SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 31, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Richter, J.P., Manzanet-Daniels, Tom, Kahn, Singh, JJ.

8257 The People of the State of New York, Respondent, Ind. 2948/08

-against-

Devin Alexander,
Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Justin J. Braun of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Ralph Fabrizio, J.), rendered January 17, 2014, convicting defendant, after a jury trial, of murder in the second degree, attempted murder in the second degree and criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 50 years to life, unanimously affirmed.

The court properly denied defendant's application made pursuant to *Batson v Kentucky* (476 US 79 [1986]). Defendant did not produce numerical or nonnumerical "evidence sufficient to permit the trial judge to draw an inference that discrimination

ha[d] occurred" (*Johnson v California*, 545 US 162, 170 [2005]), and thus failed to make a prima facie showing of racial discrimination in the People's exercise of challenges.

As we determined in rejecting a generally similar claim made on a codefendant's appeal (*People v Burgan*, 152 AD3d 401, 406 [1st Dept 2017], *lv denied* 30 NY3d 978 [2017]), defendant's claim that the People presented allegedly false testimony is based on factual assertions outside the record and therefore is unreviewable on direct appeal. The record does not support defendant's assertion that law enforcement failed to investigate the truth of a witness's testimony. In any event, at trial defendant was not prevented from challenging the thoroughness of the investigation, and the Court of Appeals has "decline[d] to impose an affirmative obligation upon the police to obtain exculpatory information for criminal defendants" (*People v Hayes*, 17 NY3d 46, 52 [2011], *cert denied* 565 US 1095 [2011]).

Defendant has not preserved any of his challenges to the court's responses to three jury notes and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. In each instance, the court provided a meaningful response that was satisfactory to the defense (*see People v Almodovar*, 62 NY2d 126, 131 [1984*]; People v Malloy*, 55 NY2d 296 [1982], *cert denied* 459 US 847 [1982]).

Defendant's ineffective assistance of counsel claims relating to these issues is unavailing (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 31, 2019

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Tom, Kahn, Singh, JJ.

8258 Carolyne A. Hall, as Attorney in Fact for Gillon R. Stephenson,
Plaintiff-Appellant,

-against-

New Way Remodeling, Inc.,
Defendant-Respondent.

Index 300752/16

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

Steven F. Goldstein, L.L.P., Carle Place (Steven F. Goldstein of counsel), for respondent.

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about November 2, 2017, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant, a contracting company that renovated a kitchen in plaintiff Gillon Stephenson's home, established entitlement to judgment as a matter of law in this action where Stephenson tripped and fell over a door saddle. Defendant submitted, inter alia, photographs and the testimony of its principal showing that the alleged defective condition created by the door saddle defendant installed between the kitchen and hallway involved a trivial height differential, and was not actionable (*see Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 77 [2015]; *McCullough v Riverbay Corp.*, 150 AD3d 624 [1st Dept 2017]).

Defendant also showed that the alleged defect was open and obvious, and not inherently dangerous, by submitting photographs showing that the door saddle was readily observable (*see Wachspress v Central Parking Sys. Of N.Y., Inc.*, 111 AD3d 499 [1st Dept 2013]).

In opposition, plaintiff failed to raise an issue of fact. The opinion of plaintiff's expert was speculative, and posited a theory of "optical confusion" that was contradicted by the expert's own photographs showing that the door saddle was a different color from the surrounding floor (*see Franchini v American Legion Post*, 107 AD3d 432 [1st Dept 2013]). The expert also relied on inapplicable standards, including those relevant to means of egress, which is defined as "a continuous and unobstructed way of travel from any point in a building or structure to a public way consisting of three separate and distinct parts: exit access, the exit, and the exit discharge" (*see* National Fire Protection Association No.

101, Life Safety Code 3.3.178 [2018]). The expert's assertion that a person could stumble over the saddle was insufficient to raise an issue as to whether it was a nontrivial defective condition (*see Hutchinson* at 77-78).

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

ENTERED: JANUARY 31, 2019

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Tom, Kahn, Singh, JJ.

8259 In re Cheick K.D.,
Appellant.

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

_____

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

Zachary W. Carter, Corporation Counsel, New York (Jessica Miller of counsel), for presentment agency.

_____

Order of disposition, Family Court, New York County (Adetokunbo O. Fasanya, J.), entered on or about January 25, 2018, which adjudicated appellant a juvenile delinquent upon his admission that he committed acts that, if committed by an adult, would constitute the crime of assault in the third degree, and placed him with the ACS Close to Home program for an initial period of 12 months, unanimously affirmed, without costs.

Application by assigned counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed the

record and agree with appellant's assigned counsel that there are no nonfrivolous points that could be raised on this appeal.

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

ENTERED: JANUARY 31, 2019

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Tom, Kahn, Singh, JJ.

8260-
8261 Index 452935/14

76th and Broadway, LLC, et al.,
Plaintiffs-Respondents,

-against-

Consolidated Edison Company
of New York, Inc.,
Defendant,

General Glass & Metal, LLC,
Defendant-Appellant.

- - - - -

[And a Third-Party Action]

_____

Sweetbaum & Sweetbaum, Lake Success (Marshall D. Sweetbaum of counsel), for appellant.

Hannum Feretic Prendergast & Merlino, LLC, New York (Sean M. Prendergast of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Gerald Lebovits, J.), entered March 14, 2018, dismissing third-party defendant General Glass & Metal LLC's (General Glass) third-party answer, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered December 29, 2017, which, upon granting General Glass's CPLR 2221(a) motion to reconsider a prior order granting third-party plaintiffs' motion to strike the third-party answer, and denying dismissal of the third-party complaint, adhered to its original decision, unanimously dismissed, without costs, as subsumed in the appeal from the

judgment.

Although denominated a motion to "modify," General Glass's motion below actually sought reargument (*see* CPLR 2221[a]; *Foley v Roche*, 68 AD2d 558, 567-568 [1st Dept 1979]). While the denial of a motion to reargue is generally not appealable, the motion court addressed the merits of the motion at oral argument. Accordingly, we treat the order as having granted reargument, and adhering to the original decision, making it appealable (*see Lipsky v Manhattan Plaza, Inc.*, 103 AD3d 418 [1st Dept 2013]; *Foley v City of New York*, 43 AD3d 702, 703 [1st Dept 2007]).

Supreme Court providently exercised its discretion in striking General Glass's answer, as the record established its failure to comply with four court orders requiring it to appear for deposition (*see McHugh v City of New York*, 150 AD3d 561, 562 [1st Dept 2017]). Contrary to General Glass's argument, the record does not establish that it was unable to locate a witness with knowledge, but rather indicates that its president wilfully refused to comply with the court's mandates.

The court also properly adhered to its decision to deny General Glass's motion for summary dismissal of the third-party complaint, as the Workers' Compensation Law does not preclude third-party plaintiffs from seeking to enforce contractually-based obligations to indemnify and to provide insurance coverage

(*see Spieger v Gerken Bldg. Corp.*, 35 AD3d 715, 717 [2d Dept 2006]).

We have considered General Glass's remaining arguments, and find them unavailing.

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

ENTERED: JANUARY 31, 2019

DEPUTY CLERK

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

8262 Sidney Sims, Index 156566/13
Plaintiff-Appellant,

-against-

Trustees of Columbia University
in the City of New York,
Defendant-Respondent.

_____

Stewart Lee Karlin Law Group, P.C., New York (Stewart Lee Karlin of counsel), for appellant.

Putney, Twombly, Hall & Hirson LLP, New York (Mary Ellen Donnelly of counsel), for respondent.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered November 2, 2017, which granted defendant's motion for summary judgment dismissing the complaint alleging claims under the New York State Human Rights Law (State HRL) (Executive Law § 296) and the New York City Human Rights Law (City HRL) (Administrative Code of City of NY § 8-107) for discrimination, retaliation, and hostile work environment, unanimously modified, on the law, to deny the motion to dismiss the hostile work environment claims, and otherwise affirmed, without costs.

Plaintiff's claims of retaliation were properly dismissed. Plaintiff never complained to defendant that he was discriminated against because of his race, age, or disability (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312-313 [2004]; *Singh v*

State of N.Y. Off. of Real Prop. Servs., 40 AD3d 1354, 1357 [3d Dept 2007]). Even if his letters to Human Resources were considered complaints they only showed that he experienced a "continuation of a course of conduct that had begun before [he] complained" (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 129 [1st Dept 2012]).

Plaintiff's claims of discrimination were also properly dismissed. He contends that he was micromanaged, assigned excessive work, written up for insubordination, threatened with discipline should he fail to meet expectations, and denied the use of a second locker to which the evidence demonstrates he was not entitled, none of which constitute an "adverse employment action" under the State HRL (*see Forrest*, 3 NY3d at 306), or "disadvantaged" him under the City HRL (*Chin v New York City Hous. Auth.*, 106 AD3d 443, 444 [1st Dept 2013], *lv denied* 22 NY3d 861 [2014]).

However, the court should not have dismissed plaintiff's hostile work environment claims. Plaintiff submitted evidence that his supervisors repeatedly made racially derogatory comments, including calling him "Bubbles," which he testified was a reference to Michael Jackson's pet chimpanzee, and referring to him as "boy" using a Southern accent. Plaintiff also asserts that he was told that he was "too old for the job," that he

worked like he "just came back from surgery," and that he had "too many worker's comp cases and . . . should resign." According to plaintiff, the supervisors' comments were continuous in nature and occurred on a regular basis. This evidence, viewed in the light most favorable to plaintiff, raises issues of fact as to whether plaintiff was subjected to a hostile work environment based on race, age and disability under both the State and City HRLs (*see Gordon v Bayrock Sapir Org. LLC*, 161 AD3d 480, 481 [1st Dept 2018]).

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

ENTERED: JANUARY 31, 2019

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Tom, Kahn, Singh, JJ.

8263 The People of the State of New York, Respondent, Ind. 2435/11

-against-

Maurice Barnar, Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Matthew B. White of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Troy K. Webber, J.), rendered March 27, 2014, as amended April 23, 2014, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him to a term of 25 years, unanimously reversed, as a matter of discretion in the interest of justice, and the matter remanded for a new trial.

Reversal in the interest of justice is warranted, based on the principle set forth in *People v Velez* (131 AD3d 129 [1st Dept 2015]), which was decided after defendant's trial. We have considered and rejected the People's arguments for affirmance.

Because we are ordering a new trial, we find it unnecessary to reach defendant's remaining contentions other than to find that the verdict was supported by legally sufficient evidence and was not against the weight of the evidence.

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

ENTERED: JANUARY 31, 2019

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Tom, Kahn, Singh, JJ.

8264-
8264A-
8264B-
8264C &
M-5044

Index 652191/15

NWM Capital, LLC,
Plaintiff-Appellant-Respondent,

-against-

Mark Scharfman, et al.,
Defendants-Respondents-Appellants.

_____

Lester J. Tanner, New York, for appellant-respondent.

Emery Celli Brinckerhoff & Abady LLP, New York (Daniel J. Kornstein of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered September 14, 2017, which, inter alia, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs. Order, same court and Justice, entered on or about January 25, 2018, which, to the extent appealable, denied plaintiff's motion to renew, unanimously affirmed, without costs. Order, same court and Justice, entered on or about January 25, 2018, which denied defendants' motion for attorneys' fees, unanimously affirmed. Appeal from order, same court and Justice, entered on or about August 2, 2017, which struck plaintiff's jury demand, unanimously dismissed, without costs, as academic.

The limited partnership agreements provide that defendants can charge up to 6% of the rental collections as a management fee. This specific provision controls over the agreements' more general provision, relied on by plaintiff, requiring that, in providing services to the limited partnerships, defendants' fees be fair, reasonable, and customary (*see Muzak Corp. v Hotel Taft Corp.*, 1 NY2d 42, 46 [1956]).

To the extent the more general provision limiting fees is applicable, plaintiff failed to raise an issue of fact as to the reasonableness of the management fees. Plaintiff's argument, and its expert's opinion, are based on the assertion that the apartments should be sold with the limited partners as the financiers of the sale. However, this is not an obligation set out in any agreement. Moreover, the plain language of the offering memoranda and limited partnership agreements demonstrates that the parties anticipated renting the apartments, as had been done for the preceding 25 years.

Contrary to plaintiff's contention, the motion court did not resolve credibility issues raised by defendants' and plaintiff's experts. Plaintiff's expert report had no factual support, and consisted only of conclusory assertions, which are insufficient to defeat summary judgment (*see Mitchell v Atlantic Paratrans of NYC, Inc.*, 57 AD3d 336 [1st Dept 2008]).

Plaintiff offered no newly discovered facts in its motion for renewal (CPLR 2221[e][2]); it submitted only additional excerpts from a deposition that had been taken before, and indeed cited to in, the original motion.

The court properly denied defendants' motion for attorneys' fees under Partnership Law § 121-1003 on the ground that plaintiff had not posted security for defendants' costs. Indeed, the court denied defendants' earlier motion to compel plaintiff to post security, and defendants did not appeal from that order. As defendants point out, Partnership Law § 121-1003 closely parallels Business Corporation Law (BCL) § 627, to which we look for guidance. We have held, in the context of BCL § 627, that, where no security has been posted, there can be no recovery (*see Amdur v Meyer*, 22 AD2d 655 [1st Dept 1964]; *accord J. A. Preston Corp. v Fabrication Enters.*, 68 NY2d 397, 401 [1986] [under claim for wrongful issuance of injunction, absent an undertaking, there is no right, short of an action for malicious prosecution, to recover for damage]).

We have considered and rejected the remaining arguments.

M-5044 - *NWM Capital, LLC v Mark Scharfman*

Motion for supplemental submission granted.

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

ENTERED: JANUARY 31, 2019

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Tom, Kahn, Singh, JJ.

8265 Michael Park, et al., Index 651048/17
Plaintiffs-Appellants,

-against-

Newbank, et al.,
Defendants-Respondents.

_____

Kimm Law Firm, Bayside (Michael S. Kimm of counsel), for appellants.

Law Offices of Tae H. Whang, LLC, Palisades (Tae H. Whang of counsel), for respondents.

_____

Appeal from order, Supreme Court, New York County (Charles E. Ramos, J.), entered September 22, 2017, which granted defendants' motion for summary judgment dismissing the complaint, deemed appeal from the judgment (CPLR 5501[c]), same court and Justice, entered February 8, 2018, dismissing the complaint, and, as so considered, the judgment unanimously affirmed, with costs.

The loan is not a construction loan, as it was not secured by a mortgage on real property (Lien Law § 2[13], [14]; *Juszak v Lily & Don Holding Corp.*, 224 AD2d 588, 589 [2d Dept 1996]).

Moreover, Newbank exercised its rights, under the security agreement, by taking possession of the proceeds of the sale of the collateral. Accordingly, plaintiffs failed to establish any damages based on the actions taken by Newbank.

We have considered the parties' remaining contentions and

find them unavailing.

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

ENTERED: JANUARY 31, 2019

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Tom, Kahn, Singh, JJ.

8267- Ind. 2229/16
8267A The People of the State of New York, 2637/16
Respondent,

-against-

Aldrick Neysmith,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Hunter Haney of counsel), and Millbank, Tweed, Hadley & McCloy LLP, New York (Allison Markowitz of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald of counsel), for respondent.

_____

Judgments, Supreme Court, New York County (Maxwell Wiley, J., at grand jury application; Arlene D. Goldberg, J. at suppression hearing, pleas, and sentencing), rendered March 30, 2017, convicting defendant of criminal possession of a controlled substance in the third and fourth degrees, and sentencing him, as a second felony offender previously convicted of a violent felony, to concurrent terms of seven years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). The officer's testimony regarding his observation of defendant selling drugs was not so implausible as to warrant rejection of the hearing court's

findings of fact (*see e.g. People v Lewis*, 136 AD3d 468 [1st Dept 2016], *lv denied* 27 NY3d 1001 [2016]).

Defendant did not preserve his claim that the court's consideration of the People's ex parte motion to resubmit a charge to the grand jury violated his right to counsel, and we decline to review it in the interest of justice. We find that this argument falls within the category of right-to-counsel claims that require preservation (*see People v Garay*, 25 NY3d 62, 67 [2015], *cert denied* 577 US __, 136 S Ct 501 [2015]). As an alternative holding, we reject it on the merits (*see e.g. People v Davis*, 149 AD3d 451, 453 [1st Dept 2017], *lv denied* 29 NY3d 1077 [2017]).

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 31, 2019

DEPUTY CLERK

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

8270-
8271 Index 655506/16

Emmet Austin, etc., et al.,
Plaintiffs-Appellants,

-against-

Jonathan Gould, et al.,
Defendants-Respondents.

_____

Law Office of Edward J. Boyle, Manhasset (Edward J. Boyle of counsel), for appellants.

Westerman Ball Ederer Miller Zucker & Sharfstein, LLP, Uniondale (Greg S. Zucker of counsel), for respondents.

_____

Orders, Supreme Court, New York County (O. Peter Sherwood, J.), entered December 14, 2017, and July 13, 2017, which granted defendants' motions to dismiss the complaint, unanimously affirmed, without costs.

The first two causes of action seek to compel access to and examination of the Managing LLCs' and the Retail Partners' books and records. Defendant Gould, the managing member of the named Managing LLCs, properly determined that there was no "valid business purpose," as required by the Managing LLCs' operating agreements, for inspecting the Managing LLC's books and records, because plaintiff Austin's purpose for inspecting related to claims for acquisition fees and management fees that had already been dismissed in a 2013 action (*see Austin v Gould*, 137 AD3d 495

[1st Dept 2016]).

The third cause of action, which alleges breach of fiduciary duty against Gould, was correctly dismissed, because it mixes an individual claim with a derivative claim (*see Dian Kui Su v Sing Ming Chao*, 150 AD3d 424, 425 [1st Dept 2017], citing *Abrams v Donati*, 66 NY2d 951 [1985]).

The fourth cause of action, which alleges that Gould transferred Austin's interest in Stonemar MM Jackson, LLC, to his (Gould's) wife without consideration or consent, was correctly dismissed, because "[t]he conversion of intangible property is not actionable" (*Sun Gold, Corp. v Stillman*, 95 AD3d 668, 669 [1st Dept 2012]).

In view of the foregoing, the fifth cause of action, which seeks legal, accounting, and expert fees, is moot.

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

ENTERED: JANUARY 31, 2019

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Tom, Kahn, Singh, JJ.

8273 The People of the State of New York, Ind. 556/15
Respondent,

-against-

Brandon Acevedo,
Defendant-Appellant.

_____

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

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

_____

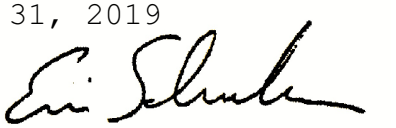
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (William Mogulescu, J.), rendered January 28, 2016 ,

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

It is unanimously ordered that the 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 31, 2019



DEPUTY CLERK

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

Richter, J.P., Manzanet-Daniels, Tom, Kahn, Singh, JJ.

8274 Michael McLaughlin, et al., Index 161034/13
Plaintiffs-Respondents-Appellants,

-against-

Arch Insurance Company, et al.,
Defendants-Appellants-Respondents.

Goldberg Segalla, Buffalo (Jonathan Schapp of counsel), for appellants-respondents.

Daniel J. Hansen, New York, for respondents-appellants.

Order, Supreme Court, New York County (Melissa A. Crane, J.), entered July 12, 2018, which denied the parties' motions for summary judgment, inter alia, declaring their respective rights and obligations under the insurance policy issued by defendants to nonparty J. Petrocelli Contracting, Inc. (Petrocelli), with respect to the underlying personal injury action, unanimously affirmed, without costs.

Plaintiffs were awarded a judgment in 2012 in the underlying personal injury action against Sterling Mets, L.P., after a trial and pursuant to a settlement agreement in which Sterling agreed to partially satisfy the judgment and to assign plaintiffs its rights against the instant defendants.

The motion court correctly declined to interpret the "Press Gate & Mailroom Contract" between Sterling affiliate Mets

Development Company (MDC) and contractor Petrocelli as a "Master Agreement" whose terms and conditions, including Petrocelli's obligation to procure additional insurance coverage on Sterling's behalf, applied to the "Weight Room" project on which plaintiff Michael McLaughlin was working when he was injured. The unambiguous Press Gate & Mailroom Contract does not support the characterization; indeed, it does not suggest that it is anything but a limited vendor acknowledgment agreement on the particular project of the press gate and mailroom renovations (*see Centro Empresarial Cempresa S.A. v America Movil, S.A.B. de C.V.*, 17 NY3d 269, 277 [2011]). The contract states that the project is "in connection with ongoing renovations in and around Shea Stadium *as further described below*" (emphasis added), and identifies the precise project to which the contract applies.

Moreover, by its express terms, the Press Gate & Mailroom Contract could not be amended other than by a writing signed by Petrocelli and MDC; the court's interpretation of the contract correctly acknowledges this provision, rather than reading it out of the contract (*see Kolmar Ams., Inc. v Bioversel Inc.*, 89 AD3d 493 [1st Dept 2011]). Contrary to plaintiffs' contention, Section II of Exhibit B of the contract does not override this provision; it provides an exception for the Scope of Work as specifically defined in Exhibit B, Section I, to which MDC

reserved the right to unilaterally make additions or deletions. The Weight Room project proposal documents are signed solely by Petrocelli, and accordingly do not fall within this exception. Plaintiffs' reliance on General Obligations Law § 15-301 is also misplaced, as there is no support in the record for a finding that the Weight Room project was meant to be a change or modification to the Press Gate & Mailroom project, rather than an altogether new and separate project.

However, the court correctly found an issue of fact as to whether Petrocelli and Sterling entered into an oral agreement to proceed with the Weight Room project on the same terms and conditions as the Press Gate & Mailroom Contract, i.e., inter alia, obligating Petrocelli to procure additional insurance coverage for Sterling under the policy issued to it by defendants (*see Kramer v Greene*, 142 AD3d 438, 440 [1st Dept 2016]). Petrocelli neither recalled nor denied that such an agreement was made, and MDC's vice president submitted two sworn affidavits attesting to such an agreement and testified at deposition that the Press Gate & Mailroom Contract was "the platform" for future projects with Petrocelli. We agree with the motion court that MDC's affidavits and the deposition testimony are not contradictory.

An issue of fact also exists as to whether plaintiff's

injuries "arose out of" the Weight Room project.

Contrary to plaintiffs' contention, the issue whether defendants were obligated to defend Sterling in the underlying action must await a determination of whether Sterling was an additional insured under the policy in connection with the Weight Room project.

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

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

ENTERED: JANUARY 31, 2019

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Tom, Kahn, Singh, JJ.

8275 In re Victor Garrido, Index 101891/16
Petitioner-Appellant,

-against-

Woody Pascal, etc.,
Respondent-Respondent.

_____

Victor Garrido, appellant pro se.

Mark F. Palomino, New York (Robert Ambaras of counsel), for respondent.

_____

Judgment (denominated decision and order), Supreme Court, New York County (Debra A. James, J.), entered October 6, 2017, inter alia, denying petitioner tenant's petition to annul an opinion and order of respondent, dated September 21, 2016, which granted the owner's petition for administrative review (PAR) and reversed a determination that the subject apartment is entitled to rent-controlled status, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondent's finding that the subject apartment is entitled to rent-stabilized status had a rational basis and was not arbitrary and capricious (*see Matter of Gilman v New York State Div. of Hous. & Community Renewal*, 99 NY2d 144, 149 [2002]). Respondent properly relied on a final 2006 ruling determining the subject apartment's regulatory status, which found that

petitioner had failed to provide the requisite proof that he occupied the apartment as tenant of record prior to July 1, 1971. That ruling is supported by the documentary evidence presented in the PAR proceeding and to the article 78 court.

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

ENTERED: JANUARY 31, 2019

DEPUTY CLERK

CORRECTED ORDER - APRIL 9, 2019

Richter, J.P., Manzanet-Daniels, Tom, Kahn, Singh, JJ.

8276 Juan Vargas, Index 302647/16
Plaintiff-Respondent,

-against-

Deutsche Bank National Trust Company,
Defendant-Appellant.

_____

Greenberg Traurig, LLP, New York (Brian Pantaleo of counsel), for appellant.

Steinberg & Associates, Kew Gardens (Herbert N. Steinberg of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about October 19, 2017, which, upon renewal, denied defendant's motion to dismiss the complaint and granted plaintiff's cross motion for summary judgment declaring plaintiff's property free and clear of all liens and encumbrances by defendant, unanimously affirmed, with costs.

The motion court correctly determined that defendant was time-barred from commencing a foreclosure action against plaintiff's mortgaged property because more than six years had passed from the date that the debt on the mortgage was accelerated (CPLR 213[4]). The 2008 letter from defendant's predecessor-in-interest informed plaintiff that his debt "will [be] accelerate[d]" and "foreclosure proceedings will be initiated" if he failed to cure his default within 32 days of the

letter. The letter highlighted that time was of the essence and it is undisputed that plaintiff did not cure his default within the time period.

We have held that this language constitutes a clear and **unequivocal** intent to accelerate the loan balance and commence the statute of limitations on the entire mortgage debt (*Deutsche Bank Natl. Trust Co. v Royal Blue Realty Holdings, Inc.*, 148 AD3d 529 [1st Dept 2017], *lv denied* 30 NY3d 960 [2017]).

Moreover, given defendant's continued efforts, including sending letters attempting to collect from plaintiff the accelerated mortgage debt and informing him that any payments made in contribution to the entire debt "will not be deemed a waiver of the acceleration of [his] loan," there is no basis for a finding that discontinuance of the prior foreclosure action constituted an affirmative act by defendant to revoke the acceleration (*see NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d 1068 [2d Dept 2017]).

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

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

ENTERED: JANUARY 31, 2019

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Tom, Kahn, Singh, JJ.

8277 The People of the State of New York, Ind. 2309/16
Respondent,

-against-

Henry Hodges,
Defendant-Appellant.

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

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

_____

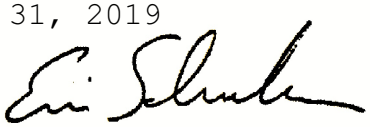
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Daniel P. FitzGerald, J. at plea; Maxwell Wiley, J. at sentencing), rendered November 30, 2016,

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 31, 2019



DEPUTY CLERK

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

Richter, J.P., Manzanet-Daniels, Tom, Kahn, Singh, JJ.

8279N In re Melvin Smiley, Index 160281/17
Petitioner-Respondent,

-against-

Metropolitan Transportation Authority, et al.,
Respondents-Appellants.

_____

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Marcia K. Raicus of counsel), for appellants.

Massimo & Panetta, P.C., Mineola (Nicholas J. Massimo of counsel), for respondent.

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Order, Supreme Court, New York County (Erika M. Edwards, J.), entered January 12, 2018, which granted the petition for leave to file a late notice of claim and deemed the notice annexed to petitioner's application timely served and filed nunc pro tunc, unanimously reversed, on the law, without costs, and the petition denied.

The court improvidently exercised its discretion in granting the petition. Although the failure to proffer a reasonable excuse for the delay in serving a notice of claim is not alone fatal to a petition for leave to file a late notice (*see e.g. Matter of Semyonova v New York City Hous. Auth.*, 15 AD3d 181, 182 [1st Dept 2005]), petitioner also failed to demonstrate that respondents acquired actual notice of the essential facts of the

incident within 90 days after his claim arose or a reasonable time thereafter. The record fails to show that respondents actually received an accident report that contained the essential facts of the claims within the statutory deadline or that the condition of the construction site has remained unchanged since the accident (*see Alladice v City of New York*, 111 AD3d 477 [1st Dept 2013]*; Ordillas v MTA N.Y. City Tr.*, 50 AD3d 391, 392 [1st Dept 2008]). That respondents are represented by the same counsel in an action commenced in Queens County Supreme Court regarding the accident does not require a different result, because petitioner does not allege that a timely notice of claim was served upon respondents in that action (*compare Matter of Fox v New York City Dept. of Educ.*, 124 AD3d 887, 889 [2d Dept 2015]).

Petitioner also failed to show that respondents would not be prejudiced in maintaining a defense on the merits as a result of the delay in filing a notice of claim, given the lack of timely, actual knowledge of the essential facts constituting the claims,

and the transitory nature of the alleged defective condition (*see Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 466 [2016]; *McClatchie v City of New York*, 105 AD3d 467, 468 [1st Dept 2013]).

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

ENTERED: JANUARY 31, 2019

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Tom, Kahn, Singh, JJ.

8280N Zubair Patel, Index 151130/17
Plaintiff-Appellant,

-against-

Macys Inc., et al.,
Defendants-Respondents.

_____

The Rose Law Group, PLLC, Astoria (Jesse C. Rose of counsel), for appellant.

Schoeman Updike Kaufman & Gerber LLP, New York (Steven Gerber of counsel), for respondents.

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Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered October 10, 2017, which granted defendants' motion to compel arbitration and to stay the action pending arbitration, unanimously affirmed, without costs.

Defendants established their right to compel plaintiff to arbitrate his employment discrimination action, based upon evidence that plaintiff electronically signed, and thus assented to the terms of, the negotiated arbitration agreement (*Tsadilas v Providian Natl. Bank*, 13 AD3d 190 [1st Dept 2004], *lv denied* 5 NY3d 702 [2005]). We reject plaintiff's claim that the arbitration agreement was unconscionable, as he was given a meaningful choice as to whether and how to opt out of arbitration when hired, a confidential procedure that would not have been communicated to his supervisors, and he did not submit the form

to do so (*id.* at 191).

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 31, 2019

DEPUTY CLERK

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

8281-
8282 The People of the State of New York,
Respondent,

-against-

Donelle Murphy,
Defendant-Appellant.

Ind. 5633/13

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Deborah L. Morse of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered June 18, 2015, convicting defendant, after a jury trial, of burglary in the second degree, attempted rape in the first degree and sexual abuse in the first degree, and sentencing him, as a second violent felony offender, to an aggregate term of 15 years, and order, same court and Justice, entered on or about January 16, 2018, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The victim returned to her home country and refused to testify. Nevertheless, there was extensive evidence that included, among other things, statements

by the victim properly admitted under the excited utterance and medical diagnosis/treatment exceptions to the hearsay rule, and the incriminating aspects of defendant's statements. Furthermore, defendant's trial testimony, asserting a innocent, nonsexual encounter with the victim, was rejected by the jury as incredible.

Based on the trial record and the submissions on defendant's CPL 440.10 motion, we find that defendant received effective assistance of counsel under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]), and that the court properly denied the motion. In particular, defendant has not established the prejudice prong of either a state or federal ineffective assistance claim.

Counsel's defense of a claimed lack of proof of identity, asserted in connection with counsel's reliance on the confession corroboration requirement of CPL 60.50, was objectively unreasonable. However, defendant has not shown that the error deprived him of a fair trial or affected the outcome of the case. No other defense, including one based on defendant's assertion of a nonsexual encounter, had any chance of success. The jury clearly rejected defendant's testimony, which was rife with credibility issues. "Counsel may not be expected to create a

defense when it does not exist" (*People v DeFreitas*, 213 AD2d 96, 101 [2d Dept 1995], *lv denied* 86 NY2d 872 [1995]). When defendant chose to testify, against counsel's advice, and gave testimony at odds with counsel's strategy, counsel's summation remarks reasonably attempted to minimize the damage from various aspects of defendant's testimony. These remarks did not undermine defendant's rights to testify and to control his defense. Defendant's reliance on *McCoy v Louisiana* (584 US __, 138 S Ct 1500 [2018]) is misplaced because counsel did not concede his client's guilt.

We also find that defendant was not prejudiced by his counsel's failure to seek suppression of a videotaped statement on the ground that it had been preceded by an improper "preamble" (*see People v Dunbar,* 24 NY3d 304, 316 [2014]). Such an argument would have been unavailing, because the very limited preamble here did not undermine the *Miranda* warnings (*see id.*). Likewise, defendant has not established that he was prejudiced by his counsel's strategic decision to refrain from making objections during the prosecutor's summation. Finally, to the extent that, in connection with his ineffective assistance claims, defendant independently seeks reversal on one or more unpreserved claims of error, we decline to review these claims in the interest of justice. As an alternative holding, we find no basis for

reversal.

Turning to defendant's remaining arguments, we find that defendant did not preserve any of his claims, including those grounded in the state and federal constitutions, regarding evidence of the victim's statements to police and medical personnel. Defendant's general argument that the victim's failure to testify violated his right of confrontation was insufficient to preserve the specific claims he makes on appeal, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. All of this evidence qualified under the state-law excited utterance and medical diagnosis/treatment exceptions to the hearsay rule. Although the victim's statement to a police sergeant was testimonial under the Confrontation Clause, defendant expressly waived that claim. The victim's statements to a nurse were not testimonial, because the nurse elicited the statements primarily to treat the victim, and her role in gathering evidence for the police by way of a rape kit was secondary (*see People v Shaw*, 80 AD3d 465 [1st Dept 2011], *lv denied* 16 NY3d 863 [2011]). Furthermore, although evidence admitted under the two hearsay exceptions at issue did not require a showing of either reliability or the unavailability of the declarant, the People made both showings. Finally, we find that defendant received a

sufficient opportunity to elicit testimony that the victim had given varying versions of the attack and defendant's description, and that there was no violation of defendant's right to present a defense.

The court providently exercised its discretion in denying defendant's request for a missing witness charge. The victim was unavailable since there was no dispute she had moved back to Japan and was unwilling to testify (*see People v Anderson*, 256 AD2d 27 [1st Dept 1998], *lv denied* 93 NY2d 850 [1999]; *People v Mancini*, 207 AD2d 730 [1st Dept 1994], *lv denied* 86 NY2d 844 [1995]). There is no reason to believe that she would have been willing to testify by videoconferencing.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 31, 2019

DEPUTY CLERK

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

8283 Anna Hobbs, Index 300562/13
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

_____

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for appellant.

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph of counsel), for respondent.

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Order, Supreme Court, Bronx County (Llinet M. Rosado, J.), entered on or about March 6, 2018, which denied defendant's motion for summary judgment, unanimously affirmed, without costs.

Plaintiff slipped on urine in an elevator in one of defendant's buildings sometime between 12:00 a.m. and 1:00 a.m. on Saturday, September 22, 2012. Defendant moved for summary judgment, claiming lack of actual or constructive knowledge of the hazardous condition.

Defendant submitted evidence that custodians were expected to inspect and clean the two elevators in the building twice daily, and that they had "often" responded to reports of urine in the elevators, which they mopped up, but did not record having cleaned. However, defendant presented no evidence at to when the elevator in which plaintiff fell was last inspected or cleaned

prior to plaintiff's fall, as required to meet its burden on this motion (*Gautier v 941 Intervale Realty LLC*, 108 AD3d 481, 481 [1st Dept 2013]).

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

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

ENTERED: JANUARY 31, 2019

DEPUTY CLERK

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

8284 In re Shirley D.-A.,
Petitioner-Respondent,

-against-

Gregory D.-A.,
Respondent-Appellant.

_____

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

Larry S. Bachner, New York, for respondent.

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Order, Family Court, New York County (Gail A. Adams, Referee), entered on or about November 30, 2017, which, upon findings that respondent committed the family offenses of harassment in the second degree and menacing in the third degree, granted the petition for a one-year order of protection on behalf of petitioner against respondent and excluded him from petitioner's home effective January 15, 2018, unanimously affirmed, without costs.

As an initial matter, respondent correctly argues that the expiration of the order of protection does not render his appeal moot, given the "significant enduring consequences" of such an order (*Matter of Veronica P. v Radcliff A.*, 24 NY3d 668, 671 [2015]; *Matter of Charlene R. v Malachi R.*, 151 AD3d 482 [1st Dept 2017]).

Petitioner proved by a fair preponderance of the evidence that respondent, her son, committed the family offenses of harassment in the second degree (Penal Law § 240.26[1]) and menacing in the third degree against her (Penal Law § 120.15). The Referee credited petitioner's testimony, and his determination is entitled to great deference and is supported by the record (*see Matter of Erin C. v Walid M.*, 165 AD3d 547, 548 [1st Dept 2018]). Petitioner testified that she moved out of her apartment and into her daughter's apartment in part due to fear of living with respondent who was living in her apartment. She stated that, on November 15, 2017, when she returned to her apartment, respondent made numerous threatening statements and gestures toward her while following her from room to room. Based on the surrounding circumstances, these actions and statements indicate that respondent was intending to harass, annoy or alarm petitioner, and that he intended to place her in fear of physical injury. Furthermore, the Referee had a sound basis for excluding respondent from petitioner's apartment beginning in January 2018 (*see* Family Ct Act § 842[k]; *Matter of V.C. v H.C.*, 257 AD2d 27, 32 [1st Dept 1999]).

Based on the existing record, respondent was afforded meaningful representation. Counsel actively participated throughout the entire hearing, timely objected to petitioner's

testimony, cross-examined petitioner, and made a coherent argument during summations (*see Matter of Devin M. [Margaret W.]*, 119 AD3d 435, 437 [1st Dept 2014]).

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

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

ENTERED: JANUARY 31, 2019

DEPUTY CLERK

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

8287 The People of the State of New York, Respondent, Ind. 1207/16

-against-

Luke Jackson, Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Arielle Reid of counsel), and Arnold & Porter Kaye Scholer LLP, New York (Zachary Sweebe of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered November 22, 2016, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the fifth degree, and sentencing him to a conditional discharge for a period of three years, unanimously affirmed.

The court properly denied defendant's suppression motion. Although defendant was in custody and had not yet received *Miranda* warnings, his inquiry about why the police were at his apartment was "immediately met by a brief and relatively innocuous answer by the police officer," not constituting interrogation or its functional equivalent (*People v Rivers*, 56 NY2d 476, 480 [1982]; *compare People v Lanahan*, 55 NY2d 711 [1981] [detailed recital of evidence held equivalent to

interrogation]). The officer's remark that defendant was "selling drugs out of here," which conveyed the underlying reason for the search, was responsive to defendant's inquiry.

Since defendant requested no further relief after the court struck the offending testimony and delivered curative instructions, his challenge to testimony that the police found pornography during the search is unpreserved (*see People v Medina*, 53 NY2d 951 [1981]), and we decline to review it in the interest of justice. As an alternative holding, we find that the court's curative actions were sufficient to prevent prejudice. The other testimony challenged on appeal did not deprive defendant of a fair trial.

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

ENTERED: JANUARY 31, 2019

DEPUTY CLERK

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

8288 José Cubelo, Index 113675/07
Plaintiff-Appellant,

-against-

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

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

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

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Order, Supreme Court, New York County (Margaret A. Chan, J.), entered June 9, 2017, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff claims that he was passed over for several promotions in his employment as a civil engineer with defendant Department of Transportation (DOT) because DOT gave persons of South Asian descent preference in promotions (plaintiff was born in Spain), and that, after he filed his discrimination complaints and a union grievance, DOT retaliated against him by transferring him to a lesser position, in violation of the State and City Human Rights Laws (HRL) (Executive Law § 296; Administrative Code of City of NY § 8-107).

Defendants established prima facie that DOT had "legitimate,

independent, and nondiscriminatory reasons" for taking the actions over which plaintiff sues (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]; *Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 514-515 [1st Dept 2016]). The record supports their explanation that the candidates selected for promotion over plaintiff were better qualified for the job, having advanced degrees and directly relevant experience that plaintiff did not possess. Plaintiff contends that these candidates were actually promoted as a result of preferential treatment toward employees of South Asian descent, but he submitted no evidence that in making these decisions his supervisors took into account the fact that he is not of South Asian descent. Indeed, plaintiff's contention that the real reason for the decisions was discrimination is undermined by the fact that a woman of Polish descent was ultimately hired to occupy one of the four positions for which he applied. Defendants also submitted evidence that plaintiff declined to pursue promotional opportunities and evidence that he had serious conflicts with two employees under his supervision, leading to their transfer out of his unit. It may reasonably be inferred that the latter limited plaintiff's suitability for those jobs that entailed supervision. In opposition, plaintiff failed to raise an issue of fact whether DOT's proffered reasons were false

and a pretext for, or motivated at least in part by, discrimination (*see Forrest*, 3 NY3d at 305; *Hudson*, 138 AD3d at 514-515).

Defendants also established prima facie that plaintiff's departmental transfer was not made in retaliation for his complaints of discrimination, because it did not constitute an "adverse employment action" (*see Forrest*, 3 NY3d at 306, 327) or an "action that disadvantaged him" (*see Harrington v City of New York*, 157 AD3d 582, 585 [1st Dept 2018]). Plaintiff had filed a grievance with his union about performing out-of-title work in his former position. His transfer was directed as a remedy for the grievance, and plaintiff continued to earn the same salary and benefits under the same title in his new position (*see Matter of Block v Gatling*, 84 AD3d 445 [1st Dept 2011], *lv denied* 17 NY3d 709 [2011]). Plaintiff's perception that the transfer was a demotion fails to raise an issue of fact.

In light of the foregoing, we need not reach defendants' alternative argument for affirmance.

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

ENTERED: JANUARY 31, 2019

DEPUTY CLERK

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

8290 Angel Leonides Cashbamba, Index 306059/12
Plaintiff-Appellant-Respondent, 83703/13

-against-

1056 Bedford LLC, et al.,
Defendants-Respondents-Appellants,

Mybem Corp.,
Defendant.

- - - - -

1056 Bedford LLC, et al.,
Third-Party Plaintiffs-Respondents-Appellants,

-against-

Constructor Luna Corp.,
Third-Party Defendant-Respondent-Appellant.

_____

Oresky & Associates, PLLC, Bronx (John J. Nonnenmacher of counsel), for appellant-respondent.

Havkins Rosenfeld Ritzert & Varriale, LLP, Mineola (Robert E. Coleman of counsel), for 1056 Bedford LLC and Leadex Inc., respondents-appellants.

Dillon Horowitz & Goldstein LLP, New York (Michael M. Horowitz of counsel), for Constructor Luna Corp., respondent-appellant.

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Order, Supreme Court, Bronx County (Donna Mills, J.), entered on or about May 2, 2018, which denied the motion of third-party defendant Constructor Luna Corporation (Luna) for summary judgment dismissing third-party plaintiffs' common-law indemnification and contribution claims, denied plaintiff's cross motion for partial summary judgment on the issue of liability on

his Labor Law § 240(1) claim, and denied the cross motion of defendants/third-party plaintiffs 1056 Bedford LLC and Leadex Inc. for summary judgment dismissing the complaint and all cross claims, and on their third-party contractual indemnification claim as against Luna, unanimously modified, on the law, to grant plaintiff's cross motion as to his Labor Law § 240(1) claim, and to grant Luna's motion, and otherwise affirmed, without costs.

Plaintiff should have been granted partial summary judgment on the issue of liability on his Labor Law § 240(1) claim. There is no dispute that plaintiff fell from the seventh floor to the sixth floor of the building on which he was working, a distance of approximately nine feet. Further, it is undisputed that there were no safety harnesses or other safety devices for plaintiff to use. "Thus, the fact that the parties offered different versions of plaintiff's accident makes no difference with respect to defendants' liability under Labor Law § 240(1). Under either version, defendants . . . failed to secure an area at a construction site from which a fall could occur, thereby exposing the injured worker to an elevation-related risk" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001]).

However, the motion court properly denied the cross motion of defendants/third-party plaintiffs on the Labor Law §§ 241(6), 200, and common-law negligence claims, since there are triable

issues of fact as to exactly how, where and why the underlying incident occurred (*see Greenwood v Whitney Museum of Am. Art*, 161 AD3d 425, 426 [1st Dept 2018].

Nevertheless, under Workers' Compensation Law § 11, the third-party claims for common-law indemnification and contribution are not viable. The record establishes that plaintiff did not sustain a "grave injury" as a result of his fall, since he was able to obtain a full time job at the beginning of 2017 (*see Rubeis v Aqua Club, Inc.*, 3 NY3d 408 [2004]).

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

ENTERED: JANUARY 31, 2019

DEPUTY CLERK

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

8292 The People of the State of New York, Ind. 2578/16
Respondent,

-against-

Sharina Dixon,
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.

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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 (Laura Ward, J.), rendered December 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 31, 2019

DEPUTY CLERK

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

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

8293 In re Nytasia W.,

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

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

Zachary W. Carter, Corporation Counsel, New York (Jessica Miller of counsel), for presentment agency.

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Order of disposition, Family Court, New York County (Jane Pearl, J.), entered on or about April 24, 2017, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that she committed acts that, if committed by an adult, would constitute the crimes of assault in the second degree, attempted petit larceny, and menacing in the third degree, and placed her on probation for a period of 14 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). Appellant's conduct during the attempted robbery was inconsistent with that of a bystander, and established that when appellant assaulted the victim, she shared a community of purpose with participants who had attempted

to steal merchandise from the victim's store. This conduct established accessorial liability supporting the count of second-degree assault based on a theory of felony assault, among other things (*see e.g. People v Brown*, 122 AD3d 461 [1st Dept 2014], *lv denied* 25 NY3d 1160 [2015]; *Matter of Richard G.*, 95 AD3d 455 [1st Dept 2012]; *Matter of Justice G.*, 22 AD3d 368 [1st Dept 2005]). The court's dismissal of counts charging a completed robbery does not support a contrary conclusion. To the extent appellant's argument in this regard may be viewed as asserting that the court's finding was legally repugnant, that claim is unpreserved and without merit.

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

ENTERED: JANUARY 31, 2019

DEPUTY CLERK

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

8294 Lexington Insurance Company, Index 650574/15
Plaintiff-Respondent,

-against-

Steadfast Insurance Company, Inc.,
Defendant-Respondent,

Langan Engineering and Environmental Services, Inc.,
Defendant-Appellant.

_____

Pasich LLP, New York (Jeffrey L. Schulman of counsel), for appellant.

Riker Danzig Scherer Hyland & Perretti LLP, New York (Michael J. Rossignol of counsel), for Lexington Insurance Company, respondent.

Coughlin Duffy LLP, New York (Lorraine M. Armenti of counsel), for Steadfast Insurance Company, Inc., respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Ellen M. Coin, J.), entered June 19, 2017, which granted plaintiff's motion for summary judgment declaring that it is not obligated to pay any part of the deductible under the policy issued by defendant Steadfast Insurance Company to defendant Langan Engineering and Environmental Services, Inc., and so declared, and granted Steadfast's motion for summary judgment declaring that Langan must reimburse it for the deductible, and so declared, unanimously reversed, on the law, without costs, the motions denied, and the declarations vacated.

The motion court erred in concluding that plaintiff was not obligated to pay any part of Langan's deductible under the Steadfast policy and that Langan owed Steadfast the amount of the deductible without first determining Steadfast's and plaintiff's duties to defend and to indemnify and, if necessary, the priority of coverage (*see Sport Rock Intl., Inc. v American Cas. Co. of Reading, Pa.*, 65 AD3d 12, 18 [1st Dept 2009], *appeal withdrawn* 14 NY3d 796 [2010]). That determination requires consideration of all relevant policies and, with regard to the duty to indemnify, the facts as found in the underlying personal injury action (*see id.* at 29; *BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714 [2007]).

In addition, we note that the court failed to reduce the disputed deductible by $25,000, as provided for in the Steadfast policy in the event of the resolution of a claim by mediation.

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

ENTERED: JANUARY 31, 2019

DEPUTY CLERK

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

8295-
8296 Index 651788/11

High Value Trading, LLC, et al.,
Plaintiffs-Respondents,

-against-

Jack Shaoul, et al.,
Defendants-Appellants.

_____

Malcolm S. Taub LLP, New York (Malcolm S. Taub of counsel), for appellants.

Budd Larner P.C., New York (Philip C. Chronakis of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Margaret A. Chan, J.), entered February 9, 2018, after a jury trial, against defendants in favor of plaintiff Alskom Realty, LLC, unanimously affirmed, with costs.

Plaintiff Alskom purchased from defendants a painting that defendant Jack Shaoul represented was a genuine Renoir but was later found to be a fake.

The trial court providently exercised its discretion in granting plaintiffs' motion in limine for leave to present evidence of Shaoul's conviction for conspiracy and mail fraud (*see United States v Shaoul*, 41 F3d 811 [2d Cir 1994]) and the judgment in a civil case in which Shaoul and defendant Universe Antiques, Inc. were found to have sold a fake Tiffany window (*see*

Universe Antiques, Inc. v Vareika, 510 Fed Appx 74 [2d Cir 2013]), although the prior conviction was old (*see People v Sandoval*, 34 NY2d 371, 377 [1974]).

Defendants contend that plaintiffs exceeded the bounds of the in limine ruling by referring to Shaoul's prior conviction and prior art fraud case before he testified. To the extent this argument is based on plaintiffs' questioning of nonparty Alexander Komolov (their principal), it is unpreserved, and we decline to reach it in the interest of justice (*see Boyd v Manhattan & Bronx Surface Tr. Operating Auth.*, 79 AD3d 412, 413 [1st Dept 2010]). To the extent defendants' argument is based on plaintiffs' counsel's opening statement, it is unavailing. Although plaintiffs sought to use Shaoul's prior legal history if he testified, defense counsel confirmed before plaintiffs' opening that Shaoul would testify. Moreover, evidence of other similar acts can be introduced to establish intent in fraud cases (*Matter of Brandon*, 55 NY2d 206, 211 [1982]; *see also People v Schwartzman*, 24 NY2d 241, 246-248 [1969], *cert denied* 396 US 846 [1969]; *compare People v Allen*,198 AD2d 789, 789 [4th Dept 1993], *affd* 84 NY2d 982 [1994]).

Defendants contend that the judgment in Alskom's favor should be reversed because, during his cross-examination of Shaoul, plaintiffs' counsel read from court transcripts that were

not in evidence and displayed them to the jury. However, *United States v Shaoul* (41 F3d 811) is a matter of public record (*see* CPLR 4513). While extrinsic evidence may not be used "to contradict a witness's answers on collateral matters" (*Badr v Hogan*, 75 NY2d 629, 631 [1990]), Shaoul's prior conviction and prior art fraud case were not collateral, because they were relevant to his intent in this action (*see Schwartzman*, 24 NY2d at 246).

Defendants' argument as to the extent of plaintiffs' cross-examination of Shaoul is unavailing (*see e.g. id.* at 244 ["questions are not rendered improper merely because of their number provided they have some basis in fact and are asked in good faith"]).

Defendants' arguments about plaintiffs' summation and their argument that the court erred in allowing Komolov to testify about what he understood a document to be are unpreserved, and we decline to reach them in the interest of justice.

The verdict was not against the weight of the evidence (*see Gonzalez v City of New York*, 45 AD3d 347 [1st Dept 2007], *lv denied* 10 NY3d 701 [2008]). As both plaintiffs' and defendants' key documents were suspect (the March 2010 invoice for plaintiffs and the September 2008 consignment agreement for defendants), the case turned on witness credibility, which, along with the weight

to be given witnesses' testimony, is an issue for the jury (*see Mazella v Beals*, 27 NY3d 694, 708 [2016] [internal quotation marks omitted]; *see also e.g. Lipson v Bradford Dyeing Assn. of U.S.A.*, 266 App Div 595, 598 [1st Dept 1943]).

Contrary to plaintiffs' claim, defendants preserved their argument that the court should have given a sophisticated dealer charge, i.e., that, because its principal was an art dealer, Alskom could not prove justifiable reliance but had the obligation to conduct due diligence before buying the painting in question. However, although Alskom and Komolov are art dealers, "the fact that one party is sophisticated does not end the fact-intensive question of what constitutes reasonable reliance, because [courts] consider the entire context of the transaction" (*Universe Antiques*, 510 Fed Appx at 76 [citation and internal quotation marks omitted]). The jury had before it evidence that, at the time of the subject transaction, Komolov trusted Shaoul as a member of his own family and that, according to Shaoul himself, he and Komolov had done approximately 30 to 40 deals, before the subject transaction. Furthermore, although the court did not give the charge that they wanted, defendants were able to make their point in other ways.

Regardless of whether the court should have limited defendants' ability to refer to the summons with notice, or the

jury's right to review it during deliberations, it was harmless error because the document was referred to during the trial and published to the jury at that time.

As defendants never moved to dismiss the unjust enrichment claim as duplicative of the fraud claim, their argument that the court erred in submitting unjust enrichment to the jury is unpreserved and does not warrant interest-of-justice review. As to the specific wording of the charge, unlike defendants' proposed charge, the court's charge correctly stated the elements of unjust enrichment (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]).

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

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

ENTERED: JANUARY 31, 2019

DEPUTY CLERK

CORRECTED ORDER - FEBRUARY 1, 2019

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

8297 In re Ardila McMillan, Petitioner-Appellant, Index **100405/16**

-against-

New York City Housing Authority, Respondent-Respondent.

_____

Ardila McMillan, appellant pro se.

Kelly D. MacNeal, New York (Seth E. Kramer of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered April 20, 2017, denying the petition to annul respondent's determination, dated October 22, 2015, which denied petitioner succession rights, as a remaining family member to the subject apartment, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Regardless of whether the Article 78 proceeding was brought timely, petitioner did not satisfy her burden for entitlement to succession rights (*see Matter of Adler v New York City Hous. Auth.*, 95 AD3d 694, 695 [1st Dept 2012], *lv dismissed* 20 NY3d 1053 [2013]). Petitioner had not been an authorized occupant of the apartment for a one-year period preceding her brother's death (*id.*). While petitioner urges

that personal hardship and factors such as her age, lack of housing alternatives, and the fact that she gave up her own apartment to care for her brother should be considered, such factors do not provide a basis to annul respondent's determination (*see Matter of Vereen v New York City Hous. Auth.*, 123 AD3d 478 [1st Dept 2014]).

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

ENTERED: JANUARY 31, 2019

DEPUTY CLERK

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

8299 The People of the State of New York, Respondent, Ind. 1348/06

-against-

Albert Javier, Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered August 10, 2015, resentencing defendant to an aggregate term of 30 years, unanimously reversed, on the law, and the matter remanded for resentencing.

We previously directed a further resentencing (128 AD3d 494 [1st Dept 2015], *lv denied* 26 NY3d 968 [2015]) on the ground that defendant's 2011 Drug Law Reform Act resentencing was improper with regard to concurrent and consecutive sentences (*see People v Norris*, 20 NY3d 1068 [2013]). On remand, the court imposed a resentence that is still defective under *Norris* as to counts 24 and 25 of the indictment. Accordingly, another resentencing on

those counts is required. However, the record refutes defendant's remaining contention that, at the 2011 resentencing, the court failed to impose any sentence on count 24.

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

ENTERED: JANUARY 31, 2019

DEPUTY CLERK

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

8300- Ind. 1087/12
8301-
8302 The People of the State of New York,
Respondent,

-against-

Andre Dennis also known as Denise Dennis,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Rena K. Uviller, J. at plea and sentencing; Daniel P. Conviser, J. at postconviction proceedings and resentencings), rendered May 22, 2013, as amended July 26, 2018 and June 19, 2018, convicting defendant, upon her plea of guilty, of attempted assault in the second degree, and sentencing her, as a second felony offender, to a term of two to four years, unanimously affirmed.

After a hearing at which defendant testified, the hearing court correctly determined that defendant's 2000 second-degree burglary conviction in Onondaga County was not unconstitutionally obtained, and that it therefore qualified as a predicate felony conviction in the instant case. Defendant failed to demonstrate that, had she known of the postrelease supervision component of

her 2000 sentence, she would not have pleaded guilty (*see People v Smith*, 28 NY3d 191, 205 [2016]). There is no basis for disturbing the court's credibility determinations. Among other things, defendant, who had been charged with first-degree burglary, received a favorable disposition with a very lenient sentence. In the instant proceedings, defendant never alleged that she was actually innocent of the burglary, or that she had a viable defense. Regardless of whether she had been convicted of the first or second-degree crime, after trial or by plea, the sentence would have included a term of PRS. The record supports the resentencing court's rejection of defendant's assertion that, simply to avoid a term of PRS, she would have risked a sentence of up to 25 years by going to trial on a first-degree burglary charge.

We decline to reach the People's procedural arguments.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 31, 2019

DEPUTY CLERK

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

8303 Stephen Barracato, Index 306525/14
Plaintiff-Respondent,

-against-

SP Plus Corporation, et al.,
Defendants-Appellants.

_____

Barry McTiernan & Moore LLC, New York (David H. Schultz of counsel), for appellants.

Bader & Yakaitis LLP, New York (Michael Caliguiri of counsel), for respondent.

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Order, Supreme Court, Bronx County (Donna Mills, J.), entered on or about February 26, 2018, which denied defendants' motion for summary judgment, unanimously affirmed, without costs.

Plaintiff was unloading merchandise from the drivers' side of his truck on the south side of 96th Street, a two way multi-lane street, when he was hit by the passenger side of defendants' shuttle bus as it drove by him. Defendants' motion for summary judgment was correctly denied because it did not present sufficient evidence to eliminate any material issues of fact concerning whether defendant driver failed to exercise due care to avoid striking plaintiff, whom he admitted seeing before the collision. While defendants presented evidence circumstantially supporting an inference that plaintiff stepped backwards into the bus, it likewise supports an inference that in the exercise of

due care, the shuttle driver could have taken steps, such as honking to warn plaintiff of his approach (*see* Vehicle and Traffic Law § 1146; *Santo-Perez v Enterprise Leasing Co.*, 126 AD3d 621[1st Dept 2015]; *Moreira v Ramos*, 95 AD3d 561 [1st Dept 2012]).

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

ENTERED: JANUARY 31, 2019

DEPUTY CLERK

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

8304N Blue Sage Capital, L.P., etc.,
Plaintiff-Respondent,

Index 650413/14
650527/14

-against-

Alfa Laval U.S. Holding, Inc.,
Defendant-Appellant.

- - - - -

Alfa Laval U.S. Holding, Inc.,
Plaintiff-Appellant,

-against-

Blue Sage Capital, LP, et al.,
Defendants-Respondents.

_____

McGuire Woods LLP, New York (Michael L. Simes of counsel), for appellant.

Locke Lord LLP, Houston, TX (Christopher Dove of the bar of the State of Texas, admitted pro hac vice, of counsel), for respondents.

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Order, Supreme Court, New York County (Marcy Friedman, J.), entered on or about April 3, 2018, which, to the extent appealed from, denied appellant Alfa Laval US Holding, Inc.'s motion for attorneys' fees and reduced its $4 million judgment by the $1,063,254 owed to respondent Blue Sage Capital, LP, before calculating prejudgment interest, unanimously affirmed, without costs.

Given the mixed results of this case, the court properly concluded that neither party had substantially prevailed on the

central claims advanced and that therefore neither was entitled to attorneys' fees (*see Sykes v RFD Third Ave. I Assoc., LLC*, 39 AD3d 279 [1st Dept 2007]; *see also Berman v Dominion Mgt. Co.*, 50 AD3d 605 [1st Dept 2008]; *Pelli v Connors*, 7 AD3d 464 [1st Dept 2004]).

Alfa Laval argues correctly that its victory need not have been total for it to have been the prevailing party (*see Duane Reade v 405 Lexington, L.L.C.*, 19 AD3d 179 [1st Dept 2005]). However, it failed to show that the two misrepresentations in its breach of contract claim on which the jury ruled in its favor – the Imcopa Contract and the earnings forecasts – were "central" to its case against Blue Sage or were any more significant than the remaining five alleged misrepresentations on which the jury ruled against it. The court thus properly determined that because Alfa Laval prevailed on only two of the seven subparts of its claim, it was not the prevailing party (*see e.g. Excelsior 57th Corp. v Winters*, 227 AD2d 146 [1st Dept 1996]; *see also Lightbox Ventures, LLC v 3rd Home Ltd.*, 2018 WL 1779346, *17, 2018 US Dist LEXIS 63485, *46-47 [SD NY Apr. 13, 2018]). To the extent the court did not account for Alfa Laval's successful defense against Blue Sage's claims (*see 25 E. 83 Corp. v 83rd St. Assoc.*, 213 AD2d 269 [1st Dept 1995]), the omission is harmless; Blue Sage also thwarted a significant portion of Alfa Laval's

litigation goals.

Alfa Laval argues that it is the prevailing party because a "net judgment" was entered in its favor, citing *Matter of Wiederhorn v Merkin* (98 AD3d 859, 862-863 [1st Dept 2012], *lv denied* 20 NY3d 855 [2012]). However, *Wiederhorn* further defines "prevailing party" as the party that prevails with respect to the central relief sought (*id.* at 863).

Alfa Laval also argues that the court erred in considering the amount of money it won relative to the amount it sought in determining in the first instance whether it was the prevailing party. However, in *Matsumura v Benihana Natl. Corp.* (2014 WL 1553638, *5, 2014 US Dist LEXIS 54404, *16-18 [SD NY Apr. 17, 2014]), on which Alfa Laval otherwise relies, in determining that the defendant was the prevailing party, the court noted that the plaintiffs' "relatively modest gain" was "even further dwarfed by the amount of damages plaintiffs sought in their complaint."

Alfa Laval waived its argument about the non-simultaneity of debts. The motion court declined to entertain the argument when Alfa Laval raised it on a motion to reargue, on the ground that Alfa Laval had not made the argument on the original posttrial motion. Alfa Laval contends that it raised the issue as early as possible. However, Blue Sage made the "net balance" issue in its posttrial motion, and Alfa Laval, at least for purposes of its

prevailing party arguments, had entertained the notion of a setoff between potential damages awards even before the jury was charged. Nor is this a "strictly legal" issue that can be considered for the first time on appeal (*see Vanship Holdings Ltd. v Energy Infrastructure Acquisition Corp.*, 65 AD3d 405, 408 [1st Dept 2009]). It involves factual issues not resolved at trial, in particular, the question of when Blue Sage's claim to the $1,063,254 first arose.

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

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

ENTERED: JANUARY 31, 2019

DEPUTY CLERK

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

8305- Index 100516/14
8306-
8307N State of New York, City of New York, etc.,
ex rel. Leonard M. Campagna,
Plaintiff-Respondent,

-against-

Post Integrations, Inc., et al.,
Defendants-Appellants.

_____

Hodgson Russ LLP, Buffalo (Aaron M. Saykin of counsel), for appellants.

Law Offices of Joshua Parkhurst, New York (Joshua Parkhurst of counsel), for respondent.

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Order, Supreme Court, New York County (James E. d'Auguste, J.), entered January 8, 2018, and orders (same court and Justice), entered January 31, 2018, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion to compel discovery of alter ego/veil piercing documents and defendants' federal tax returns and corporate financial documents, and denied defendants' cross motion to strike plaintiff's discovery demands, unanimously affirmed, without costs.

The trial court's discovery determinations, unattended by error of law or abuse of discretion, should not be disturbed on appeal (*Forman v Henkin*, 30 NY3d 656, 662 [2018]).

Discovery concerning the alter ego/veil piercing allegations is appropriate at this stage (*see First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 293-294 [1st Dept 1999]).

Plaintiff established his entitlement to defendant Post Integrations' federal tax returns, which allegedly contain some of the misrepresentations at issue (*see Gama Aviation Inc. v Sandton Capital Partners, LP*, 113 AD3d 456, 457 [1st Dept 2014]; *Nanbar Realty Corp. v Pater Realty Co.*, 242 AD2d 208, 209-210 [1st Dept 1997]).

Defendants' financial statements are central to the claims under New York's False Claims Act (Finance Law § 189[1]). Their argument that documents lacking a clear New York nexus are irrelevant misses the point of the allegations that defendants intentionally sought to avoid the payment of New York franchise and corporate taxes.

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

ENTERED: JANUARY 31, 2019

DEPUTY CLERK

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

8308N The Port Authority of New York and New Jersey, Plaintiff-Respondent, Index 154871/12

-against-

Weiss & Hiller, P.C., etc., Defendant-Respondent,

American Stevedoring, Inc., Defendant-Appellant.

Gabor & Marotta LLC, Staten Island (Daniel C. Marotta of counsel), for appellant.

Sills Cummis & Gross P.C., New York (Michael J. Geraghty of counsel), for The Port Authority of New York and New Jersey, respondent.

Hiller, PC, New York (Michael S. Hiller of counsel), for Weiss & Hiller, P.C., respondent.

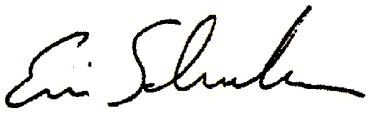
Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered May 11, 2017, which, to the extent appealed from, denied the cross motion of defendant American Stevedoring, Inc. (ASI) to vacate the temporary restraining order and release the remaining escrow funds to ASI, unanimously affirmed, with costs.

The motion court did not abuse its discretion when it denied the cross motion to vacate the temporary restraining order (*see Rosemont Enters. v Irving*, 49 AD2d 445, 448 [1st Dept 1975], *appeal dismissed* 41 NY2d 829 [1977]; *see also Dupree v Scottsdale Ins. Co.*, 96 AD3d 546 [1st Dept 2012]). The TRO was entered on

consent to stay distribution of funds escrowed by the parties under a separate agreement for the benefit of ASI'S creditors, which included plaintiff. ASI was a terminal operator at the Brooklyn and Newark Ports that suspended its marine terminal operations and went into the business of leasing equipment necessary to such operations. ASI's statements in the prior litigation that it was threatened with insolvency, in addition to ASI's improper transfer of approximately $4 million to the wife of ASI's principal, demonstrate the need to continue the temporary restraining order so that any arbitration award would not be rendered ineffectual (*see* CPLR 7502[c]; *New York City Off-Track Betting Corp. v New York Racing Assn.*, 250 AD2d 437, 439 [1st Dept 1998]).

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

ENTERED: JANUARY 31, 2019



DEPUTY CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rosalyn H. Richter, J.P.
Sallie Manzanet-Daniels
Barbara R. Kapnick
Cynthia S. Kern
Peter H. Moulton, JJ.

7399
Index 305654/11

_____x

A. L., etc.,
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.
_____x

Plaintiff appeals from the order of the Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about February 17, 2017, which granted defendant's motion for summary judgment dismissing the complaint.

The Fitzgerald Law Firm, P.C., Yonkers (Mitchell Gittin, Deborah P. Henkin and Alberto Casadevall of counsel), for appellant.

Herzfeld & Rubin, P.C., New York (Linda M. Brown of counsel), for respondent.

MOULTON, J.

The presence of lead in paint is not evident to the naked eye. Detection comes by testing the paint itself or, inferentially, by testing the blood of people who have come in contact with paint chips or dust. Children are particularly vulnerable to lead-based paint "because of their normal hand-to-mouth activity and their developing neurological systems" (*Matter of New York City Coalition to End Lead Poisoning v Vallone*, 100 NY2d 337, 343 [2003]). There is no blanket requirement in New York State that a landlord test an apartment for lead-based paint based solely on the general knowledge of its dangers (*see Chapman v Silber,* 97 NY2d 9, 21 [2001]). Instead, the State has mandated that health care providers perform routine blood tests on young children in order to detect exposure.[1]

Plaintiff Helena C. (plaintiff) brings this appeal on behalf of her child A.L. after Supreme Court granted New York City

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[1]Pursuant to the State's Health Law (Public Health Law § 1370-a), the City enacted regulations requiring that health care providers test all children's blood for lead at age one (or earlier at routine well-child visits if the child is at least six months old) and again at age two (*see* 10 NYCRR 67-1.2). Further blood testing is required if the child is "at risk" or if the child has elevated blood lead levels (*see* New York State Department of Health website located at https://www.health.ny.gov/environmental/lead/health_care_providers/index.htm.

Housing Authority's (NYCHA) motion for summary judgment dismissing her negligence complaint. The sole basis of the motion was NYCHA's contention that plaintiff's apartment did not contain a hazardous lead-based paint condition.

Supreme Court correctly found that the rebuttable presumption of Local Law No. 1 (1982) of City of New York (Local Law 1) did not apply because the subject building was not erected before January 1, 1960. However, Supreme Court erred in finding, as a matter of law, that NYCHA demonstrated that no hazardous condition existed in the apartment. Supreme Court also erred in finding that plaintiff failed to raise an issue of fact for trial.

Background

A.L. moved with his family into an apartment at NYCHA's Castle Hill Housing complex immediately after his birth in June 1999, and he has resided there ever since.[2] When he was 10 months old, a routine blood test at Lincoln Hospital's pediatric clinic revealed that he had a lead level of 4 ug/dL.[3] When he

[2]Plaintiff testified that she left A.L. with her sister on the island of Dominica for four or five months in 2005-2006. However, that was more than three years after A.L.'s lead poisoning diagnosis.

[3]New York City Health Code (24 RCNY 11.03) defines lead poisoning as a blood level of 10 micrograms per deciliter (ug/dL) or higher (*see also* 10 NYCRR 67-1.1[e]). The State's Health Law

was two years old, a blood test revealed a level of lead of 7 ug/dL. On July 12, 2002, at three years of age, A.L. was diagnosed with lead poisoning as the result of a lead level of 10 ug/dL. Less than a year later, on March 27, 2003, the lead level in A.L.'s blood had increased to 16 ug/dL. His lead levels did not decrease to under 10 ug/dL until May 8, 2004. His last blood test was on July 19, 2005, and indicated a lead level of 6 ug/dL.

Plaintiff testified at her General Municipal Law § 50-h hearing and her deposition that she complained to NYCHA in person and by telephone about chipped and peeling paint in the apartment and flaking plaster caused by recurring leaks. She testified at her 50-h hearing that there was "[a] lot of flaking and falling on the floor. So I always had to keep sweeping it up. It was bad." She further testified that the windowsill "had a lot of chipping paint where the paint was like powder." At her deposition, plaintiff testified that chipped and peeling paint existed in all the rooms on interior doors, walls, windowsills, and the ceiling. At his deposition, NYCHA's representative, Thomas Sheil, similarly described observing chipped, peeling

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provides that the term "[e]levated lead levels" means "a blood lead level greater than or equal to ten micrograms of lead per deciliter of whole blood or such blood lead level as may be established by the department pursuant to rule or regulation" (Public Health Law §1370[6]).

paint throughout the apartment during his inspections in 2002, 2003 and 2004. NYCHA's annual inspection reports from 2002 through 2004 indicate the presence of "Paint/Paint Chips" and the need for followup. NYCHA's records also reflect that the apartment was painted March 5-6, 2003.

Plaintiff also testified at her 50-h hearing that the apartment was inspected for lead-based paint either in 2002, after A.L. was diagnosed with a blood lead level of 10 mg/dL, or in 2003, after A.L's blood lead level rose to 16 mg/dL. She testified to a distinct memory of an "African woman who had washed the window" and used "chemicals to check to clean up for the lead paint around the window" and a "Caucasian or Spanish" man who used a "laser." Plaintiff testified that the workers told her that they were there to test for lead-based paint. She recalled that it was around "summertime" because the weather was nice. Plaintiff originally testified at her 50-h hearing that she did not "know if they were from the City" but she later testified at her deposition that "NYCHA came." Plaintiff testified that NYCHA never informed her of the testing results. NYCHA maintains that this inspection never occurred.

At her 50-h hearing, plaintiff further testified that NYCHA performed extensive repairs to her apartment sometime after that inspection. Plaintiff recalled "Mexican" contractors who

"scraped the walls, and they put plastic on the floor, and they told me I had to step out with the baby, and they came and scraped the walls, and they painted over," and "they redid the apartment." She testified at her deposition that these repairs were made after A.L. was diagnosed with 16 ug/dL: "[T]hey made repairs. They come and take out the peeling paint and stuff like that." She explained at her deposition that the repairs included scraping and painting the radiator and the walls and ceilings in the bedroom, living room and bathroom. Plaintiff testified that NYCHA also replaced chipped, peeling doors, which is evidenced by a NYCHA June 17, 2004 work ticket for replacement of two bedroom doors and two closet doors.

The apartment was tested for lead-based paint on April 26, 2005 by Housing Environmental Services, Inc. (HES), a company retained by NYCHA. NYCHA does not explain why it hired HES to test the apartment.[4] The report found no actionable level of lead-based paint in the apartment (the 2005 report).[5]

On October 17, 2008, the apartment was tested again at the

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[4]NYCHA's appellate brief asserts that "NYCHA would not have any reason to test the alleged peeling paint," because the building was not built before January 1, 1960.

[5]The report found lead in the bathtub, bathroom sink and bathroom bend pipe. Plaintiff, however, does not claim that the bend pipe, the bathtub or bathroom sink caused A.L.'s injuries.

request of plaintiff's counsel, who had been recently retained (the 2008 report). The tested surfaces did not contain actionable levels of lead-based paint.

Local Law 1 of 1982

Supreme Court correctly found that the rebuttable presumption of Local Law 1 did not apply because the subject building was not erected before January 1, 1960.[6] Local Law 1 amended Administrative Code of City of NY § 27-2013 to add a new subdivision [h]. That subdivision included a presumption of lead content providing that:

> "In any multiple dwelling erected prior to January 1, 1960 in which paint or other similar surface-coating material is found to be peeling on the interior walls, ceilings, doors, window sills or moldings in any dwelling unit in which a child or children six (6) years of age or under reside, it shall be presumed that the peeling substance contains more than 0.5 percent of metallic lead based on the non-volatile content of the paint or other similar surface-coating material or having a reading of 0.7 milligrams of lead per square

[6]Plaintiff relies on Local Law No. 1 (1982) based on A.L.'s 2002 and 2003 elevated blood lead levels. Local Law No. 38 (1999) of City of New York (Local Law 38) replaced Local Law 1, but the Court of Appeals declared Local Law 38 null and void in 2003 (*see Matter of New York City Coalition to End Lead Poisoning*, 100 NY2d at 349-350 [Local Law 38 was declared null and void because the City failed to comply with SEQRA]). As a result, Local Law 1 was revived (*id.* at 350).

centimeter or greater" (Administrative Code former § 27-2013[h][2], repealed by Local Law No. 38 (1999) City of NY).[7]

Plaintiff argues that Supreme Court erred in concluding that the building was not erected before January 1, 1960. The term "erected" is not defined in the Local Law. Plaintiff contends that the legislature purposefully chose not to use such terms as "completed," "constructed" or "legally habitable." Instead, citing the definition of "erected" from the Dictionary of Construction, Surveying & Civil Engineering (Oxford University Press 2012) and from an online website, plaintiff asserts that Local Law 1 used the term "erected" to refer to the installation of a building's steel structure. Resort to legislative history would be improper, plaintiff contends, because Local Law 1 is clear on its face. The building's March 7, 1961 certificate of occupancy, plaintiff argues, has no bearing on when the building was erected. Instead, plaintiff points to the building's temporary certificate of occupancy dated October 26, 1959, issued for the "Boiler Room (Only)."

NYCHA counters that plaintiff's argument regarding the

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[7]The presumption was "unquestionably intended to protect a definite class of persons from a particular hazard they are incapable of avoiding themselves," but Local Law 1 did not create an additional standard of care (*Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 643-644 [1996]).

definition of "erected" should not be considered because it is a factual argument that was not raised before Supreme Court. If plaintiff had raised that argument, NYCHA explains that it would have submitted an affidavit by an engineer or architect to refute plaintiff's definition. NYCHA further points out that the painting of apartment interiors takes place long after the placement of a building's steel structure. The temporary certificate of occupancy is not probative, the agency asserts, because it was issued for the boiler room. Accordingly, in light of the date of the building's certificate of occupancy, NYCHA maintains that Supreme Court correctly found that Local Law 1 did not apply.

Plaintiff's argument is properly reached as a legal argument that appears on the face of the record and could not have been avoided if brought to the opposing party's attention (*see Chateau D'If Corp. v City of New York*, 219 AD2d 205, 209 [1st Dept 1996], *lv denied* 88 NY2d 811 [1996]).

Resort to legislative history is appropriate because the law does not define the term "erected," and it is necessary to determine the intent of the City Council. The construction industry's definition of the term "erected" is of no import. Notably, throughout the legislative history, the terms "built" and "erected" are used interchangeably (*see generally* NYLS Local

Law Bill Jacket, Local Law No. 1 [1982] of City of New York). Indeed, we have used the term "constructed" in lieu of the term "erected" when discussing whether a building falls within the ambit of Local Law 1 (*see Herrera v Persuad*, 276 AD2d 304, 305 [1st Dept 2000]; *Guzman v 560 Realty Co.*, 273 AD2d 25, 26 [1st Dept 2000]).

The legislative history also indicates that Local Law 1's pre-1960 date is tied to the date of New York City's ban on the use of lead paint (*see* Report of Comm on Housing and Buildings recommending the adoption of Local Law 1 [1982], 1982 NY City Legis Ann at 1; *see also* New York City Independent Budget Office, Preventing Lead Poisoning in Children, Fiscal Impact of Intro. 205, A Legislative Alternative to Local Law 1 at 2, April 28, 1999, NYLS Local Law Bill Jacket, Local Law No. 38 [1999] of City of New York).[8] As NYCHA points out, the obvious purpose of Local Law 1 is to prevent lead poisoning. Lead poisoning can only occur when (or after) an apartment is painted. It cannot occur when a building's steel structure is erected. Thus, absent evidence that the apartment was painted earlier than March 7, 1961 (when the certificate of occupancy was issued), Supreme

[8]Effective January 1, 1960, New York City banned the use of lead-based paint on interior building surfaces (*see Juarez*, 88 NY2d at 641; NY City Health Code [24 RCNY] § 173.13[c]).

Court correctly concluded that Local Law 1 does not apply.

Hazardous Condition

While plaintiff is not entitled to the presumption of Local Law 1, that is not the end of the inquiry. We find that NYCHA failed to meet its burden on summary judgment to demonstrate that the apartment did not contain a hazardous level of lead-based paint.

NYCHA attempts to meet its burden by invoking the 2005 report.[9] The agency's reliance on that report is misplaced. The probative value of the 2005 report is dependent on NYCHA's unstated assumption that the lead condition of the apartment in 2005 was the same as the lead condition of the apartment three years earlier. This assumption, however, is not supported by any evidence (*compare Tomaino v 209 E. 84th St. Corp.*, 72 AD3d 460, 461 [1st Dept 2010] [employees testified that the photographs taken two or three months after the accident accurately represented the condition on the date of the accident and therefore there was "no reason to believe that the condition of the treads changed significantly between the date of the accident

[9]Supreme Court properly considered the 2005 report because, contrary to plaintiff's argument, the report was not hearsay. While NYCHA employee Margarita Cabral was not employed by the dissolved company HES, she properly authenticated the report as one of NYCHA's business records.

and the date of plaintiff's return to the scene"]). NYCHA's assumption is particularly misplaced here, where plaintiff has brought forth evidence that 1) there were paint chips and dust in the apartment before 2003; 2) A.L. had elevated lead levels in 2002 and 2003; 3) an abatement went forward in 2003; and 4) A.L.'s levels went down after the alleged abatement.

Michaud v Lefferts 750, LLC (87 AD3d 990, 991-992 [2d Dept 2011]) illustrates that summary judgment may be granted based on apartment testing at or near the time of a lead poisoning diagnosis and that testing that occurs years later, and at a time when the child no longer has an elevated blood lead level, is not probative. In *Michaud*, the Second Department reversed the motion court for denying summary judgment to a landlord where the resident child was diagnosed with an elevated blood level in April 2004, and a September 2, 2004 test found no lead-based paint in the apartment. The Court held that the plaintiffs failed to raise an issue of fact based on apartment testing (finding actionable levels of lead-based paint) conducted two years and six months after the child's lead diagnosis and when the child no longer had an elevated blood lead level (*id.* at 992). Similarly, NYCHA's testing here is not probative, because it occurred nearly three years after A.L.'s lead poisoning diagnosis and at a time when A.L. no longer suffered from lead

poisoning. The 2008 report is even more remote in time.[10]

Supreme Court also erred in finding that plaintiff failed to raise issues of fact, citing "counsel's speculation" and plaintiff's "conflicting" testimony. As the nonmovant, plaintiff is entitled to all reasonable inferences that can be drawn in her favor (*see e.g. Melendez v Dorville*, 93 AD3d 528, 528 [1st Dept 2012]). A plaintiff is generally not required to prove her claim (the plaintiff's ultimate burden) in order to defeat summary judgment (*see Ferrante v American Lung Assn.*, 90 NY2d 623, 630 [1997]). At trial a plaintiff "need only prove that it was 'more likely' . . . or 'more reasonable' . . . that the alleged injury was caused by the defendant's negligence than by some other agency" (*Gayle v City of New York*, 92 NY2d 936, 937 [1998]).

Because "lead in paint is undetectable to the senses" (*Chapman*, 97 NY2d at 20) and because NYCHA did not test the apartment in 2002, no direct evidence exists regarding whether

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[10]Plaintiff also maintains that NYCHA failed to establish a prima facie entitlement to summary judgment under *Chapman v Silber* (97 NY2d 9 [2001]). *Chapman* is inapposite. The issue before the Court of Appeals was "[w]hat evidence of notice must a plaintiff-tenant in a lead paint poisoning case proffer in order to survive defendant-landlord's motion for summary judgment?" (*id.* at 15). Here, notice is not at issue. Instead, plaintiff unpersuasively cites *Chapman* to support a presumption that the apartment contained an actionable level of lead-based paint. However, because lead based-paint was found in the apartment in *Chapman*, the existence of a hazardous condition was never at issue (*id.* at 17).

the apartment contained a hazardous level of lead-based paint at the relevant time - that of A.L.'s 2002 diagnosis. However, sufficient circumstantial evidence exists to raise an issue of fact for trial.

We have previously looked to whether a child's blood is elevated in determining whether a hazardous apartment condition exists. In *Brown v Webb-Webber* (161 Ad3d 523 [1st Dept 2018]), we affirmed the motion court's grant of summary judgment to a third-party defendant owner who established that he was not liable for the resident child's lead poisoning because the child's "blood-lead levels were well within normal range" (161 AD3d 523, 524 [1st Dept 2018]). Even though the apartment in *Brown* had not been tested for lead-based paint while the child lived there, the owner satisfied his burden of proof by pointing to the child's low blood lead levels (*see Brown v Webb-Weber*, 2017 NY Slip Op 32074[U],*5-6 [Sup Ct, NY County 2017], *affd* 161 AD3d 523 [1st Dept 2018]).

Here, A.L.'s elevated blood lead level suggests that the reverse is true - a hazardous condition may have existed in the apartment during the relevant period. While there are other sources of lead poisoning, housing is a prime source (*New York City Coalition to End Lead Poisoning v Koch*, 138 Misc 2d 188, 189 n 1 [Sup Ct, NY County 1987] ["(l)ead-based paint on the interior

surfaces of (children's) homes is a primary cause of the disease"], *affd* 139 AD2d 404 [1st Dept 1988]). At this point, other than the apartment, no other "more likely" or "more reasonable" source of A.L.'s injury exists (*Gayle v City of New York*, 92 NY2d at 937 [internal quotation marks omitted]).[11] The circumstantial evidence of a hazardous lead-based paint condition is also supported by an affirmation by Dr. Douglas B. Savino and an affidavit by lead paint expert William Savarese. Dr. Savino concluded that the apartment contained a hazardous level of lead-based paint, given the "chronology of the infant plaintiff's blood lead levels," which was "environmentally and temporally

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[11]At plaintiff's 50-h hearing and deposition, NYCHA questioned plaintiff about potential alternative sources of lead exposure. Plaintiff testified that "Richard Green" preschool was the first "place" where she enrolled A.L. when he was approximately four years old. She testified that A.L. attended kindergarten and grade school at P.S. 138 when he was five years old. She also testified that her husband (who lived in the apartment from 2000-2005) worked as a construction "helper" repairing homes. However, plaintiff testified that she did not believe that A.L. was in preschool when he was diagnosed with lead poisoning at three years old. Moreover, although she laundered her husband's clothes at home, plaintiff testified that she did not know the materials with which her husband came into contact. Additionally, in response to NYCHA's questioning regarding whether anyone told plaintiff about other potential sources of A.L.'s lead exposure, she responded no. Thus, at this juncture, no alternative more likely or more reasonable explanation for A.L.'s lead poisoning exists (*see Juarez*, 88 NY2d at 648 ["defendant submitted speculative assertions by its attorney as to other possible sources of the lead poisoning," which was not competent proof to defeat plaintiff's motion for summary judgment under Local Law 1]).

related to the infant plaintiff's residence." He noted that A.L.'s blood levels increased over time until he was diagnosed with 16 ug/dl on March 19, 2003, coinciding with the repainting of the apartment on March 5-6, 2003. Dr. Savino attributed the lead spike in A.L.'s blood to A.L. ingesting an excessive amount of lead dust. Dr. Savino further pointed out that A.L.'s blood lead levels declined gradually after the 2003 apartment repair and the 2004 removal of the chipped and peeling interior doors. William Savarese echoed Dr. Savino's statements and conclusions.

Contrary to NYCHA's position, plaintiff has also raised an issue of fact as to whether the abatement actually occurred. Supreme Court improperly discounted plaintiff's testimony as "conflicting." Any inconsistencies in a plaintiff's testimony present a credibility issue for the trier of fact (see *Ferrante*, 90 NY2d at 631 ["It is not the court's function on a motion for summary judgment to assess credibility"]). The agency is not more believable because it submitted "sworn affidavit proof by NYCHA that no such inspection or abatement occurred." Moreover, the agency's assertion is based on affidavits by Margarita Cabral and Tyrone Gordils. We cannot confirm that Cabral found no lead-based paint violations or an abatement for the apartment, because the second page of her affidavit is missing from both the appellate record and from Bronx County Clerk's Office online

records. Nor can NYCHA rely on the Gordils affidavit, because it was improperly submitted to Supreme Court for the first time in reply and was based on a database search by unnamed "staff."

Accordingly, the order of the Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about February 17, 2017, which granted defendant's motion for summary judgment dismissing the complaint, should be reversed, on the law, without costs, and the motion denied.

All concur.

Order Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about February 17, 2017, reversed, on the law, without costs, and defendant's motion for summary judgment denied.

Opinion by Moulton, J. All concur.

Richter, J.P., Manzanet-Daniels, Kapnick, Kern, Moulton, JJ.

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

ENTERED: JANUARY 31, 2019

DEPUTY CLERK