There is no basis for disturbing the administrative law judge's conclusion following a hearing that respondent Emily Sherman, Danielle Sherman and Allen Sherman were tenants for purposes of Administrative Code §§ 26-412(d) and 26-413(b)(3)(a) and 9 NYCRR 2205.1(b) and 2206.5 (*see Matter of Herzog v Joy*, 74 AD2d 372, 374-375 [1st Dept 1980], *affd* 53 NY2d 821 [1981]; Administrative Code § 26-403[m] [defining "tenant" as "tenant, subtenant, lessee, sublessee, or other person entitled to the possession or to the use and occupancy of any housing accommodation"]; 9 NYCRR 2200.2[o]). Contrary to petitioners' argument, the departure of respondent Emily Sherman, the tenant of record, from the apartment is not determinative as to the family members who remained (*see Herzog*, 74 Ad2d at 374-375). Nor did petitioners demonstrate that Danielle, who testified to having lived in the apartment her whole life, and Allen, who testified to having lived there since 2004, were not "entitled"

to the "use and occupancy" of the apartment.

The record also supports the determination that petitioners were not, as they claim, acting to restore the premises to a livable condition but were neglecting or taking affirmative steps to worsen the deplorable conditions in the apartment, of which they were well aware at all relevant times, with the aim of evicting the residents so that they could demolish and redevelop the premises, and that, in doing so, they destroyed the apartment and most of the family's belongings.

Petitioners' argument that the tenants are not entitled to the protections of the Rent Stabilization Code because the apartment is not their primary residence is raised for the first time on appeal and is in any event unavailing. The Rent Stabilization Code is not implicated here. Moreover, petitioners failed to show that the apartment was not Danielle's and Allen's primary residence. Indeed, petitioners failed to show that the apartment was not Emily's primary residence, given the circumstances of her departure (*see e.g. 542 E. 14th St. LLC v Lee*, 18 Misc 3d 98 [App Term, 1st Dept 2007], *affd* 66 AD3d 18 [1st Dept 2009]).

Petitioners complain of procedural defects under CPLR 7804(e), in particular, "the absence of a full transcript of the

record and proceedings." However, there was no apparent prejudice to petitioners, who cited to hearing testimony in their pleadings (*see Matter of Smith v Quinn*, 120 AD3d 1509 [3d Dept 2014]).

Petitioners waived their arguments about Lebovits's personal liability by failing to raise them before DHCR (*see Matter of Yonkers Gardens Co. v State of N.Y. Div. of Hous. & Community Renewal*, 51 NY2d 966 [1980]).

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

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

ENTERED: FEBRUARY 7, 2019

CLERK

Acosta, P.J., Gische, Kapnick, Gesmer, Singh, JJ.

8348- Ind. 5309/15
8348A The People of the State of New York,
Respondent,

-against-

Christopher Joseph,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Eleanor J. Ostrow of counsel), for respondent.

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Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered February 23, 2017, convicting defendant, upon his plea of guilty, of sexual abuse in the first degree and sentencing him to a term of two years, unanimously affirmed. Order, same court and Justice, entered on or about December 1, 2017, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

As to the appeal from the judgment of conviction, we perceive no basis for reducing the sentence.

As to defendant's civil appeal from his sex offender adjudication, we conclude that the court properly assessed 10

points under the factor for sexual contact under clothing, based on a reasonable inference that can be drawn from the victim's grand jury testimony (*see People v O'Neal*, 35 AD3d 302 [1st Dept 2006] *lv denied* 8 NY3d 809 [2007]). Regardless of whether defendant's correct point score is 85, or 80 as he claims, he remains a level two offender, and we find no basis for a discretionary downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). There were no mitigating factors that were not adequately taken into account by the risk assessment instrument, or that outweighed the seriousness of the underlying predatory sexual conduct.

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

ENTERED: FEBRUARY 7, 2019

CLERK

Acosta, P.J., Gische, Kapnick, Gesmer, Singh, JJ.

8349 Marlen Kruzhkov, et al., Index 302161/10
Plaintiffs-Respondents, 83962/10

-against-

The Eglise St. Jean Baptiste, et al.,
Defendants-Appellants-Respondents,

The Fathers of the Blessed Sacrament,
Defendant,

West New York Restoration of CT, Inc.,
Defendant-Respondent-Appellant.

- - - - -

West New York Restoration of CT, Inc.,
Third-Party Plaintiff-Respondent-Appellant,

-against-

The City of New York,
Third-Party Defendant-Respondent.

_____

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Jonathan D. Harwood of counsel), for appellants-respondents.

Torino & Bernstein PC, Mineola (Thomas B. Hayn of counsel), for West New York Restoration of CT, Inc., respondent-appellant.

Law Office of Stephen B. Kaufman, P.C., Bronx (John Decolator of counsel), for Marlen Kruzhkov and Shelby Kruzhkov, respondents.

Zachary W. Carter, Corporation Counsel, New York (Mackenzie Fillow of counsel), for City of New York, respondent.

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Order, Supreme Court, Bronx County (Donna M. Mills, J.),

entered on or about March 5, 2018, which denied defendants Eglise

St. Jean Baptiste (Baptiste) and Archdiocese of New York's motion

for summary judgment dismissing the complaint and all cross claims against them and for summary judgment on their claims against defendant West New York Restoration of CT, Inc. for indemnification, and denied defendant West New York's motion for summary judgment dismissing the complaint and all cross claims against it, unanimously modified, on the law, to grant Baptiste and the Archdiocese's motion for summary judgment dismissing the complaint and all cross-claims as against the Archdiocese, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

The complaint should be dismissed as against the Archdiocese, because the record demonstrates that the Archdiocese did not own, control or have any responsibility for the property abutting the pedestrian ramp on which plaintiff Marlen Kruzhkov allegedly slipped and fell (*see Batts v City of New York*, 93 AD3d 425 [1st Dept 2012]; Administrative Code of City of NY § 7-210).

However, summary judgment in favor of either Baptiste or West New York is precluded by issues of fact as to the cause of the icy condition on the ramp (*see Ortiz v City of New York*, 103 AD3d 595 [1st Dept 2013]; *see also Schnur v City of New York*, 298 AD2d 332 [1st Dept 2002]). While Baptiste and West New York had no duty to maintain the ramp, as the abutting landowner and the

party that erected a sidewalk shed for Baptiste that extended over an area used by pedestrians, respectively, they had a nondelegable duty to construct and maintain the sidewalk shed in a safe manner (*see Batts*, 93 AD3d at 426). There is evidence that the construction of the sidewalk shed permitted water to drip onto the sidewalk and pedestrian ramp, freeze, and become a slipping hazard. Moreover, Baptiste had a duty to keep the sidewalk abutting its property free of snow and ice (Administrative Code of City of NY § 7-210). There is an issue of fact as to whether evidence the snow removal efforts were insufficient to address the snow and ice condition or even exacerbated it (*see Prenderville v International Serv. Sys., Inc.*, 10 AD3d 334, 336-337 [1st Dept 2004]). Baptiste's indemnification claim against West New York is premature.

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 7, 2019

CLERK

Acosta, P.J., Gische, Kapnick, Gesmer, Singh, JJ.

8350N The City of New York, Index 451648/17
Plaintiff-Appellant,

-against-

FC 42nd Street Associates, L.P.,
Defendant-Respondent.

_____

Carter Ledyard & Milburn LLP, New York (John R. Casolaro of counsel), for appellant.

Fried, Frank, Harris, Shriver & Jacobson LLP, New York (Janice Mac Avoy and Danica L. Brown of counsel), for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J. J.), entered on or about May 2, 2018, which granted defendant's motion to compel arbitration and stay the action pending arbitration, unanimously affirmed, without costs.

Article 3.01(c) of the parties' Ground Lease unambiguously provides for arbitration of the instant dispute concerning the Fair Market Value of certain property (*see Matter of Excelsior 57th Corp. (Kern)*, 290 AD2d 329, 330 [1st Dept 2002]; *ITT Sheraton Corp. v 801 Seventh Ave.*, 184 AD2d 329, 329 [1st Dept 1992]). The arbitrators are qualified professionals competent in

the area of land valuation, and the court should not interfere with the broad authority granted them to resolve this dispute (*ITT*, 184 AD2d at 329).

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 7, 2019

CLERK

Acosta, P.J., Gische, Kapnick, Gesmer, Singh, JJ.

8351N The Board of Managers of 50 West 127th Street Condominium, Plaintiff-Respondent, Index 151386/15

-against-

Chekesha Kidd, Defendant-Respondent,

Christiana Trust as Trustee of ALPRP Trust 4, etc., et al., Defendants.

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City West Capital LLC, Nonparty Appellant.

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Dani Schwartz, New York, for appellant.

Adam Leitman Bailey, P.C., New York (Jeffrey R. Metz of counsel), for The Board of Managers of 50 West 127th Street Condominium, respondent.

Kurzman Eisenberg Corbin & Lever, LLP, White Plains (John C. Re of counsel), for Chekesha Kidd, respondent.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered July 26, 2017, which, inter alia, upon granting nonparty appellant City West Capital LLC (City West) leave to reargue, adhered to its prior determination which granted defendant Chekesha Kidd's motion to vacate the judgment granted upon her default and the resulting foreclosure sale, unanimously affirmed, without costs.

Supreme Court properly determined that plaintiff did not establish that personal service could not be made with due diligence by personal delivery before effecting service pursuant to CPLR 308(4). While a process server's affidavit evidencing three attempts at personal service over a period of time may satisfy the plaintiff's prima facie burden in some circumstances (*see e.g. Ayala v Bassett*, 57 AD3d 387, 388 [1st Dept 2008]), where, as in this case, it is evident that the defendant works during day time hours, a showing of three attempts to serve defendant at home on consecutive days, twice during working hours and once in the evening, is insufficient to demonstrate due diligence (*see Barnes v City of New York*, 70 AD2d 580 [2d Dept 1979], *affd* 51 NY2d 906, 907 [1980]; *see also Spath v Zack*, 36 AD3d 410 [1st Dept 2007]; *Kaszovitz v Weiszman*, 110 AD2d 117, 120 [2d Dept 1985]). Here, defendant presented evidence that plaintiff and its managing agent knew of her travel and work schedule, which required her to be in Connecticut during the week, and plaintiff did not contest that showing (*see Barnes*, 50 NY2d at 907; *see* CPLR 308[4]).

Defendant did not waive the defense of lack of jurisdiction. Before her incoming counsel filed a notice of appearance without mentioning the defense, she had already presented an order to

show cause seeking to vacate the judgment based on lack of personal jurisdiction, and she moved to vacate based on improper service shortly after new counsel appeared. In contrast, in the cases relied on by plaintiff and City West, the defendant's counsel filed a notice of appearance without preserving any objection to jurisdiction after the time to move or answer had elapsed, and did not move to vacate for years afterwards, indicating an intentional abandonment of the defense (*see e.g. Wilmington Sav. Fund Socy., FSB v Zimmerman*, 157 AD3d 846, 846-847 [2d Dept 2018], *lv denied* 31 NY3d 1135 [2018]; *Capital One Bank, N.A. v Farraco*, 149 AD3d 590, 590 [1st Dept 2017]). Defendant's communications with plaintiff's managing agent in which she arranged to pay her arrears, cannot be construed as an appearance in the action, much less a waiver of her defense of lack of jurisdiction.

Because the judgment was entered without jurisdiction over defendant, City West is not entitled to restitution as an alternative remedy to vacatur of the foreclosure sale, as "[a] judgment rendered without jurisdiction is void" and "a deed [] issued in execution upon such a void judgment . . . is similarly

void" (*U.S. Bank, N.A. v Bernhardt*, 88 AD3d 871, 872 [2d Dept 2011]).

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

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

ENTERED: FEBRUARY 7, 2019

CLERK

Acosta, P.J., Gische, Kapnick, Gesmer, Singh, JJ.

8352N Marcia Harris, M.D., Index 159990/7
Plaintiff-Respondent, 595107/18

-against-

Patients Medical, P.C.,
Defendant-Appellant.

- - - - -

Patients Medical, P.C.,
Third-Party Plaintiff-Appellant,

-against-

John P. Salerno M.D., et al.,
Third-Party Defendants.

_____

Bowles Liberman & Newman LLP, New York (David K. Bowles of counsel), for appellant.

Kaiser Saurborn & Mair, P.C., New York (Henry L. Saurborn, Jr. of counsel), for respondent.

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Order, Supreme Court, New York County (O. Peter Sherwood), entered April 4, 2018, which denied defendant/third-party plaintiff Patients Medical, P.C.'s (Patients Medical) motion for a preliminary injunction enjoining plaintiff Marcia Harris, M.D. (Harris) from breaching certain restrictive covenants in an employment agreement between her and Patients Medical, and enjoining third-party defendants John P. Salerno, M.D. (Salerno) and Salerno Complementary Medicine, PLLC (PLLC) from interfering with the agreement during pendency of the matter, unanimously

affirmed, with costs.

A preliminary injunction is an extraordinary provisional remedy which will only issue where the proponent demonstrates (1) a likelihood of success on the merits, (2) irreparable injury absent a preliminary injunction, and (3) a balance of equities tipping in its favor (CPLR 6301; *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]). The granting of such relief is committed to the sound discretion of the motion court (*Doe v Axelrod*, 73 NY2d 748 [1988]). Here, the court providently exercised its discretion in denying a preliminary injunction.

Patients Medical has not demonstrated a likelihood of success on the merits. Under New York law, "[a] restraint is reasonable only if it: (1) is *no greater* than is required for the protection of the *legitimate interest* of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public" (*BDO Seidman v Hirshberg*, 93 NY2d 382 388-389 [1999]). In cases between professionals, courts recognize the legitimate interest an employer has against unfair competition, but, to avoid broad restraints on competition, have limited such employer interests "to the protection against misappropriation of the employer's trade secrets or of confidential customer lists, or protection from competition by a

former employee whose services are unique or extraordinary" (*id at 389*). We have found restrictive covenants to be unenforceable where the employees have not used the employers' confidential business information, or where the employees' services were not extraordinary or unique (*Buhler v Maloney Consulting*, 299 AD2d 190 [1st Dept 2002]; *TMP Worldwide v Franzino*, 269 AD2d 332 [1st Dept 2000]).

Patients Medical has not established that Harris's OB/GYN and ancillary services are unique or extraordinary such that they gave her an unfair advantage over its practice. Patients Medical has not demonstrated an unfair competitive advantage as it is undisputed that Harris brought her own OB/GYN practice to Patients Medical and that Patients Medical did not offer OB/GYN care after Harris left the practice. Accordingly, Patients Medical has not shown that the restrictive covenants were necessary to protect its legitimate interests.

We find that irreparable harm is not established as monetary damages is an adequate remedy (*Metropolitan Med. Group, v Eaton*, 154 AD2d 252 [1st Dept 1989]; *see also Sterling Fifth Assoc. v Carpentille Corp*, 5 AD3d 328 [1st Dept 2004]). Moreover, the equities tip in Harris' favor. Granting a preliminary injunction would disrupt the physician-patient relationship she has with her

current patients.

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

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

ENTERED: FEBRUARY 7, 2019

CLERK

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

8298 Ashley Han, etc., et al., Index 152872/13
Plaintiffs-Respondents,

-against-

New York City Transit Authority,
Defendant-Appellant.

_____

Lawrence Heisler, Brooklyn, (Harriet Wong of counsel), for appellant.

Alexander J. Wulwick, New York, for respondents.

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Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered July 27, 2017, which granted plaintiffs' motion for sanctions pursuant to CPLR 3126 to the extent it precluded defendant from calling its former employee train operator as a witness at trial, or offering any statements by the employee as evidence at trial, and directed that an adverse inference instruction be given as to defendant's failure to produce him for deposition despite repeated court orders, unanimously reversed, on the law, without costs, and the motion denied.

CPLR 3126 provides that if a party "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed . . . , the court may make such orders with regard to the failure or refusal as are

just." It is within the motion court's discretion to determine the nature and degree of the penalty (*see Kihl v Pfeffer*, 94 NY2d 118, 122 [1999]), and the sanction will remain undisturbed unless there has been a clear abuse of discretion (*see Those Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, 11 NY3d 843, 845 [2008]). The sanction should be "commensurate with the particular disobedience it is designed to punish, and go no further than that" (Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3126:8 at 497; *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v Global Strat Inc.*, 22 NY3d 877, 880 [2013]).

Despite defendant's alleged noncompliance with several discovery stipulations and court orders relating to the taking of the train operator's deposition, the record considered as a whole

does not support a finding of willfulness on the part of the defendant so as to justify the severe sanctions imposed. Therefore, the motion court's order was an abuse of discretion.

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

ENTERED: FEBRUARY 7, 2019

CLERK

CORRECTED ORDER - FEBRUARY 28, 2019

Sweeny, J.P., Tom, Webber, Kahn, Kern, JJ.

8353-
8353A The People of the State of New York,
Appellant,

Ind. **58743C/04**

-against-

Felix Cabrera,
Defendant-Respondent.

_____

Darcel D. Clark, District Attorney, Bronx (Joshua P. Weiss of counsel), for appellant.

Edelstein & Grossman, New York (Jonathan Edelstein of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (John W. Carter, J.), entered on or about February 21, 2018, which, upon granting defendant's CPL 440.10 motion, vacated a judgment (same court and Justice) rendered February 28, 2006, unanimously affirmed. Appeal from order, same court and Justice, entered on or about June 27, 2018, which effectively granted reargument and adhered to the original decision, unanimously dismissed, as academic.

Although the second order was denominated a denial of reargument, it is appealable because the court addressed the merits of the motion, in effect granting it, and expressly adhered to the original determination (*see High Definition MRI, P.C. v Mapfre Ins. Co. of N.Y.*, 148 AD3d 470 [1st Dept 2017]). However, that appeal is rendered academic by our affirmance of the first order.

The court properly granted defendant's motion to vacate the

judgment on the ground of ineffective assistance of counsel, consisting of affirmative misadvice (*see People v McDonald*, 1 NY3d 109, 113-114 [2003]) about the deportation consequences of a domestic violence felony conviction. The court conducted a hearing that included testimony from defendant and the attorney who represented him at the time of his 2006 guilty plea, and there is no basis for disturbing the court's credibility determinations. Evidence credited by the court established that the attorney affirmatively misrepresented the deportation consequences of the plea by telling defendant that he would not become deportable, and that he likely would be granted citizenship five years after he completed his sentence of probation if he had no further trouble with the law. Such "affirmative misrepresentation falls below an objective standard of reasonableness" (*McDonald*, 1 NY3d at 114-115).

Although the People dispute whether, at the time of the plea, defendant's conviction actually rendered him deportable, they have established, at most, that defendant's deportability was less clear in 2006 than it is today. However, counsel's

affirmative misadvice was not that defendant *might* avoid deportation, but that he *would* do so.

The People do not challenge the court's finding that defendant was prejudiced in that he would not have pleaded guilty had he received correct immigration advice.

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

ENTERED: FEBRUARY 7, 2019

CLERK

Sweeny, J.P., Tom, Webber, Kahn, Kern, JJ.

8354 Estate of Linda A. Bachman, by Cynthia Charles, as Executrix, Plaintiff-Appellant, Index 157050/17

-against-

Edna Hong, Defendant-Respondent.

Bernstein & Bernstein, White Plains (Walter L. Rich of counsel), for appellant.

Cartiglia, Connolly & Russo, Garden City (Joseph T. Belevich of counsel), for respondent.

Order, Supreme Court, New York County (Adam Silvera, J.), entered March 14, 2018, which denied plaintiff Linda Bachman's motion for partial summary judgment on the issues of defendant's liability and the serious injury threshold of Insurance Law § 5102(d), unanimously modified, on the law, to grant the motion on the issue of defendant's liability, and otherwise affirmed, without costs.

In this action arising from a motor vehicle accident, plaintiff established prima facie entitlement to partial summary judgment against defendant on the issue of liability, by submitting her affidavit averring that, at the time of the accident, she was a passenger in a car driven by defendant, and

that defendant caused the accident by failing to stop at a steady red light at an intersection and hitting a second vehicle (*see Uribe v Pronto Gas Heating Supplies, Inc.*, 129 AD3d 509, 509 [1st Dept 2015]; *Pace v Robinson*, 88 AD3d 530, 531 [1st Dept 2011]. In opposition, defendant did not submit any affidavit or other evidence concerning how the accident occurred that would raise an issue of fact. Her speculation that the other driver could also have been at fault is insufficient to deny plaintiff's motion for summary judgment against defendant, given the uncontested showing of negligence (*see Martinez v Cofer*, 128 AD3d 421, 422 [1st Dept 2015]). Although discovery had not yet been taken, the motion was not premature as to liability because defendant, as the driver, has knowledge of how the accident occurred and did not show any need for discovery on that issue (*see Delgado v Martinez Family Auto*, 113 AD3d 426, 427 [1st Dept 2014]; *Johnson v Phillips*, 261 AD2d 269, 270, 272 [1st Dept 1999]; CPLR 3212[f]).

On the other hand, plaintiff failed to meet her prima facie evidence on the serious injury issue because she neglected to submit admissible evidence supporting her allegation that she suffered a fractured finger and sternum (CPLR 3212[a]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Although plaintiff's hospital records were submitted on reply, that did

not provide defendant with any opportunity to submit medical evidence in opposition or to address whether the records supported the injuries alleged in the complaint. Further, the motion was premature because defendant had not received those documents or conducted any discovery on the serious injury issue before the motion was made (*see Cruz v Skeritt*, 140 AD3d 554, 555 [1st Dept 2016]; *Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 103 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]).

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

ENTERED: FEBRUARY 7, 2019

CLERK

Sweeny, J.P., Tom, Webber, Kahn, Kern, JJ.

8355 In re Junior V.-R.,

A Person Alleged to be a
Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency.

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Dawne A. Mitchell, The Legal Aid Society, New York (John A. Newbery of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for presentment agency.

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Order, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about June 5, 2017, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of assault in the second and third degrees, attempted assault in the second degree, menacing in the second and third degrees and criminal possession of a weapon in the fourth degree (two counts), and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

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

disturbing the court's credibility determinations. The evidence supported inferences that appellant injured the victim by means of a metal object, immediately after also swinging a knife at him.

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

ENTERED: FEBRUARY 7, 2019

CLERK

Sweeny, J.P., Tom, Webber, Kahn, Kern, JJ.

8357 Omar Evans, et al., Index 22563/13E
Plaintiffs-Respondents,

-against-

Arnulfo J. Acosta, et al.,
Defendants-Appellants.

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Gannon, Rosenfarb & Drossman, New York (Lisa L. Gokhulsingh of counsel), for appellants.

McMahon & McCarthy, Bronx (Matthew J. McMahon of counsel), for respondents.

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Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered April 24, 2018, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff Omar Evans sustained skull fractures and traumatic brain injury after an accident of which he has no personal recollection. One eyewitness testified that she saw plaintiff cross the intersection and fall to the ground in a seizure-like episode. However, another eyewitness testified that he saw plaintiff start to cross the street by walking behind defendants' tractor trailer, as it was going through the intersection, and then fall straight over after being hit in the head by a cherry picker extending from the back corner of the tractor-trailer.

Defendant driver denied having hit anybody, and the police investigation found no signs that defendants' vehicle came into contact with a pedestrian. The parties also each submitted expert opinions as to whether plaintiff's injuries could have been caused by defendants' tractor trailer, and whether the cherry picker was properly secured.

The conflicting testimony of the two eyewitnesses concerning how plaintiff came to be lying in the intersection with a severe head injury, as well as the conflicting expert opinions, present triable issues of fact and credibility precluding summary judgment (*see Rawls v Simon*, 157 AD3d 418 [1st Dept 2018]; *Barba v Stewart*, 137 AD3d 704, 705 [1st Dept 2016]; *Bradley v Soundview Healthcenter*, 4 AD3d 194 [1st Dept 2004]). Based on the evidence that plaintiff suffered amnesia as a result of the accident, the

court properly found that plaintiffs' were entitled to application of the *Noseworthy* doctrine (*see e.g. Bah v Binto*, 92 AD3d 133, 135 [1st Dept 2012]).

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

ENTERED: FEBRUARY 7, 2019

CLERK

Sweeny, J.P., Tom, Webber, Kahn, Kern, JJ.

8358 The People of the State of New York, Ind. 4015/13
Respondent,

-against-

Aly Toure,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, Bronx County (Margaret L. Clancy, J.), rendered September 8, 2015, unanimously affirmed.

Although we find that defendant did not make a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 7, 2019

CLERK

Sweeny, J.P., Tom, Webber, Kahn, Kern, JJ.

8359 Michel Kadosh, etc., Index 651834/10
Plaintiff-Respondent, 650048/13

-against-

David Kadosh,
Defendant-Appellant,

114 W. 71St Street, LLC, et al.,
Defendants.

- - - - -

[And Other Actions]

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Martino & Weiss, Rye Brook (Douglas J. Martino of counsel), for appellant.

David J. Aronstam, New York, for respondent.

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Appeal from order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered November 3, 2017, which awarded plaintiff the entire amount held in escrow by a court-appointed receiver, unanimously dismissed, without costs.

Plaintiff commenced this action against his brother, defendant David Kadosh, alleging that defendant had failed to pay his share of expenses for work performed at a building owned by a limited liability company of which the brothers were equal members. Plaintiff also alleged that defendant had breached an oral joint venture agreement to pool the profits from the LLC's building with the profits from two buildings owned by defendant,

and split the profits evenly between them. Defendant subsequently filed an action for judicial dissolution of the LLC, and a temporary receiver was appointed to sell the LLC's building.

The stipulation between plaintiff and defendant, made in open court, setting forth the manner of resolving the parties' claims and waiving their rights to appeal the trial court's determination, is binding on defendant (*see Hallock v State of New York*, 64 NY2d 224, 230 [1984]; *Matter of Department of Social Servs. v Herbert R.*, 213 AD2d 636 [2d Dept 1995]; *Stern v Stern*, 304 AD2d 649, 649-650 [2d Dept 2003], *lv denied* 100 NY2d 508 [2003]). The record does not support defendant's claim that he entered into the stipulation based on a unilateral mistake (*see Structured Asset Sales Group LLC v Freeman*, 45 AD3d 327, 328 [1st Dept 2007]; *Pasteur v Manhattan & Bronx Surface Tr. Operating Auth.*, 241 AD2d 305, 305-306 [1st Dept 1997]). Prior to the terms of the stipulation being read in open court, defendant conferred with counsel and agreed that the trial court's determination would be final, that the court would not be required to issue a reasoned decision, and that he would waive his right to appeal. Although the trial court indicated that it would review the evidence, it never stated that it would issue a

reasoned decision. Finally, defendant later confirmed, on the record, that he agreed to waive his right to appeal and understood that he would not have an opportunity to obtain a detailed, reasoned decision.

We have considered defendant's remaining arguments and find them to be unavailing. We have also considered plaintiff's request for sanctions pursuant to Part 130 of the Rules of the Chief Administrator (22 NYCRR 130-1.1 *et seq.*). We decline to impose sanctions in this case (*see Gordon Group Invs., LLC v Kugler*, 127 AD3d 592, 594-595 [1st Dept 2015]).

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

ENTERED: FEBRUARY 7, 2019

CLERK

Sweeny, J.P., Tom, Webber, Kahn, Kern, JJ.

8360-
8360A Gary Rawlins,
Plaintiff-Respondent,

-against-

Andrew Sheppard, etc., et al.,
Defendants-Appellants.

Index 655457/17

Busson & Sikorski, P.C., New York (Oleksandr Kryvenko of counsel), for appellants.

Rawlins Law, PLLC, White Plains (Gary Rawlins of counsel), for respondent.

Judgment, Supreme Court, New York County (Gerald Lebovits, J.), entered April 23, 2018, in plaintiff's favor, unanimously reversed, on the law, without costs, and the judgment vacated. Appeal from order, same court and Justice, entered February 15, 2018, which granted plaintiff's motion for summary judgment in lieu of complaint and denied defendants' cross motion to dismiss the complaint, unanimously dismissed, without costs, as subsumed in the appeal from the judgment. The Clerk is directed to enter judgment dismissing the complaint.

Defendants' arguments about interpreting their retainer agreements with plaintiff attorney, even if raised for the first time on appeal, raise issues of law that are resolvable on the

face of the existing record, and thus will be considered (*see Facie Libre Assoc. I, LLC v SecondMarket Holdings, Inc.*, 103 AD3d 565 [1st Dept 2013], *lv denied* 21 NY3d 866 [2013]).

Under the plain language of the retainer agreements, the contingency fee was to be calculated based on the amount received by defendants as beneficiaries of the estate, not based on the gross amounts collected by the estate in the first instance, before costs and expenses. To the extent the agreements could be said to be ambiguous on this point, they must be construed against plaintiff (*see Albunio v City of New York*, 23 NY3d 65, 71 [2014]).

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

ENTERED: FEBRUARY 7, 2019

CLERK

Sweeny, J.P., Tom, Webber, Kahn, Kern, JJ.

8361 Aspire Music Group, LLC, Index 652029/17
Plaintiff-Respondent,

-against-

Cash Money Records, Inc., et al.,
Defendants,

UMG Recordings, Inc.,
Defendant-Appellant.

_____

Sidley Austin LLP, New York (John G. Hutchinson of counsel), for appellant.

Kasowitz Benson Torres LLP, Los Angeles, CA (Daniel A. Saunders of the bar of the State of California, admitted pro hac vice of counsel), for respondent.

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Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered July 3, 2018, which, to the extent appealed from, denied defendant UMG Recordings, Inc.'s (Universal) motion pursuant to CPLR 3211 to dismiss the complaint as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

The motion court correctly applied New York law to plaintiff's claim that Universal is the alter ego of defendant Cash Money Records, Inc. (*see Deutsche Bank, AG v Vik*, 142 AD3d 829 [1st Dept 2016]). The agreement between plaintiff and the joint venture of which Cash Money was a part (Aspire/YME

Agreement) was executed in New York, and the record establishes that Cash Money and Universal conducted business with each other in New York.

Nevertheless, the court erred in sustaining the claims against Universal on the basis of the alter ego theory. Even assuming Universal was an "equitable owner" of Cash Money (*see Freeman v Complex Computing Co., Inc.*, 119 F3d 1044, 1051 [2d Cir 1997]), the complaint fails to allege that Universal's domination of Cash Money was used to commit a wrong against plaintiff (*see Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). The complaint essentially alleges that Universal took advantage of Cash Money's cash flow problems by helping to satisfy millions of dollars of Cash Money's debts in exchange for control of Cash Money, and then, through such control, paid itself higher distribution fees, thereby reducing the net profits that plaintiff was entitled to receive under the Aspire/YME Agreement. These allegations describe legitimate business conduct; there is no indication that Universal engaged

in this conduct for the purpose of harming plaintiff (*see JTS Trading Ltd. v Trinity White City Ventures Ltd.*, 139 AD3d 630 [1st Dept 2016]; *TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339-340 [1998]).

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

ENTERED: FEBRUARY 7, 2019

CLERK

Sweeny, J.P., Tom, Webber, Kahn, Kern, JJ.

8362 The People of the State of New York, SCI 3616/16
Respondent,

-against-

Kevin McDonald,
Defendant-Appellant.

_____

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

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

_____

Appeal from order, Supreme Court, Bronx County (Ethan Greenberg, J.), entered on or about March 7, 2012, which, after a hearing, denied defendant's CPL 440.10 motion to vacate a judgment of conviction, same court (Greenberg, J. at plea; Steven L. Barrett, J. at sentencing), rendered April 21, 2010, unanimously dismissed.

Defendant's permissive appeal is dismissed due to his involuntary deportation (*see People v Harrison*, 27 NY3d 281, 288

[2016]; *People v Medina*, 142 AD3d 799 [1st Dept 2016]).

We note also that defendant's appeal is untimely as it was perfected more than 3 years after his time to do so expired.

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

ENTERED: FEBRUARY 7, 2019

CLERK

Sweeny, J.P., Tom, Webber, Kahn, Kern, JJ.

8363 In re Natasha M.,
Petitioner-Appellant,

-against-

James H.,
Respondent-Respondent.

_____

Carol L. Kahn, New York, for appellant.

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

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Order, Family Court, New York County (J. Machelle Sweeting, J.), entered on or about January 12, 2018, which dismissed petitioner mother's petition for violation of order of support, unanimously affirmed, without costs.

Petitioner failed to establish that respondent willfully violated the order of child support (*see Matter of Powers v Powers*, 86 NY2d 63, 69 [1995]; Family Ct Act § 454). The evidence, which included the New York City Office of Child Support Enforcement Account Statement, showed that respondent made all the payments as ordered, and that his payments actually exceeded the required monthly child support payments. Contrary to petitioner's argument that respondent willfully violated the order because he made no additional payments towards the accrued arrears, the order of support did not direct respondent to pay an

additional fixed amount towards the arrears.

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 7, 2019

CLERK

Sweeny, J.P., Tom, Webber, Kahn, Kern, JJ.

8364-
8365 Index 32059/17E

Wilmington Savings Fund Society FSB
doing business as Christina Trust, etc.,
Plaintiff-Appellant-Respondent,

-against-

Sung R. Park also known as Sung Rae Park,
et al.,
Defendants,

East Fork Capital Equities LLC,
Defendant-Respondent-Appellant.

_____

Weber Law Group, LLP, Melville (Jaret S. Weber of counsel), for appellant-respondent.

Butler, Fitzgerald, Fiveson & McCarthy, New York (David K. Fiveson of counsel), for respondent-appellant.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered November 15, 2017, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment dismissing defendant East Fork Capital Equities LLC's counterclaim for strict foreclosure under RPAPL 1352, and denied East Fork's motion for summary judgment on that counterclaim, unanimously modified, on the law, to grant plaintiff's motion, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered June 21, 2010, which denied plaintiff's motion for renewal, unanimously dismissed, without

costs, as academic.

In opposition to plaintiff's showing that a 1986 mortgage held by Dime Savings Bank was satisfied, and therefore that plaintiff's mortgage was a "first mortgage" under RPL § 339-z(ii), East Fork failed to show that the mortgage was unpaid when the common charge lien was filed in 2014 (*see Board. of Mgrs. of Parkchester N. Condominium v Richardson*, 238 AD2d 282, 284 [1st Dept 1997]).

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

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

ENTERED: FEBRUARY 7, 2019

CLERK

Sweeny, J.P., Tom, Webber, Kahn, Kern, JJ.

8366 Rahman Jeffers, et al., Index 153386/12
Plaintiffs-Respondents-Appellants,

-against-

American University of Antigua, et al.,
Defendants-Appellants-Respondents,

GCLR, LLC,
Defendant.

_____

Cowan, Liebowtiz & Latman, P.C., New York (J. Christopher Jensen of counsel), for appellants-respondents.

Jamie Andrew Schreck, P.C., New York (Jamie A. Schreck of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Margaret A. Chan, J.), entered on or about January 16, 2018, which denied defendant American University of Antigua's (AUA) (defenant) motion for summary judgment dismissing the complaint, and denied plaintiffs' cross motion for summary judgment on the issue of liability, unanimously modified, on the law, to grant AUA's motion to the extent of dismissing the claims raised by the non-graduated plaintiffs - Rahman Jeffers, George Mafwil, Lynda Bedeau, Oluwabusayo Alake, Angela Pugliese, Stephanie Veillard, Rolande Cenafils, and Ruslan Berdichevsky - and to grant plaintiffs' motion to the extent of granting summary judgment on liability as

to the claims of the graduated plaintiffs' - Rosalena Velazquez, Carla Benjamin, Ophalyn Gariando, Tricia Guarin, Todd Perez, Shalini Tiwari, Beleena Koshy, Dwayna Morris, and Abraham Varghese - and ordering an inquest on damages as to each of the graduated plaintiffs' claims, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint as to the non-graduated plaintiffs.

In a prior decision in this action, this Court expressly recognized that there were specific promises which established the existence of an implied contract between plaintiffs and defendant AUA when it stated that "AUA's 'fact book' aimed at prospective students promised, inter alia, that AUA graduates would be eligible to take the NCLEX [National Council License Examination for Registered Nurses], and, upon passing that exam, 'automatically matriculate' into Lehman College's 'one-year RN to BSN program'" (*Jeffers v American Univ. of Antigua*, 125 AD3d 440, 442 [1st Dept 2015]).

The record clearly establishes that defendant AUA breached these promises with regard to the graduated plaintiffs as it showed that they were (1) not eligible to take the NCLEX exam until after December 13, 2011 (when the New York State Education Department [NYSED] admitted the mistake and permitted AUA

graduates to sit for the exam), and (2) were not permitted to enroll in Lehman College until 2011 when they enrolled in a standard BSN program (not the ASN to BSN program AUA had promised). Supreme Court properly found that a reasonable period of time should be inferred following graduation (*Savasta v 470 Newport Assoc.*, 82 NY2d 763, 765 [1993]). However, because the graduated plaintiffs did not have the opportunity to take the NCLEX exam or enroll in Lehman College's ASN to BSN program in a timely fashion after graduation from AUA, AUA breached the implied contract. The graduated students also established the element of damages by submitting affidavits wherein each averred that they graduated from AUA and shortly thereafter, applied to take the NCLEX but were denied because all AUA students were "ineligible" to take the exam preventing them from obtaining their nursing license and begin their profession. Accordingly, the plaintiffs who graduated from AUA are entitled to summary judgment as to liability on their breach of contract claims, and Supreme Court should hold an inquest to determine the extent of each of their damages.

With respect to the non-graduated plaintiffs, defendant AUA has properly established entitlement to summary judgment as a matter of law. Specifically, it is well settled that "a party to

a contract cannot rely on the failure of another to perform a condition precedent where he has frustrated or prevented the occurrence of the condition" (*Kooleraire Serv. & Installation Corp. v Board of Educ. of City of N.Y.*, 28 NY2d 101, 106 [1971]; *Fairway Prime Estate Mgt., LLC v First Am. Intl. Bank*, 99 AD3d 554, 557 [1st Dept 2012]). It is undisputed that plaintiffs Jeffers, Cenafils, Bedeau, Mafwil, Pugliese, Veillard, Alake and Berdichevsky did not graduate from AUA's school of nursing. As such, these non-graduated plaintiffs rendered defendant AUA's performance of its implied contract with each of them impossible when they voluntarily withdrew from the school or failed to complete the necessary credits and consequently, did not graduate.

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

ENTERED: FEBRUARY 7, 2019

CLERK

Sweeny, J.P., Tom, Webber, Kahn, Kern, JJ.

8368 The People of the State of New York, Ind. 2483/17
Respondent,

-against-

Juan DeJesus,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Kristin D. Amundsen 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 (Steven Hornstein, J. at plea; Bahaaiti Pitt, J. at sentencing), rendered December 11, 2017,

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

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

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

ENTERED: FEBRUARY 7, 2019

CLERK

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

Sweeny, J.P., Tom, Webber, Kahn, Kern, JJ.

8369- Index 105985/10
8370- 157465/16
8371-
8372 Koya Abe,
Plaintiff-Appellant,

-against-

New York University, et al.,
Defendants-Respondents.

- - - - -

Koya Abe,
Plaintiff-Appellant,

-against-

New York University, et al.,
Defendants-Respondents.

_____

Jennifer L. Unruh, Astoria, for appellant.

Davis Wright Tremaine LLP, New York (Lyle S. Zuckerman of counsel), for Cathleen Dawe, respondent.

DLA Piper LLP (US), New York (Brian S. Kaplan of counsel), for New York University, David M McLaughlin, Nancy Barton, Ken Castronuovo, Joseph Giovannelli, Roger Ho, Mary Brabeck, Barbara Cardeli-Arroyo, respondents.

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Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered December 5, 2017, which to the extent appealed from as limited by the briefs, granted summary judgment dismissing the discrimination and hostile work environment claims in Index Number 105985/10 (the 2010 action); granted defendants' motion to

seal confidential information in the 2010 action; denied plaintiff's motion to vacate the note of issue, compel additional discovery, and for discovery related sanctions in the 2010 action; granted defendants' motion to dismiss the complaint in Index Number 157465/16 (the 2016 action); and granted defendants' motion for sanctions against plaintiff and his counsel for engaging in frivolous conduct in both actions, unanimously affirmed, without costs. Orders, same court and Justice, entered April 2, 2018, dismissing, upon reargument, all claims against defendant Cathleeen Dawe in the 2010 action; entered April 3, 2018, ordering certain documents filed in the 2010 action to be sealed; and entered December 19, 2017, referring both actions to a judicial hearing officer or special referee to hear and report on the amount of attorneys' fees owed to defendants as sanctions, unanimously affirmed, without costs. Order, same court and Justice, entered April 2, 2018, which, to the extent appealable, denied plaintiff's motion to renew the summary judgment motions in the 2010 action, unanimously affirmed, without costs.

Assuming that plaintiff established a prima facie case of discrimination on the basis of race, national origin, immigration status, or age (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 112-113 [1st Dept 2012]; *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d

29, 35 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]; *Bailey v New York Westchester Sq. Med. Ctr.*, 38 AD3d 119, 123 [1st Dept 2007]; *see* Executive Law § 296; Administrative Code of City of NY § 8-107[1][a]), the Supreme Court properly dismissed that claim because plaintiff failed to raise an issue of fact whether defendants' reason for terminating him was pretextual (*see Melman*, 98 AD3d at 113-114, 120). Defendants demonstrated a legitimate nondiscriminatory reason why they eliminated plaintiff's part-time darkroom lab manager and photography adjunct teaching positions, citing budget cuts and the fact that the duties of another full-time employee, recommended by plaintiff, overlapped significantly with most of plaintiff's duties as part-time darkroom lab manager. Defendant New York University, which was facing an uncertain financial future after the 2007-2008 fiscal crisis, directed each Department to find areas to reduce expenses, including in the Art Department where plaintiff was employed. Defendants did not reappoint plaintiff to semester-long adjunct teaching positions after 2009, but they demonstrated that other adjunct staff who were not reappointed did not share plaintiff's protected characteristics, and that adjunct positions were offered to MFA students who were non-Caucasian. In addition, his supervisor, defendant Nancy Barton,

who decided to terminate his positions, is older than plaintiff.

Plaintiff failed to raise triable issues of fact whether defendants' preference for more affordable MFA graduate students, or consolidation of his duties with another employee amount to pretext. He briefly argues that the Art Department spent money on equipment around the time of stated budget issues, but this amounts only to questions regarding whether the company's decision to terminate his employment was correct or justified; they do not raise an inference of pretext, *i.e.*, that defendants' reason for the termination was false and that discrimination was the real reason (*Melman*, 98 AD3d at 120-121).

The court also properly rejected plaintiff's disparate impact claim (*Levin v Yeshiva Univ.*, 96 NY2d 484 [2001]). NYU showed that of the six other adjuncts who were not reappointed, none were Japanese. All were non-Asian and two were Causasian (*see* R1148 at ¶¶24-37). Moreover, mere disparate treatment, without a showing that the disparity was based on a protected characteristic, does not amount to discrimination (*Mete v New York State Off. of Mental Retardation & Dev. Disabilities*, 21 AD3d 288, 297 [1st Dept 2005]).

The Supreme Court incorrectly cited the "severe and pervasive" standard in evaluating plaintiff's hostile work

environment claim, instead of applying the more liberal standard under the New York City Human Rights Law (HRL) (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 76, 80 [1st Dept 2009], *lv denied* 13 NY3d 702 [2009]). Nevertheless, it properly dismissed the claim because plaintiff failed to show that any adverse employment action was on account of any protected class. Instead, plaintiff argued that such claims were in retaliation for his filing prior discrimination complaints, and the court denied dismissal of the retaliation claim. The court correctly concluded that other conduct plaintiff described was either time-barred or consisted of a few vague and stray remarks, which do not, without more, constitute evidence of discrimination (*Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 517 [1st Dept 2016], *lv denied* 28 NY3d 902 [2016]).

The court also properly denied plaintiff's motion for leave to renew the summary judgment motions in the 2010 action because plaintiff failed to explain why he waited at least four years since the litigation commenced to submit his first FOIA request, and thus did not receive evidence of other discrimination charges filed against NYU sooner (CPLR 2221[e][2]; see *Ramos v City of New York*, 61 AD3d 51, 54 [1st Dept 2009]). In any case, the mere fact that others filed discrimination claims on similar grounds

does not tend to show that NYU acted with any discriminatory intent towards him; thus, they do not constitute "new facts" that would change the prior determination. As a result, plaintiff's motion to renew and reargue was in essence only a motion for reargument, the denial of which is non-appealable as of right (*see e.g. Kitchen v Diakhate*, 68 AD3d 570 [1st Dept 2009]).

The Supreme Court correctly granted, upon reargument, summary judgment dismissing all claims against defendant Dawe, NYU's former associate general counsel, including aiding and abetting retaliation. Plaintiff cites no facts to show Dawe did anything other than act in her role as an attorney in advising NYU employees regarding discriminatory conduct, and in investigating and gathering information to respond to an EEOC charge plaintiff had filed (*see generally Art Capital Group, LLC v Neuhaus*, 70 AD3d 605, 606 [1st Dept 2010]). None of the documents or correspondence plaintiff cites raise any triable issue whether she acted with any discriminatory intent or colluded with others to create a hostile work environment.

The Supreme Court providently exercised its discretion in denying plaintiff's motions to compel additional discovery (*GoSMILE, Inc. v Levine*, 112 AD3d 469 [1st Dept 2013]) and to vacate the note of issue (*Savino v Lewittes*, 160 AD2d 176, 178

[1st Dept 1990]). As the voluminous record shows, plaintiff received ample discovery, and he fails to cite any missing information that is material to his case, or explain why he did not seek certain information prior to issuance of the note of issue, six years after commencement of the 2010 action (*see Alvarez v Feola*, 140 AD3d 596, 597 [1st Dept 2016]; *Rosenberg & Estis, P.C. v Bergos*, 18 AD3d 218 [1st Dept 2005]). For the same reasons, denial of summary judgment was not warranted on the basis that discovery was not complete (CPLR 3212[f]; *Frierson v Concourse Plaza Assoc.*, 189 AD2d 609, 610 [1st Dept 1993]; *see Fulton v Allstate Ins. Co.*, 14 AD3d 380, 381 [1st Dept 2005]).

Regarding the court's order that certain documents be sealed, plaintiff overlooks that numerous documents have been unsealed since an initial order temporarily directed that all of his opposition papers be sealed. Thus, while he correctly argues that certain public records should be unsealed, they have been unsealed. The court, in its orders entered December 5, 2017 and April 3, 2018 directed only that documents "narrowly tailored" to the definition of "Confidential Information," as defined in the parties' so-ordered stipulation regarding the filing of such information, be sealed. The record demonstrates that the court made a finding of good cause before ordering them sealed (*see* 22

NYCRR 216.1; *Gryphon Dom. VI, LLC v APP Intl. Fin. Co., B.V.*, 28 AD3d 322, 325 [1st Dept 2006]). Nor was that stipulation nullified, as plaintiff claims.

The Supreme Court properly granted defendants' motion to dismiss the complaint in the 2016 action on res judicata grounds. In an order entered May 12, 2016, Supreme Court, New York County (Joan M. Kenney, J.), denied plaintiff's motion to amend the complaint in the 2010 action to add former NYU President John Sexton as a defendant and assert additional claims under the City HRL against NYU because plaintiff failed to state any reasonable excuse for his delay in doing so in the six years the case had been pending, and defendants would suffer prejudice if additional claims or new parties were added at that stage. Plaintiff subsequently filed a complaint alleging federal employment discrimination causes of action, related federal claims, and Labor Law claims based on the same facts stemming from the 2010 action. On March 30, 2016, the United States District Court for the Southern District of New York dismissed the complaint, and dismissed the federal employment discrimination claims on abstention grounds, as the court found that they were mere parallel counterparts of Abe's claims under the City HRL in the 2010 action (*Abe v New York Univ.*, 2016 WL 1275661 [SD NY 2016]).

After these unsuccessful attempts to add additional discrimination claims and Sexton, in September 2016, plaintiff commenced the 2016 action against NYU and former NYU President Sexton and alleged all of the same federal claims which the Southern District had found overlapped with the 2010 action, additional claims under the City HRL based on the same conduct as in the 2010 action, and Labor Law claims based on the same conduct as in the 2010 action, which alleged that his wages and hours had been reduced.

As his claims could have been and were not raised in the 2010 action, they are barred by res judicata (*Matter of Josey v Goord*, 9 NY3d 386, 389-390 [2007]; *Matter of Hunter*, 4 NY3d 260, 269 [2005]). The court thus correctly surmised that the commencement of yet another action against NYU, and against Sexton for the first time in over six years, was an "impermissible attempt at an end-run around" the prior order denying plaintiff's motion for leave to amend the complaint in the 2010 action (*see e.g. United States v McGann*, 951 F Supp 372, 379-380 [ED NY 1997]; *see also* CPLR 3211[a][4]; *Simonetti v Larson*, 44 AD3d 1028 [2d Dept 2007]).

Finally, as the above shows, the court providently exercised its discretion in imposing sanctions for Abe's violation of the

stipulation regarding the filing of confidential documents and for commencement of the 2016 action (22 NYCRR § 130-1.1[a],[c]; *see also* 22 NYCRR § 130-1.1-a[b]; *Levy v Carol Mgt. Corp.*, 260 AD2d 27, 35 [1st Dept 1999]), and enjoining Abe from commencing any further suits in the Supreme Court without prior approval (*see e.g. Bikman v 595 Broadway Assoc.*, 88 AD3d 455, 455-456 [1st Dept 2011], *lv denied* 21 NY3d 856 [2013]).

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

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

ENTERED: FEBRUARY 7, 2019

CLERK

Sweeny, J.P., Tom, Webber, Kahn, Kern, JJ.

8374- Index 160687/16
8375N Kamran Hakim, et al.,
Plaintiffs-Appellants,

-against-

Letitia James in Her Official
Capacity as the Public Advocate, et al.,
Defendants-Respondents.

_____

Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., New York (Darren R. Marks of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (John Moore of counsel), for City of New York, respondent.

Emery Celli Brinckerhoff & Abady LLP, New York (Matthew D. Brinckerhoff of counsel), for Letitia James and The Office of The Public Advocate for The City of New York, respondents.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered May 7, 2018, which granted defendants' motions to dismiss the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered March 13, 2017, which denied plaintiffs' motion for a preliminary injunction, unanimously dismissed, without costs, as moot.

Plaintiffs, two landlords and their managing member, were included on the Public Advocate's list of "The 100 Worst Landlords in New York City" (the Watchlist) in 2015 and 2016. They commenced this action seeking damages and an order enjoining

the Public Advocate from publishing any Watchlist that includes them.

The mandamus cause of action was correctly dismissed, because the Watchlist is within the scope of the Public Advocate's powers as defined in the New York City Charter, at a minimum, "by necessary implication" (*see Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148, 156 [1994] [internal quotation marks omitted]). The Charter provides that the Public Advocate "shall . . . monitor the operation of the public information and service complaint programs of city agencies and make proposals to improve such programs" (NY City Charter § 24[f]). The Watchlist aggregates and shares publicly available governmental data compiled by the City Departments of Housing Preservation and Development, Buildings, and Finance, thereby enhancing the accessibility of public information.

This information-sharing function of the Public Advocate is consistent with the legislative history of the Charter. As plaintiffs themselves note, in 1973, the first report of the newly created State Charter Revision Commission addressed the fact that citizens frequently did not know how to locate or obtain help from City officials or agencies, and the 1975 Charter revisions provided that the president of the council (later

renamed Public Advocate) would oversee the coordination of city-wide citizen information.

The cases cited by plaintiffs in support of their mandamus argument are inapposite, as they address the very different question of the Public Advocate's authority to commence judicial proceedings (*see Matter of James v City of New York*, 154 AD3d 424 [1st Dept 2017], *lv dismissed* 32 NY3d 1036 [2018]; *Matter of Madison Sq. Garden, L.P. v New York Metro. Transp. Auth.*, 19 AD3d 284 [1st Dept 2005], *appeal dismissed* 5 NY3d 878 [2005]; *Matter of James v Donovan*, 130 AD3d 1032 [2d Dept 2015], *lv denied* 26 NY3d 1048 [2015]).

The deprivation of due process claim was correctly dismissed because damage to reputation, the sole type of damage plaintiffs allege, does not constitute the requisite "stigma-plus" (*Knox v New York City Dept. of Educ.*, 85 AD3d 439 [1st Dept 2011]; *Sadallah v City of Utica*, 383 F3d 34, 38 [2d Cir 2004]). Plaintiffs do not allege that the Watchlist has jeopardized their employment, career prospects, or corporate existence (*compare Matter of Lee TT. v Dowling*, 87 NY2d 699 [1996] [petitioner's future employment prospects in chosen field would be severely jeopardized]; *Matter of Natasha W. v New York State Off. of Children & Family Serve.*, 145 AD3d 401 [1st Dept 2016]

[petitioner would be essentially barred from pursuing career in chosen field], *revd* 32 NY3d 982 [2018]). Nor does NY City Charter § 24(i)-(l) support plaintiffs' due process claim, as it applies to the Public Advocate's investigations of city officers or agencies and is not relevant here.

The defamation claim is not sustainable because the Public Advocate is entitled to the privilege that attaches to statements she made while discharging a public function arising from the duties of her office (*see Cosme v Town of Islip*, 63 NY2d 908 [1984]; *Duffy v Kipers*, 26 AD2d 127 [4th Dept 1966]). Moreover, the phrase "Worst Landlords" is nonactionable opinion (*see Gunduz v New York Post Co.*, 188 AD2d 294 [1st Dept 1992]; *Miller v Richman*, 184 AD2d 191 [4th Dept 1992]). The facts underlying the opinion were fully disclosed (*see Gross v New York Times Co.*, 82 NY2d 146, 153 [1993]; *Steinhilber v Alphonse*, 68 NY2d 283 [1986]; *cf. Guerrero v Carva*, 10 AD3d 105, 114 [1st Dept 2004] ["the flyers . . . did far more than imply undisclosed facts; they directly invited the reader to call for more information"]). The title "100 Worst Landlords in New York City" is also not actionable because it does not name plaintiffs (*see Chaiken v VV Publ. Corp*, 907 F Supp 689, 698 [SD NY 1995], *affd* 119 F3d 1108 [2d Cir 1997], *cert denied* 522 US 1149 [1998]; *cf. Schermerhorn v*

Rosenberg, 73 AD2d 276 [2d Dept 1980]).

The prima facie tort claim was correctly dismissed because the record demonstrates that motives other than "disinterested malevolence" lie behind the publication of the Watchlist (*see Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 333 [1983]; *Brook v Peconic Bay Med. Ctr.*, 152 AD3d 436, 438-439 [1st Dept 2017]). The Watchlist describes itself as "an information-sharing tool intended to allow residents, advocates, public officials, and other concerned individuals to identify which property owners consistently flout the City's laws intended to protect the rights and safety of tenants." As even plaintiffs note, in her interview with NY1, the Public Advocate stated that her goal was to shame the landlords into making a good faith effort to address the violations. In addition, their allegations of general, rather than special, damages render the pleading insufficient (*see Leather Dev. Corp. v Dun & Bradstreet*, 15 AD2d 761 [1st Dept 1962], *affd* 12 NY2d 909 [1963]).

In view of the foregoing, plaintiffs' appeal from the denial of their motion for a preliminary injunction is moot (*Chalasani v*

Neuman, 91 AD2d 1030 [2d Dept 1983]; *see also Hejailan-Amon v Amon*, 160 AD3d 481, 483-484 [1st Dept 2018]).

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

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

ENTERED: FEBRUARY 7, 2019

CLERK

Sweeny, J.P., Tom, Webber, Kahn, Kern, JJ.

8376N Country-Wide Insurance Company, Index 153639/18
Plaintiff-Appellant,

-against-

Frances Melia,
Defendant-Respondent,

Bishwanan Jagmohan,
Defendant.

_____

Thomas Torto, New York, for appellant.

Held & Hines, L.L.P., New York (Scott B. Richman of counsel), for respondent.

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Order, Supreme Court, New York County (Adam Silvera, J.), entered on or about September 24, 2018, which granted defendant Frances Melia's motion for a change of venue, unanimously affirmed, without costs.

Defendant met its burden for a discretionary change of venue of this action from New York County to Queens County (*Wickman v Pyramid Crossgates Co.*, 127 AD3d 530, 531 [1st Dept 2015]*; see Tricarico v Cerasuolo*, 199 AD2d 142 [1st Dept 1993]). While plaintiff insurance company has its principal place of business in New York County, this action arose in Queens County, two related actions based upon the same accident were venued in Queens County, the subject insurance policy was issued in Queens,

and the elderly defendant lives in a nursing home there. Under these circumstances, changing venue to Queens County will better promote the ends of justice (*Wickman*, 127 AD3d at 531).

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

ENTERED: FEBRUARY 7, 2019

CLERK

Sweeny, J.P., Tom, Webber, Kahn, Kern, JJ.

8377N Patmos Fifth Real Estate Inc., et al.,
Plaintiffs-Respondents,

-against-

Mazl Building LLC, et al.,
Defendants-Appellants,

Raba Abramov, et al.,
Defendants.

- - - - -

[And a Third Party Action]

Index 108421/11

Berkman, Henoch, Peterson, Peddy & Fenchel, P.C., Garden City (James E. Durso of counsel), for appellants.

Andrew T. Hambelton, New York, for respondents.

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered February 15, 2018, which denied defendants Mazl Building LLC and High Line Holdings LLC's motion to amend their answer to add two counterclaims, unanimously affirmed, without costs.

Defendants' proposed counterclaim for equitable subrogation relates to their counterclaim for foreclosure of a consolidated mortgage and is barred by the applicable six-year statute of limitations (see CPLR 213[1]; *see Wells Fargo Bank, N.A. v Burke*, 155 AD3 668, 670 [2d Dept 2017]). The equitable subrogation claim is founded upon the interest of nonparties Avi Weiss,

Batsheba Weiss, Zvi Gotian, and Hana Gotian (collectively, Weiss) in the consolidated mortgage — an interest that was previously undisclosed — which accrued when plaintiffs defaulted under the terms of the consolidated mortgage on October 1, 2009. An equitable subrogation right would place defendants in Weiss's shoes, with no greater legal rights than Weiss possessed with respect to the mortgage.

Similarly, defendants' proposed counterclaim for a declaration pursuant to RPAPL article 15 that they are the owner and holder of the 62.5% interest that Weiss held in the consolidated mortgage is time-barred.

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

ENTERED: FEBRUARY 7, 2019

CLERK