SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 14, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Manzanet-Daniels, Kapnick, Kahn, Oing, JJ.

8686 The People of the State of New York, Respondent, Ind. 2533/15

-against-

Jesus Perez,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society (David Crow of counsel), and Davis Polk & Wardwell LLP, New York (Lindsay Schare of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered March 24, 2016, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of six years, unanimously reversed, on the law and the facts, defendant's motion to suppress physical evidence and identification testimony granted, and the matter remanded for a new trial preceded by an independent source hearing.

The hearing court expressly determined that the police

detention of defendant was supported by reasonable suspicion, but that probable cause did not exist until the undercover officer who allegedly bought drugs from defendant made an identification. Because the record provides no reason for the officers to have concluded that defendant, a suspect in a street drug sale, was armed or dangerous, or likely to resist arrest or flee, handcuffing him was inconsistent with an investigatory detention and elevated the intrusion to an arrest not based on probable cause (*see People v Steinbergin*, 159 AD3d 591 [1st Dept 2018]; *People v Blanding*, 116 AD3d 498 [1st Dept 2014]; *People v Acevedo*, 179 AD2d 465, 465-466 [1st Dept 1992], *lv denied* 79 NY2d 996 [1992]). Accordingly, the undercover officer's identification of defendant and the buy money recovered as a result of the unlawful arrest should have been suppressed, and defendant is entitled to a new trial preceded by an independent source hearing (*see People v Burts*, 78 NY2d 20, 23-24 [1991]).

Because we are ordering a new trial, we find it unnecessary to reach any other issues.

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

ENTERED: MARCH 14, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Kapnick, Kahn, Oing, JJ.

8687 Alexandria Grant, et al., Index 25864/14E
Plaintiffs-Appellants,

-against-

AAIJ African Market Corp.,
Defendant-Respondent,

Justin C. Canaday,
Defendant.

_____

Steven Adam Rubin & Associates PLLC, New York (Steven Adam Rubin of counsel), for appellants.

Saretsky Katz & Dranoff, L.L.P., New York (Daniel P. Rifkin of counsel), for respondent.

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Order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered August 7, 2017, which granted the motion of defendant AAIJ African Market Corp. (AAIJ) for summary judgment dismissing the complaint and all cross claims as against it, unanimously reversed, on the law, without costs, and the motion denied.

The failure to provide seatbelts in a taxicab is a violation of Vehicle and Traffic Law § 383, and constitutes negligence as a matter of law (*see DiMauro v Metropolitan Suburban Bus Auth.*, 105 AD2d 236, 246 [2d Dept 1984]; *McMahon v Butler,* 73 AD2d 197, 199 [3d Dept 1980]). Where an injured party fails to wear an available seatbelt, such failure would go to damages, not liability (*see Spier v Barker*, 35 NY2d 444, 450 [1974]). That is

not the case when the vehicle owner fails to provide seatbelts in the first instance (*see DiMauro* at 246; *McMahon* at 199).

Here, the alleged failure to provide seatbelts warranted denial of AAIJ's summary judgment motion. That the vehicle that struck AAIJ's vehicle in the rear did not provide a nonnegligent reason for doing so does not relieve AAIJ of its alleged separate liability, if it is found to be a proximate cause of plaintiffs' injuries.

Furthermore, plaintiffs did not cross-move for summary judgment, and the record does not sufficiently reflect that AAIJ was placed on notice of the need to develop facts on the issue of whether seatbelts were present in the vehicle, and whether they were "clearly visible, accessible, and maintained in good working order" (Vehicle and Traffic Law § 383[4-b]). Accordingly, we decline plaintiffs' request to find AAIJ negligent as a matter of law.

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

ENTERED: MARCH 14, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Kapnick, Kahn, Oing, JJ.

8688-
8689-
8690 In re Evanna S., and Another,

Dependent Children Under the Age of
Eighteen Years etc.,

Omatee S., et al.,
Respondents-Appellants,

Administration for Children's Services,
Petitioner-Respondent.

_____

Law Offices of Randall S. Carmel, Jericho (Randall S. Carmel of counsel) for Omatee S., appellant.

Law and Mediation Office of Helene Bernstein, PLLC, Brooklyn (Helene Bernstein of counsel), for Santiago D., appellant.

Zachary W. Carter, Corporation Counsel, New York (Melanie T. West of counsel), for respondent.

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

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Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about April 25, 2017, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about March 7, 2017, which found that respondent father and respondent mother neglected the subject children, unanimously affirmed, without costs. Appeals from fact-finding order, unanimously dismissed, without costs, as subsumed in the appeals from the order of disposition.

The findings of neglect were supported by a preponderance of the evidence (*see* Family Court Act 1046[b][i]). The chronic unsanitary conditions of the mother and children's living space, including dirty diapers and feces strewn around the room, as well as the children's odor and unkempt appearance, were well documented in the record and demonstrated that the children were at imminent risk of impairment (*see Matter of Nivek A.S. [Juanita S.])*, 148 AD3d 459 [1st Dept 2017]). The mother also failed to provide the children with adequate nutrition and medical care, notwithstanding that the children's pediatrician identified the children's weight loss as an issue and prescribed a feeding plan (*see id.*). The mother also failed to heed the caseworker's advice to seek prompt medical attention for the children when they were seriously ill. Furthermore, the mother failed to comply with her service plan and attend required weekly therapy, and routinely exercised poor judgment in caring for herself and the children (*see e.g. Matter of Viveca AA.*, 51 AD3d 1072, 1073 [3d Dept 2008].

The record supports a finding of neglect against the father

in light of his untreated mental illness (*see Matter of Enrique S. [Kelba S.]*, 134 AD3d 576 [1st Dept 2015], *lv denied* 27 NY3d 948 [2016]), and failure to provide adequate care during the period that the children resided with him. The court also properly drew a negative inference from his failure to testify (*see Matter of Zelda McM. [Patrick L.-O. McM.]*, 154 AD3d 573, 574 [1st Dept 2017]).

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

ENTERED: MARCH 14, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Kapnick, Kahn, Oing, JJ.

8691 Alyson Shatsky, Index 162531/15
Plaintiff-Respondent,

-against-

Highpoint Associates V, LLC,
et al.,
Defendants-Appellants.

_____

Law Offices of Michael E. Pressman, New York (Steven H. Cohen of counsel), for appellants.

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

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Order, Supreme Court, New York County (Carmen Victoria St. George, J.), entered August 21, 2018, which, inter alia, denied defendants' motions for summary judgment, unanimously affirmed, without costs.

Triable issues of fact regarding whether defendant Bagels and More created a slipping hazard allegedly responsible for plaintiff's accident by diverting condensation from its air conditioning unit down the side of the door with a plastic tube, such that water streamed down the tube onto the sidewalk and onto the warning tile (*see Gary v 101 Owners Corp.*, 89 AD3d 627 [1st Dept 2011]), combined with photographs, video, deposition testimony, and expert affidavits that provide conflicting

evidence as to whether the other defendants had notice of the hazardous condition, preclude the granting of summary judgment (*see Irizarry v 1915 Realty LLC*, 135 AD3d 411 [1st Dept 2016]; *Jahn v SH Entertainment, LLC*, 117 AD3d 473 [1st Dept 2014]).

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

ENTERED: MARCH 14, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Kapnick, Kahn, Oing, JJ.

8692 The People of the State of New York, Respondent, Ind. 4372N/13

-against-

Donald Bowman, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Eric Del Pozo of counsel), for respondent.

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Judgment, Supreme Court, New York County (James M. Burke, J.), rendered March 12, 2014, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of five years, unanimously affirmed.

We do not find that defendant made a valid waiver of his

right to appeal. We have conducted an in camera review of the minutes of the examination of the confidential informant and the unredacted warrant application and find no basis for suppression.

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

ENTERED: MARCH 14, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Kapnick, Kahn, Oing, JJ.

8693 Union Ave Estates, LLC, Index 25848/15E
Plaintiff-Respondent,

-against-

Garsan Realty Inc., et al.,
Defendants-Appellants.

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Joseph A. Altman, P.C., Bronx (Joseph A. Altman of counsel), for appellants.

Law Offices of Geoffrey S. Hersko, P.C., Cedarhurst (Geoffrey S. Hersko of counsel), for respondent.

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Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered February 23, 2018, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

The disclaimer provisions in the contract of sale and the rider are not sufficiently specific to preclude the claim that defendants fraudulently induced plaintiff to purchase the property by misrepresenting the status of the commercial tenants' leases (*see Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128, 137 [1st Dept 2014]). None of the provisions relied upon by defendants specifically disclaim any warranties about the status of commercial tenants' leases, or indeed of any leases.

Whether plaintiff's reliance on defendants' alleged

misrepresentations – that the commercial tenants were month-to-month tenants and that their respective leases expired on July 31, 2014 – was reasonable or whether due diligence would have revealed the truth are issues of fact that cannot be resolved at this stage of the litigation (*see Lunal Realty, LLC v DiSanto Realty, LLC*, 88 AD3d 661, 664 [2d Dept 2011], citing *DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 NY3d 147, 154 [2010]).

The motion court correctly concluded that if defendant Gardon, the principal owner of defendant Garsan Realty Inc., concealed pertinent documents on behalf of Garsan, he may be held personally liable for fraud, regardless of the corporate veil (*see First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 294 [1st Dept 1999]).

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: MARCH 14, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Kapnick, Kahn, Oing, JJ.

8694 Joseph Smith, Index 306697/14
Plaintiff-Appellant,

-against-

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

_____

Apicella & Schlesinger, New York (Philip S. Schlesinger of counsel), for appellant.

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

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Judgment, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered March 20, 2018, to the extent appealed from as limited by the briefs, dismissing the 42 USC § 1983 claims, unanimously reversed, on the law, without costs, and the claims reinstated.

The complaint, as amplified by plaintiff's opposition papers, alleges that, on February 13, 2013, plaintiff and a friend, both black men, were driving in a luxury sports car in the Bronx. They were not driving recklessly or violating any traffic laws. Nevertheless, they were pulled over by the police, and five or six officers, including the individual defendants, removed them from the car and searched them and the car. The police found marijuana in the friend's pocket, but recovered no other contraband, either in the car or on plaintiff's person.

Nevertheless, plaintiff was arrested and held for two days. Charges against him were dismissed in October 2013.

The complaint alleges further that, during this time period, the New York City Police Department employed a "stop and frisk" policy, pursuant to which every year the police stopped hundreds of thousands of overwhelmingly and disproportionately minority persons, including black men, and subjected them to searches, for no reason other than that they were in supposedly high-crime areas. The complaint alleges that the "stop and frisk" policy, rather than some constitutionally cognizable cause, was the reason plaintiff was detained, searched, and arrested. To prove the existence of this policy, plaintiff submitted, among other things, the New York City Bar Association's 24-page "Report on the NYPD's Stop-and-Frisk Policy," dated May 2013, which examined the policy and made recommendations for its reform and the protection of city residents' civil liberties.

The foregoing states a cause of action under 42 USC § 1983 against the individual defendants (*see Shelton v New York State Liq. Auth.*, 61 AD3d 1145, 1148 [3d Dept 2009]; *Littlejohn v City of New York*, 795 F3d 297, 314 [2d Cir 2015]). At this procedural juncture, it is not necessary for plaintiff to allege that any of the individual defendants did any more than participate in his unlawful arrest.

By alleging the existence of an extraconstitutional municipal "stop and frisk" policy, and that the individual defendants unlawfully arrested plaintiff pursuant to that policy, the complaint states a cause of action under 42 USC § 1983 against the City (*see Monell v Department of Social Servs. of City of N.Y.*, 436 US 658, 694-695 [1978]; *see also Ashcroft v Iqbal*, 556 US 662, 678-681 [2009] [setting forth federal pleading standards]; *Cabrera v City of New York*, 2014 NY Slip Op 30533[U] [Sup Ct, Bronx County 2014] [comparing federal and state pleading standards]).

Defendants' contention that plaintiff has not pointed to any cognizable evidence that the stop and frisk policy even exists is without merit (*see Floyd v City of New York*, 959 F Supp 2d 540 [SD NY 2013]).

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

ENTERED: MARCH 14, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Kapnick, Kahn, Oing, JJ.

8699 The People of the State of New York, Ind. 1174/14
Respondent,

-against-

Gregory Kettrell,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Melissa C. Jackson, J.), rendered January 14, 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: MARCH 14, 2019

CLERK

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

Acosta, P.J., Manzanet-Daniels, Kapnick, Kahn, Oing, JJ.

8700- Index 652323/14
8701- 595472/16
8702 595475/16

Hoyt David Morgan,
Plaintiff,

-against-

Worldview Entertainment Holdings, Inc., et al.,
Defendants.

- - - - -

Worldview Entertainment Holdings, Inc.,
Third-Party Plaintiff,

Worldview Entertainment Holdings LLC, et al.,
Third-Party Plaintiffs-Appellants,

-against-

Goetz Fitzpatrick LLP, et al.,
Third-Party Defendants-Respondents,

Christopher Woodrow,
Third-Party Defendant.

- - - - -

Maria Cestone,
Second Third-Party Plaintiff-Appellant,

-against-

Goetz Fitzpatrick LLP, et al.,
Second Third-Party Defendants-Respondents,

Christopher Woodrow,
Second Third-Party Defendant.

- - - - -

Hoyt David Morgan,
Plaintiff,

-against-

Worldview Entertainment Holdings, Inc., et al.,
Defendants.

- - - - -

Worldview Entertainment Holdings, Inc., et al.,
Third-Party Plaintiffs-Appellants,

-against-

Goetz Fitzpatrick LLP, et al.,
Third-Party Defendants,

Christopher Woodrow,
Third-Party Defendant-Respondent.

- - - - -

Maria Cestone,
Second Third-Party Plaintiff-Appellant,

-against-

Goetz Fitzpatrick LLP, et al.,
Second Third-Party Defendants,

Christopher Woodrow,
Second Third-Party Defendant-Respondent.

_____

Quinn McCabe LLP, New York (Simon Block of counsel), for Worldview Entertainment Holdings, Inc., Worldview Entertainment Holdings LLC, Worldview Entertainment Partners VII, LLC and Molly Conners, appellants.

Schenck, Price, Smith & King LLP, New York (Ryder T. Ulon of counsel), for Maria Cestone, appellant.

Furman Kornfeld & Brennan LLP, New York (A. Michael Furman of counsel), for Goetz Fitzpatrick LLP and Aaron Boyajian, respondents.

Pinnisi & Anderson, Ithaca (Michael D. Pinnisi of counsel), for Christopher Woodrow, respondent.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered July 27, 2017, which granted third-party and second third-party defendants Goetz Fitzpatrick LLP and Aaron Boyajian, Esq.'s (the Goetz Defendants) motion to dismiss the third-party and second third-party complaints as against them pursuant to CPLR 3211(a)(1) and (7), unanimously modified, on the law, to deny the motion as to so much of the malpractice claims as is based on the Goetz Defendants' inclusion of "its parents, successors, predecessors, divisions, affiliates, and assigns," without defining "affiliates," in the separation agreement entered into by plaintiff and defendant/third-party plaintiff Worldview Entertainment Holdings Inc., and otherwise affirmed, without costs. Order, same court and Justice, entered on or about August 16, 2017, which granted third-party defendant Christopher Woodrow's motion to dismiss the third-party complaint as against him pursuant to CPLR 3211(a)(7), unanimously modified, on the law, to deny the motion as to the fourth cause of action for breach of fiduciary duty, and otherwise affirmed, without costs. Order, same court and Justice, entered on or about August 16, 2017, which granted Woodrow's motion to dismiss the second third-party complaint as against him pursuant to CPLR 3211(a)(7),

unanimously affirmed, without costs.

As noted in our decision on the prior appeal (*Morgan v Worldview Entertainment Holdings, Inc.*, 141 AD3d 461 [1st Dept 2016]), plaintiff was the chief financial officer of defendant/third-party plaintiff Worldview Entertainment Holdings Inc. (Worldview Inc.), a movie production company wholly owned by defendant/third-party plaintiff Worldview Entertainment Holdings LLC (Holdings LLC). When his employment was terminated, plaintiff and Worldview Inc.'s then chief executive officer, third-party and second third-party defendant Christopher Woodrow, signed a separation agreement (the contract).

The contract, which was drafted by the Goetz Defendants, begins, "WORLDVIEW . . . INC.[,] its parents, successors, predecessors, divisions, affiliates, and assigns (collectively hereinafter referred to as 'Worldview' or the 'Company') and . . . MORGAN, his heirs, executors, administrators, and assigns (hereinafter referred to as 'Employee'), agree . . ." (boldface omitted). The document does not define "affiliates."

Worldview Inc.'s business model was to set up a separate company for each movie in which it invested. For example, defendant/third-party plaintiff Worldview Entertainment Partners VII LLC (Partners VII) provided funding for the film Birdman. Plaintiff, who in addition to being an employee of Worldview Inc.

invested money in various Worldview films, did not invest in Partners VII.

In the contract, the Company agreed to give plaintiff executive producer credit for various films, including Birdman. It also guaranteed to return any nonrecouped principal as of May 31, 2014. When Worldview Inc. failed to comply with these provisions, plaintiff sued not only Worldview Inc., but also (as relevant to this appeal) Holdings LLC, Partners VII, third-party plaintiff Molly Conners, and second third-party plaintiff (Cestone). Plaintiff obtained an attachment against Partners VII in the amount of $2.7 million (*see* 141 AD3d at 462).

Conners and Cestone moved to dismiss the claims against them. We affirmed the denial of their motion to dismiss plaintiff's breach of contract claim, on the ground that the term "affiliates" was not defined within the contract and that neither its meaning nor whether the parties intended to bind Conners and Cestone under the contract could be determined on a pre-answer motion (*id.* at 463).

Third-party plaintiffs and Cestone then sued the Goetz Defendants for malpractice and breach of fiduciary duty and the Goetz Defendants and Woodrow for common-law indemnity. Third-party plaintiff Partners VII sued Woodrow for negligence and breach of fiduciary duty.

On appeal, Holdings LLC, Partners VII, Conners, and Cestone (appellants) argue that the Goetz Defendants were negligent in failing to investigate Woodrow's authority to enter into the agreement on their (appellants') behalf. However, they did not plead this claim. In any event, the Goetz Defendants had no duty to inquire into Woodrow's authority to act on behalf of Holdings LLC and Partners VII (*see Goldston v Bandwidth Tech. Corp.*, 52 AD3d 360, 363 [1st Dept 2008], *lv denied* 14 NY3d 703 [2010]).

Appellants' allegation that the Goetz Defendants were negligent in making them obligors under the contract states a cause of action (*see Flintlock Constr. Servs., LLC v Rubin, Fiorella & Friedman LLP*, 110 AD3d 426, 426-427 [1st Dept 2013]). It is premature to determine on this pre-answer motion to dismiss whether it was reasonable for the Goetz Defendants to include Worldview Inc.'s "parents, successors, predecessors, divisions, affiliates, and assigns" in the contract, especially without defining "affiliate" (*see Escape Airports [USA], Inc. v Kent, Beatty & Gordon, LLP*, 79 AD3d 437, 439 [1st Dept 2010]).

The Goetz Defendants contend that appellants' malpractice claims fail due to lack of privity. The third-party complaint alleges that the Goetz Defendants represented Holdings LLC and Partners VII. Boyajian denied that the Goetz Defendants represented Cestone and said that the matters on which they

represented Conners were unrelated to the issues raised in the main and third-party actions. By contrast, he made no such denials or qualifications about Holdings LLC and Partners VII. Thus, Boyajian's affidavit does not establish conclusively that the Goetz Defendants had no attorney-client relationship with Holdings LLC and Partners VII (*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]). As for Conners and Cestone, the "special circumstances" exception to the privity rule applies (*see Deep Woods Holdings LLC v Pryor Cashman LLP*, 145 AD3d 447, 449-450 [1st Dept 2016]).

The motion court correctly dismissed the fiduciary duty claims against the Goetz Defendants as duplicative of the previously dismissed malpractice claims (*see e.g. Murray Hill Invs. v Parker Chapin Flattau & Klimpl*, 305 AD2d 228, 229 [1st Dept 2003]).

Dismissal of the indemnification claim against the Goetz Defendants was also correct. Under New York law, the gravamen of an indemnity claim is that the third-party plaintiff and third-party defendant both owe a duty to the plaintiff and that, because of the third-party defendant's negligence or wrongful conduct, the third-party plaintiff has been held legally liable

and cast in damages to the plaintiff (*see City of New York v Lead Indus. Assn.*, 222 AD2d 119, 126-127 [1st Dept 1996]). The Goetz Defendants owed no duty to plaintiff.

Woodrow contends that Partners VII waived its negligence and fiduciary claims. However, Partners VII's operating agreement shows that its members – not Partners VII itself – waived those claims.

Woodrow contends that the claims against him are governed by Delaware law because Partners VII is a limited liability company that is managed by Worldview Inc., a Delaware corporation. However, as he has not shown an actual conflict between New York and Delaware regarding negligence (on the contrary, he says they are similar), New York law, the law of the forum, should apply (*see SNS Bank v Citibank*, 7 AD3d 352, 354 [1st Dept 2004]). In any event, it would not be anomalous to apply New York law; Partners VII's and Worldview Inc.'s place of business was New York during the relevant time frame.

The third cause of action in the third-party complaint (by Partners VII against Woodrow for negligence) was correctly dismissed, because it is, in essence, a contract claim rather than a tort claim (*see Sommer v Federal Signal Corp.*, 79 NY2d 540, 552 [1992]). But for two contractual relationships – Partners VII's operating agreement, which made Worldview Inc.

Partners VII's manager, and Worldview Inc.'s employment of Woodrow – Woodrow would have no relationship with Partners VII. Partners VII's injury "was not personal injury or property damage; there was no abrupt, cataclysmic occurrence" (*id.*).

Woodrow may have shown that New York and Delaware differ somewhat regarding breach of fiduciary duty. New York precedent states that determining whether a fiduciary relationship exists requires a fact-specific inquiry (*see e.g. Roni LLC v Arfa*, 18 NY3d 846, 848 [2011]). By contrast, Delaware does not hesitate to dismiss a fiduciary duty claim (*see Feeley v NHAOCG, LLC*, 62 A3d 649, 672 [Del Ch 2012]). Woodrow was arguably Worldview Inc.'s "controller" at the time of the agreement with plaintiff, because Woodrow was Worldview Inc.'s CEO at that time. Therefore, he can be held liable if he used his control over Partners VII's property to advantage Worldview Inc. at Partners VII's expense (*id.* at 671-672). The fourth cause of action in the third-party complaint alleges that Woodrow made Partners VII liable for Worldview Inc.'s obligations to plaintiff, even though plaintiff had never invested in Partners VII.

Regardless of whether New York or Delaware law applies, the business judgment rule does not protect Woodrow (*see Amfesco Indus. v Greenblatt*, 172 AD2d 261, 264 [1st Dept 1991]; *Brehm v Eisner*, 746 A2d 244, 264 n 66 [Del 2000]). Partners VII alleges

that making it an obligor under the agreement "served no rational purpose in connection with the business of Partners VII, and in fact was adverse to the interests thereof."

Woodrow has not shown that New York and Delaware differ regarding the substance of indemnification; hence, New York law applies (*see SNS*, 7 AD3d at 354). As noted earlier, New York law requires both the third-party plaintiff and the third-party defendant to owe a duty to the plaintiff. Woodrow owed no duty to plaintiff.

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

ENTERED: MARCH 14, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Kapnick, Kahn, Oing, JJ.

8703 The People of the State of New York, Ind. 521/15
Respondent,

-against-

Keenon Lozano,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Megan DeMarco 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 (Ronald A. Zweibel, J. at plea; Ellen Biben, J. at sentencing), rendered July 15, 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: MARCH 14, 2019

CLERK

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

Acosta, P.J., Manzanet-Daniels, Kapnick, Kahn, Oing, JJ.

8704 The People of the State of New York, Ind. 3885N/16
Respondent,

-against-

Juan Cruz,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (David J. Klem 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 (Neil Ross, J.), rendered October 30, 2017,

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

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

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

ENTERED: MARCH 14, 2019

CLERK

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

Acosta, P.J., Manzanet-Daniels, Kapnick, Kahn, Oing, JJ.

8705 Svetlana Martin, Index 103214/10
Plaintiff-Appellant,

-against-

Stephen Silver, M.D.,
Defendant-Respondent.

_____

Svetlana Martin, appellant pro se.

DeCorato Cohen Sheehan & Federico LLP, New York (Amanda L. Tate of counsel), for respondent.

_____

Appeal from order, Supreme Court, New York County (Alexander M. Tisch, J.), entered May 26, 2017, which granted defendant's motion for a directed verdict, deemed appeal from judgment, same court and Justice, entered February 27, 2018 (CPLR 5220[c]), and, so considered, said judgment, unanimously affirmed, without costs.

Plaintiff failed to adduce expert testimony establishing that the information disclosed to her about the risks inherent in the procedure was qualitatively inadequate or that defendant deviated or departed from any accepted standard of medical practice (*Gardner v Wider*, 32 AD3d 728, 730 [1st Dept 2006] [lack of informed consent]; *Rivera v Jothianandan*, 100 AD3d 542 [1st Dept 2012], *lv denied* 21 NY3d 861 [2013] [medical malpractice]).

We have considered plaintiff's remaining arguments with

respect to informed consent and medical malpractice and find them unavailing.

We lack jurisdiction to entertain plaintiff's arguments as to the trial court's grant of defendant's motions in limine, preclusion of plaintiff's expert, or refusal to admit the out-of-state records of one of her doctors. Plaintiff's notice of appeal does not refer to or otherwise incorporate those determinations (*see* CPLR 5515[1]; *Frank v City of New York*, 161 AD3d 713, 713 [1st Dept 2018]), and those determinations do not necessarily affect the final judgment (*see* CPLR 5501[a][1]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 20 NY3d 37, 42 [2012]).

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

ENTERED: MARCH 14, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Kapnick, Kahn, Oing, JJ.

8706 Manuel D. Paulino, Index 22499/17E
Plaintiff-Respondent,

-against-

Menachem Braun,
Defendant-Appellant.

_____

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

Gropper Law Group, PLLC, New York (Joshua Gropper of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered on or about June 13, 2018, which, to the extent appealed from, denied defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff alleges that he sustained a fractured pelvis as a result of defendant's negligent operation of a boat on the Hudson River. Defendant moved to dismiss the complaint on the ground that plaintiff accepted $6,000 in settlement and release of all claims. In opposition, plaintiff submitted an affidavit stating that a claim specialist for defendant's insurer made him the $6,000 offer while he was still recovering from surgery and unable to work, and that, despite his response that it was insufficient, continued to "pressure" him to sign the release until "[f]inally" he "relented." At this posture of the

litigation, the evidence of overreaching and unfair circumstances raises an issue of fact as to the validity of the release (*see Mangini v McClurg*, 24 NY2d 556, 567 [1969]; *Sacchetti-Virga v Bonilla*, 158 AD3d 783, 784 [2d Dept 2018]; *Powell v Adler*, 128 AD3d 1039, 1041 [2d Dept 2015]). Both the "nature of the relationship between the parties" that negotiated the release and "the disparity between the consideration received and the fair value" of plaintiff's claim weigh in plaintiff's favor (*see Skolnick v Goldberg*, 297 AD2d 18, 20 [1st Dept 2002]).

Defendant's contention that plaintiff ratified the release is unpreserved and does not present a pure question of law appearing on the face of the record that may be considered for the first time on appeal (*see Nadella v City of New York*, 161 AD3d 412, 413 [1st Dept 2018]).

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

ENTERED: MARCH 14, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Kapnick, Kahn, Oing, JJ.

8707- Index 651472/12
8708N American Stevedoring, Inc.,
Plaintiff,

-against-

Red Hook Container Terminal LLC,
et al.,
Defendants,

Seneca Insurance Company, Inc.
doing business as The Seneca Companies,
Defendant-Respondent,

The Alex N. Sill Company,
Nominal Defendant.

- - - - -

Red Hook Container Terminal, LLC,
Third-Party Plaintiff,

-against-

JBL Trinity Group, LTD,
Third-Party Defendant-Appellant.

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Keidel, Weldon & Cunningham, LLP, White Plains (Robert J. Grande of counsel), for appellant.

Saretsky Katz & Dranoff, L.L.P., New York (Allen L. Sheridan of counsel), for respondent.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered August 15, 2016, which, to the extent appealed from as limited by the briefs, denied third-party defendant's (JBL) request for production by defendant Seneca Insurance Company, Inc. of insurance policies issued to other customers containing

commercial property and inland marine coverage, in addition to the subject flood endorsement, denied its request for all but 10% of the underwriting files for policies already produced, and denied its request for documents related to the flood endorsement that were provided to state insurance departments for approval to use the form, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered January 20, 2017, unanimously dismissed, without costs, as abandoned.

The motion court providently exercised its discretion in denying JBL's requests for unrelated insurance policies containing commercial property and inland marine coverage, in addition to the flood endorsement, and for submissions to state insurance departments regarding the flood endorsement form, and limiting its request for the underwriting files for policies already produced, because JBL has failed to demonstrate that the information produced thus for was insufficient to prepare its defense.

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

ENTERED: MARCH 14, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Kapnick, Kahn, Oing, JJ.

8709N Hearst Communications, Inc., et al.,
Plaintiffs-Respondents,

-against-

Anil Kottoor,
Defendant-Appellant.

Index 650835/18

_____

Paduano & Weintraub, LLP, New York (Leonard Weintraub of counsel), for appellant.

The Hearst Corporation Office of General Counsel, New York (Jonathan R. Donnellan of counsel), for respondents.

_____

Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered on or about September 26, 2018, which denied defendant's motion for a preliminary injunction, unanimously affirmed, without costs.

In seeking to enjoin plaintiffs' enforcement of a noncompetition agreement, defendant's motion for a preliminary injunction was properly denied to the extent it sought the ultimate relief in the action (*SportsChannel Am. Assoc. v National Hockey League*, 186 AD2d 417, 418 [1st Dept 1992]).

Moreover, even if this Court were to ignore the defects in the relief sought, defendant's motion would fail based on his failure to point to any specific activity of plaintiffs to be enjoined. Thus, defendant did not establish that plaintiffs are

"threaten[ing] or . . . about to do, or [are] doing or procuring or suffering to be done, an act in violation of [defendant's] rights" as required for relief under CPLR 6301.

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: MARCH 14, 2019

CLERK

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

7978 Capital One, N.A., Index 35191/15E
Plaintiff-Respondent,

-against-

Carmela Saglimbeni,
Defendant-Appellant,

Sterling Recoveries, Inc., et al.,
Defendants.

_____

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

Woods Oviatt Gilman LLP, Rochester (Stephanie Rowe of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered September 11, 2017, which granted plaintiff's motion for, inter alia, summary judgment on its foreclosure complaint, unanimously reversed, on the law, without costs, and the motion denied.

Defendant contends that this action is time-barred, because the six year statute of limitations was triggered by a prior foreclosure action, in which the lender (plaintiff's assignor) accelerated the mortgage debt, and the instant action was not commenced until after the limitations period expired.

Summary judgment was not precluded by plaintiff's failure to demonstrate that it served defendant with a 30-day notice in

compliance with Section 22 of the mortgage, because defendant waived the argument by failing to raise it in her answer with the requisite specificity and particularity required by CPLR 3015(a) (see *1199 Hous. Corp. v International Fid. Ins. Co.*, 14 AD3d 383, 384 [1st Dept 2005]).

However, in this action, Supreme Court erred in nullifying plaintiff's assignor's acceleration in the prior action based on Section 22 of the mortgage which provides that the lender may accelerate the mortgage only if, inter alia, it has served defendant with a proper 30-day notice of default. Where the acceleration is optional as here, some affirmative action must be taken to evince the note holder's election to accelerate (*see Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 982-983 [2d Dept 2012]). Affirmative action can be in the form of a letter (*see Deutsche Bank Natl. Trust Co. v Royal Blue Realty Holdings, Inc.*, 148 AD3d 529, 530 [1st Dept 2017], *lv denied* 30 NY3d 959, 960 [2017]) or the commencement of a foreclosure action (*see Nationstar Mtge. LLC v Islam*, 158 AD3d 553, 553 [1st Dept 2018]). Plaintiff's assignor accelerated the mortgage debt by commencing the prior action and stating in its complaint that "plaintiff elects herein to call due the entire amount secured by the mortgage(s)."

Because there was no finding in the prior action that

plaintiff's assignor did not have the authority or standing to accelerate the mortgage debt (*see Deutsche Bank Natl. Trust Co. v Board of Mgrs. of the E. 86th St. Condominium*, 162 AD3d 547, 547 [1st Dept 2018]; *EMC Mtge. Corp. v Suarez*, 49 AD3d 592, 593 [2d Dept 2008]), Supreme Court had no basis to nullify the prior assignor's acceleration. In fact, in the prior action, Supreme Court found that plaintiff's assignor had standing to sue, despite defendant's argument to the contrary. Nor can plaintiff raise plaintiff's assignor's failure to serve a proper 30-day notice to nullify the prior acceleration. Noncompliance with a condition precedent is an affirmative defense (*Azriliant v Oppenheim*, 91 AD2d 586, 587 [1st Dept 1982] ["any condition precedent must be raised by the defendants as an affirmative defense"]). Defendant did not raise the affirmative defense of noncompliance with Section 22 of the mortgage in the prior action.

However, an issue of fact exists regarding whether the action is time-barred, which is dependent on whether plaintiff's assignor's voluntary discontinuance of the prior action due to a "defective default notification" de-accelerated the mortgage debt (see *NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d 1068, 1070 [2d Dept 2017]).

Contrary to plaintiff's argument, it is not entitled to a 90

day toll under CPLR 204(a) where it served the 90-day notice under RPAPL 1304 one year before it commenced this action and where nothing in RPAPL 1304 proscribed it from commencing this action earlier (*see HSBC Bank USA v Kirschenbaum*, 159 AD3d 506, 507 [1st Dept 2018]).

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

ENTERED: MARCH 14, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Oing, Moulton, JJ.

8385 Ewart A. Haynes, Index 305322/14
Plaintiff-Respondent,

-against-

Boricua Village Housing Development Fund Company, Inc., et al.,
Defendants-Appellants.

- - - - -

Boricua Village Housing Development Fund Company, Inc., et al.,
Third-Party Plaintiffs-Appellants.

-against-

United Commercial Development, LLC, et al.,
Third-Party Defendants-Respondents.

_____

Carol R. Finocchio, New York, for appellants.

The Perecman Firm, P.L.L.C., New York (David H. Perecman of counsel), for Ewart A. Haynes, respondent.

Linda A. Stark, New York, for United Commercial Development, LLC, respondent.

Law Office of Kevin P. Westerman, Garden City (Jonathan R. Walsh of counsel), for Evergreen Electrical Corp., respondent.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about June 20, 2018, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 241(6) claim as against defendants Boricua Village Housing Development Fund Company, Inc., Boricua Village F, LLC, and

Knickerbocker Construction II, LLC (Knickerbocker) (collectively, defendants), denied Knickerbocker's motion for summary judgment dismissing the common-law negligence and Labor Law § 200 claims as against it, denied Knickerbocker's motion for summary judgment on its contractual indemnification claims against third-party defendants United Commercial Development, LLC (United) and Evergreen Electrical Corp. (Evergreen), and denied defendants' motion for summary judgment on their common-law indemnification claim against Evergreen, unanimously affirmed, without costs.

Supreme Court was correct in granting plaintiff partial summary judgment on the Labor Law § 241(6) claim. Plaintiff's deposition testimony and an affidavit by his supervisor, Maldonado, who did not witness the accident but arrived at the scene shortly thereafter, indicated that plaintiff was performing his assigned tasks of installing pins in a drop ceiling using a Hilti gun when he received an electrical shock, and that exposed, uncapped electrical wiring was seen hanging from the ceiling in the vicinity of where plaintiff was working. His co-worker, Eagan, further averred that after plaintiff's accident he observed electricians, who were working in the building, arriving at the accident site and capping the exposed wires. The owner of plaintiff's employer, Calhoun, however, testified that when he arrived at the accident site, he saw no exposed wiring or any

other signs of anything unusual. This apparent discrepancy does not raise a factual issue because the employer also testified that he came onto the scene 20 to 30 minutes after the accident. As such, defendants have failed to raise an issue of fact as to whether they violated Industrial Code 12 NYCRR §§ 23-1.13(b)(3) and (4), and that such violation proximately caused plaintiff's injuries (*see Rubino v 330 Madison Co., LLC,* 150 AD3d 603, 604 [1st Dept 2017]).

The court properly denied Knickerbocker's motion for summary judgment dismissing the Labor Law § 200 and common-law negligence claims as against it. Issues of fact exist as to whether Knickerbocker had actual or constructive notice of a defective condition on the premises that proximately caused plaintiff's injuries (*see McCullough v One Bryant Park*, 132 AD3d 491, 492 [1st Dept 2015]; *Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 555 [1st Dept 2009]). In contrast, it is noted that no issues of fact exist as to whether Knickerbocker is liable for negligence based on the means and methods of the work. Plaintiff followed instructions given to him solely by his employer and used only equipment provided by his employer or himself. Knickerbocker's general responsibility for ensuring site safety does not rise to the level of supervisory control required to hold a contractor liable for an accident caused by the means and methods of the

work (*see Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 449 [1st Dept 2013]).

In light of the issues of fact as to negligence in this case, the court properly denied Knickerbocker's motion for summary judgment on its contractual indemnification claims against United and Evergreen, United's motion for summary judgment dismissing defendants' contractual indemnification claims against it, and defendants' motion for summary judgment on their common-law indemnification claims against Evergreen (*see Correia v Professional Data Mgt.*, 259 AD2d 60, 64 [1st Dept 1999]; *see also Miano v Battery Place Green LLC*, 117 AD3d 489, 490 [1st Dept 2014]).

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

ENTERED: MARCH 14, 2019

CLERK

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

8443N David Hill, et al., Index 24128/15E
Plaintiffs-Respondents,

-against-

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

_____

Zachary W. Carter, Corporation Counsel, New York (Elina Druker of counsel), for appellants.

Pollack, Pollack, Isaac & DeCicco LLP, New York (Jillian Rosen of counsel), for respondents.

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Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about August 14, 2017, which denied defendants' motion for a protective order preventing disclosure of a confidential informant's personal identifying information, including the dates, times and amounts of the controlled buys leading up to a search warrant, unanimously reversed, on the law and in the exercise of discretion, without costs, and the motion for a protective order granted.

The court's denial of a protective order was an improvident exercise of discretion. Defendants showed that the redactions to the police paperwork were necessary to protect the identity of a confidential informant, and plaintiff failed to show that he has a compelling interest in the information that would outweigh

defendants' interest in nondisclosure (*see generally Aguilar v Immigration & Customs Enforcement Div.*, 259 FRD 51, 56-58 [SD NY 2009]; *see also Matter of the City of New York*, 607 F3d 923, 941 [2d Cir 2010]). The court's direction that disclosure be made on an attorneys'-eyes-only basis was not sufficiently protective of the confidential informant's identity. In all likelihood, the information at issue would aid plaintiff's case only if the attorney were to discuss it with plaintiff or others, which could endanger the informant's safety.

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

ENTERED: MARCH 14, 2019

CLERK

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

8698 Marisol Munoz, Index 112223/09
Plaintiff-Appellant,

-against-

New York Presbyterian Hospital, et al.,
Defendants-Respondents.

_____

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

Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Deirdre E. Tracey of counsel), for respondents.

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Judgment, Supreme Court, New York County (Joan A. Madden, J.), entered December 6, 2017, which, after a jury verdict in defendants' favor, dismissed the complaint, unanimously affirmed, without costs.

This case essentially came down to a battle of the experts with respect to the standard of care and whether antibiotics should have been administered to plaintiff as a precaution several hours earlier, and surgery performed within an hour of her manifesting likely symptoms of necrotizing fasciitis and compartment syndrome. During trial, the jury heard conflicting expert testimony as to these issues, thus raising an issue of credibility peculiarly within the province of the jury (*see Briggins v Chynn*, 204 AD2d 158 [1st Dept 1994]), which is

afforded great deference (*see Cholewinski v Wisnicki*, 21 AD3d 791, 791 [1st Dept 2005]). However, upon review of the record, a "fair interpretation of the evidence" supports the jury's verdict that defendants comported with good and accepted practice in plaintiff's treatment (*see Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]). Accordingly, we find no reason to disturb the verdict.

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

ENTERED: MARCH 14, 2019

CLERK

Richter, J.P., Gische, Kern, Moulton, JJ.

8710 The People of the State of New York, Respondent, SCI 30205/15

-against-

Chad Dworkowitz, Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Whitney A. Robinson of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Noreen M. Stackhouse of counsel), for respondent.

_____

Order, Supreme Court, New York County (Robert M. Mandelbaum, J.), entered on or about January 8, 2016, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]), in light of its legitimate concerns regarding defendant's criminal history. That history included, among other things, violations of the probation-like sentence defendant received in another state for the underlying sex crime, resulting

in revocation of that sentence, as well as a conviction for failing to register as a sex offender.

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

ENTERED: MARCH 14, 2019

CLERK

Richter, J.P., Gische, Kern, Moulton, JJ.

8711 Kenia Garcia, Index 302654/15
Plaintiff-Appellant,

-against-

Shauntay E. McCrea, et al.,
Defendants-Respondents.

_____

Law Offices of Igor Tarasov, Brooklyn (Harlan Wittenstein of counsel), for appellant.

Purcell & Ingrao, P.C., Mineola (Terrance J. Ingrao of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Donna Mills, J.), entered on or about December 27, 2017, which denied plaintiff's motion for partial summary judgment on the issue of liability, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff made a prima facie showing of negligence on the part of defendants by submitting an affidavit stating that as she was driving through the intersection she noticed that defendant driver failed to stop at the stop sign when plaintiff had the right of way (*see* Vehicle and Traffic Law § 1142[a]). Plaintiff was not required to demonstrate her own freedom from comparative negligence to be entitled to summary judgment as to defendants'

liability (*see Rodriguez v City of New York*, 31 NY3d 312 [2018]; *Silverio v Ford Motor Co.*, ___ AD3d ___, 2019 NY Slip Op 00568 [1st Dept 2019]). Furthermore, defendants' argument that triable issues were raised by the police accident report and weather records is unpersuasive since such documents were uncertified (*see e.g. Silva v Larkin*, 118 AD3d 556, 557 [1st Dept 2014]; *Morabito v 11 Park Place LLC*, 107 AD3d 472 [1st Dept 2013]).

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

ENTERED: MARCH 14, 2019

CLERK

Richter, J.P., Gische, Kern, Moulton, JJ.

8712 In re Elisa N.,
Petitioner-Respondent,

-against-

Yoav I.,
Respondent-Appellant.

_____

Bruce A. Young, New York, for appellant.

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

_____

Order, Family Court, New York County (Susan M. Doherty, Referee), entered on or about January 20, 2016, insofar as it granted petitioner mother's summary judgment motion and petition to modify a prior custody order, and awarded her sole custody of the subject children, unanimously affirmed, without costs.

A motion for summary judgment may be utilized in proceedings under Family Court Act article 6 (*see Matter of Suffolk County Dept. of Social Servs. v James M.*, 83 NY2d 178, 182-183 [1994]). The motion should only be granted when there are no material facts disputed sufficiently to warrant a trial (*see Matter of Singer v Levitt*, 65 AD3d 634 [2d Dept 2009]). The Family Court providently exercised its discretion in allowing the mother to file a late motion for summary judgment and did not err in

granting her application (*Goodman v Gudi*, 264 AD2d 758 [2nd Dept 1999]).

Contrary to the father's contention, the court properly determined that a full plenary hearing was not required because it possessed ample information to render an informed decision on the children's best interests and because the father offered no proof that he was in compliance with his treatment of his mental health issue (see *Matter of Martha V. v Tony R.*, 151 AD3d 653 [1st Dept 2017]; *Matter of Tony R. v Stephanie D.*, 146 AD3d 691 [1st Dept 2017]; *Matter of Fayona C. v Christopher T.*, 103 AD3d 424 [1st Dept 2013]). Both parties and the attorney for the children were provided an opportunity to present their positions, and the court made the factual basis for its determination clear on the record.

Further, the court's decision to modify custody based on a change in circumstances and the best interests of the children has a sound and substantial basis in the record. Contrary to the father's contention, the neglect finding against him constituted a change in circumstances warranting a modification of the prior custody arrangement (*Matter of Zen'Nya G. [Nina W.]*, 126 AD3d 566 [1st Dept 2015]; *Matter of Gabriel J.[Dainee A.]*, 100 AD3d 572, 573 [1st Dept 2012]). Moreover, in October 2014, following a full hearing, the court made an award of custody to the mother,

with supervised visitation to the father. The court indicated that supervision would be without end unless the father could demonstrate that he was receiving treatment for his mental illness within the next six months. There is no dispute that he did not get such treatment and that the safety risk to the children has not been mitigated since then.

The Family Court properly determined that supervision of the father's visits was in the children's best interests, particularly given the evidence of the father's persistent noncompliance with treatment for his mental illness and his threats to harm the children, which placed the children at risk (*see Braverman v Braverman* 140 AD3d 413 [1st Dept 2016], *lv denied* 28 NY3d 910 [2016]; *Matter of Arelis Carmen S. v Daniel H.*, 78 AD3d 504 [1st Dept 2010], *lv denied* 16 NY3d 707 [2011]).

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

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

ENTERED: MARCH 14, 2019

CLERK

Richter, J.P., Gische, Kern, Moulton, JJ.

8713 RJR Mechanical Inc., Index 158764/15
Plaintiff-Appellant,

-against-

Harold J. Ruvoldt, et al.,
Defendants-Respondents.

_____

Law Office of Misha M. Wright, New York (Misha M. Wright of counsel), for appellant.

Elman Freiberg PLLC, New York (Jeremy C. Bates of counsel), for respondents.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered on or about June 14, 2017, which granted defendants' CPLR 3211(a) motion to dismiss the complaint on statute of limitations grounds, unanimously affirmed, without costs.

The statute of limitations on a cause of action for legal malpractice is three years (*see* CPLR 214[6]). Contrary to plaintiff's assertions, the claim was not tolled by the continuous representation doctrine. Generally, tolling under the continuous representation doctrine "end[s] once the client is informed or otherwise put on notice of the attorney's withdrawal from representation" (*Shumsky v Eisenstein*, 96 NY2d 164, 171 [2001]).

Moreover, there was not a "mutual understanding of the need for further representation on the specific subject matter

underlying the malpractice claim" (*McCoy v Feinman*, 99 NY2d 295, 306 [2002]).

Finally, the cause of action for unjust enrichment is redundant of the legal malpractice claim, since they arise from the same allegations and seek identical relief (*see Estate of Nevelson v Carro, Spanbock, Kaster & Cuiffo*, 290 AD2d 399 [1st Dept 2002]; *see also Weksler v Kane Kessler, P.C.*, 63 AD3d 529 [1st Dept 2009]).

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

ENTERED: MARCH 14, 2019

CLERK

Richter, J.P., Gische, Kern, Moulton, JJ.

8715 The People of the State of New York, Ind. 5403N/14
Respondent,

-against-

Robert Shapiro,
Defendant-Appellant.

_____

Justine M. Luongo, The Legal Aid Society, New York (Eve Kessler 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 (James M. Burke, J. at plea; Abraham Clott, J. at sentencing), rendered February 10, 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: MARCH 14, 2019

CLERK

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

Richter, J.P., Gische, Kern, Moulton, JJ.

8720-
8720A In re Jaylyn Z., and Others,

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

Jesus O.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

The Bronx Defenders, Bronx (Roshell Amezcua of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Carolyn Walther of counsel), for respondent.

Steven N. Feinman, White Plains, attorney for the children Jaylyn Z., Hevenly O., Jaydan O., Destiny O., and Maci O.

Dawne A. Mitchell, The Legal Aid Society, New York (Claire V. Merkine of counsel), attorney for the child Ashley F.

_____

Order of disposition, Family Court, Bronx County (Valerie A. Pels, J.), entered on or about January 27, 2017, to the extent it brings up for review a fact-finding order (denominated a decision), same court and Judge, entered on or about December 5, 2016, which found that respondent sexually abused Ashley F., and derivatively abused Jaylyn Z., Destiny O., Jaydyan O., Maci O., and Hevenly O., unanimously affirmed, without costs. Appeal from fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The contention of Ashley's attorney that respondent's appeal as applied to Ashley should be dismissed since the dispositional order from which he appealed did not include Ashley's name and her case docket number, nor did the notice of appeal, is unavailing. By order entered May 29, 2018, this Court, sua sponte, deemed respondent's notice of appeal to include the Family Court's fact-finding order, which included the docket numbers for all of the children, including Ashley (*see* 2018 NY Slip Op 73601[U] [1st Dept 2018]). Accordingly, this issue has already been decided by this Court.

On the merits, this appeal raises the issue of whether a child's testimony stricken from a hearing pursuant to Family Ct Act § 1028 may be considered in connection with a fact-finding hearing regarding abuse allegations, pursuant to Family Ct Act § 1046(a)(vi). We hold that it may be so used. Family Ct Act § 1046(a)(vi) sets forth, in relevant part, that "previous statements made by the child relating to any allegations of abuse or neglect shall be admissible in evidence," when corroborated, and "[t]he testimony of the child shall not be necessary to make a fact-finding of abuse or neglect." Here, then 14-year-old Ashley refused to continue with her testimony at the FCA 1028 hearing regarding her allegations of sexual abuse after she already had been cross-examined for three days by respondent's

counsel. According to a letter from Ashley's therapist submitted to the court, it would be detrimental for the child to return to testify. We agree with the Family Court that it could rely upon Ashley's incomplete testimony for the purposes of the subsequent fact-finding hearing, subject to a statutory requirement of corroboration. The use of Ashley's incomplete testimony was in accordance with the legislative intent of Family Ct Act § 1046(a)(vi) to address "the reluctance or inability of victims to testify" (*Matter of Nicole V.*, 71 NY2d 112, 117 [1987]). Respondent's arguments regarding the timing and circumstances of Ashley's incomplete testimony only go its weight, not admissibility.

Significantly, during the fact-finding hearing, the allegations of sexual abuse were corroborated by testimony from Ashley's therapist, who stated that Ashley disclosed that respondent sexually abused her, and expressed symptoms and behaviors consistent with Post-Traumatic Stress Disorder (PTSD) and other symptoms consistent with the abuse. A psychologist supervising the therapist also testified, confirming Ashley's diagnosis of PTSD, sexual abuse and neglect. Such expert testimony was sufficient to support a finding of sexual abuse (*see e.g. Matter of Estefania S. [Orlando S.]*, 114 AD3d 453 [1st Dept 2014]), and we see no reason to disturb the findings of

derivative abuse as to the other children.

In light of the corroboration requirement for previous statements of abuse under Family Ct Act § 1046(a)(vi), respondent's due process concerns are unsupported (*see Nicole V.*, 71 NY2d at 124).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: MARCH 14, 2019

CLERK

Richter, J.P., Gische, Kern, Moulton, JJ.

8721 The People of the State of New York, Respondent, Ind. 2133/14

-against-

Richard Porter, Defendant-Appellant.

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

_____

Judgment, Supreme Court, New York County (Patricia Nunez, J.), rendered July 2, 2015, unanimously affirmed.

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

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

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

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

ENTERED: MARCH 14, 2019

CLERK

Richter, J.P., Gische, Kern, Moulton, JJ.

8724 Mettie Alicia Chapman, Index 21457/13E
Plaintiff-Respondent,

-against-

Winifred S. Tovar, M.D., et al.,
Defendants,

St. Barnabas Hospital,
Defendant-Appellant.

_____

Garbarini & Scher, P.C., New York (Rita Aronov of counsel), for appellant.

Hasapidis Law Offices, Scarsdale (Annette G. Hasapidis of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered February 22, 2018, which, insofar as appealed from as limited by the briefs, in this action alleging medical malpractice, denied the motion of defendant St. Barnabas Hospital for summary judgment dismissing plaintiff's claim that St. Barnabas was vicariously liable for the negligence of defendant Dr. Tovar, unanimously affirmed, without costs.

St. Barnabas failed to make a prima facie showing of entitlement to summary judgment by demonstrating the absence of any material issues of fact as to whether Dr. Tovar was acting as its agent (*see Malcolm v Mount Vernon Hosp.*, 309 AD2d 704, 706 [1st Dept 2003], *lv dismissed* 2 NY3d 793 [2004]). St. Barnabas

also failed to show that the plaintiff could not have reasonably believed Dr. Tovar was acting at the hospital's behest (*Malcolm* at 706). Plaintiff and Dr. Tovar had no relationship prior to the emergency room visit that led to St. Barnabas referring plaintiff to Dr. Tovar, and questions of fact exist as to whether plaintiff was aware of the nature of Dr. Tovar's affiliation with St. Barnabas (*see Shafran v St. Vincent's Hosp. & Med. Ctr.*, 264 AD2d 553, 557-558 [1st Dept 1999]).

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

ENTERED: MARCH 14, 2019

CLERK

Richter, J.P., Gische, Kern, Moulton, JJ.

8725- Ind. 4607N/15
8725A The People of the State of New York, 4747N/15
Respondent,

-against-

Enrique Nunez-Reyes,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Michael R. Sonberg, J.), rendered January 5, 2016,

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

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

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

ENTERED: MARCH 14, 2019

CLERK

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

Richter, J.P., Gische, Kern, Moulton, JJ.

8729N WDF, Inc., Index 651250/16
Plaintiff-Appellant,

-against-

The Trustees of Columbia University
in the City of New York, et al.,
Defendants-Respondents.

_____

Pepper Hamilton LLP, New York (Frank T. Cara of counsel), for appellant.

Zetlin & DeChiara LLP, New York (Joeann E. Walker of counsel), for The Trustees of Columbia University in the City of New York, respondent.

Milber Makris Plousadis & Seiden, LLP, White Plains (Lorin A. Donnelly of counsel), for Lend Lease (US) Construction LMB, Inc., respondent.

_____

Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered on or about May 9, 2018, which denied plaintiff's motion to amend the complaint, unanimously affirmed, without costs.

Plaintiff, an HVAC subcontractor hired to perform work on a construction project on Columbia University's Manhattanville campus, filed a complaint alleging, inter alia, that defendants delayed the project causing them damages. To defeat an enforceable no delay damages clause in the subcontract, plaintiff made conclusory allegations to try to apply one of the exceptions

set forth in *Corinno Civetta Constr. Corp. v City of New York* (67 NY2d 297, 309 [1986]), and this Court affirmed dismissal of the claims relating to delay damages on that basis (156 AD3d 530 [1st Dept 2017]).

Denial of plaintiff's motion was properly denied since the allegations set forth in the proposed amended complaint are "palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]). Plaintiff merely alleges additional details regarding the delays due to failure to erect the steel work for the building in a timely fashion, not enclosing the building's floors in the winter months, interfering with plaintiff's plan to complete its work on a floor-by-floor basis, having to deal with extreme revisions to change orders and redesigned mechanical work, and failing to provide a complete project schedule. Plaintiff's allegations amount to "inept administration or poor planning" and do not constitute bad faith or willful, malicious, or grossly negligent conduct (*Advanced Automatic Sprinkler Co., Inc. v Seaboard Sur. Co.*, 139 AD3d 424, 425 [1st Dept 2016] [internal quotation marks omitted]). Furthermore, these alleged delays were within the contemplation of the broad no-damages-for-delay clause of the subcontract (*see Blau Mech. Corp. v City of New York*, 158 AD2d 373, 374 [1st Dept 1990]).

In view of the foregoing, we need not consider whether defendants were prejudiced by plaintiff's delay in seeking leave to amend.

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

ENTERED: MARCH 14, 2019

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Dianne T. Renwick, J.P.
Peter Tom
Angela M. Mazzarelli
Troy K. Webber
Cynthia S. Kern, JJ.

7610
Index 150522/17

_____x

Summer Zervos,
Plaintiff-Respondent,

-against-

Donald J. Trump,
Defendant-Appellant.

- - - - -

Law Professors,
Amici Curiae.

_____x

Defendant appeals from an order of the Supreme Court, New York County (Jennifer G. Schecter, J.), entered March 21, 2018, which denied his motion to dismiss the defamation complaint or in the alternative to stay the action, and denied his special motion to strike the complaint under California's anti-SLAAP statute.

Kasowitz Benson Torres LLP, New York (Marc E. Kasowitz, Christine A. Montenegro and Paul J. Burgo of counsel), for appellant.

Cuti Hecker Wang LLP, New York (Mariann Meier Wang, John Cuti, Eric Hecker, Daniel Mullkoff and Heather Gregorio of counsel), for respondent.

Ropes & Gray LLP, New York (Robert S. Fischler, Patrick J. Reinikainen, Elizabeth Bierut and Nicholas C. Spar of counsel), for amici curiae.

RENWICK, J.P.

This case raises a constitutional issue of first impression: whether the Supremacy Clause of the United States Constitution requires a state court to defer litigation of a defamation action against a sitting President until his terms end.

Two decades ago, in *Clinton v Jones* (520 US 681 [1997]), the United States Supreme Court rejected the then-sitting President's attempt to shield himself from alleged unofficial misconduct by relying upon the constitutional protection of the Presidency. Specifically, the Supreme Court found that the Separation of Powers doctrine of the United States Constitution did not afford President Clinton temporary immunity from civil damages litigation, in federal court, arising out of events that occurred before he took office. The Court determined that a federal court's exercise of its constitutional authority to decide cases and controversies did not encroach upon the exercise of the executive powers of the President.

More than 20 years later, the current sitting President attempts to shield himself from consequences for his alleged unofficial misconduct by relying upon the constitutional protection of the Presidency. We reject defendant President Trump's argument that the Supremacy Clause of the United States Constitution prevents a New York State court - and every other

state court in the country - from exercising its authority under its state constitution. Instead, we find that the Supremacy Clause was never intended to deprive a state court of its authority to decide cases and controversies under the state's constitution.

As more fully explained below, the Supremacy Clause provides that federal law supersedes state law with which it conflicts, but it does not provide that the President himself is immune from state law that does not conflict with federal law. Since there is no federal law conflicting with or displacing this defamation action, the Supremacy Clause does not provide a basis for immunizing the President from state court civil damages actions. Moreover, in the absence of a federal law limiting state court jurisdiction, state and federal courts have concurrent jurisdiction. Thus, it follows that the trial court properly exercised jurisdiction over defendant and properly denied his motion to dismiss.

The hypothetical raised by the dissent, in explaining its position, that a state court could potentially exercise direct control over the President by holding him in contempt, should not be the basis for this Court to broadly hold that a state court lacks jurisdiction over defendant at this juncture. Rather, we should not and do not make a present jurisdictional determination

based on a hypothetical scenario that is highly unlikely to occur in the context of this lawsuit. In the event that, in the future, the trial court should hold defendant in contempt, the issue of whether the court has jurisdiction over the President to do so can be determined as a discrete issue. Concerns about contempt, however, should not be the underpinning for a conclusion that the Supremacy Clause renders defendant immune from this civil lawsuit while he is serving as President.

Factual and Procedural Background

This defamation lawsuit was commenced by Summer Zervos, a former contestant on the "Apprentice," a reality show starring defendant Donald Trump. Plaintiff alleges that in 2016, when defendant was a Presidential candidate, he wrongly smeared her by claiming that her allegations of sexual misconduct against him were lies.

Specifically, on October 14, 2016, plaintiff held a press conference to recount two separate incidents in which defendant had made unwanted sexual advances towards her. The first incident allegedly occurred when she met with defendant at his New York office in 2007, where he kissed her on the lips upon her arrival, and after stating that he would love to have her work for him, kissed her on the lips again as she was about to leave. The kisses made her feel "very nervous and embarrassed" and

"upset."

The second encounter occurred soon thereafter. Ms. Zervos went to meet defendant for dinner at a restaurant in the Beverly Hills Hotel. Instead, she was escorted to his bungalow, where he kissed her "open mouthed," "grabbed her shoulder, again kissing her very aggressively, and placed his hand on her breast." After she pulled back and walked away, defendant took her hand, led her into the bedroom, and when she walked out, turned her around and suggested that they "lay down and watch some telly telly." He embraced her, and after she pushed him away, he "began to press his genitals against her, trying to kiss her again." She "attempt[ed] to make it clear that [she] was not interested" and insisted that she had come to have dinner. They had dinner, which ended abruptly when defendant stated that he needed to go to bed. Later that week, plaintiff, who was seeking a position in the Trump Organization, was offered a job at half the salary that she had been seeking. Plaintiff called defendant and told him that she "was upset, because it felt like she was being penalized for not sleeping with him." Plaintiff concluded her press statement by stating that after hearing the released audiotape and defendant's denials during the debate, "I felt that I had to speak out about your behavior. You do not have the right to treat women as sexual objects just because you are a star."

The audiotape referred to by plaintiff had been released a week earlier. On October 7, 2016, during the 2016 United States presidential election, the Washington Post published a video and accompanying article about then-presidential candidate Donald Trump and television host Billy Bush having an extremely lewd conversation about women in 2005. Trump and Bush were in a bus on their way to film an episode of Access Hollywood. In the video, defendant described his attempt to seduce a married woman and indicated he might start kissing a woman that he and Bush were about to meet. He added, "I don't even wait. And when you're a star, they let you do it. You can do anything. Grab them by the pussy. You can do anything."

Several hours after plaintiff's press conference, defendant posted on his campaign the following statement: "To be clear, I never met her at a hotel or greeted her inappropriately a decade ago. That is not who I am as a person, and it is not how I've conducted my life." Between October 14, 2016 and October 22, 2016, defendant, on Twitter, at campaign rallies, and at a presidential debate, made additional statements in response to plaintiff's allegations and other women's claims of sexual misconduct, including, "These allegations are 100% false. . . . They are made up, they never happened. . . . It's not hard to find a small handful of people willing to make false smears for

personal fame, who knows maybe for financial reasons, political purposes"; "Nothing ever happened with any of these women. Totally made up nonsense to steal the election"; these were "false allegations and outright lies, in an effort to elect Hillary Clinton President. . . . False stories, all made-up. . . . All big lies"; the reports were "totally false," he "didn't know any of these women," and "didn't see these women"; and "Every woman lied when they came forward to hurt my campaign, total fabrication. The events never happened. Never. All of these liars will be sued after the election is over." He also re-tweeted statements by others, including one that had a picture of plaintiff and stated, "This is all yet another hoax."

On January 17, 2017, plaintiff commenced this action against defendant who in November 2016 had been elected President of the United States. Plaintiff alleged that the above statements by defendant were false and defamatory, and that defendant made them "knowing they were false and/or with reckless disregard for their truth or falsity." Plaintiff alleged that the statements about her were "defamatory per se," because "they would tend (and did) injure [her] trade, occupation or business," that "[b]eing branded a liar who came forward only for fame or at the manipulation of the Clinton campaign has been painful and demoralizing," and that as a direct result of those statements,

she has suffered "both emotionally and financially." She also alleged that defendant's statements "have been deeply detrimental to [her] reputation, honor and dignity." The complaint seeks an order directing defendant to retract any and all defamatory statements and/or apologize for such statements, as well as an order directing defendant to pay compensatory and punitive damages.

Defendant moved to dismiss the complaint pursuant to CPLR 3211(a) on the basis that the state court had no jurisdiction to entertain a suit against a sitting President. Alternatively, defendant sought a stay, pursuant to CPLR 2201, that would remain in effect for the duration of his presidency. First, defendant argued that, as implied by the United States Supreme Court in *Clinton v Jones* (520 US 681 [1997], *supra*), the Supremacy Clause of the United States Constitution prevents a state court from hearing an action, whatever its merit or lack thereof, against a sitting President, because a state court may not exercise "direct control" over or interfere with the President, and that the action should be dismissed without prejudice to plaintiff's refiling after defendant leaves office, or stayed until such time.

Second, defendant argued that the complaint should be dismissed on the merits because plaintiff, who resides and was

allegedly injured in California, cannot state a single cause of action for defamation under California law, because the statements at issue "were made during a national political campaign that involved heated public debate in political forums," and that "[s]tatements made in that context are properly viewed by courts as part of the expected fiery rhetoric, hyperbole, and opinion that is squarely protected by the First Amendment." Defendant further argued that his denials of plaintiff's "accusations cannot constitute defamation as a matter of law," because plaintiff cannot show that each of the purportedly defamatory statements was "of and concerning" her because they make no mention of her, and that plaintiff's complaint fails to adequately plead damages.

Finally, defendant argued that California's "Anti-SLAPP" statute, which protects defamation defendants from "strategic lawsuits against public participation" (lawsuits brought primarily to chill the valid exercise of free speech in connection with a public issue) also bars the action, contending that plaintiff could not satisfy the heightened burden of showing a probability that she will prevail on her claim, and that his motion to strike should be granted.

In opposition, plaintiff first argued that a state court may adjudicate civil claims against a sitting President, where those

claims involve unofficial conduct that occurred prior to the President's taking office, at least in the absence of any showing of local prejudice in the state court or that the discovery would involve disclosure of secret information deemed vital to national security. Plaintiff argued that *Clinton v Jones* did not suggest otherwise. Plaintiff further argued that there is no basis to stay the action for years on the ground that the proceeding might interfere with the President's official duties.

Second, plaintiff argued that New York law applies to the defamation claim because there is no conflict with California's defamation law, and that the claim is well pleaded, contending that the cited statements charging plaintiff with making false allegations of defendant's sexual misconduct for political purposes or to seek fame and fortune are factual in nature and not opinions or rhetoric, and that there is no immunity for defamation by a political candidate during a campaign. Plaintiff further argued that, even assuming she is a limited purpose public figure, she sufficiently pleaded actual malice by alleging defendant made the statements knowing they were false and/or with reckless disregard for their truth or falsity, and that she adequately pleaded damages.

Finally, plaintiff argued that California's anti-SLAPP statute does not apply to this New York State case because it is

procedural, not substantive, and that even if it did apply, the special motion to strike was untimely filed and without merit.

The motion court denied defendant's motion in its entirety. First, the court found that *Clinton v Jones*, where the Supreme Court required President Clinton to defend against a federal civil rights action that included a state-law defamation claim, "settled that the President of the United States has no immunity and is 'subject to the laws' for purely private acts" (quoting *Clinton* at 696). That case, the motion court explained, found that regardless of the outcome, there was no possibility that the decision would curtail the scope of the official powers of the executive branch or involve the risk of misallocation of judicial power, and that the doctrine of Separation of Powers did not mandate a stay of even burdensome private actions against the President, which did not "necessarily rise to the level of constitutionally forbidden impairment of the [e]xecutive's ability to perform its constitutionally mandated functions."

The motion court concluded that the "rule is no different for suits commenced in state court related to the President's unofficial conduct," ruling that "[n]othing in the Supremacy Clause of the United States Constitution even suggests that the President cannot be called to account before a state court for wrongful conduct that bears no relationship to any federal

executive responsibility." This is because, the motion court explained, "there is no risk that a state will improperly encroach on powers given to the federal government by interfering with the manner in which the President performs federal functions," and "[t]here is no possibility that a state court will compel the President to take any official action or that it will compel the President to refrain from taking any official action." While the court noted that the Supreme Court in *Clinton v Jones* had pointed out that state court proceedings may warrant a different analysis than those in federal court, the motion court found that the concerns raised by the Supreme Court involved "unlawful state intrusion into federal government operations," concerns that are "nonexistent when only unofficial conduct is in question."

Further, the court concluded that there is no legitimate fear of local prejudice in state court when the actions under review bear no relationship to federal duties, and that there is "no reason . . . that state courts like their federal counterparts will be 'either unable to accommodate the President's needs or unfaithful to the tradition . . . of giving the utmost deference to Presidential responsibilities'" (quoting *Clinton* at 709 [internal quotation marks omitted]). Accordingly, the court also denied the motion for a stay of the action for the

same reasons as in *Clinton v Jones*, finding that important federal responsibilities will be afforded precedence over the prosecution of the lawsuit.

Second, finding that New York law applies and that the California anti-SLAPP provision is procedural and inapplicable, the motion court declined to dismiss the defamation action for failure to state a claim. The court cited Court of Appeals precedent (*Davis v Boeheim*, 24 NY3d 262 [2014]) in determining that "a defamation action could be maintained against a defendant who called individuals claiming to have been victims of sexual abuse liars and stated that he believed that they were motivated by money to go public," noting that a reader or listener, cognizant that defendant knows exactly what transpired, could reasonably believe that his statements of "fact" that the allegations of sexual misconduct were totally false and fabricated for personal gain conveyed that plaintiff was contemptible. The court further found that "in their context, defendant's repeated statements – which were not made through op-ed pieces or letters to the editor but rather were delivered in speeches, debates and through Twitter . . . - cannot be characterized simply as opinion, heated rhetoric or hyperbole," and that the fact that the statements were made in a political campaign does not make them any less actionable.

This appeal ensued. We now affirm for the reasons explained below.

Discussion

We first address the threshold question of whether the Supremacy Clause prevents a New York court from exercising jurisdiction over defendant in this defamation lawsuit. Defendant essentially argues that the motion court erred in failing to dismiss or stay the action under the Supremacy Clause because the clause makes federal law the "supreme law" of the land, and the Clause is violated when a state court exercises "direct control" over a sitting President, who has principal responsibility to ensure that federal laws are faithfully executed. Defendant submits that such forbidden direct control necessarily occurs where a state court hears an action like this one, that would inevitably involve a court issuing, among others, scheduling and discovery orders that would require a response from the President, such as the production of documents and an appearance at a deposition. As explained below, defendant's arguments fail and he must necessarily revert to the policy arguments made by then-President Clinton and rejected by the United States Supreme Court.

The Supremacy Clause provides, "Th[e] Constitution, and the Laws of the United States which shall be made in Pursuance

thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding" (US Const, art VI, cl 2).

Read plainly, the Supremacy Clause confers "supreme" status on federal laws, not on the status of a federal official (*see Haywood v Drown*, 556 US 729, 751-752 [2009, Thomas, J., dissenting] ["(A) valid federal law is substantively superior to a state law" and the "exclusive function" of the Supremacy Clause "is to disable state laws that are substantively inconsistent with federal law"]). The Supreme Court has interpreted the Clause to affirmatively permit Congress to impose limitations on state sovereignty (*see Tafflin v Levitt*, 493 US 455, 459 [1990]; *see also id.* at 470 [Scalia, J., concurring] ["It therefore takes an affirmative act of power under the Supremacy Clause to oust the States of jurisdiction"]); *Goodyear Atomic Corp. v Miller*, 486 US 174, 180 [1988] ["(A)ctivities of federal installations are shielded by the Supremacy Clause from direct state regulation unless Congress provides 'clear and unambiguous' authorization for such regulation"]). The President may also preempt state law through an executive order (*see American Ins. Assn. v Garamendi*, 539 US 396, 416 [2003]).

In the jurisdictional context, the Supreme Court has held that "if exclusive jurisdiction [is] neither express nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it" *(Claflin v Houseman*, 93 US 130, 136 [1876]; *Tafflin*, 493 US at 458, citing *Claflin*). "So strong is the presumption of concurrency [of federal and state court jurisdiction] that it is defeated only in two narrowly defined circumstances: first, when Congress expressly ousts state courts of jurisdiction and second, [w]hen a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts" (*Haywood*, 556 US at 735 [internal quotation marks and citation omitted]).

Defendant's reading of the Supremacy Clause -- that it bars a state court from exercising jurisdiction over him because he is the "ultimate repository of the Executive Branch's powers and is required by the Constitution to be 'always in function'" -- finds no support in the constitutional text or case law. Defendant's interpretation conflicts with the fundamental principle that the United States has a "government of laws and not of men" (*Cooper v Aaron*, 358 US 1, 23 [1958] [internal quotation marks omitted]). Despite the suggestion in his brief that he is the "embodi[ment of] the Executive Branch," and though he is tasked with significant responsibilities, the President is still a person,

and he is not above the law. Supremacy Clause jurisprudence makes clear that an affirmative act is required to divest a state court of jurisdiction and defendant is not exempt from state court jurisdiction solely because of his identity as commander-in-chief (*see Clinton v Jones*, 520 US at 695 ["(I)mmunities are grounded in nature of the function performed, not the identity of the actor who performed it"] [internal quotation marks omitted]). Therefore, the Supremacy Clause does not provide blanket immunity to the President from having to defend against a civil damages action against him in state court.

Defendant has not demonstrated entitlement to immunity from a state court civil damages lawsuit where his acts are purely unofficial. Analysis of defendant's presidential immunity argument is informed by *Nixon v Fitzgerald* (457 US 731 [1982]), the first case to present the claim that the President of the United States possesses absolute immunity from civil damages liability, and *Clinton v Jones*. In *Fitzgerald*, a discharged Air Force employee brought suit against former President Nixon under two federal statutes and the First Amendment, alleging that Nixon, while acting in his official capacity, improperly dismissed him. The employee had testified before a congressional subcommittee on the cost overruns and unexpected technical difficulties in the design of a certain type of aircraft (*id.* at

734). After his discharge, Fitzgerald filed a claim alleging that President Nixon, certain White House aides, and other Department of Defense officials discharged him in retaliation for his congressional testimony (*id.* at 739).

Fitzgerald contended that Nixon could only claim qualified immunity, which only protected the President from certain suits. In contrast, Nixon claimed he was entitled to absolute immunity for his official acts. The Supreme Court agreed with President Nixon, stating that "[i]n view of the special nature of the President's constitutional office and functions, we think it appropriate to recognize absolute Presidential immunity from damages liability for acts within the 'outer perimeter' of his official responsibility" (*id.* at 756). The Supreme Court gave little guidance as to what type of acts were within the "outer perimeter" of the President's official responsibility. The Court simply stated that the President has the "constitutional and statutory authority to prescribe the manner in which the Secretary will conduct the business of the Air Force" (*id.* at 757). This absolute immunity for official conduct is necessary because the President is "an easily identifiable target for [civil] suits" and such vulnerability "could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency

was designed to serve" (*id.* at 753).

Accordingly, the premise underlying presidential immunity (and governmental immunity in general) is that society does not want the government's acts and decisions to be influenced by the fear of future civil liability. Society insists that the President base his decisions on sound policy for the nation, not on individual threats of a lawsuit. In furtherance of this rationale, cabinet members and presidential aides are entitled to qualified immunity to protect the free flow of ideas during communications with the President (*Harlow v Fitzgerald*, 457 US 800, 810 [1982]; *see also Butz v Economou*, 438 US 478 [1978]). Judicial recognition of the President's immunity from civil suit for his official acts protects the nation from a presidential decision based on potential civil liability, which could be significantly different from the decision that is best for the country.

In *Clinton v Jones*, the Supreme Court was presented with the opportunity to expand upon the doctrine of presidential immunity as set forth in *Nixon v Fitzgerald*. The Supreme Court, however, rejected the invitation to extend the reasoning of *Nixon v Fitzgerald* to cases in which a sitting President is sued for civil damages that occurred before he took office. In *Clinton v Jones*, the plaintiff alleged misconduct by President Clinton,

which allegedly took place in 1991 and 1992, before he became President (*Clinton v Jones*, 520 US at 685-686). The Supreme Court described the alleged misconduct as "unrelated to any of his official duties as President of the United States," having "occurred before he was elected to that office" (*id.* at 686).

The Supreme Court explained that the rationale for immunizing the President from liability for his official conduct does not apply to unofficial conduct (*id.* at 694-695). Applying a "functional approach," the Court stated that "an official's absolute immunity should extend only to acts in performance of particular functions of his office" and the President's "effort to construct an immunity from suit for unofficial acts grounded purely in the identity of his office is unsupported by precedent" (*id.* citing *Fitzgerald*).

In so holding, the Supreme Court weighed conflicting historical evidence. The parties pointed to statements made by various Founding Fathers that reflected differences in their views of the role of the President in American society. Ultimately, however, the Supreme Court credited as "consistent with both the doctrine of Presidential immunity as set forth in *Fitzgerald* and rejection of the immunity claim in this case" the statement that, "although the President 'is placed [on] high,' 'not a single privilege is annexed to his character; far from

being above the laws, he is amenable to them in his private character as a citizen, and in his public character by impeachment'" (*id.* at 696, quoting 2 Jonathan Elliot, Debates on the Federal Constitution at 480 [2d ed. 1863 [statement in favor of the Constitution's adoption by James Wilson, one of the leading framers of the Constitution, who also served as a Supreme Court Justice]).

The Supreme Court also rejected the President's argument that the Separation of Powers doctrine placed limits on the federal judiciary's authority to interfere with the executive branch because the President's role in American society is unique and his duties so important that he must "devote his undivided time and attention to his public duties" (*id.* at 697). The Court "recognized the 'unique position in the constitutional scheme'" that the presidency occupies (*id.* at 698-699, quoting *Fitzgerald*, 457 US at 749) but noted that the "'separation-of-powers doctrine does not bar every exercise of jurisdiction over the President'" (*Clinton* at 705, quoting *Fitzgerald*, at 753-754) and does not "require federal courts to stay all private actions against the President until he leaves office" (*Clinton*, at 705-706). The Court also identified historical instances when the President has complied with judicial orders and proposed various accommodations, such as depositions taken at the White House or

via teleconference, that could be made to avoid burdensome impositions on the President (*id.* at 704-705, 709).

In short, the Supreme Court's decision in *Clinton v Jones* clearly and unequivocally demonstrates that the Presidency and the President are indeed separable. Hence, the Court in *Clinton v Jones* effectively recognized that the President is presumptively subject to civil liability for conduct that had taken place in his private capacity. The Supreme Court, however, held that within the exercise of its judicial discretion and power, rather than a constitutionally mandated rule of presidential immunity, a federal court may determine that such presumption has been overcome when the President establishes unusual circumstances that outweigh a plaintiff's legal remedy for constitutionally protected rights (*id.* at 707-708).[1]

To be sure, because *Clinton v Jones* did not involve a state court action, the Supreme Court declined to resolve whether the President may claim immunity from suit in state court (*id.* at 691). Instead, it presumed that if the case was being heard in state court, the President would rely on federalism and comity concerns, "as well as the interest in protecting federal

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[1] President Clinton did not show at the federal district court level that the public interest outweighed the plaintiff Jones's right to a legal remedy for constitutional violations (*see Clinton v Jones*, 520 US at 707-708).

officials from possible local prejudice" (*id.*). In a footnote, the Court also stated:

> "Because the Supremacy Clause makes federal law 'the Supreme Law of the Land,' Art. VI, cl. 2, any direct control by a state court over the President, who has principal responsibility to ensure that those laws are 'faithfully executed,' Art. II, § 3, may implicate concerns that are quite different from the interbranch separation-of-powers questions addressed here (*cf. e.g.*, *Hancock v Train*, 426 US 167, 178-179 [1976]; *Mayo v United States*, 319 US 441, 445 [1943])" (*Clinton v Jones*, 520 US at 691 n 13 [third citation omitted]).

This observation by the Court provides the primary fuel for defendant's arguments and the dissent's conclusion that defendant is immune from suit in state court because a state court "is not part of the Constitution's tripartite system of governance and so has none of the powers of a federal court." However, the cases cited in the footnote above suggest only that the Supreme Court was concerned with a state's exercise of control over the President in a way that would interfere with his execution of federal law (*Hancock*, 426 US at 167 [holding that the State of Kentucky could not force federal facilities in the State to obtain state permits to operate]; *Mayo*, 319 US at 441 [holding that a Florida state official could not order the cessation of a federal fertilizer distribution program]; *but see Alabama v King & Boozer*, 314 US 1 [1941] [holding that the State of Alabama

could charge a tax on lumber that a federal government contractor purchased within the state for construction of an army base, where the federal government would ultimately pay the tax]).

Indeed, aside from the forum, plaintiff's case is materially indistinguishable from *Clinton v Jones*. Plaintiff's state law claims against defendant are based purely on his pre-presidential unofficial conduct. By holding that the President can be sued for civil damages based on his purely unofficial acts, *Clinton v Jones* implicitly rejected the notion that because the President is "always in function," he cannot be subjected to state court litigation (*id.* at 695 ["Petitioner's effort to construct an immunity from suit for unofficial acts grounded purely in the identity of his office is unsupported by precedent"]). The Supreme Court also considered that "[i]f Congress deems it appropriate to afford the President stronger protection, it may respond with appropriate legislation" (*id.* at 709; *cf.* Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 Minn L Rev 1454, 1460-1461 [2009] ["(I)t would be appropriate for Congress to enact a statute providing that any personal civil suits against presidents . . . be deferred while the President is in office. The result the Supreme Court reached in (*Clinton v*) *Jones* . . . . may well have been entirely correct . . . But the Court in (*Clinton v*) *Jones*

stated that Congress is free to provide a temporary deferral of civil suits while the President is in office"]).

Congress has not passed any law immunizing the President from state court damages lawsuits since *Clinton v Jones* was decided. Therefore, because *Clinton v Jones* held that a federal court has jurisdiction over the kind of claim plaintiff now asserts and because there is no federal law limiting a state court from entertaining similar claims, it follows that state courts have concurrent jurisdiction with federal courts over actions against the President based on his purely unofficial acts.

Contrary to defendant's contention, *Clinton v Jones* did not suggest that its reasoning would not apply to state court actions. It merely identified a potential constitutional concern. Notwithstanding that concern, this Court should not be deterred from holding that a state court can exercise jurisdiction over the President as a defendant in a civil lawsuit.

Likewise, defendant's contention that the President is always in function and thus not separable from the office of the Presidency does not make him immune from state civil litigation simply because a court has the power to hold a party in contempt. Defendant's contention and dissent's reasoning rest primarily on

a hypothetical concern about a state court's authority to hold the President in contempt and concomitantly impose imprisonment. That is not, however, the question before this Court. The issue before this Court is whether a state court has jurisdiction over the President, not whether it can hold him in contempt. We should not "make mere hypothetical adjudications, where there is no presently justiciable controversy" regarding contempt and "where the existence of a controversy is dependent upon the happening of future events" (*Prashker v United States Guar. Co.*, 1 NY2d 584, 592 [1956] [internal quotation marks omitted]).

Defendant's concerns, adopted by the dissent, regarding contempt are also unsupported. In fact, as a practical matter, courts rarely hold litigants in contempt and the requirements for a finding of contempt are quite onerous (see *Matter of McCormick v Axelrod*, 59 NY2d 574, 583 [1983]). Furthermore, regarding penalties for refusal to comply with discovery demands and notices, CPLR 3126 provides a broad range of sanctions tailored to protect the parties, but which fall short of a finding of contempt.[2] To the extent that the President must be involved in discovery, the court can minimize the impact on his ability to

[2] Like federal court judges (*see* Fed R Civ P 37[b][2]; *see e.g. Southern New England Tel. Co. v Global NAPs Inc.*, 624 F3d 123, 149 [2d Cir 2010]), state court judges have wide latitude in imposing sanctions.

carry out his official duties by issuing protective orders to prevent abuse (CPLR 3103).[3] Should the trial court find it necessary to require the President to testify, it could allow him to do so by videotape, as has been the custom in recent proceedings involving sitting Presidents.[4]

Ultimately, contrary to defendant and dissent's suggestion, state courts are fully aware that they should not compel the President to take acts or refrain from taking acts in his official capacity or otherwise prevent him from executing the responsibilities of the Presidency. It is likely that holding the President in contempt would be the kind of impermissible "direct control" contemplated by *Clinton v Jones* and violative of the Supremacy Clause.

However, defendant does not appeal from a contempt order and plaintiff does not argue that defendant should be held in contempt. In fact, in *Clinton v Jones*, the Supreme Court held that it did

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[3] Courts have held that the President need only testify on matters for which no other source is available *(see e.g. United States v North*, 713 F Supp 1448, 1449 [D DC 1989]; *United States v Mitchell*, 385 F Supp 1190, 1193 [D DC 1974]).

[4] *See e.g. United States v Branscum, No. LRP-CR-96-49* (ED Ark June 7, 1996) (Clinton); *United States v McDougal*, 934 F Supp 296, 298 (ED Ark 1996) (Clinton); *United States v Poindexter*, 732 F Supp 142, 160 (DDC 1990) (Ronald Reagan); 1 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law § 7.1(b), at 575 (2d ed. 1992) (Jimmy Carter) (citing several instances); *United States v Fromme*, 405 F Supp 578, 583 (ED Cal 1975) (Gerald Ford).

not have to rule on the constitutionality of ordering a President to appear at a particular time and place because it assumed, as we must do here, that reasonable accommodations would be made with respect to the President's schedule (520 US at 691-692), and thus the particular issue of whether any hypothetical order would be so onerous as to interfere with the President's official duties was not relevant to the appeal. We follow the prudent course charted by the *Clinton v Jones* Court.

Accordingly, where, as here, purely unofficial pre-Presidential conduct is at issue, we find, consistent with *Clinton v Jones*, that a court does not impede the President's execution of his official duties by the mere exercise of jurisdiction over him.

Since the Supremacy Clause does not deprive a state court of its power and authority to decide this case, we must examine defendant's alternative grounds for the dismissal of the action: whether plaintiff has failed to state a cause of action for defamation and whether the action is barred by California anti-SLAAP law. We find neither argument persuasive.

First, we find that the motion court properly determined that New York's law of defamation applies. Defendant, who cites to both California and New York law in support of his defense, fails to show there is the required "actual conflict" between the

law of defamation in California and defamation law in New York. Absent a showing of a discernable difference in the laws of the two states, no choice of law analysis is necessary, and New York law is applicable (*see SNS Bank v Citibank*, 7 AD3d 352, 354 [1st Dept 2004]). In any event, as plaintiff shows, California defamation 1aw is the same as New York defamation law in all relevant ways.

In determining whether a "reasonable" reader would consider that defendant's statements that plaintiff lied about their encounters connotes fact or nonactionable opinion, there are three relevant factors to be considered holistically: (1) whether the statements have a "precise meaning" that is "readily understood"; (2) whether the statements can be proven true or false; and (3) whether either the context in which the statements were made or the "broader social context and surrounding circumstances [were] such as to signal . . . readers or listeners that what [was] being read or heard [was] likely to be opinion, not fact" (*Davis v Boeheim*, 24 NY3d at 270 [2014] [internal quotation marks omitted]).

Here, defendant's denial of plaintiff's allegations of sexual misconduct is susceptible of being proven true or false, since he either did or did not engage in the alleged behavior. To be sure, a denial, which is a statement of purported fact and

not mere opinion, does not always provide a basis for a defamation claim, even though it implicitly claims that the alleging party is not telling the truth. However, a denial, coupled with the claim that the accuser is or will be proven a liar, impugns a person's character as dishonest or immoral and typically crosses the line from nonactionable general denial to a specific factual statement about another that is reasonably susceptible of defamatory meaning (*see McNamee v Clemens*, 762 F Supp 2d 584, 601 [ED NY 2011]).

The use of the term liar could be perceived in some cases as no more than rhetorical hyperbole that is a nonactionable personal opinion (*see Davis*, 24 NY3d at 271, citing *Independent Living Aids, Inc. v Maxi-Aids, Inc.*, 981 F Supp 124, 128 [ED NY 1997]). However, that is not the case here, where, again, defendant used the term in connection with his specific denial of factual allegations against him, which was necessarily a statement by him of his knowledge of the purported facts. Further, although defendant's statement that plaintiff was motivated by financial gain was not accompanied with recitation of the "facts" upon which it was based, and although it did not plainly imply that it was based on undisclosed facts, the statement could be viewed by a reasonable reader as containing the implication that defendant knows certain facts, unknown to

his audience, concerning organized political efforts to destroy his campaign, which supports his opinion. Given that, the complaint at the very least includes allegations of "mixed opinion" that are actionable (*see Davis*, 24 NY3d at 271-73).

Defendant further argues that the statements, are nonactionable given the political context in which he made them. We recognize that in light of the hotly contested 2016 campaign, not to mention the fora in which the statements were made (defendant's Internet posting, campaign literature, rallies, and debates), the average reader would largely expect to hear the vigorous expressions of personal opinion, rather than rigorous and comprehensive presentation of factual matter. However, defendant's flat-out denial of a provable, specific allegation against him concerning his own conduct, accompanied by a claim that the accuser was lying, could not be viewed even in that context as a rhetorical statement of pure opinion or as "vague, subjective, and lacking in precise meaning" (*Jacobus v Trump*, 156 AD3d 452, 453 [1st Dept 2017], *lv denied* 31 NY3d 903 [2018]). Nor is there any support for defendant's claim that such statements when made in the context of a heated political campaign are protected political speech. Indeed, claims for defamation may arise out of acrimonious political battles (*see Silsdorf v Levine*, 59 NY2d 8 [1983], *cert denied* 464 US 831

[1983]).

Defendant's argument that some of the alleged defamatory statements are not "of and concerning plaintiff" is also without merit. Even where statements alleged by plaintiff do not refer to her by name, most of the challenged statements could reasonably be considered of and concerning her. Defendant began making the challenged statements immediately after plaintiff gave her press conference and they were all made within eight days thereafter. The "allegations" that defendant's statements attack as false and politically motivated and the "events" the statements claim "never happened" are easily understood as relating to plaintiff's accusations, as well as the accusations by other women who had come forward by that time (*see Elias v Rolling Stone*, 872 F3d 97, 108 [2d Cir 2017]).

Finally, we find that the motion court correctly declined to apply the California anti-SLAPP statute here, and that even if the motion to strike under that statute were to be considered, it would likely be denied. Plaintiff has established that the defamation claim has the requisite "minimal merit" (*Grenier v Taylor*, 34 Cal App 4th 471, 480 [2014]).

Accordingly, the order of the Supreme Court, New York County (Jennifer G. Schecter, J.), entered March 21, 2018, which denied defendant's motion to dismiss the defamation complaint or in the

alternative to stay the action, and denied his special motion to strike the complaint under California's anti-SLAAP statute, should be affirmed, without costs.

All concur except Tom and Mazzarelli, JJ. who dissent in part in an Opinion by Mazzarelli, J.

MAZZARELLI, J. (dissenting in part)

In *Clinton v Jones* (520 US 681 [1997]), the United States Supreme Court held that separation of powers concerns did not preclude a federal lawsuit against a sitting President of the United States based on unofficial acts allegedly committed by him before he assumed office. The Court expressly cautioned in that decision that different concerns, including the Supremacy Clause of the United States Constitution, might influence the result if such a case were brought against the President in state court. However, the Court did not rule that such a suit could or could not proceed. This matter gives us an opportunity to squarely address the question.

Since the majority accurately relates the facts, which are not in controversy, I need not repeat them here. Further, I agree with the majority's conclusion that plaintiff has stated a claim for defamation and that the action is not barred by California's anti-SLAAP law. Where I depart from the majority is in its conclusion to the question outlined above. As explained below, subjecting the President to a state trial court's jurisdiction imposes upon him a degree of control by the State of New York that interferes with his ability to carry out his constitutional duty of executing the laws of the United States. Since the Supremacy Clause guarantees that any effort by the

individual states to annul, minimize, or otherwise interfere with those laws will be struck down, it follows that any effort by a state court to control the President must likewise fail.

As a preliminary matter, I do not accept plaintiff's contention that because defendant did not invoke the Supremacy Clause in unrelated actions in which he or an affiliated entity was sued in the court of a different state for activities not related to his official duties, he cannot invoke it here. Plaintiff has offered no support for the notion that the President can waive the operation of the Supremacy Clause, which is an important underpinning of the Constitution's federalist system.

Turning to the merits, the parties agree that the President enjoys complete immunity from suit as concerns actions he takes in his official capacity. They differ, however, on the impact of *Clinton v Jones*, which, like this case, was based on allegations involving behavior unrelated to any official acts[1], and which appears to be the only other case addressing whether the President is amenable to suit based on behavior not related to

[1] The case arose out of allegations that when he was Governor of the state of Arkansas, President Clinton made unwanted sexual advances toward Paula Jones, a state employee, and then retaliated against her when she spurned those advances (520 US at 685).

his office. The Supreme Court in that case rejected President Clinton's argument that the separation of powers doctrine afforded him absolute immunity from suit for unofficial acts, notwithstanding the extraordinary demands of his job. Plaintiff posits that *Clinton v Jones* stands for the proposition that, regardless of the forum, so long as the President is not being asked to defend official actions, there is no danger of judicial encroachment into the executive branch. She highlights the Court's statement that

> "[w]hatever the outcome of this case, there is no possibility that the decision will curtail the scope of the official powers of the Executive Branch. The litigation of questions that relate entirely to the unofficial conduct of the individual who happens to be the President poses no perceptible risk of misallocation of either judicial power or executive power" (520 US at 701).

Plaintiff sees no functional difference between the effect a federal court's supervision of litigation would have over a President's executive power and the effect a state court's would, as long as the subject matter were unrelated to the President's official duties, arguing that "the logic of the Court's analysis was aimed at judicial power generally, not at any unique characteristics of federal judicial power."

In arguing that the holding in *Clinton v Jones* does not

compel the same result in this action, defendant stresses that, contrary to plaintiff's characterization of the "logic" of *Clinton*, the case was entirely about "the unique characteristics of federal judicial power." He relies on the Supreme Court's statement that

> "[i]f this case were being heard in a state forum, instead of advancing a separation of powers argument, petitioner would presumably rely on federalism and comity concerns, as well as the interest in protecting federal officials from possible local prejudice that underlies the authority to remove certain cases brought against federal officers from a state to a federal court" (520 US at 691)."

Footnote 13, inserted after the phrase "federalism and comity concerns" in the quoted material, stated

> "Because the Supremacy Clause makes federal law "the supreme Law of the Land," Art. VI, cl. 2, any direct control by a state court over the President, who has principal responsibility to ensure that those laws are "faithfully executed," Art. II, § 3, may implicate concerns that are quite different from the interbranch separation-of-powers questions addressed here. Cf., *e.g.*, *Hancock v. Train*, 426 U.S. 167, 178–179, 96 S.Ct. 2006, 2012–2013, 48 L.Ed.2d 555 (1976); *Mayo v. United States*, 319 U.S. 441, 445, 63 S.Ct. 1137, 1139–1140, 87 L.Ed. 1504 (1943). See L. Tribe, American Constitutional Law 513 (2d ed.1988) ("[A]bsent explicit congressional consent no state may command federal officials ... to take action in derogation of their ... federal responsibilities")."

Defendant argues that the Supremacy Clause acts as an

absolute bar to state courts' authority to exercise jurisdiction over a sitting President, citing *McCulloch v Maryland* (17 US 316, 436 [1819]), which held that "the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government." He describes the President as being "vested with the entire executive authority," such that to permit a state court to have any degree of control over defendant himself would be tantamount to giving that court control over the entire executive branch of the United States government.

Defendant is correct that, in stressing the Supreme Court's view in *Clinton v Jones* that the litigation against the President would not unduly interfere with his executive power because it was not related to any official acts, plaintiff glosses over the fact that the Court's analysis was limited to whether the separation of powers doctrine barred the litigation. The separation of powers doctrine precludes one branch of the federal government from performing a function of another branch or significantly impairing another branch's ability to perform its function (520 US at 701). As the *Clinton* Court emphasized, however, separation of powers "'does not bar every exercise of jurisdiction over the President of the United States'" (*id.* at

705, quoting *Nixon v Fitzgerald*, 457 US 731, 753-754 [1982]). The Court quoted James Madison in the Federalist No. 47, who wrote that "separation of powers does not mean that the branches 'ought to have no *partial agency* in, or no *controul* over the acts of each other'" (*id.* at 702). Indeed, as the *Clinton* Court noted, the federal courts have exerted their control over the Presidency in dramatic ways, such as by issuing holdings sharply limiting the President's exercise of executive authority, citing *Youngstown Sheet & Tube Co. v Sawyer* (343 US 579 [1952]), in which the Court struck down President Truman's plan to nationalize the country's steel mills. The Court also cited to historical examples of Presidents being ordered to submit to federal judicial process, such as Thomas Jefferson when he was served with a subpoena in the treason trial of Aaron Burr (*United States v Burr* (25 F Cas 30 [No. 14,692d][CC Va 1807]), and Richard Nixon when he was forced to comply with a subpoena seeking tape recordings made in the Oval Office (*United States v Nixon* (418 US 683 [1974]). Thus, the *Clinton* Court concluded, the level of intrusion into the President's duties that would be caused by his having to engage in litigation related to unofficial actions would "pose [] no perceptible risk of misallocation of either judicial power or executive power" (*id.* at 701).

This, of course, is not a separation of powers case. Indeed, plaintiff fails to address the key hypothetical question posed in footnote 13 of *Clinton*, which is whether there is a corollary notion that a state court, which is not part of the Constitution's tripartite system of governance and so has none of the powers of a federal court, has leeway to "direct appropriate process to the President himself . . .[and] determine the legality of his unofficial conduct" (520 US at 705). In exclusively relying on the logic of *Clinton v Jones*, which did not analyze the issue, she offers no independent reason why the Supremacy Clause does not prevent the New York state courts from having jurisdiction over her action. I believe that it is her burden to do so, and that she has failed to carry it.

To be sure, the United States Supreme Court has identified some very limited circumstances where state institutions may take action that impacts the federal government, without violating the Supremacy Clause. *Mayo* (319 US at 447) and *Hancock* (426 US at 179-180), the cases cited by the *Clinton* Court in footnote 13, each alluded to, but distinguished, the same two cases in which a state successfully argued that the Supremacy Clause did not preclude it from enforcing regulations that had an effect on the United States. In *Alabama v King & Boozer* (314 US 1 [1941]), the Court upheld the ability of Alabama to charge a sales tax on

lumber that a government contractor purchased in connection with construction of an army base, over the objection of the federal government, which would ultimately pay the cost of the tax. And in *Penn Dairies, Inc., v Milk Control Commn. of Pennsylvania* (318 US 261 [1943]), the Court rejected a milk seller's Supremacy Clause argument when it was cited for violating a Pennsylvania law setting a floor on the amount milk purveyors could charge for their product. The dairy argued that because it was selling to a United States Army encampment, the statutory scheme did not apply. The Court found that it was irrelevant that the price control imposed by the state would result in higher costs for the federal government, since the dairy was not a federal agency (318 US at 269).

As stated by the Court in *Hancock*, these cases reinforce the notion that "[n]either the Supremacy Clause nor the Plenary Powers Clause bars all state regulation which may touch the activities of the Federal Government" (426 US at 179). Here, the court's jurisdiction over defendant would go much further than merely "touch[ing] the activities of the Federal Government." As defendant correctly notes, "the President alone is vested with the entire executive authority, and is therefore uniquely required under the Constitution to be 'always in function,' [such that] he is inseparable from the office he holds." This notion

that the President occupies a unique place in the Constitutional structure was endorsed by the *Clinton* Court, which accepted as true the observations of former Presidents from the beginning of the Republic to the modern era as to the sheer magnitude and incessant press of the job (520 US at 698). The Court additionally pointed to the 25th Amendment to the Constitution, which was adopted to ensure that there was never a moment when the nation was not without a President who is up to the task of discharging that office's responsibilities (*id.*). The question then becomes whether this all-consuming nature of the Presidency creates a constitutional barrier to defendant's susceptibility to suit in state court.

I believe that it does. A state court's jurisdiction over any person is an exercise of considerable power (*see Licci v Lebanese Can. Bank*, SAL, 20 NY3d 327, 340 [2012] ["personal jurisdiction is fundamentally about a court's control over the person of the defendant"]). Besides the court's ability to issue a decree by which a defendant must abide (here, if plaintiff prevails, to award a money judgment and order defendant to retract his statements and offer an apology), the court holds the power to direct him to respond to discovery demands, to sit for a deposition, and to appear before it. This power includes formidable enforcement mechanisms, including the ability to hold

parties in criminal contempt, and, as a last resort, to imprison them. I recognize that this is a highly unlikely event in this case, as the motion court made clear that it would accommodate the singular nature of defendant's job. However, while the court's need to order the President of the United States before it so he can answer to contempt charges is hypothetical, the even remote possibility of such an event elevates an arm of the state over the federal government to a degree that the Supremacy Clause cannot abide. While I have no reason to doubt that the court would demonstrate extraordinary deference to defendant and no reason to believe that defendant would not cooperate in the litigation, there is no way to be absolutely certain that the court would not at some point have to take steps to protect its own legitimacy.

The majority argues that, in light of the doctrine of concurrent jurisdiction, there is no basis in law for depriving state courts of jurisdiction over the President. The majority further contends that there is no policy reason why the President should be immune from suit in state court for unofficial acts he commits before he takes office. Considering each of those arguments in a vacuum, the majority may very well be right. However, each is unhelpful in terms of determining whether the President may be a defendant in state court. *Tafflin v Levitt*

(493 US 455 [1990]), cited by the majority, dealt with whether state courts have concurrent jurisdiction over civil claims brought under the federal Racketeer Influenced and Corrupt Organizations Act. The Supreme Court held in that case that they do, since state courts had not been divested of jurisdiction over such claims "by 'an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests'" (493 US at 460, quoting *Gulf Offshore Co. v Mobil Oil Corp.*, 453 US 473, 478 [1981]). Not at issue was whether the state court's exercise of jurisdiction would interfere with the very ability of the President to execute federal law, which is what defendant is arguing.

Nor do I (nor does defendant, for that matter) take any issue with the concept that, focusing on the acts themselves, the President is not immune from suit in state court for unofficial acts. Again, however, in holding that there is no immunity for the President's unofficial acts, the Supreme Court in *Clinton v Jones* merely distinguished unofficial acts from the official acts at issue in *Nixon v Fitzgerald* (457 US 731 [1982], supra). Citing the rationale for the immunity found in *Fitzgerald*, which was "'to forestall an atmosphere of intimidation that would conflict with [public officials'] resolve to perform their

designated functions in a principled fashion'" (*Clinton*, 520 US at 693, quoting *Ferri v Ackerman*, 444 US 193, 204 [1979]), the Court held that any immunity that stemmed not from presidential functions but from presidential identity was not justified. Again because *Clinton* was litigated in federal court, the impact of the Supremacy Clause was not relevant. I disagree with the majority that the *Clinton* Court's holding that the President's identity alone confers on him no special cloak of immunity when he is sued is an "implicit reject[ion of] the notion that because the President is 'always in function,' he cannot be subjected to state court litigation." Had the Supreme Court meant to imply any such thing it would have had no reason to suggest in footnote 13 that the Supremacy Clause might demand a different result.

The ultimate proof of the irrelevancy of these arguments is that the majority, along with the amici, ultimately agrees with defendant's position, stating that "[i]t is likely that holding the President in contempt would be the kind of impermissible 'direct control' contemplated by *Clinton v Jones* and violative of the Supremacy Clause." However, the majority minimizes the possibility that the court would have to exercise its contempt power, and is not at all concerned about this sword of Damocles hanging over the President's head. It is instead content to allow the litigation to proceed until such time as a

constitutional crisis is at hand. In my view, this is too narrow an approach. It is not the act of holding the President in contempt that would trigger a Supremacy Clause violation, but the very power to do so once personal jurisdiction is conferred over the President. It is at that point that the court unquestionably has "direct control" over the President, that is, the immediate and ever-present power to issue an order *requiring* him to take some action, as mundane as directing him to produce discovery or as consequential as mandating his appearance in court on a date certain. For this reason, the majority's suggestion that the court could employ "reasonable accommodations" designed to alleviate the burden on the President is irrelevant. That there is any burden to be managed is the problem. Furthermore, the *Clinton* Court's discussion of how the litigation involving President Clinton could be managed so as to accommodate his schedule came after it had already determined that he was amenable to suit in federal court, and also after it noted that the analysis might be very different in state court.

The amici argue that the sheer happenstance of a President being sued in state court, rather than federal court, should not be the factor that determines whether the President should have to answer to charges related to his unofficial duties. We do not view this as a conundrum. Indeed, *King & Boozer* and *Penn Dairies*

turned on the fact that an intermediary prevented a state's regulatory scheme from working directly against the federal government, thus implicating the Supremacy Clause, even though the regulatory scheme ultimately impacted the United States. Accordingly, I do not see this argument as particularly compelling.

Because of the concerns addressed above, the President should not be forced to defend this lawsuit while he is in office. Therefore, in my view the action should be stayed until such time as defendant no longer occupies the office of President of the United States (CPLR 2201).

Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered March 21, 2018, affirmed, without costs.

Opinion by Renwick, J.P. All concur except Tom and Mazzarelli, JJ. who dissent in part in an Opinion by Mazzarelli, J.

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

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

ENTERED: MARCH 14, 2019

CLERK