SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 3, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Manzanet-Daniels, Gische, Tom, Moulton, JJ.

7799- Index 300174/12
7800- 300885/13
7801- 21702/13E
7801A Pilar Ramirez, et al.,
Plaintiffs-Appellants,

-against-

Jose Elias-Tejada, et al.,
Defendants-Respondents.

- - - - -

Jose A. Corchado,
Plaintiff,

-against-

Michael P. Thomas, et al.,
Defendants-Respondents.

- - - - -

Paul Charles Yovino,
Third-Party Plaintiff,

-against-

Jose Elias-Tejada,
Third-Party Defendant-Respondent.

- - - - -

Jose M. Elias-Tejada,
Plaintiff,

-against-

Michael P. Thomas, et al.,
Defendants-Respondents.

- - - - -

Fairway Douglaston LLC, et al.,
Nonparty Respondents.

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Pazer, Epstein, Jaffe & Fein, P.C., New York (Matthew J. Fein of counsel), for Pilar Ramirez and Yedmy Batista Peralta, appellants.

Raymond Schwartzberg & Associates, PLLC, New York (Raymond Schwartzberg of counsel), for Delio Polanco, appellant.

Martin Fallon & Mullè, New York (Stephen P. Burke of counsel), for Jose Elias-Tejada, respondent.

Russo & Tambasco, Melville (Susan J. Mitola of counsel), for Paul Charles Yovino, respondent.

Law Office of Brian Rayhill, Elmsford (Karen Queenan of counsel), for Michael P. Thomas, respondent.

O'Connor Redd LLP, Port Chester (Hillary P. Kahan of counsel), for Fairway Douglaston, LLC and Fairway Group Holdings Corp., respondents.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered August 10, 2016, which, inter alia, denied plaintiff Delio Polanco's motion for leave to serve a supplemental summons and complaint, unanimously reversed, on the law, without costs, and the motion granted. Order, same court and Justice, entered

on or about April 26, 2017, which granted defendant Jose Elias-Tejada's motion to amend his answer to assert a defense based on Workers' Compensation Law §§ 11 and 29, unanimously affirmed, without costs. Order, same court and Justice, entered on or about April 28, 2017, which granted defendant Paul Charles Yovino's motion for summary judgment dismissing the complaint as against him, unanimously affirmed, without costs. Order, same court and Justice, entered on or about May 4, 2017, which denied plaintiffs Pilar Ramirez and Yedmy Batista Peralta's cross motion for summary judgment as to liability and serious injury, unanimously modified, on the law, to grant the motion solely as to the lack of culpable conduct on their part, and otherwise affirmed, without costs.

These consolidated actions arise from a three-car collision that occurred on December 12, 2011 when a car driven by defendant Jose Elias-Tejada stalled on the Throgs Neck Bridge. Paulina Cortorreal Hiciano, plaintiff Polanco's decedent (his wife), and plaintiffs Ramirez and Peralta were passengers in Elias-Tejada's car. Jose Corchado (plaintiff in Action No. 2), was a passenger in that car as well. Elias-Tejada's car was struck from behind by a car driven by defendant Michael P. Thomas. A third car, driven by defendant Paul Charles Yovino, struck Thomas's car from

behind. The decedent, who was seated behind Elias-Tejeda, was transported to a hospital where she was pronounced dead. Ramirez, Peralta, the decedent and Elias-Tejada were all employees of Fairway and they were carpooling their way to a newly opened Fairway store in Douglaston.

In 2012, Polanco commenced an action against the three drivers of the cars, Elias-Tejada, Thomas, and Yovino. Ramirez and Peralta commenced their own action against the same defendants. The two actions were later consolidated into the *Polanco* action (Action No. 1). Also in 2012, Ramirez and Peralta, who are represented separately from Polanco, commenced a separate action against two Fairway entities, alleging that Elias-Tejada was transporting them within the scope of his employment when the accident occurred and that Fairway was vicariously liable for their injuries (*Ramirez v Fairway Douglaston, LLC,* Supreme Court, Bronx County, Index No. 309415/12) (*Fairway* action).

Polanco now seeks to amend his complaint to assert claims against various Fairway entities, similar to those in the *Fairway* action, relying on the relation back doctrine because the statute of limitations has expired (*see* CPLR 203[f]). The motion court denied leave to serve an amended complaint on the basis that

Polanco had not met the conditions warranting application of the relation back doctrine (*see Buran v Coupal*, 87 NY2d 173, 178 [1995]). The motion court, however, permitted Elias-Tejada to amend his answer to assert a Workers' Compensation Law defense against all three plaintiffs, notwithstanding that such defense could have been pleaded in the original answer or more promptly.

CPLR 203(f) is a codification of the relation back doctrine (*O'Halloran v Metropolitan Transp. Authority*, 154 AD3d 83, 86 [1st Dept 2017]). It provides that "[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions [or] occurrences . . . to be proved pursuant to the amended pleading" (CPLR 203[f]; *see also Giambrone v Kings Harbor Multicare Ctr.*, 104 AD3d 546, 548 [1st Dept 2013]). Application of the relation back doctrine allows a plaintiff to "correct a pleading error--by adding either a new claim or a new party--after the statutory limitations period has expired" (*Buran*, 87 NY2d at 177). Where, as here, a plaintiff seeks to add new defendants, not just assert more claims against defendants already in the action, the following three conditions must be met before claims against one defendant may relate back to claims

against another:

> "(1) both claims arose out of same conduct, transaction or occurrence; (2) the new party is 'united in interest' with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits and (3) the new party knew or should have known that, but for a[] ... mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well" (*id.* at 178 [internal quotation marks omitted]).

The motion court determined, and we agree, that Polanco met his burden as to the first condition. The claims that Polanco seeks to assert against Fairway arise out of the same occurrence as alleged in the complaint against Elias-Tejada, Thomas, and Yovino. Unlike the motion court, however, we find that Polanco also satisfied the second condition, because under the doctrine of respondeat superior, an employer will be vicariously liable for the negligence of an employee committed while the employee is acting in the scope of his or her employment (*see e.g. Lunberg v State of New York*, 25 NY2d 467, 470 [1969]). Based on Elias-Tejada's employer/employee relationship with Fairway, they are united in interest because a judgment against one of them will similarly affect the other (*Grossman v New York City Health & Hospitals Corp.*, 178 AD2d 323, 324 [1st Dept 1991]). Under those

circumstances, the Fairway defendants can, therefore, be charged as having notice of Polanco's potential claims against them, based upon the claims asserted against Elias-Tejada in the original summons and complaint (*see id.*; *Davis v Larhette*, 39 AD3d 693 [2d Dept 2007]).

Polanco has also shown that but for a mistake, he would have sooner moved to amend his complaint to assert a claim against Fairway and that the Fairway defendants will not be unduly prejudiced by allowing him to serve the amended complaint proposed (*O'Halloran* 154 AD3d at 89). *Buran* does not require that Polanco show an "excusable" mistake. What is required is that a mistake was made in failing to sue the prospective defendant within the applicable time limitations (*Buran* at 175, 179). To establish he made a mistake in not bringing the Fairway defendants into the action sooner, Polanco explains that certain important information was not available to him until well into 2016 because of the delay in depositions. Although he had a general awareness of the decedent's travel arrangements with Elias-Tejada, it was a relatively new arrangement only in place for two weeks prior to the accident. Polanco knew the decedent paid Elias-Tejada $30 a week in cash to transport her and other Fairway employees from the Bronx to the new Fairway store in

Douglaston, but he thought the carpool was for her own personal convenience. Only later, after depositions were held, including those of a key Fairway employee and Elias-Tejada, did he learn that Fairway compensated Elias-Tejada for hosting the car pool and that this travel arrangement was condoned, if not actually implemented and encouraged, by Fairway's human resources department because Fairway reimbursed him for tolls and mileage.

Despite its December 2012 commencement date, issue was not joined in the Fairway action until 2016. During that four-year period Fairway pursued pre-action discovery related to Ramirez's and Peralta's workers' compensation filings. The action was delayed even further when Fairway filed for bankruptcy in March 2016. The Fairway defendants subsequently moved to dismiss the complaint, which motion was denied in December 2016. Fairway's opposition largely focuses on the fact that they will face increased or unexpected liability and that its identity as the decedent's employer was known at the outset. "Prejudice does not occur simply because a defendant is exposed to greater liability or because a defendant has to expend additional time preparing its case" (*O'Halloran* at 89), and Polanco has explained why he did not have full knowledge of the necessary facts sooner. The mistake was not as to Fairway's identity, but as to whether

Elias-Tejada was "on the job" when the accident occurred.

As for Elias-Tejada's motion to amend his answer to assert a Workers' Compensation Law defense, the applicability of the defense to each of the injured plaintiffs and the decedent is disputed. Since it cannot be concluded, as a matter of law, that the defense is palpably insufficient or patently devoid of merit, Elias-Tejada's motion was properly granted (*see e.g. Ifafore v Lebron*, 111 AD3d 570 [1st Dept 2013]).

The record demonstrates as a matter of law that any negligence on Yovino's part in the operation of his vehicle was not a proximate cause of the injured plaintiffs' or the decedent's injuries. There is no evidence controverting Yovino's testimony that his vehicle hit Thomas's vehicle after Thomas's had struck Elias-Tejada's vehicle. None of the occupants of Thomas's or Elias-Tejada's vehicle testified that they were aware of the contact between Yovino's and Thomas's vehicle. Plaintiffs acknowledge that the contact between Yovino's vehicle and Thomas's vehicle did not propel Thomas's vehicle forward or otherwise affect it.

Ramirez and Peralta failed to submit proof in admissible form entitling them to summary judgment on the threshold issue of serious injury, because the medical records they submitted were

not sworn or certified (CPLR 4518[c]). In addition, their cross motion was untimely, and serious injury was not the subject of a timely motion (*see Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281-282 [1st Dept 2006], *appeal dismissed* 9 NY3d 862 [2007]). As to liability, Ramirez and Peralta's argument is merely that they were not culpable. Although lack of culpable conduct also was not the subject of a timely motion, and although Ramirez and Peralta are not entitled to summary judgment on the issue of defendants' negligence, we grant these plaintiffs summary judgment on the limited issue of their lack of culpable conduct, because defendants do not dispute that as innocent passengers they were not at fault in the happening of the accident (*see Oluwatayo v Dulinayan*, 142 AD3d 113, 115 [1st Dept 2016]).

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

ENTERED: JANUARY 3, 2019

CLERK

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

7909 Ethan Goldwater, Index 160002/15
Plaintiff-Appellant,

-against-

Amicus Associates Limited Partnership,
Defendant-Respondent.

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Ween & Kozek, PLLC, Brooklyn (Michael P. Kozek of counsel), for appellant.

Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., New York (Paul N. Gruber of counsel), for respondent.

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Order, Supreme Court, New York County (Erika M. Edwards, J.), entered December 8, 2017, which, insofar as appealed from, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

"[T]he law does not extend the protection of rent stabilization to a person not using the subject apartment as a primary residence" (*Chekowsky v Windermere Owners LLC*, 130 AD3d 523, 523 [1st Dept 2015]). Moreover, "[a] party to litigation may not take a position contrary to a position taken in an income tax return" (*Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 422 [2009]; *see Naghavi v New York Life Ins. Co.*, 260 AD2d 252 [1st Dept 1999]).

Here, plaintiff does not dispute that he declared the full

amount of rent and utilities for the subject unit on his 2014 and 2015 federal income tax returns for his S-Corporation, and that on his 2013 federal tax return, he deducted the full amount of rent and utility on Schedule C, which concerns profit and loss for a business. Plaintiff has therefore not established that he is subject to rent stabilization, as he cannot demonstrate that the unit was his primary residence (*see Matter of Ansonia Assoc. L.P. v Unwin*, 130 AD3d 453 [1st Dept 2015]).

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

ENTERED: JANUARY 3, 2019

CLERK

Friedman, J.P., Richter, Gesmer, Kern, Moulton, JJ.

7977 The People of the State of New York, Ind. 3196/09
Respondent,

-against-

Mark Laramore,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, Bronx County (Steven Lloyd Barrett, J.), rendered June 11, 2014, convicting defendant, upon his plea of guilty, of manslaughter in the first degree, and sentencing him to a term of 23 years, unanimously modified, on the law, to the extent of vacating the sentence and remanding for a youthful offender determination, and otherwise affirmed.

As the People concede, defendant is entitled to an express youthful offender determination (*see People v Rudolph*, 21 NY3d 497 [2013]).

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

ENTERED: JANUARY 3, 2019

CLERK

Friedman, J.P., Richter, Gesmer, Kern, Moulton, JJ.

7979 In re Donte E.,

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

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Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Rebecca L. Visgaitis of counsel), for presentment agency.

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Appeal from order, Family Court, New York County (Carol Goldstein, J.), entered on or about October 17, 2017, which extended appellant's placement with the Administration for Children's Services for an additional 12-month period, unanimously dismissed as moot, without costs.

This appeal is moot because the extension of placement has expired and has been superseded by an order on consent that extended the placement for six additional months (*see e.g. Matter*

of Gabriel N., 144 AD3d 443 [1st Dept 2016]). In any event, the 12-month extension was a provident exercise of discretion.

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

ENTERED: JANUARY 3, 2019

CLERK

Friedman, J.P., Richter, Gesmer, Kern, Moulton, JJ.

7980 Dina Mangiafridda, et al., Index 21098/15E
Plaintiffs-Appellants,

-against-

Masker Fruit Farms, Inc., et al.,
Defendants-Respondents.

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

Ehrlich Gayner LLP, New York (Charles J. Gayner of counsel), for respondents.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered December 2, 2016, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff alleges that she was injured because of the hazardous nature of the roadway at defendants' apple orchard, which sloped downward and was rocky. However, as the rocky nature of the roadway is an open and obvious condition, inherent in the nature of an apple orchard, which plaintiff should have reasonably anticipated, the court correctly dismissed the complaint. Moreover, defendant had posted signs explicitly

warning guests of the hazards. (*Moriello v Stormville Airport Antique Show & Flea Mkt.*, 271 AD2d 664 [2d Dept 2000]; *see also Fox v Central Park Boathouse, LLC* 71 AD3d 598 [1st Dept 2010]).

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

ENTERED: JANUARY 3, 2019

CLERK

Friedman, J.P., Richter, Gesmer, Kern, Moulton, JJ.

7981 Stephen Soloway, Index 159116/16
Plaintiff-Appellant,

-against-

Kane Kessler, PC, et al.,
Defendants-Respondents,

Ebert Lontok, LLC, et al.,
Defendants.

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Russ & Russ P.C., Massapequa (Jay Edmond Russ of counsel), for appellant.

Furman Kornfeld & Brennan, LLP, New York (Rachel Aghassi of counsel), for respondents.

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Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered on or about August 8, 2017, which, to the extent appealed from as limited by the briefs, granted the motion of defendants Kane Kessler PC and Darren S. Berger to dismiss the complaint as against them, unanimously affirmed.

The court correctly found the complaint time-barred under CPLR 202, New York's "borrowing statute," which requires a claim to be timely under both the New York limitations period and that of the jurisdiction where the claim is alleged to have arisen (*Kat House Prods., LLC v Paul, Hastings, Janofsky & Walker, LLP*, 71 AD3d 580 [1st Dept 2010]).

Plaintiff, a New Jersey resident, alleged legal malpractice in connection with defendants' representation of him for numerous real estate transactions, a cause of action which has a three year statute of limitations in New York (CPLR 214[6]), and a six year limitations period in New Jersey (NJ Stat Ann 2A:14-1). The latest that the alleged malpractice could have occurred was February 7, 2013, the date set for closing on the last of the real estate matters. Because plaintiff commenced the action on October 28, 2016, more than three years later, it was correctly dismissed as untimely.

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

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

ENTERED: JANUARY 3, 2019

CLERK

Friedman, J.P., Richter, Gesmer, Kern, Moulton, JJ.

7982 Hector Guerrero, et al., Index 26884/15E
Plaintiffs-Appellants,

-against-

115 Central Park West Corporation,
Defendant-Respondent.

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

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Christopher Simone of counsel), for respondent.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered January 26, 2018, which denied plaintiffs' motion for partial summary judgment on the issue of liability on the Labor Law § 240(1) cause of action, unanimously affirmed, without costs.

Summary judgment was properly denied because triable issues of fact exist as to whether plaintiff Hector Guerrero's accident occurred in the manner in which he alleged (*see e.g. Smigielski v Teachers Ins. & Annuity Assn. of Am.*, 137 AD3d 676 [1st Dept 2016]). The record shows that plaintiff testified that the scaffolding on which he was standing moved from side-to-side, causing his leg to fall into a gap between the scaffolding and the adjacent building. However, plaintiff did not tell his

foreman about his accident on the day that it occurred, and plaintiff's foreman testified that when plaintiff did report the accident the next day, plaintiff said that he was injured while lifting equipment, but did not mention the scaffold.

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

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

ENTERED: JANUARY 3, 2019

CLERK

Friedman, J.P., Richter, Gesmer, Kern, Moulton, JJ.

7983 The People of the State of New York, Ind. 1742/09
Respondent,

-against-

Antonio Villafane,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes of counsel), for respondent.

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Order, Supreme Court, New York County (Charles H. Solomon, J.), entered on or about March 12, 2015, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant were outweighed by the egregious circumstances of the underlying

offense, as well as defendant's prior sex offense against another child.

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

ENTERED: JANUARY 3, 2019

CLERK

Friedman, J.P., Richter, Gesmer, Kern, Moulton, JJ.

7984 Steven Kind, et al., Index 151273/13
Plaintiffs-Appellants,

-against-

1177 Avenue of the Americas
Acquisitions, LLC, et al.,
Defendants-Respondents.

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LaRock & Perez, LLP, New York (Lawrence B. Goodman of counsel), for appellants.

Nicoletti Gonson Spinner Ryan Gulino Pinter LLP, New York (Benjamin Gonson of counsel), for 1177 Avenue of the Americas Acquisitions, LLC, 1177 Avenue of the Americas Holdings, LLC, Silverstein Metro Fund, LLC, Metro Fund, LLC, and Silverstein Properties, Inc., respondents.

Wade Clark Mulcahy LLP, New York (Georgia G. Coats of counsel), for Titanium Scaffold Services, LLC, respondent.

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Order, Supreme Court, New York County (Richard F. Braun, J.), entered September 20, 2017, which denied plaintiffs' motion for partial summary judgment on the issue of liability on the Labor Law § 240(1) claim, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiffs established entitlement to judgment as a matter of law in this action where plaintiff Steven Kind was injured when one end of a scaffold that he and a coworker were using to wash exterior windows on a building dropped out from under him

and the scaffold came to rest at an angle, causing everything in it to crash down on him. The tilting or collapse of the scaffold was prima facie evidence of a violation of Labor Law § 240(1) (*see Jamison v GSL Enters.*, 274 AD2d 356, 360 [1st Dept 2000]; *Aragon v 233 W. 21st St.*, 201 AD2d 353, 354 [1st Dept 1994]), and plaintiffs were not required to demonstrate a specific defect (*see Arnaud v 140 Edgecomb LLC*, 83 AD3d 507 [1st Dept 2011]).

In opposition, defendants failed to raise a triable issue of fact as to whether plaintiff's actions were the sole proximate cause of the accident. The conclusion of the Department of Labor investigator that the scaffold tilted because plaintiff and his coworker caused a safety line to become caught in a spool for the scaffold's suspension cables was speculation unsupported by the evidence (*see Arce v 1133 Bldg. Corp.*, 257 AD2d 515 [1st Dept 1999]). Furthermore, defendant Titanium Scaffold Services, Inc., which contracted to maintain the scaffold, was an agent for

purposes of the Labor Law (*see Medina v MSDW 140 Broadway Prop., L.L.C.*, 13 AD3d 67 [1st Dept 2004]).

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

ENTERED: JANUARY 3, 2019

CLERK

Friedman, J.P., Richter, Gesmer, Moulton, JJ.

7985-
7986 Index 651637/15

Dr. Tsen-Tsen Jin, et al.,
Plaintiffs-Respondents,

-against-

Margarette Lee Ik-Jong Kang, et al.,
Defendants,

AG/Woo Center Street Owner, LLC,
Defendant-Appellant.

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Shirley W. Kornreich, J.), entered on or about September 8, 2016,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated December 12, 2018,

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

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

ENTERED: JANUARY 3, 2019

CLERK

Friedman, J.P., Richter, Gesmer, Kern, Moulton, JJ.

7987-
7988 The People of the State of New York,
Respondent,

-against-

Mark Williams,
Defendant-Appellant.

Ind. 1888/01

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

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

Order, Supreme Court, New York County (Roger S. Hayes, J.), entered on or about December 2, 2016, which denied defendant's motion for resentencing under the 2005 Drug Law Reform Act (L 2005, ch 643), unanimously affirmed.

Although the motion court erred in its reason for denying resentencing, we affirm because, as defense counsel conceded, defendant is ineligible for resentencing at this time since he is not in New York custody (*see* L 2005, ch 643, § 1). It is undisputed that, at all relevant times, defendant was, and remains, in the custody of the State of New Jersey on a murder conviction. The New York sentence at issue runs consecutively to that sentence, and it has not yet commenced.

In light of this determination, we find it unnecessary to address any other issues.

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

ENTERED: JANUARY 3, 2019

CLERK

Friedman, J.P., Richter, Gesmer, Kern, Moulton, JJ.

7989 In re Caroline D.,
Petitioner-Respondent,

-against-

Travis S.,
Respondent-Appellant.

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Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Diana Lawless of counsel), for respondent.

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

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Order of filiation, Family Court, New York County (Linda H. Safron, Support Magistrate), entered on or about August 1, 2017, which adjudged respondent to be the father of the subject child, unanimously reversed, on the law and the facts, without costs, and the matter remanded for further proceedings.

Although no appeal lies as of right from an order of filiation entered in a proceeding where an order of support has been requested, we deem the notice of appeal an application for leave to appeal and grant respondent such leave (*see* Family Ct Act § 1112[a]; *Matter of Harstein v Mike S.*, 107 AD2d 684 [2d Dept 1985]).

The order under review, which resolves "issues of contested paternity involving claims of equitable estoppel," was outside of the scope of the Support Magistrate's statutory authority (Family Ct Act § 439 [a], [b]), as were the August 1, 2017 proceedings resulting in that order and the Support Magistrate's issuance of a determination, before Family Court had considered the estoppel issue, that respondent was precluded from obtaining a DNA test, (*see* Family Ct Act 418; *Matter of Commissioner of Social Servs. v Victor C.*, 91 AD3d 417 [1st Dept 2012]).

Furthermore, the record shows that the Family Court Judge who was to have heard respondent's request for a DNA test and the estoppel issue on May 15, 2017 did not wait for respondent to join his attorney in the courtroom before denying respondent's request. Shortly thereafter, when respondent appeared before the Support Magistrate without his attorney, the Support Magistrate gave respondent technical instructions for counsel about the procedure and substance of the motion to be filed to have the matter heard by a judge. Given this, and because respondent appeared at the August 1, 2017 proceedings prepared to file his motion to vacate the default or re-calendar the case, this was not an ordinary default situation for purposes of CPLR 5511, even though his attorney stood mute at those proceedings (*cf. Matter*

of Lastanzea L [Lakesha L.]., 87 AD3d 1356 [4th Dept 2011], *lv dismissed in part and denied in part* 18 NY3d 854 [2011]; *Matter of Miguel M.-R.B.*, 36 AD3d 613 [2d Dept 2007], *lv dismissed* 8 NY3d 957 [2007]). Under the circumstances presented, the Support Magistrate abused her discretion by denying respondent's request to adjourn the proceedings where respondent needed the adjournment in order to file the motion, and we remand to Family Court for further proceedings.

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

ENTERED: JANUARY 3, 2019

CLERK

Friedman, J.P., Richter, Gesmer, Kern, Moulton, JJ.

7990 Adem Arici, Index 654665/17
Plaintiff-Appellant,

-against-

Andrew Poma,
Defendant-Respondent.

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Law Office of Michael H. Joseph, P.L.L.C., White Plains (Michael H. Joseph of counsel), for appellant.

Woods Lonergan PLLC, New York (Annie E. Causey of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered April 16, 2018, which, to the extent appealed from, granted defendant's motion to dismiss the complaint, unanimously reversed, on the law, with costs, and the motion denied.

Plaintiff seeks to recover the balance of the purchase price that defendant was required to pay under a stock purchase agreement, after accounting for all payments made by defendant and by the corporation itself under a promissory note. Following the corporation's default in payments, plaintiff purportedly assigned the promissory note, and the stock purchase agreement, to an attorney then representing him in criminal and tax proceedings. The attorney brought suit on the promissory note (*Scharf v Idaho Farmers Mkt. Inc.*, 115 AD3d 500 [1st Dept 2014]),

which he then settled. Plaintiff alleges that the assignment of the stock purchase agreement was null and void from the outset due to mutual mistake and the terms of the agreement and that in any event the agreement has been reassigned to him by the attorney.

Defendant contends that plaintiff's claim is barred by the release given by the attorney, as plaintiff's predecessor-in-interest as owner of the stock purchase agreement, in connection with the settlement of his action against the corporation. However, the attorney's limited release does not expressly mention the stock purchase agreement, and defendant failed to establish by documentary evidence that the release encompasses claims relating to the stock purchase agreement (*see Burgos v New York Presbyt. Hosp.*, 155 AD3d 598, 600 [2d Dept 2017]; CPLR 3211[a][1], [5]). Further, accepted as true on this motion to dismiss (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]), the pleadings establish that the stock purchase agreement was not validly assigned to the attorney, and the documentary evidence is insufficient to resolve the factual issues related to the dealings between plaintiff and his former attorney.

Contrary to the motion court's concern that plaintiff is

seeking double recovery, we find, accepting the allegations in the complaint as true, that plaintiff is only seeking to be "made whole" by receiving the balance of the purchase price set in the stock purchase agreement, after deducting amounts already paid by defendant and the corporation, including those received in connection with the *Scharf* litigation (*see Credit Suisse First Boston v Utrecht-America Fin. Co.*, 84 AD3d 579 [1st Dept 2011]). There is nothing in the stock purchase agreement or the note that would prevent plaintiff from suing defendant to recover the remainder of the purchase price due under the stock purchase.

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

ENTERED: JANUARY 3, 2019

CLERK

Friedman, J.P., Richter, Gesmer, Kern, Moulton, JJ.

7991 The People of the State of New York, Ind. 147/13
Respondent,

-against-

Jose Martinez,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, Bronx County (William I. Mogulescu, J.), rendered March 31, 2016, convicting defendant, after a jury trial, of criminal sale of a firearm in the third degree (two counts), criminal possession of a weapon in the third degree (two counts) and unlawfully engaging in the business of dealing in rifles and shotguns, and sentencing him to an aggregate term of six years, unanimously affirmed.

The court providently exercised its discretion in denying defendant's challenge for cause to a prospective juror who disclosed that he was married to a "supervisor" in the Bronx District Attorney's "complaint office." He gave repeated assurances that he could be impartial despite his wife's employment. The prosecutor stated that he did not know who the

panelist's wife was, and it has never been asserted that the wife had ever had any contact with defendant's case. On this limited record, defendant failed to meet his burden of showing implied bias, requiring automatic exclusion (*see People v Furey*, 18 NY3d 284, 287 [2011]). The connection between the panelist and the prosecution was too attenuated to support a finding of implied bias (*see People v Hawkins*, 41 AD3d 732 [2d Dept 2007], *lv denied* 9 NY3d 876 [2007]; *People v Malave*, 271 AD2d 204 [1st Dept 2000], *lv denied* 95 NY2d 836 [2000]; *People v Whittington*, 267 AD2d 486 [2d Dept 1999], *lv denied* 94 NY2d 926 [2000]).

We perceive no basis to reduce defendant's sentence.

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

ENTERED: JANUARY 3, 2019

CLERK

Friedman, J.P., Richter, Gesmer, Kern, Moulton, JJ.

7992 Julie Karen Nacos, Index 306730/10
Plaintiff-Appellant,

-against-

John Christopher Nacos,
Defendant-Respondent.

_____

Borstein Turkel, P.C., New York (Avram S. Turkel of counsel), for appellant.

Warshaw Burstein, LLP, New York (Eric I. Wrubel of counsel), for respondent.

_____

Judgment of divorce, Supreme Court, New York County (Deborah A. Kaplan, J.), entered August 1, 2017, to the extent appealed from as limited by the briefs, adjudging that marital funds spent by defendant husband during the pendency of the action would not be reallocated, that defendant's minority ownership in a business investment, Cabo New LLC, remained his, free and clear of any claims of plaintiff wife, and that plaintiff's debt (promissory notes) to her father were her sole responsibility, awarding defendant a $150,000 credit for counsel fees, and directing defendant to obtain life insurance in the amount of $4,000,000, unanimously modified, on the law and the facts, to vacate the $150,000 credit awarded to defendant for counsel fees, and otherwise affirmed, without costs.

We agree with Supreme Court that plaintiff's conduct during the pendency of this highly contentious divorce action now entering its eighth year of litigation warrants consequences. The record supports the referee's finding that plaintiff was aware that her brother had hired a private investigator to make scurrilous allegations about defendant to his employer, including that he was engaged in tax evasion, money laundering, and corporate espionage, and that these actions may have contributed to the termination of defendant's employment seven months later. For these reasons, we find no abuse of discretion in the trial court's equitable distribution award.

The court properly declined to distribute the marital asset of defendant's minority shares in Cabo New LLC. Plaintiff failed to meet her burden, as the party seeking an interest in the business, of establishing its value (*see Post v Post*, 68 AD3d 741, 743 [2d Dept 2009]). Although defendant retained a court-appointed neutral to appraise the LLC and provided financial information, plaintiff did not obtain a valuation, for reasons that were never fully explained. In the absence of any information by which to assess the value of the business, and in view of the LLC's strict operating agreement, the court was unable to distribute defendant's minority interest (*see Antoian v*

Antoian, 215 AD2d 421 [2d Dept 1995]).

The court properly rejected plaintiff's claim that defendant should be responsible for a debt owed to her father, which she alleged represented loans used to cover her and the children's expenses. Given that the promissory notes submitted as evidence of the loans were not executed until October 2013, shortly after plaintiff's father was served with a trial subpoena seeking documentation of the loans, the referee properly found that they were not valid. Even if the promissory notes were enforceable, the referee properly concluded that plaintiff should be solely responsible for repayment because she was being supported by defendant during the period in question.

We find that defendant was improperly credited $150,000 for his counsel fees expended on litigation related to trial subpoenas served on plaintiff's brother and husband, including an appeal to this Court (*Nacos v Nacos*, 124 AD3d 462 [1st Dept 2015]). The appeal, while unsuccessful, was not completely devoid of merit. Moreover, to the extent the credit appears to be a punitive award of attorneys' fees to the monied spouse against the non-monied spouse, it was improper (*see Silverman v Silverman*, 304 AD2d 41, 48 [1st Dept 2003]).

The court properly denied plaintiff's application for

counsel fees for failure to comply with 22 NYCRR 1400.2 (*see Moyal v Moyal*, 85 AD3d 614, 616 [1st Dept 2011]). Contrary to her contention, plaintiff waived a hearing on the matter by consenting to submit the issue on papers rather than testimony (*see Olsan v Olsan*, 100 AD2d 776, 777 [1st Dept 1984], *appeal dismissed* 63 NY2d 649 [1984]).

The court properly calculated that an insurance policy with a face value of $4,000,000 would be sufficient to cover defendant's maintenance and child support obligations under the judgment of divorce, and properly accounted for any health insurance and unreimbursed medical expenses by directing that the policy be maintained in that amount until the oldest child is emancipated.

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: JANUARY 3, 2019

CLERK

Friedman, J.P., Richter, Gesmer, Kern, Moulton, JJ.

7993 The People of the State of New York, Ind. 876/18
Respondent,

-against-

Robert Jones,
Defendant-Appellant.

_____

Christina Swarns, Office of the Appellate Defender, New York (David Billingsley of counsel), for appellant.

_____

Judgment, Supreme Court, Bronx County (Jeanette Rodriguez-Morick, J.), rendered September 17, 2015, unanimously affirmed.

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

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

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

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

ENTERED: JANUARY 3, 2019

CLERK

Friedman, J.P., Richter, Gesmer, Kern, Moulton, JJ.

7994- Index 656611/17
7995 Second Avenue Group LLC,
Plaintiff-Appellant,

-against-

Capdell LLC,
Defendant-Respondent.

_____

The Price Law Firm, LLC, New York (Joshua Price of counsel), for appellant.

Westerman Ball Ederer Miller Zucker & Sharfstein, LLP, Uniondale (Philip J. Campisi, Jr., of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Gerald Lebovitz, J.), entered June 26, 2018, which denied plaintiff's order to show cause seeking a declaratory judgment that defendant seller was in breach of a contract to sell real property; granted defendant's cross motion to dismiss the action against it; vacated plaintiff's notice of pendency; and directed that plaintiff's down payment of $190,000 held in escrow be released to defendant, unanimously affirmed, without costs.

Plaintiff purchaser failed to demonstrate, as a matter of law, that it was entitled to a return of its down payment (*see Donerail Corp. N.V. v 405 Park LLC*, 100 AD3d 131, 137 [1st Dept 2012]; *see also Martocci v Schneider*, 119 AD3d 746, 748 [2d Dept

2014]). Plaintiff failed to establish that defendant seller was in breach of the contract since defendant submitted evidence that the subject premises were insured by a reputable title insurance company pursuant to the contract of sale and that the plain language of the contract did not obligate defendant to cure violations, post-contract, from the NYC Department of Buildings. Although the March 30, 2017 contract of sale did not contain a time is of the essence provision, the parties entered into a stipulation to extend the closing date to November 1, 2017 at the office of defendant's counsel and provided that time was of the essence (*see Miller v Almquist*, 241 AD2d 181, 185 [1st Dept 1998]). The court denied plaintiff's motion to stay the closing date on October 30, 2017. Defendant sent plaintiff documents for the closing, again declared it was ready, willing and able to close, and provided the time and location to close. Plaintiff defaulted, as it failed to appear at the closing (*see* Donerail Corp., 100 AD3d at 137-138; *115-117 Nassau St., LLC v Nassau Beekman, LLC*, 74 AD3d 537, 537 [1st Dept 2010]).

As there are no issues of fact whether defendant was ready, willing and able to perform at closing (*see Jian Yun Guo v Azzab*, 162 AD3d 754, 754-755 [2d Dept 2018]), and in light of plaintiff's failure to show a lawful excuse, the court properly

granted defendant summary judgment, vacated plaintiff's notice of pendency, and awarded defendant the down payment as liquidated damages (*see Donerail*, 100 AD3d at 138). 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: JANUARY 3, 2019

CLERK

Friedman, J.P., Richter, Gesmer, Kern, Moulton, JJ.

7997 The People of the State of New York, Ind. 1823/16
Respondent,

-against-

James Power,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered December 2, 2016, convicting defendant, upon his plea of guilty, of burglary in the third degree, and sentencing him, as a second felony offender, to a term of two to four years, unanimously affirmed.

The record does not establish that defendant made an enforceable waiver of the right to appeal. However, defendant failed to preserve his claim that the court conducted an insufficient inquiry as to whether he violated the terms of his plea agreement (*see e.g. People v Stephens*, 108 AD3d 414 [1st Dept 2013], *lv denied* 21 NY3d 1077 [2013]), and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. Due process was satisfied, because

the sentencing court conducted an adequate inquiry and provided defendant with a reasonable opportunity to present his explanation before finding that he had willfully violated the plea agreement and forfeited his opportunity for a disposition involving dismissal of the charges (*see People v Fiammegta*, 14 NY3d 90, 98 [2010]).

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

ENTERED: JANUARY 3, 2019

CLERK

Friedman, J.P., Richter, Gesmer, Kern, Moulton, JJ.

7998 The People of the State of New York, Ind. 2800/16
Respondent,

-against-

Kevin R. Almonte,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Abraham Clott, J.), rendered October 19, 2016,

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

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

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

ENTERED: JANUARY 3, 2019

CLERK

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

Friedman, J.P., Richter, Gesmer, Kern, Moulton, JJ.

7999 The People of the State of New York, Ind. 4273/14
Respondent,

-against-

Joselyn Cabrera,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Abraham Clott, J.), rendered July 6, 2016,

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

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

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

ENTERED: JANUARY 3, 2019

CLERK

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

Friedman, J.P., Richter, Gesmer, Kern, Moulton, JJ.

8000 The People of the State of New York, Ind. 4166/15
Respondent,

-against-

Craig D. Higgins,
Defendant-Appellant.

_____

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

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

_____

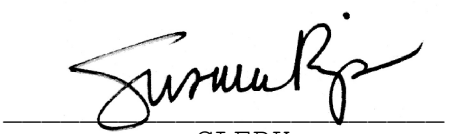
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered March 9, 2016,

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

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

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

ENTERED: JANUARY 3, 2019



CLERK

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

Friedman, J.P., Richter, Gesmer, Kern, Moulton, JJ.

8001N Doris Garcia, Index 158778/15
Plaintiff-Appellant,

-against-

2728 Broadway Housing Development Fund Corp., et al.,
Defendants-Respondents.

_____

Thomas S. Fleishell & Associates, P.C., New York (Thomas S. Fleishell of counsel), for appellant.

Andrea Shapiro, PLLC, New York (Andrea Shapiro of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered June 15, 2017, which, insofar as appealed from, denied plaintiff's cross motion for a protective order with respect to her 2014 and 2015 tax returns, and to compel defendants to appear for a deposition and produce unredacted copies of their emails, unanimously affirmed, with costs.

The court did not improvidently exercise its discretion in directing plaintiff to produce the 2014 and 2015 tax returns in order to show whether or not she met the income eligibility restriction for transfer of her father's interest in the cooperative corporation to her (*see generally Brooklyn Union Gas Co. v American Home Assur. Co.*, 23 AD3d 190 [1st Dept 2005]).

Article X of the certificate of incorporation and § 5.05(b)(i) of the proprietary lease restricted transfers to persons who do not meet the income eligibility restriction, and article V, § 4 of the bylaws adopted the provisions of the certificate of incorporation. Thus, even if plaintiff was viewed as an initial shareholder, the transfer of her father's interest from his estate to her required a showing that she had the requisite income (*see Sachs v Adeli*, 26 AD3d 52, 56 [1st Dept 2005]; *compare Williams v New York City Hous. Auth.*, 22 AD3d 315, 316 [1st Dept 2005]).

Plaintiff contends that initial shareholders were not required to demonstrate income eligibility in order to purchase shares, so the transfer of her father's shares to her had no such requirement. She cites to various documents concerning the cooperative which stated that "new" shareholders were required to demonstrate income eligibility, and she asserts that all of the offering documents must be read together (*see Sassi-Lehner v Charlton Tenants Corp*, 55 AD3d 74, 78-79 [1st Dept 2008]). However, the provisions cited by plaintiff that applied to new shareholders did not expressly negate the provisions of the certificate of incorporation and proprietary lease that made no distinction between initial shareholders and new shareholders.

The court did not improvidently exercise its discretion in declining to order depositions of the individual defendants since they asserted that they were ready and willing to be deposed, but plaintiff's then counsel was unavailable. Furthermore, plaintiff failed to show why she required unredacted copies of the emails or that relevant emails were withheld by defendants.

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

ENTERED: JANUARY 3, 2019

CLERK

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

8002 The People of the State of New York, Ind. 3871/13
Respondent,

-against-

Andres Lopez,
Defendant-Appellant.

_____

Christina Swarns, Office of The Appellate Defender, New York (Daniel R. Lambright of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (R. Jeannie Campbell-Urban of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered May 20, 2014, convicting defendant, after a jury trial, of forcible touching and sexual abuse in the third degree, and sentencing him to an aggregate term of one year, unanimously affirmed.

The court properly denied defendant's request for a missing witness charge as to the victim, who had relocated to another state and failed to reveal her new address or otherwise cooperate in any way with the prosecution. The People established that, notwithstanding her status as a victim, she could not be deemed under the People's control for missing witness purposes, and was likewise unavailable (*see People v Gonzalez*, 68 NY2d 424, 427-429 [1986]; *People v Smith*, 279 AD2d 259 [1st Dept 2001], *lv denied*

96 NY2d 835 [2001]; *see also People v Gardine*, 293 AD2d 287 [1st Dept 2002], *lv denied* 98 NY2d 651 [2002]).

In any event, regardless of whether the court should have granted a missing witness charge regarding the uncooperative victim, any error was harmless in light of the overwhelming evidence of defendant's guilt (*see People v Crimmins*, 36 NY2d 230 [1975]), including police observations of defendant's conduct leading up to and during the crime, and an officer's cell phone video. In particular, there was no reasonable possibility that defendant's unmistakable sexual contact with a stranger on the subway was either consensual or inadvertent. Moreover, the court permitted defense counsel to comment on the victim's absence.

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

ENTERED: JANUARY 3, 2019

CLERK

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

8003 Fitzmore H. Harris, Index 17097/06
Plaintiff-Appellant,

-against-

Mitchell N. Kay, et al.,
Defendants-Respondents.

_____

H. Fitzmore Harris, P.C., Bronx (Fitzmore H. Harris of counsel), for appellant.

Smith Carroad Levy Wan & Parikh, Commack (Riley Mendoza of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Joseph E. Capella, J.), entered February 3, 2017, which granted defendants' motion pursuant to CPLR 3126(3) to strike the complaint, unanimously affirmed, without costs.

The court did not abuse its discretion in striking the complaint, given plaintiff's repeated, willful and contumacious refusals to provide discovery and to comply with court's orders over an approximately eight-year period (*see McHugh v City of New York*, 150 AD3d 561, 562 [1st Dept 2017]; *Fish & Richardson, P.C. v Schindler*, 75 AD3d 219, 221-222 [1st Dept 2010]; *see generally Merrill Lynch, Pierce, Fenner & Smith, Inc. v Global Strat Inc.*, 22 NY3d 877, 880 [2013]). Even if plaintiff's response to defendants' first set of interrogatories could be considered

"timely" pursuant to the court's August 28, 2013 order, despite that the interrogatories were served more than six years prior, the response certainly does not "evince[] a good-faith effort to address the requests meaningfully" (*Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]).

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: JANUARY 3, 2019

CLERK

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

8004-
8005 In re Messiah G.,

A Dependent Child Under Eighteen Years of Age, etc.,

Giselle F.,
Respondent-Appellant,

Catholic Guardian Services,
Petitioner-Respondent.

_____

Geoffrey P. Berman, Larchmont, for appellant.

Magovern & Sclafani, Mineola (Joanna M. Roberson of counsel), for respondent.

Dawne A. Mitchell, The Legal Aid Society, New York (Riti P. Singh of counsel), attorney for the child.

_____

Appeal from order, Family Court, New York County (Adetokunbo O. Fasanya, J.), entered on or about July 14, 2017, which, upon respondent mother's default at the dispositional hearing, found that respondent permanently neglected the subject child, and terminated her parental rights to the child and transferred custody of the child to petitioner agency for purposes of adoption, unanimously dismissed, without costs. Order, same court and Judge, entered on or about September 29, 2017, which denied respondent's motion to vacate her default, unanimously affirmed, without costs.

To the extent respondent appeals from the permanent neglect finding set forth in the dispositional order, the appeal must be dismissed as untimely (*see* Family Court Act § 1113; *Matter of Rashi-Malik Olatunji G. [Quashi G.]*, 121 AD3d 540 [1st Dept 2014], *lv denied* 24 NY3d 913 [2015]).

In support of her motion to vacate her default, respondent failed to demonstrate a reasonable excuse for the default and a potentially meritorious defense (*see* CPLR 5015[a][1]; *Matter of Arianna-Samantha Lady Melissa S. [Carissa S.]*, 134 AD3d 582, 583 [1st Dept 2015], *lv dismissed in part, denied in part* 27 NY3d 952 [2016]). Her proffered excuses - that she was unaware of the hearing date and that she was overcome with grief at the death of her grandmother - are supported only by the uncorroborated affirmation of counsel without personal knowledge of the facts (*see Matter of Lenea'jah F. [Makeba T.S.]*, 105 AD3d 514 [1st Dept 2013]; *Matter of Chelsea Antoinette A. [Anna S.]*, 88 AD3d 627 [1st Dept 2011]). Respondent's claim to have been unaware of the hearing date is also belied by the record (*see Matter of Christina McK. v Kyle S.*, 154 AD3d 548 [1st Dept 2017]). If she misplaced the paper on which she had written the date, she should have reached out to her attorney or to the agency for assistance (*see Matter of Jenny F. v Felix C.*, 121 AD3d 413 [1st Dept

2014]). Respondent also failed to explain how the death of her grandmother nearly one month earlier prevented her from attending the hearing - especially since she claims she went to court two days before the hearing, on the date of her grandmother's memorial service.

In any event, clear and convincing evidence established that respondent permanently neglected the child despite the agency's diligent efforts (*see* Social Services Law § 384-b[3][g][i], [7][a], [f]; *Matter of Star Leslie W.*, 63 NY2d 136 [1984]). The agency scheduled regular visitation and planning meetings, made appropriate referrals, and repeatedly explained the importance of compliance with the service plan (*see Matter of Christian D. [Marian R.]*, 157 AD3d 599 [1st Dept 2018], *lv denied* 31 NY3d 904 [2018]; *Matter of Essence T.W. [Destinee R.W.]*, 139 AD3d 403, 404 [1st Dept 2016]). However, respondent's attendance at visits was inconsistent (*see Matter of Lihanna A. [Marcella H.]*, 140 AD3d 404, 404 [1st Dept 2016], *lv denied* 28 NY3d 904 [2016]), she failed to take advantage of the recommended services (*see Matter of Micah Zyair F.W. [Tiffany L.]*, 110 AD3d 579, 579 [1st Dept 2013]), and she repeatedly refused to acknowledge the need for substance abuse or mental health treatment, demonstrating a lack of insight into the conditions that led to the child's removal

(*see Matter of Nathaniel T.*, 67 NY2d 838 [1986]). The Family Court also properly drew a negative inference from respondent's failure to testify on her own behalf (*see Matter of Alford Isaiah B. [Alford B.]*, 107 AD3d 562, 562 [1st Dept 2013]).

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

ENTERED: JANUARY 3, 2019

CLERK

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

8006-
8006A The People of the State of New York, Respondent,

SCI 3839/15
782/16

-against-

Steven Nunez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (R. Jeannie Campbell-Urban of counsel), for respondent.

_____

Judgments, Supreme Court, New York County (Larry R.C. Stephen, J.), rendered February 23, 2016, convicting defendant, upon his pleas of guilty, of burglary in the third degree and attempted burglary in the third degree, and sentencing him to concurrent terms of one year, unanimously affirmed.

Regardless of whether defendant validly waived his right to appeal, we find that the court providently exercised its discretion in denying youthful offender treatment (*see People v Drayton*, 39 NY2d 580 [1976]), in light of defendant's violation of the terms of his original plea agreement. Defendant both failed to complete a treatment program and committed a new felony. Moreover, the court extended leniency to defendant

despite his failure to comply with the agreement by sentencing him to concurrent terms.

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

ENTERED: JANUARY 3, 2019

CLERK

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

8007- Ind. 492/11
8008- 493/11
8009 The People of the State of New York, 2592/11
Respondent,

-against-

Albert Anderson,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, J.), rendered February 21, 2013, unanimously affirmed.

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

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

service of a copy of this order.

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

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

ENTERED: JANUARY 3, 2019

CLERK

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

8011 In re Pride Technologies of Ohio, LLC, Petitioner-Appellant, -against- Chris Philpott, Respondent-Respondent. Index 152363/17

Davis & Gilbert LLP, New York (Neal H. Klausner of counsel), for appellant.

Finney Law Firm, Cincinnati OH (Stephen E. Imm of the bar of the State of Ohio, admitted pro hac vice, of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Barbara Jaffe, J.), entered February 15, 2018, inter alia, denying the petition to vacate an arbitration award and confirming the award, unanimously affirmed, without costs.

The arbitrator did not rewrite the parties' profit sharing agreement, nor was it irrational for her to determine that such agreement provides not only that its effective date is February 7, 2007, but also that respondent's profit interest will be credited or debited during "each full calendar year of employment," which, consistent with that provision, includes years preceding 2008 (*see e.g. Azrielant v Azrielant*, 301 AD2d 269, 275 [1st Dept 2002], *lv denied* 99 NY2d 509 [2003]; *compare*

Matter of Riverbay Corp. [Local 32-E, S.E.I.V., AFL-CIO], 91 AD2d 509, 510 [1st Dept 1982]).

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

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

ENTERED: JANUARY 3, 2019

CLERK

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

8012 The People of the State of New York, Ind. 794N/16
Respondent,

-against-

Luther Winfrey,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Jonathan R. McCoy of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered October 13, 2016, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing him to a term of three years, unanimously affirmed.

Defendant made a valid waiver of his right to appeal. The oral colloquy, viewed in conjunction with the written waiver, which defendant signed after an opportunity to confer with counsel, establishes that he made the waiver knowingly, intelligently, and voluntarily (*see People v Bryant*, 28 NY3d 1094, 1096 [2016]).

Defendant's waiver of his right to appeal forecloses review of his excessive sentence claim. Defendant contends that the

waiver does not apply because he is challenging the adequacy of the court's inquiry into the violation of his plea agreement (*see People v Outley*, 80 NY2d 702, 713 [1993]). However, defendant makes clear that he is not seeking a remand for an *Outley* hearing, and is only raising the absence of such a hearing in the context of an excessive sentence claim. In any event, his claim that he was denied the opportunity for an *Outley* hearing regarding his postplea arrest is without merit, because he declined the court's offer to conduct such a hearing and agreed to the 6-month sentence enhancement (*see People v Pollard*, 132 AD3d 554 [1st Dept 2015], *lv denied* 26 NY3d 1111 [2016]).

In any event, regardless of whether defendant made a valid waiver of the right to appeal, and regardless of whether the waiver forecloses defendant's particular excessive sentence claim, we perceive no basis for reducing the enhanced sentence.

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

ENTERED: JANUARY 3, 2019

CLERK

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

8013 In re Jarvis L.,
Petitioner-Respondent,

-against-

Jasmine L.L.,
Respondent-Appellant.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

Steve Cohen, New York, for respondent.

Kenneth M. Tuccillo, Hastings on Hudson, attorney for the child.

_____

Order, Family Court, Bronx County (Dakota Ramseur, J.), entered on or about June 26, 2017, which, to the extent appealed from as limited by the briefs, granted sole legal custody of the subject child to petitioner father, unanimously affirmed, without costs.

Family Court's determination that it is in the child's best interests to award sole legal and primary physical custody to petitioner has a sound and substantial basis in the record (*see Matter of David H. v Khalima H.*, 111 AD3d 544 [1st Dept 2013], *lv dismissed* 22 NY3d 1149 [2014]). The evidence demonstrates that the child thrives in the stable environment of petitioner's home and that petitioner is better equipped than respondent mother to address the child's educational, emotional, and material needs.

For the first seven years of the child's life, while respondent was the child's primary caretaker, she had a difficult time providing a stable home environment for him, as evidenced by a series of relocations. Moreover, the child missed a substantial number of days from school, repeated the first grade, displayed behavioral problems, and changed school districts three times. During the year that he was in petitioner's care, the child thrived academically, participated in extracurricular activities, and exhibited improved behavior.

The record shows that petitioner was more willing than respondent to facilitate the noncustodial parent's relationship with the child (*see Matter of Damien P.C. v Jennifer H.S.*, 57 AD3d 295 [1st Dept 2008], *lv denied* 12 NY3d 710 [2009]). While the child was in respondent's care, petitioner was unable to communicate with him daily. While in petitioner's care, the child was able to communicate with respondent, and petitioner arranged the child's travel to ensure that respondent had visitation with him.

The court also gave proper weight to the child's expressed preference to reside with petitioner (*see Melissa C.D. v Rene I.D.*, 117 AD3d 407, 408 [1st Dept 2014]).

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

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

ENTERED: JANUARY 3, 2019

CLERK

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

8017 Lorraine Landau, Index 154347/12
Plaintiff-Respondent,

-against-

Balbona Restaurant Corp. doing business as Sam's Place, et al.,
Defendants-Appellants.

_____

Lewis Brisbois Bisgaard & Smith, LLP, New York (James M. Strauss of counsel), for appellants.

Sullivan Papain Block McGrath & Cannavo, P.C., New York (Stephen C. Glasser of counsel), for respondent.

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Judgment, Supreme Court, New York County (Frank P. Nervo, J.), entered April 26, 2018, upon a jury verdict, awarding plaintiff $529,964 plus costs, unanimously reversed, on the law, without costs, the judgment vacated, and the matter remanded for a new trial.

Plaintiff fell and injured her ankle while descending a staircase at defendants' restaurant. Plaintiff testified that she fell because she did not see the final step, which was of a different color, size, and material from the other steps in the staircase. Contrary to defendants' contention that a prior summary judgment order limited plaintiff's claim to optical illusion, the order only explicitly found that the Building Code

was inapplicable to the staircase.

However, defendants' argument that there was insufficient evidence adduced at trial to charge the jury on theories that either riser heights or the handrail were a proximate cause of plaintiff's fall, has merit (*see Raghu v New York City Hous. Auth.*, 72 AD3d 480, 482 [1st Dept 2010]; *Ridolfi v Williams*, 49 AD3d 295 [1st Dept 2008]). Although plaintiff testified that it was her usual habit to hold a handrail while descending stairs, her testimony was equivocal on whether she held the handrail that day. Further, she testified that she did not attempt to reach for a handrail at the time of her fall, because the accident happened too fast. Nor did she provide any testimony connecting the handrail to her optical illusion theory. Thus, plaintiff's expert should not have been allowed to testify that the handrail was a contributing cause of plaintiff's fall, and the jury should not have been charged on the question whether the handrail was too short. Moreover, while the final step's size may have helped contribute to plaintiff's claim of optical illusion, the riser heights in the staircase should not have been charged as an independent theory of liability.

The trial court's response to a jury note asking whether the building was "up to code" was incorrect in light of the prior

summary judgment order. Rather than responding that there was no evidence that the code was either violated or complied with, the jury should have been informed that the building code was not applicable to the staircase.

In view of the forgoing, coupled with the fact that the jury was instructed to return a general verdict only, a retrial is warranted (*see Davis v Caldwell*, 54 NY2d 176, 178 [1981]; *Hernandez v Columbus Ctr., LLC*, 50 AD3d 597, 598 [1st Dept 2008]). While sufficient evidence was adduced to support plaintiff's theory of optical illusion (*see Saretsky v 85 Kenmare Realty Corp.*, 85 AD3d 89 [1st Dept 2011]), it cannot be said that the verdict was founded on that theory, as opposed to the incorrectly charged theories.

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

ENTERED: JANUARY 3, 2019

CLERK

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

8019 The People of the State of New York, Ind. 4991/13
Respondent,

-against-

Carl Moller,
Defendant-Appellant.

_____

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

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

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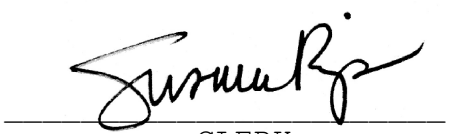
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered October 1, 2014,

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

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

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

ENTERED: JANUARY 3, 2019



CLERK

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

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

8020 Corrine Concotilli, doing business as Black Arrow Press,
Plaintiff-Appellant,

-against-

Scot Brown,
Defendant-Respondent.

Index 155423/16

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Law Office of Richard A. Altman, New York (Richard A. Altman of counsel), for appellant.

Bruno, Gerbino & Soriano, LLP, Melville (Nathan M. Shapiro of counsel), for respondent.

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Order, Supreme Court, New York County (Erika M. Edwards, J.), entered July 11, 2017, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

The court correctly found that it lacked personal jurisdiction over defendant pursuant to CPLR 302(a)(1). Plaintiff failed to provide any evidence that defendant purposefully transacts business within the state, as required by statute, or that there is a connection between defendant's transactions and the alleged defamatory statement at issue (*SPCA of Upstate NY, Inc. v American Working Collie*, 18 NY3d 400, 404 [2012]; *Copp v Ramirez*, 62 AD3d 23, 28 [1st Dept 2009], *lv denied* 12 NY3d 711 [2009]). Defendant is an Arizona resident who does not own

property, live, or conduct business in New York, other than his work as managing member of an Arizona LLC, which sells holistic supplies over the internet (*see Minella v Restifo*, 124 AD3d 486 [1st Dept 2015]). The alleged defamatory statement was posted on the Arizona LLC website, and plaintiff has not produced evidence to connect it to defendant, or otherwise meet the requirements of CPLR 302(a)(1).

Having failed to submit more that bare allegations in opposition to defendant's motion, we reject plaintiff's request for discovery on the jurisdictional issue (*Minella*, 124 AD3d at 487).

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

ENTERED: JANUARY 3, 2019

CLERK

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

8022 In re Jeannine Shanley Argondizza, Deceased. File 3991/12

- - - - -

Leo Shanley, et al., Petitioners-Appellants,

-against-

Christopher Argondizza, Respondent-Respondent.

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Joseph A. Ledwidge, P.C., Jamaica (Joseph A. Ledwidge of counsel), for appellants.

Goldfarb Abrandt Salzman & Kutzin LLP, New York (Michael S. Kutzin of counsel), for respondent.

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Order, Surrogate's Court, New York County (Rita S. Mella, S.), entered October 13, 2017, which, to the extent appealed from, denied petitioners' cross motion for summary judgment on the petition for turnover of assets, and granted respondent's motion for summary judgment dismissing the petition, unanimously affirmed, without costs.

The court properly concluded that respondent overcame the presumption of self-dealing (*see Estate of Ferrara*, 7 NY3d 244, 254 [2006]; *Matter of Maikowski*, 24 AD3d 258, 260 [1st Dept 2005]) based upon petitioners' testimony that they knew about the power of attorney and understood that it would be used to

transfer decedent's half-interest in the apartment to respondent in order for her to obtain Medicaid benefits. Additionally, decedent's treating physician testified that she told him about the transfer and indicated her approval. Moreover, respondent did not act in a surreptitious manner since he advised petitioners in advance that he was having a power of attorney prepared, and Leo Shanley was present when it was executed by decedent. Agnes Shanley typed the letter to the cooperative, which was signed by respondent and decedent, requesting the transfer of decedent's half-interest in the apartment to respondent.

Petitioners also failed to provide evidence that decedent intended to grant respondent only a life estate in the apartment, and her doctor testified that she believed the apartment belonged to respondent.

Petitioners contend that decedent suffered from dementia, which invalidated the power of attorney. However, as noted, Leo was present when it was signed. Moreover, both her doctor and her brother, also a doctor, testified that she was lucid and aware until the last days of her life, and she told her physician about retitling her interest in the apartment. As the court noted, the medical records provided by petitioners do not reflect

a diagnosis of mental incapacity by a treating medical professional.

Based on the foregoing, petitioners' cross motion for leave to amend the petition to add a claim for partition becomes moot.

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: JANUARY 3, 2019

CLERK

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

8023 The People of the State of New York, Ind. 4179/14
Respondent,

-against-

Justin Gonzalez,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (James M. Burke, J.), rendered June 22, 2016, as amended November 10, 2016, convicting defendant, upon his plea of guilty, of attempted robbery in the second degree, and sentencing him to a term of two years, unanimously affirmed.

The court providently exercised its discretion in denying defendant's request for youthful offender treatment (*see People v Drayton*, 39 NY2d 580 [1976]) in light of, among other things, the seriousness of the offense and defendant's termination from a

treatment program that he was required to complete as a condition of his original plea agreement.

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

ENTERED: JANUARY 3, 2019

CLERK

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

8024 The People of the State of New York, Ind. 4722/15
Respondent,

-against-

Dever Campbell,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Julia P. Cohen 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 (Michael Obus, J.), rendered April 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 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: JANUARY 3, 2019


CLERK

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

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

8025N Steven Grant, Index 20112/14E
Plaintiff-Appellant,

-against-

Arcodio A. Almonte,
Defendant-Respondent.

_____

Parker Waichman LLP, Port Washington (Jay L.T. Breakstone of counsel), for appellant.

Marjorie E. Bornes, Brooklyn, for respondent.

_____

Order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered December 12, 2017, which denied plaintiff's motion to restore the action to the trial calendar, unanimously reversed, on the law, without costs, and the motion granted.

The requisite formality necessary to accord an oral agreement binding effect as an "open court" stipulation under CPLR 2104 was not present when, following a pre-trial conference at which an unidentified per diem attorney appeared for plaintiff, the matter was marked "settled" in the court's records. There was no indication of the terms of the settlement, and the agreement was never further recorded, memorialized, or filed with the County Clerk (*see Velazquez v St. Barnabas Hosp.*,

13 NY3d 894 [2009]; *Andre-Long v Verizon 31 Ad3d 353, 354 [2006]; compare Harrison v NYU Downtown Hosp.,* 117 AD3d 479 [1st Dept 2014]).

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

ENTERED: JANUARY 3, 2019

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, Jr., J.P.
Troy K. Webber
Ellen Gesmer
Anil C. Singh
Peter H. Moulton, JJ.

6631-
6632
Index 656007/16

_____x

Avilon Automotive Group, et al.,
Plaintiffs-Appellants,

-against-

Sergey Leontiev, et al.,
Defendants-Respondents,

Leonid Leontiev, et al.,
Defendants.

_____x

Plaintiff appeals from the order of the Supreme Court, New York County (Barry R. Ostrager, J.), entered October 5, 2017, which dismissed the action in its entirety with prejudice.

Debevoise & Plimpton LLP, New York (Sean Hecker, William H. Taft V, Nathan S. Richards and Megan Corrarino of counsel), for appellants.

Gibson, Dunn & Crutcher LLP, New York (Robert L. Weigel, Alison L. Wollin and Marshall R. King of counsel), for Sergey Leontiev, respondent.

Kobre & Kim LLP, New York (Andrew C. Lourie, Lindsey Weiss Harris and Carrie A. Tendler of counsel), for Wonderworks Investments Limited, respondent.

MOULTON, J.

Plaintiffs Avilon Automotive Group (Avilon), a Russian Corporation, and Karen Avagumyan (Avagumyan), a Russian national and the son of one of Avilon's principals, bring this action to recover loans to companies allegedly controlled, and looted, by defendant Sergey Leontiev (Leontiev). The remaining defendants are alleged to have assisted Leontiev in a scheme to fraudulently convey the loan proceeds to accounts controlled by Leontiev in the Cook Islands.

Supreme Court dismissed the action based on res judicata, finding that a federal action brought by Leontiev in the Southern District of New York (*Leontiev v Varshavsky*, US Dist Ct, SD NY, 16 Civ 03595, Rakoff, J., 2016) (the federal action) precludes the claims brought herein. We now reverse and remand for the reasons stated below.

Background

The amended complaint herein avers that in 2008 Avilon lent approximately $19.9 million to nonparty Ambika Investments Limited (Ambika), a Cyprus entity with a registered address in that country. In 2011 Avilon made another loan to Ambika of approximately $6.625 million.

Avagumyan is the son of Kamo Avagumyan, a 45% owner of Avilon. The amended complaint alleges that between August 2014

and March 2015, nonparty ZAO Financial Group Life (FG Life), a Russian entity with a registered address in Moscow, issued approximately $21.2 worth of promissory notes to Avagumyan. In 2015 nonparty Venop Trading Limited (Venop), a Cyprus entity with a registered address in that country, issued approximately $4.75 million in promissory notes to Avagumyan. There was some discovery in the federal action that indicated that Avagyuman was merely the nominal owner of the notes from FG Life and Venop, and that his father actually put up the money and received the interest associated with the notes.

Plaintiffs allege that Ambika, FG Life and Venop are shell companies that are owned and controlled by Leontiev and nonparty Alexander Zheleznyak. Leontiev did not sign any of the loan documents discussed above, and is not a named party in them, but plaintiffs herein assert he is responsible for the loans because he misappropriated and currently controls the loan proceeds.

In August 2015 Probusiness Bank, a Russian commercial bank and allegedly the pillar of Leontiev and Zheleznyak's financial empire, came under the scrutiny of the Russian Central Bank, and eventually was placed in receivership. These developments caused Avilon's president, nonparty Alexander Varshavsky, to seek assurances from Leontiev on behalf of the creditors that the notes would be repaid. At meetings in Moscow and London in

August 2015 Leontiev allegedly promised to repay the loans. In September 2015 Leontiev did pay back approximately $17 million of the money allegedly owed Avilon, but plaintiffs allege that as of August 2016 there remained outstanding balances owed to Avilon of approximately $29.6 million and owed to Avagumyan of approximately $28 million.

Plaintiffs allege that instead of repaying these outstanding balances, Leontiev, with the assistance of the other defendants, transferred assets to defendant Legion Trust, a Cook Islands Trust, allegedly to place these assets out of the reach of plaintiffs and other creditors. To date Leontiev has not made any further repayments to plaintiffs. In the federal action, and herein, Leontiev has maintained that he is not personally responsible on the notes.

In May 2016 Leontiev sued Varshavsky, and only Varshavsky, in the Southern District of New York. A summary of the federal action is necessary in order to determine its preclusive effect on the instant litigation.

Leontiev contends that he brought the federal action in response to Varshavsky's relentless demands that he personally repay the loans. To that end, in his amended complaint in the federal action Leontiev sought a declaration that "he owes no debt to Mr. Varshavsky, or to anyone acting in concert with him,

relating to the Alleged Loans." Leontiev also sought an injunction preventing Varshavsky "or anyone acting in concert or participation with [him], from taking any further steps to enforce these debts against Mr. Leontiev in his personal capacity, including, but not limited to, . . . pursuing litigation." While the sole named defendant was Varshavsky, Leontiev's complaint in the federal action attached appendices listing the actual creditors to various notes, including Avilon and Avagumyan. As the amended complaint acknowledged, the loans listed in the appendices allegedly concerned "obligations owed by various non-parties - none of whom are Mr. Leontiev - to various other non-parties - none of whom are Mr. Varshavsky." Federal jurisdiction was based on the parties' diversity. Leontiev and Varshavsky agreed that the former is a Russian national who resides in New York[1] and that the latter is a naturalized US citizen who resides in New Jersey.

In his answer in the federal action, Varshavsky averred that his status as Avilon's president gave him authority to negotiate "on behalf of" Avilon for payment of the loans. It is clear that Varshavsky was not himself a party to the notes and loan

[1]In their proposed second amended complaint herein plaintiffs have alleged, upon information and belief, that Leontiev subsequently acquired Cypriot citizenship.

documents. However, during the course of the federal litigation Varshavsky did assert, or at least did not deny, that he somehow had, or could obtain, standing to enforce the notes. For example, his answer denied Leontiev's allegation that "Leontiev owns Mr. Varshavsky nothing." Additionally, while he did not assert any counterclaims against Leontiev, Varshavsky asked, as a request for relief in his answer, that the Court determine "on the merits that [Leontiev] is personally liable for the debts in question and on that basis deny his claim for declaratory judgment."

Judge Rakoff, who presided over the federal action, noted at several junctures that Varshavsky appeared to argue that he had standing to collect on the notes. Judge Rakoff denied Leontiev's motion on the pleadings, noting that "the pleadings do not foreclose the possibility that Varshavsky can enforce the loans in his personal capacity, such as through assignments" (*Leontiev v Varshavsky*, US Dist Ct, SD NY, 16 Civ 03595, at 18, Rakoff, J., Dec. 4, 2016). Accordingly, Judge Rakoff allowed Varshavsky extensive discovery concerning Leontiev's alleged alter ego liability for the debts of Ambika, FG Life and Venop, and Leontiev's alleged use of various shell companies to safely funnel the loan proceeds to the Cook Islands. Defendants herein argue that this discovery was wholly unnecessary as Leontiev, at

oral argument on his motion for judgment on the pleadings, limited his prayer for declaratory relief to a declaration that he was not indebted to Varshavsky in the latter's personal capacity.[2]

Leontiev sought discovery concerning Varshavsky's authority to collect on the loans. Kamo Avagumyan (as noted, Avagumyan's father) was deposed by Leontiev's lawyers and testified that he verbally authorized Varshavsky to collect on the promissory notes nominally owned by his son. However, at his own deposition, Varshavsky admitted that he had no assignments from the actual creditors on the notes, and that he personally was not owed any money by Leontiev. Leontiev thereupon moved for summary judgment, citing Varshavsky's admission at his deposition. In his motion papers Leontiev also argued that he had no personal obligation under the relevant loan documents to anyone. "Even if Mr. Varshavsky had rights with regard to the Alleged Loans - he does not - Mr. Leontiev is entitled to a declaratory judgment for a second, independent reason: Mr. Leontiev is not personally liable for those debts."

In his opposition papers Varshavsky admitted that Leontiev

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[2]For their part Varshavsky's lawyers assert that they made a similar offer to Leontiev's counsel early in the federal litigation.

did not owe him any money in his personal capacity. At oral argument on the motion, Judge Rakoff noted that the parties could have agreed "weeks or months ago" that Leontiev in his personal capacity owed nothing to Varshavsky. In a final judgment dated March 1, 2017, the court granted summary judgment in Leontiev's favor on the parties' consent and declared that "Sergey Leontiev owes no debt or obligation to Alexander Varshavsky in [Varshavsky's] personal capacity with respect to the loans and other debt instruments described in paragraph 32 of the complaint in this case."

The Clerk of the Southern District levied costs in the amount of $19,975.85 against Varshavsky, who thereupon sought relief from Judge Rakoff. In denying Varshavsky's application, Judge Rakoff noted that "Varshavsky's current protests to the contrary, throughout most of the case Varshavsky suggested to the Court that he might be owed money from Leontiev in his (Varshavsky's) personal capacity" (*Leontiev v Varshavsky*, US Dist Ct, SD NY, 16 Civ 03595, at 3, Rakoff, J., May 1, 2017). Therefore the court found that Leontiev was the prevailing party, as the declaration in his favor "stymies any efforts by Varshavsky to collect on the loans in his own name, and makes plain that any further debt collection efforts must be in a purely representative capacity" (*id.*).

Plaintiffs brought the instant action in Supreme Court, New York County in November 2016, before the federal action was dismissed. Plaintiffs are represented by the same firm that defended Varshavsky in the federal action and Leontiev is represented by the same firm that represented him in the federal action. The allegations in the initial complaint concern the Ambika, FG Life and Venop loan transactions. The complaint alleges that Leontiev used his domination of the three companies, and other entities, to gain possession of the loan proceeds. The complaint also asserted that defendants Wonderworks, Legion Trust and Southpac Trust International all were unjustly enriched by enabling Leontiev's scheme to steal the loan principal and avoid repayment. An amended complaint, filed in December 2016, added defendant Leonid Leontiev, Sergey Leontiev's father. On February 22, 2017, plaintiffs moved for leave to file a second amended complaint. At oral argument on the motion to amend, Supreme Court deferred decision on the motion, and stayed discovery, pending any motions on forum non conveniens or "jurisdiction" by defendants.

Defendants Leontiev and Wonderworks duly moved to dismiss, asserting, among other arguments, that plaintiffs' claims herein are barred by res judicata. None of the other defendants moved.

In a decision dated October 5, 2017, Supreme Court dismissed

the action with prejudice on claim preclusion grounds, and denied the motion to amend as moot. The court found that plaintiffs herein should have intervened in the federal action, or assigned their claims to Varshavsky. The failure to do so was a "blatant misuse of the federal forum," which resulted in a "stunning" amount of discovery, and several motions, which Supreme Court found were wasted because plaintiffs herein failed to use the federal forum to resolve all "claims aris[ing] from a common nucleus of operative facts." Supreme Court noted that the same counsel were arrayed against each other in the federal action and that plaintiffs therefore had to be aware that Varshavsky had taken the position in the federal action that he had authority to act on their behalf. Supreme Court concluded that plaintiffs were thus seeking nothing more than a "do-over" of the federal action and a "second bite at the apple."

Discussion

The doctrine of claim preclusion does not bar plaintiffs' claims herein. Varshavsky, the sole defendant in the federal action, was not himself the creditor of the subject loans and had no standing to assert a counterclaim for recovery of plaintiffs' loans in that action. Plaintiffs' putative rights to intervene as party defendants in the federal action, or to assign their claims to Varshavsky, are far from clear. Either option,

intervention or assignment, might have been rejected by the federal court as an attempt to evade the strictures of diversity jurisdiction. Apart from the efficacy of these options, even if intervention or assignment were possible, there is no legal doctrine that would compel plaintiffs herein to litigate in the federal action. In short, plaintiffs herein, as nonparties to the federal litigation, are not precluded from asserting claims that no party in the federal litigation had standing to pursue. To hold otherwise would mean that a debtor may, by suing a creditor's principal or associate, require the creditor to participate in the action or have its claims precluded.

Claim preclusion, or res judicata, "bars successive litigation based upon the same transaction or series of connected transactions if: (i) there is a judgment on the merits rendered by a court of competent jurisdiction, and (ii) the party against whom the doctrine is invoked was a party to the previous action, or in privity with a party who was" (*Matter of People v Applied Card Sys., Inc.*, 11 NY3d 105, 122 [2008], *cert denied* 555 US 1136 [2009] [internal quotation marks and citation omitted]). Claim preclusion "applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation" (*Matter of Hunter*, 4 NY3d 260, 269 [2005]).

Defendants' argument on claim preclusion is twofold.

First, they argue that Varshavsky's status as Avilon's president and Avagumyan's representative means that plaintiffs' interests were represented in the federal action. This argument rests on the factual predicate that Varshavsky was in privity with plaintiffs. However, the Court of Appeals has cautioned that privity is an "amorphous" concept (*Beuchel v Bain*, 97 NY2d 295, 304 [2001] [internal quotation marks omitted]), that "does not have a technical and well-defined meaning" (*Watts v Swiss Bank Corp.*, 27 NY2d 270, 277 [1970]). Relationship alone is not sufficient to support preclusion. "Ultimately, we must determine whether the severe consequences of preclusion flowing from a finding of privity strike a fair result under the circumstances" (*Applied Card Sys., Inc.*, 11 NY3d at 123).

Neither Varshavsky's position as president of Avilon, nor his status as designated negotiator for Kamo Avagumyan, gave him standing to assert a claim in court for return of the outstanding loans. Therefore it is not a "fair result" to preclude plaintiffs from raising claims herein that Varshavsky had no standing to assert in the federal action. To be sure in the federal action Varshavsky asserted, as a defense, that Leontiev was personally responsible for the loans, and extensive discovery was taken on that topic. But that broad defense came in response to Leontiev's equally broad prayer for declaratory relief that **he**

"owe[d] [no] debt or obligation to Mr. Varshavsky, *or anyone acting in concert or participation with* [*him*], relating to the Alleged Loans" (emphasis added). Though Leontiev appeared to narrow his prayer as the litigation progressed, he continued to hedge his bets until the very end. Leontiev's summary judgment motion, though primarily based upon Varshavsky's belated admission that he had no right to enforce the loans, contained the alternate ground for relief that Leontiev was not personally responsible to any creditor for the loans, and Leontiev's counsel continued to assert this claim, though in vain, at oral argument on the motion.

A plaintiff in a subsequent litigation may face claim preclusion if he "ha[s] a relationship with a party to the prior litigation such that his own rights or obligations in the subsequent proceeding are conditioned in one way or another on, or derivative of, the rights of the party to the prior litigation" (*D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990]). For example, a union member may be bound by a declaratory judgment against his union in a prior action (*see Weisz v Levitt*, 59 AD2d 1002 [3d Dept 1977]). Similarly, a judgment against a liability insurer can have binding effect against its insured in a subsequent action (*see Hinchey v Sellers*, 7 NY2d 287 [1959]). Here, Avilon and Avagumyan's rights

derive from their status as parties to the loan agreements in question; they are not conditioned or derivative of Varshavsky's nonexistent rights under the same documents. Where a party in an earlier action lacks standing to bring a claim, dismissal will not preclude a subsequent action where the party does have standing, even where both cases arise from the same nucleus of operative facts (*see Pullman Group v Prudential Ins. Co. of Am.*, 297 AD2d 578 [1st Dept 2002], lv dismissed 99 NY2d 610 [2003]; *Tak Shing David Tong v Hang Seng Bank,* 210 AD2d 99 [1st Dept 1994]).

Defendants' second theory of preclusion is that plaintiffs herein should have inserted themselves into the federal litigation via intervention or assignment. Plaintiffs' failure to do so, defendants argue, precludes the prosecution of this action. Defendants do not cite any apposite case law for the proposition.

It is not clear that plaintiffs herein could have been made parties (presumably parties defendant) in the federal litigation without running athwart the requirements of diversity jurisdiction.[3] Defendants do not argue on this appeal that

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[3]28 USC § 1332 permits federal courts to exercise jurisdiction in a civil action where the amount in controversy exceeds $75,000 (exclusive of interest and costs) and which is between, in relevant part, "citizens of a State and citizens or

joinder was viable. As for intervention, there is conflicting authority as to whether plaintiffs could have intervened in the federal action without destroying diversity jurisdiction (*compare e.g. Price v Wolford*, 608 F3d 698, 703 [10th Cir 2010] *with Merrill Lynch & Co. Inc. v Allegheny Energy Supply Co. Inc.*, 500 F3d 171, 177, 179-180 [2d Cir 2007]). The second option argued by defendants on this appeal, assignment of plaintiffs' claims to Varshavsky, was mentioned by Judge Rakoff and so might have had greater chance of success. However, there are colorable arguments that assignment would have constituted collusion sufficient to run afoul of 28 USC § 1359, which divests a federal district court of jurisdiction in a civil action where assignment is used "improperly or collusively" to invoke the jurisdiction of the court. It is worth noting that plaintiffs have sued a number of parties in the instant action, not just Leontiev. It is unclear whether counsel discussed with Judge Rakoff the potential roster of (nondiverse) parties that might populate the federal

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subjects of a foreign state," or "citizens of different States and in which citizens or subjects of a foreign state are additional parties" (28 USC § 1332[a][2], [3]). The Second Circuit has explained that "diversity is lacking within the meaning of these sections where the only parties are foreign entities, or where on one side there are citizens and aliens and on the opposite side there are only aliens" (*Universal Licensing Corp. v Paola del Lungo S.p.A.*, 293 F3d 579, 581 [2d Cir 2002]; *see also Corporation Venezolana de Fomento v Vintero Sales Corp.*, 629 F2d 786, 790 [2d Cir 1980], *cert denied* 449 US 1080 [1981]).

action in the wake of intervention or assignment. Given the strict requirements of diversity jurisdiction, and facing potential motion practice in federal court concerning same, plaintiffs could rationally choose to bring their claims in state court.

Whether or not it was possible to insert plaintiffs into the federal lawsuit without destroying diversity, the fundamental question is why should plaintiffs be compelled to do so upon penalty of preclusion? "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process" (*Taylor v Sturgell*, 553 US 880, 884 [2008] [internal quotation marks omitted]). There are narrow exceptions to this rule (*id.*; *Green v Santa Fe Indus.*, 70 NY2d 244 [1987]). However, the exception invoked by defendants -- Varshavsky's privity with plaintiffs -- does not support preclusion for the reasons discussed above. In the absence of such an exception, "a party seeking a judgment binding on another cannot obligate that person to intervene; he must be joined" (*Martin v Wilks*, 490 US 755, 763 [1989]).

Two related purposes of claim preclusion are to ensure finality of decisions and to avoid inconsistent adjudications

(Weinstein-Korn-Miller, NY Civ Prac, ¶ 5011.08 [2d ed 2004]; *Matter of Applied Card Sys., Inc.*, 11 NY3d at 124. Neither of these purposes is served by precluding plaintiffs' claims herein. So far, there has been no adjudication of anything but that Leontiev owes no debt or obligation to Alexander Varshavsky in the latter's personal capacity. Whatever the resolution of the instant case, it will not be inconsistent with the outcome of the federal action. There has been no final adjudication concerning defendants' alleged liability for the loans at issue. Certainly Judge Rakoff did not understand the resolution of the federal action to bar all future claims against Leontiev arising from the loans. The declaration in that action, he stated, "stymies any efforts by Varshavsky to collect on the loans in his own name, and makes plain that any further debt collection efforts must be in a purely representative capacity."

The Court of Appeals has cautioned that "[i]n properly seeking to deny a litigant two days in court, courts must be careful not to deprive him of one" (*Matter of Reilly v Reed*, 45 NY2d 24, 28 [1978] [internal quotation marks omitted]). Such a deprivation is the effect of the decision below.[4]

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[4]Leonid Leontiev, Legion Trust, and Southpac International, Inc. did not move to dismiss,, and the complaint should not have been dismissed against them on that ground as well.

Because it granted the moving defendants' motions on claim preclusion grounds, Supreme Court did not reach the parties' arguments concerning the legal insufficiency of plaintiffs' claims. The proposed second amended complaint restates plaintiffs' claims for fraudulent conveyance and unjust enrichment, and adds other causes of action that appear to arise under the law of the United Kingdom. As the motion to amend has not been considered by Supreme Court and as the proposed second amended complaint raises additional causes of action which have not been argued below, we remand to Supreme Court for consideration of the motion to amend. Finally, in a brief passage at the end of its decision, Supreme Court found that it lacked in personam jurisdiction over Wonderworks "and undoubtedly also lacks personal jurisdiction over any of the defendants other than, perhaps, Leontiev." We find that this conclusion is premature. Plaintiffs have alleged sufficient facts that might give rise to alter ego jurisdiction over Wonderworks. If Supreme Court were to find that plaintiffs have one or more viable claims that implicate Wonderworks, then plaintiffs have brought forth sufficient facts to justify jurisdictional discovery concerning Wonderworks.[5] Plaintiffs have cited evidence tending to show

[5]Whether such jurisdictional discovery is warranted against other defendants is not before us on this appeal.

that Leontiev completely dominated Wonderworks and that he misused the corporate form to advance his scheme to gain control over the loan proceeds and place them beyond the reach of the plaintiff creditors. Where there is such a relationship, a court may have jurisdiction over the dominated corporation if it has jurisdiction over the principal (*New Media Holding Co. LLC v Kagalovsky*, 97 AD3d 463 [1st Dept 2012]). Because Leontiev has not disputed that New York has general jurisdiction over him under CPLR 301, it may be that Wonderworks is within the jurisdiction of the court as well. Additionally, plaintiffs have averred that Wonderworks' New York-based conveyances confer jurisdiction under CPLR 302.

Where a defendant moves to dismiss for lack of jurisdiction under CPLR 3211(a)(8), a plaintiff need not present definitive proof of personal jurisdiction, but only make a "sufficient start" in demonstrating such jurisdiction by reference to pleadings, affidavits, and other suitable documentation (*American BankNote Corp. v Daniele*, 45 AD3d 338, 340 [1st Dept 2007] [internal quotation marks omitted]). Plaintiffs have done so here. If Supreme Court finds that plaintiffs have one or more viable claims that implicate Wonderworks, then jurisdictional discovery is warranted with respect to Wonderworks.

Accordingly, the order of the Supreme Court, New York County

(Barry R. Ostrager, J.), entered October 5, 2017, which dismissed the action in its entirety with prejudice, should be reversed, on the law, without costs, and the matter remanded for further proceedings in accordance with this opinion.

All concur.

Order Supreme Court, New York County (Barry R. Ostrager, J.), entered October 5, 2017, reversed, on the law, without costs, and the matter remanded for further proceedings in accordance with this opinion.

Opinion by Moulton, J. All concur.

Sweeny, J.P., Webber, Gesmer, Singh, Moulton, JJ.

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

ENTERED: JANUARY 3, 2019

CLERK