SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Rosalyn H. Richter
Marcy L. Kahn
Jeffrey K. Oing
Peter H. Moulton, JJ.

7561-7562
Index 652283/15

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Sotheby's, Inc.,
Plaintiff-Appellant-Respondent,

-against-

Christophe Mao, et al.,
Defendants-Respondents-Appellants.

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Cross appeals from an order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about March 1, 2017, which granted defendants' motion for summary judgment dismissing the amended complaint, and denied defendants' motion for summary judgment on the counterclaim.

Stroock & Stroock & Lavan LLP, New York (Charles G. Moerdler, Ernst H. Rosenberger, Julie G. Matos and Kayley R. McGrath of counsel), and Cahill Cossu Noh & Robinson LLP, New York (John R. Cahill and Paul S. Cossu of counsel), for appellant-respondent.

Thomas, M. Lahiff, New York, for respondents-appellants.

FRIEDMAN, J.P.

The primary issue on this appeal is whether a party to a contract may, by orally waiving the other party's accrued obligation to render a performance when due under the contract (but not the performance itself), extend its time under the statute of limitations in which to sue for breach of contract *without* complying with General Obligations Law § 17-103. We answer this question in the negative.

This action arises out of a revolving credit agreement that provided for the financing by plaintiff Sotheby's, Inc. of the purchase by defendant Chambers Fine Art LLC (CFA) of contemporary Chinese fine art for resale. Under the agreement (entitled "Secured Revolving Loan and Sale Agreement"), dated June 29, 2006 (the 2006 agreement), CFA was permitted to draw down on the loan in increments of not more than $500,000 (up to a maximum of $5 million) from time to time as it located art to purchase. Interest was to accrue at fluctuating rates based on the prime rate announced by a designated bank in New York (the prime rate plus one percent until the entire principal amount of the loan became due; the prime rate plus four percent thereafter). The agreement contains no set repayment schedule but requires CFA, "[w]ithin two business days after [it] collect[s] and receive[s] the sale price of any item of the Property [i.e., art purchased

with Sotheby's funds], . . . [to] remit the gross sale proceeds . . . to a joint [bank] account," with the remitted funds to be applied as specified in the agreement. CFA's principal, defendant Christophe Mao, executed a guarantee of all of CFA's obligations under the 2006 agreement.

The 2006 agreement provides that all of CFA's indebtedness becomes due and payable on the earlier of a specified maturity date (June 29, 2009) or "the occurrence of an Event of Default (as defined below)." The agreement further provides that, upon the occurrence of such an "Event of Default,"

> "then, the outstanding principal amount of the Loan together with accrued interest thereon and all other outstanding indebtedness and obligations of [CFA] to Sotheby's *shall become immediately due and payable, without presentment, demand, protest, notice of intent to accelerate, notice of acceleration or notice of any other kind, all of which are hereby waived* by [CFA]" (emphasis added).

The record establishes, and it is undisputed, that an "Event of Default" within the meaning of the 2006 agreement occurred two business days after December 28, 2007 (if not before), thereby triggering CFA's obligation to repay the entire outstanding balance of the loan on that date. Specifically, on February 2, 2007, CFA purchased, with $250,000 drawn from Sotheby's, a painting by the prominent artist Liu Xiaodong entitled "Swimming Pool on the Top of the Building" (SPTB). On December 20, 2007,

CFA sold SPTB for $350,000, and the sale settled on December 28, 2007. The parties agree that CFA did not remit the proceeds of the sale of SPTB to the joint bank account specified in the 2006 agreement within two business days after receiving the funds or at any time thereafter. The 2006 agreement defines the term "Event of Default" to include, inter alia, a "default in the payment of any principal of or interest on the Loan or any other amount payable by [CFA] to Sotheby's hereunder as and when the same shall become due and payable." The term "Event of Default" is defined also to include a "breach [by CFA], or fail[ure] [by CFA] to perform when due, any agreement, covenant or obligation to be performed by [CFA] pursuant hereto." Accordingly, the undisputed failure by CFA to remit the proceeds of the sale of SPTB within two business days after December 28, 2007, as required by the 2006 agreement, constituted an "Event of Default" thereunder.[1]

CFA's purchase of SPTB in February 2007 was the last one it made with funds provided by Sotheby's under the 2006 agreement.

[1]There is evidence that CFA committed other breaches of the 2006 agreement (such as failing to store the art as required by the agreement) before June 29, 2009. However, as it is plain that an "Event of Default" occurred with respect to the failure to remit the funds from the sale of SPTB, consideration of the other possible "Events of Default" is unnecessary to the determination of this appeal.

Thereafter, CFA neither borrowed additional funds under the agreement nor made any additional payments into the designated joint bank account. The parties have stipulated that, of the total principal amount of $2,166,000.00 that Sotheby's disbursed to CFA under the 2006 agreement, $2,142,455.70 has not been repaid.

After February 2007, the parties had intermittent communications concerning the disposition of the inventory CFA had purchased with Sotheby's funds. The financial crisis of 2008 caused a serious downturn in the market for contemporary Chinese fine art, and CFA was left holding a substantial inventory of unsold art that it had purchased with Sotheby's funds within the first year after the parties entered into the agreement. Sotheby's made no demand for repayment on June 29, 2009, the date on which, by the terms of the 2006 agreement, repayment of the loan would have become due absent any prior "Event of Default." In March 2010, Sotheby's sent Mao at CFA an email suggesting possible ways to try to dispose of the art and stating that "[t]he goal is to work our way to a position where at the end of the year we have cut the current outstanding amount significantly." Mao responded, in an email dated April 1, 2010, that he did not "see how there is any sort of outstanding debt" because, in his view at the time, "we all agreed that this

arrangement would be a joint venture and not a loan from Sotheby's to [CFA]."

By letters to CFA and Mao, respectively, both dated March 8, 2011, Sotheby's demanded repayment of the full principal amount of the loan, with accrued interest. In response, CFA, through Mao, sent Sotheby's a letter, dated April 6, 2011, setting forth a "proposal to deal with the amounts claimed by Sotheby's." Mao proposed that the 2006 agreement be "replaced and extinguished" by a promissory note in the principal amount that Sotheby's had demanded ($2,142,455.70), which "amount will not be subject to interest" and would be payable in quarterly installments over five years, with the debt being secured by the art previously purchased with Sotheby's funds. As part of this proposal, Mao stated that he was also "willing to give Sotheby's a second security interest in my apartment," subject to his co-owner's consent. The proposal was never implemented.

Sotheby's commenced this action against CFA, Mao and Chambers 2010, Inc. (another entity owned by Mao) on June 25, 2015. As relevant to this appeal, Sotheby's asserts a cause of action against CFA for breach of the 2006 agreement and a cause of action against Mao for breach of his guarantee of CFA's

obligations under the 2006 agreement.[2] Defendants' answer raised the affirmative defense of the statute of limitation and asserted a counterclaim for breach of contract. In the order appealed from, Supreme Court granted defendants' motion for summary judgment dismissing the complaint as barred by the statute of limitations, but denied defendants' motion for summary judgment on their counterclaim.[3] On Sotheby's appeal and defendants' cross appeal, we modify only to dismiss the counterclaim on a search of the record, and otherwise affirm.

In addressing the issue of the timeliness of Sotheby's claims, we begin by taking note of the Court of Appeals' longstanding recognition — reiterated in its recent decisions — that "the statute of limitations is not only a personal defense but also expresses a societal interest or public policy of giving repose to human affairs" (*Deutsche Bank Natl. Trust Co. v Flagstar Capital Mkts.*, 32 NY3d 139, 151 [2018] [internal

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[2]As limited by the briefs, Sotheby's appeal does not challenge Supreme Court's dismissal of its other causes of action.

[3]In defendants' notice of cross appeal, and in both sides' respective appellate briefs, Supreme Court's order is described as having dismissed the counterclaim. However, the order states only that "summary judgment as to [defendants'] counterclaim is denied." Similarly, in the decision it rendered on the record, the court stated, "I am denying summary judgment on the counterclaim." We note that Sotheby's, in its notice of motion, did not request summary judgment dismissing the counterclaim.

quotation marks omitted]; *see also Ajdler v Province of Mendoza*, __ NY3d __, 2019 NY Slip Op 02151, *4 n 6 [March 21, 2019] ["Our statute of limitations doctrine serves the objectives of finality, certainty and predictability"] [internal quotation marks and alterations omitted]). That policy, the Court further noted in *Deutsche Bank*, "becomes pertinent where the contract not to plead the statute [of limitations] is in form or effect a contract to extend the period as provided by statute *or to postpone the time from which the period of limitations is to be computed*" (32 NY3d at 152 [internal quotation marks omitted], quoting *John J. Kassner & Co. v City of New York*, 46 NY2d 544, 551 [1979], quoting 1961 Rep of NY Law Rev Commn at 97-98, reprinted in 1961 McKinney's Session Laws of NY at 1871).

To govern the resulting "subtle interplay . . . between the freedom to contract and New York public policy" (*Deutsche Bank*, 32 NY3d at 143), the legislature enacted General Obligations Law § 17-103 ("Agreements waiving the statute of limitation"), the first paragraph of which provides:

> "A promise to waive, to extend, or not to plead the statute of limitation applicable to an action arising out of a contract express or implied in fact or in law, if made after the accrual of the cause of action and made, either with or without consideration, *in a writing signed by the promisor or his agent* is effective, according to its terms, to prevent interposition of the defense of the statute of limitation in an action or proceeding commenced within

> the time that would be applicable if the cause of action had arisen at the date of the promise, or within such shorter time as may be provided in the promise" (General Obligations Law § 17-103[1] [emphasis added]).

"An agreement to extend the statute of limitations that does not comply with these requirements [of § 17-103(1)] 'has no effect'" (*Deutsche Bank*, 32 NY3d at 153, quoting General Obligations Law § 17-103[3][4]; *see also* CPLR 201 ["An action . . . must be commenced within the time specified in this article unless a different time is prescribed by law or a shorter time is prescribed by written agreement," and "[n]o court shall extend the time limited by law for the commencement of an action"]).

Sotheby's causes of action against CFA for breach of the 2006 agreement and against Mao to enforce the guarantee are, of course, governed by a six-year statute of limitations (CPLR 213[2]). Under the terms of the 2006 agreement, Sotheby's became entitled to demand immediate payment of the total outstanding balance of the loan two business days after December 28, 2007, when an "Event of Default" occurred upon CFA's failure to remit the proceeds of the SPTB sale. The statute of limitations begins

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[4]General Obligations Law § 17-103(3) provides in full: "A promise to waive, to extend or not to plead the statute of limitation has no effect to extend the time limited by statute for commencement of an action or proceeding for any greater time or in any other manner than that provided in this section, or unless made as provided in this section."

to run on a contractual claim for the payment of a sum of money "when the party that [is] owed money had the right to demand payment, not when it actually ma[kes] the demand" (*Hahn Automotive Warehouse, Inc. v American Zurich Ins. Co.*, 18 NY3d 765, 771 [2012]; *see also ACE Sec. Corp., Home Equity Loan Trust, Series 2006-SL2 v DB Structured Prods., Inc.*, 25 NY3d 581, 594 [2015] [noting that *Hahn* held "that breach of contract counterclaims began to run when insurers possessed the legal right to demand payment from the insured, not years later when they actually made the demand"] [internal quotation marks and brackets omitted]). Since the date two business days after December 28, 2007, was January 2, 2008 — and the parties never entered into a written agreement to waive or extend the statute of limitations in compliance with General Obligations Law § 17-103 — Sotheby's time in which to commence this action expired no later than January 2, 2014, about a year and a half before Sotheby's actually brought suit on June 25, 2015.

The foregoing notwithstanding, Sotheby's argues that it delayed the accrual of its causes of action by waiving the "Events of Default" that occurred before June 29, 2009, the date on which repayment of the loan was set to become due absent any

prior defaults.[5] Specifically, Sotheby's claims that the record at least raises a triable issue as to whether it waived CFA's obligation to timely remit the proceeds of the SPTB sale or to make immediate repayment of the outstanding loan balance upon the occurrence of an "Event of Default" (which, as previously discussed, occurred no later than January 2, 2008).[6] In this regard, Sotheby's relies on authority holding that, even if a written agreement provides (as the 2006 agreement does) that none of its provisions "may be amended, supplemented or waived other

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[5]If Sotheby's causes of action had accrued on June 29, 2009, the commencement of this action on June 25, 2015, would have been timely.

[6]There is, at best, weak support in the record for Sotheby's claim to have waived the "Event of Default" arising from CFA's failure to remit the proceeds of the SPTB sale. In his affidavit, a Sotheby's executive (who does not claim to have personal knowledge of the matter) makes the conclusory assertion that Sotheby's "waived (as it was entitled to do in its sole discretion) [CFA's] . . . failure to remit payment from the sale of [SPTB] to Sotheby's bank account within two business days." In support of this assertion, the executive cites to the following brief excerpt from Mao's deposition:

> "Q. You say you also chased Sotheby's about the [SPTB] payment?
>
> "A. Yes, the settlement.
>
> "Q. And Sotheby's never sued you or demanded the payment?
>
> "A. Never."

than by means of a writing signed by [the parties]," a fully performed oral modification or waiver of the terms of such an agreement may be given effect.[7] In none of the cases Sotheby's cites was the timeliness of the action under the statute of limitations at issue.

Sotheby's position is untenable because the present case (unlike the cases it cites) implicates, not merely a contractual no-oral-modification clause, but "[t]he public policy represented by the statute of limitations, CPLR 201, and General Obligations Law § 17-103" (*Deutsche Bank*, 32 NY3d at 153). To vindicate that policy, General Obligations Law § 17-103 mandates, inter alia, that a consensual extension of the statute of limitations on an already-accrued contractual claim be given effect only if the extension is set forth "in a writing signed by the promisor." Because Sotheby's fails to identify any such writing in this case, Supreme Court correctly dismissed Sotheby's amended complaint as time-barred.

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[7]Sotheby's cites the following cases for this proposition: *Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.* (7 NY3d 96 [2006]); *Rose v Spa Realty Assoc.* (42 NY2d 338 [1977]); *Estate of Kingston v Kingston Farms Partnership* (130 AD3d 1464 [4th Dept 2015]); *Aiello v Burns Intl. Sec. Servs. Corp.* (110 AD3d 234 [1st Dept 2013]); *Taylor v Blaylock & Partners* (240 AD2d 289 [1st Dept 1997]); *Marine Midland Bank v Midstate Lbr. Co.* (79 AD2d 783 [3d Dept 1980]); *All-Year Golf v Products Invs. Corp.* (34 AD2d 246 [4th Dept 1970], *lv denied* 27 NY2d 485 [1970]).

To decide this appeal, we need not, and therefore do not, determine whether Sotheby's has established that (or has raised an issue as to whether) it effectively waived CFA's performance of any contractual obligation for purposes other than extending Sotheby's time in which to sue.[8] Even if Sotheby's conduct was otherwise sufficient to effect such a waiver, any such waiver, if not embodied in a writing signed by CFA as required by General Obligations Law § 17-103, would not be effective to delay the accrual of Sotheby's cause of action for breach or otherwise to extend the statute of limitations on that claim. Sotheby's cannot be permitted to circumvent § 17-103 by characterizing the conduct on which it relies to avoid the statutory time-bar as its own waiver of an obligation of CFA rather than as an agreement by CFA to waive or extend the statute of limitations. Whatever

[8]We note that Sotheby's present position that it effected waivers as to any of CFA's breaches is contradicted by its March 2011 demand letters to CFA and Mao, in which it stated that "no delay, failure or omission by us to exercise any right under the Agreement or otherwise, shall impair any right available to us under the Agreement or otherwise, or operate as a waiver of any such right." Sotheby's present position is also contradicted by its position at the commencement of this action. In its amended complaint, dated August 18, 2015, Sotheby's alleged that the 2006 agreement "has never been modified by a writing signed by both Sotheby's and [CFA] as required." Similarly, in an affirmation submitted the previous month, Sotheby's counsel averred that Sotheby's had afforded defendants "years of courtesy . . . (none of which can constitute a waiver or an amendment to the Loan Agreement which, per § 13, must be in a signed writing)."

label is placed on the conduct, the effect Sotheby's seeks to draw from it — the extension of its time in which to commence suit — requires compliance with § 17-103.

The Court of Appeals' *Hahn* decision is instructive. In *Hahn*, the Court of Appeals held that

> "any debts for which Zurich had the legal right to demand payment prior to May 2000, i.e., more than six years before the commencement of this action, are time-barred. To hold otherwise would allow Zurich to extend the statute of limitations indefinitely by simply failing to make a demand" (18 NY3d at 771 [footnote and internal quotation marks omitted]).

Here, too, Sotheby's theory that the accrual of its breach of contract claim was delayed by Sotheby's alleged waiver of CFA's obligation to remit the proceeds of the SPTB sale to the joint bank account in timely fashion — a waiver effected by nothing more than Sotheby's failure to act, as previously noted — would result in an indefinite delay of the accrual of Sotheby's claim until whatever time Sotheby's saw fit to demand payment, thereby indefinitely extending the statute of limitations. This conclusion is not changed by the 2006 agreement's backstop maturity date of June 29, 2009, since Sotheby's continuing inaction until March 2011 (when it finally demanded payment) could similarly be said to have waived CFA's obligation to make

payment on June 29, 2009.[9] In any event, under General Obligations Law § 17-103, even an affirmative agreement by the parties to waive CFA's obligation to make timely remittance of sale proceeds cannot have the effect of extending Sotheby's time in which to sue unless memorialized in a writing signed by CFA.[10]

We reject Sotheby's argument that Mao's aforementioned letter of April 6, 2011, which offered a "proposal to deal with the amounts claimed by Sotheby's," served to extend the limitation period pursuant to General Obligations Law § 17-101. The letter was, in effect, a settlement offer conditioned on Sotheby's acceptance of additional terms, a condition that was never satisfied (*see National Westminster Bank USA v Petito*, 202 AD2d 193, 195 [1st Dept 1994]). We also find unavailing

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[9]In fact, Sotheby's takes the position in its appellate brief that it also waived the June 29, 2009 maturity date, stating: "Indeed, though by its terms the Loan Agreement fixed June 29, 2009 as the maturity date of the several loans, Sotheby's agreed not to demand payment at that time (and until March 8, 2011)." By Sotheby's reasoning, the alleged waiver of the June 2009 due date would also serve to delay accrual of the cause of action, thereby opening the door to indefinite extension of the statute of limitations — a result plainly impermissible under *Hahn*.

[10]*Hahn* cannot be distinguished on the ground that the failure to demand payment in that case was the result of "inadvertence" (*id.* at 771) while here the delay was intentional. Mere delay, whether intentional or inadvertent, cannot serve to extend the statute of limitations. On its face, General Obligations Law § 17-103 governs intentional conduct.

Sotheby's arguments that defendants are judicially or equitably estopped to invoke the statute of limitations as a defense.

Finally, as previously noted, the order under review also denied defendants' motion for summary judgment on their counterclaim for breach of the 2006 agreement on the ground that CFA itself failed to perform. This determination, which defendants challenge on their cross appeal, was correct (*see Sun Gold, Corp. v Stillman*, 95 AD3d 668 [1st Dept 2012]). Because CFA's own breaches, as established by the record, render the counterclaim without merit, we modify the order appealed from, upon a search of the record, to grant Sotheby's summary judgment dismissing the counterclaim.

Accordingly, the order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about March 1, 2017, which granted defendants' motion for summary judgment dismissing the amended complaint, and denied defendants' motion for summary judgment on the counterclaim, should be modified, on the law, upon a search of the record, to grant plaintiff summary judgment dismissing the counterclaim, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

All concur.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about March 1, 2017, modified, on the law, upon a search of the record, to grant plaintiff summary judgment dismissing the counterclaim, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Opinion by Friedman, J.P. All concur.

Friedman, J.P., Richter, Kahn, Oing, Moulton, JJ.

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

ENTERED: MAY 2, 2019

CLERK

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 2, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Renwick, Mazzarelli, Gesmer, Singh, JJ.

7775-
7776 The People of the State of New York,
Respondent,

-against-

James Eury,
Defendant-Appellant.

Ind. 858/13

Christina A. Swarns, Office of the Appellate Defender, New York (Kami Lizarraga of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered January 11, 2016, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing him to a term of two years, unanimously affirmed.

The arresting officer's knowledge that defendant was on a list of persons barred from entering The Polo Grounds, a Housing Authority complex, was enough to create probable cause to arrest him for criminal trespass (in violation of a no trespass notice) in such a building (Penal Law 140.10[f]). The officer was part

of a team of officers that had arrested defendant two months earlier in The Polo Grounds, after which defendant ultimately pleaded guilty to trespass. In this previous interaction with defendant, the officer learned that defendant was in the "trespass program."

We note, however, that trespass notices (such as the one in the instant case) often have exceptions that allow recipients to visit family members who live in Housing Authority complexes. In those situations, since the person is legally authorized to be on site despite the trespass notice, he/she should be allowed to visit, with police intrusion aimed primarily at ascertaining that the person is headed to the right apartment. To this end, we note that probable cause is not decided by the "officer's subjective evaluation" but by an "objective judicial determination of the facts in existence and known to the officer" at the time arrest (*People v Robinson*, 271 AD2d 17, 24 [1st Dept 2000] [internal quotation marks omitted], *affd* 97 NY2d 341 [2014]). Thus, there must be a basis for an inference by the arresting officer, at the time of arrest, that the suspect "knowingly enters or remains unlawfully [on the premises] . . . in violation of a personally communicated request to leave the premises from a housing police officer or other person in charge thereof" (Penal Law § 140.10[f]).

We also reject defendant's other suppression argument, relating to a visual body cavity search, on the merits. The hearing evidence established that this search was supported by "a specific, articulable factual basis supporting a reasonable suspicion to believe the arrestee secreted evidence inside a body cavity" (*People v Hall*, 10 NY3d 303, 311 [2008], cert denied 555 US 938 [2008]). The totality of the evidence supported the officers' belief that defendant was hiding contraband in his buttocks, and we have considered and rejected defendant's arguments to the contrary.

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

ENTERED: MAY 2, 2019

CLERK

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

9193 The People of the State of New York, Ind. 4760/12
Respondent,

-against-

Ezequiel Rodriguez,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Renee White, J.), rendered April 30, 2013,

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: MAY 2, 2019

CLERK

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

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

9194 Joseph Levine, et al., Index 655889/17
Plaintiffs-Respondents,

-against-

Sunseet Singal, et al.,
Defendants,

First Capital Real Estate Advisors, LP,
Defendant-Appellant.

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Brinen & Associates, New York (Joshua D. Brinen of counsel), for appellant.

Wollmuth Maher & Deutsch LLP, New York (Nicole M. Clark of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered on or about April 20, 2018, to the extent it granted plaintiff's cross motion for entry of a default judgment against defendant First Capital Real Estate Advisors, LP (defendant) unanimously reversed, on the law, with costs, and the default vacated with leave for defendant to file an answer within 10 days of service of notice of entry of this order.

Defendant's time to answer the complaint was extended by virtue of its serving a notice of motion, together with its co-defendants, seeking dismissal of the causes of action asserted against the co-defendants, pursuant to CPLR 3211(f) (*see also* CPLR 320[a]; 3012[a], [c]). Generally, a CPLR 3211(a) motion to

dismiss made against any part of a pleading extends the time to serve a responsive pleading to all of it (*see Chagnon v Tyson*, 11 AD3d 325 [1st Dept 2004]). Here, Advisors did not default, but appeared by joining in defendants' motion to dismiss the causes of action asserted against the individual named defendants, thereby extending its time to answer the complaint (*see De Falco v JRS Confectionary*, 118 AD2d 752 [2d Dept 1986]). Thus, Advisors had ten days from service upon it of notice of entry of the order deciding the partial motion to dismiss, to answer the causes of action against it, pursuant to CPLR 3211(f).

Defendant's appeal from the order granting the default motion was proper, as it appeared and contested the application for entry of a default order below (*Cole-Hatchard v Eggers*, 132 AD3d 718 [2d Dept 2015]; *see also Spatz v Bajramoski*, 214 AD2d 436 [1st Dept 1995]). Accordingly, CPLR 5511, which generally prohibits an appeal from an order or judgment entered upon

default, is inapplicable (*id.*).

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: MAY 2, 2019

CLERK

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

9195 In re Alisha A.,

A Child under Eighteen
Years of Age, etc.,

Nelson V.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

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

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

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

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Order of fact-finding and disposition (one paper), Family Court, New York County (Jane Pearl, J.), entered on or about October 23, 2017, insofar as it determined that respondent Nelson V. was a person legally responsible for the subject child, and sexually abused her, unanimously affirmed, without costs.

The determination that respondent sexually abused the child Alisha A. is supported by a preponderance of the evidence (*see* Family Ct Act §§ 1046[b][i]; 1012[e][iii][A]; *Matter of Tammie Z.*, 66 NY2d 1 [1985]). The Family Court was in the best position to observe the witnesses and assess their demeanor, and there is no basis to disturb its credibility determinations (*see Matter of*

Irene O., 38 NY2d 776, 777 [1975]; *Matter of Nasir J.*, 35 AD3d 299 [1st Dept 2006]).

The record supports the Family Court's determination that, at the time of the abuse, respondent was a person legally responsible for the child, because he cared for her and assumed other household duties during the period in which the abuse occurred. He also held her out as his daughter, and arranged a family outing that included her with his then-girlfriend and her family. Appellant's contentions that he had no relationship with Alisha A. were rebutted not only by the testimony of the child and her mother, but by the testimony of his girlfriend on his behalf. The fact that he may not have lived with the child consistently does not preclude the finding that he was legally responsible for the child's well-being during the relevant period (*see Matter of Yolanda D.*, 88 NY2d 790 [1996]; *Matter of Christopher W.*, 299 AD2d 268 [1st Dept 2002]).

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

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

ENTERED: MAY 2, 2019

CLERK

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

9196 Sharon Neppl, Index 26627/15E
Plaintiff,

-against-

Fairway Pelham LLC,
Defendant-Respondent,

Levin Properties, L.P.,
Defendant-Appellant.

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Milber Makris Plousadis & Seiden, LLP, White Plains (Vincent Camacho of counsel), for appellant.

Cerussi & Spring, P.C., White Plains (Gabrielle R. Lang of counsel), for respondent.

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Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered on or about May 7, 2018, which granted the motion of defendant Fairway Pelham LLC (Fairway) for summary judgment dismissing the complaint and all cross claims against it, unanimously reversed, on the law, without costs, and the motion denied.

The governing lease between defendant Levin Properties, L.P. (Levin), the landlord of a large shopping center, and Fairway, a commercial tenant in the shopping center, unambiguously allocates to Levin the duty to maintain the shopping center parking lot,

including keeping it free of snow and ice (*see Waverly Corp. v City of New York*, 48 AD3d 261, 264-65 [1st Dept 2008]). However, plaintiff does not allege where the accident occurred. Accordingly, at this stage, summary judgment was not appropriate.

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

ENTERED: MAY 2, 2019

CLERK

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

9197 Yeshaya Averbuch, suing individually and derivatively on behalf of New York Budget Inn LLC, et al., Plaintiffs-Appellants, Index 653343/16

-against-

New York Budget Inn LLC, et al., Defendants,

JBJB Associates LLC, et al., Defendants-Respondents.

_____

David E. Schorr, New York, for appellants.

Becker, Glynn, Muffly, Chassin & Hosinski LLP, New York (Andrea Likwornik Weiss of counsel), for respondents.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered January 10, 2018, which denied plaintiffs' motion for leave to amend the complaint, unanimously affirmed, without costs.

Defendants argue that this appeal should be dismissed on standing grounds, because New York Budget Inn LLC, on whose behalf plaintiff Averbuch seeks to assert claims for conversion and breach of fiduciary duty in connection with certain lease settlement monies, was dissolved on March 20, 2018. However, defendants failed to show that New York Budget Inn's business was completely wound up by the time the motion court addressed plaintiffs' motion for leave to amend (*see Singer v Riskin*, 137

AD3d 999 [2d Dept 2016], citing *Tedesco v A.P. Green Indus., Inc.*, 8 NY3d 243 [2007]; Limited Liability Company Law § 703[b]).

The motion was properly denied because the proposed claims are palpably devoid of merit, given the terms of the lease agreement at issue and the parties' operating agreement for New York Budget Inn, which together provided that defendant JBJB Associates LLC was the sole lessee of the premises and that New York Budget Inn's payment of the lease security and monthly rent, inter alia, could not operate to confer upon it a lease interest of any type, whether by assignment, sublet, or otherwise (*see ID Beauty S.A.S. v Coty Inc. Headquarters*, 164 AD3d 1186 [1st Dept 2018]).

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

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

ENTERED: MAY 2, 2019

CLERK

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

9198 Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP, et al., Plaintiffs-Appellants, Index 650932/17

-against-

Matthew Bender & Company, Inc., a Member of LexisNexis Group, Inc., Defendant-Respondent.

Fishmanlaw, PC, New York (James B. Fishman of counsel), and Anderson Kill, PC, New York (Jeffrey E. Glen of counsel), for appellants.

Skadden, Arps, Slate, Meagher & Flom LLP, New York (Anthony J. Dreyer of counsel), for respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered February 20, 2018, which granted defendant's motion to dismiss the complaint pursuant to CPLR 3211(a), unanimously affirmed, without costs.

Plaintiffs allege that defendant Matthew Bender & Company Inc.'s New York Landlord-Tenant Law, commonly known as the Tanbook, is "rife with inaccuracies and omissions," at least with respect to rent-regulated housing in New York City. The Tanbook is a compilation of statutes, regulations, and editorial contents such as summaries and commentaries, addressing New York rent regulation and landlord-tenant law. Plaintiffs allege that there have been such inaccuracies and omissions in annual editions of

the Tanbook for at least six years preceding 2017.

The breach of express warranty claim, based on the representations defendant made about the content of the Tanbook in the book's "Overview" and on websites on which the book was sold, was correctly dismissed because the Terms and Conditions pursuant to which defendant sold the Tanbook to plaintiffs contain a merger clause and a disclaimer of warranties, which states, in bold type, "We do not warrant the accuracy, reliability or currentness of the materials contained in the publications" (*see* Uniform Commercial Code [UCC] § 2-202; *Potsdam Cent. Schools v Honeywell, Inc.*, 120 AD2d 798, 800 [3d Dept 1986]). Contrary to plaintiffs' contention, this is a specific, not a general, disclaimer. In addition, the complaint fails to allege that plaintiffs relied on the statements that they contend constitute an express warranty (*see CBS Inc. v Ziff-Davis Publ. Co.*, 75 NY2d 496, 503 [1990]; *see also Murrin v Ford Motor Co.*, 303 AD2d 475, 477 [2d Dept 2003] [the plaintiff failed to allege that he even was aware of the advertisements he claimed formed an express warranty]). Although this defect was cured with respect to plaintiff law firm by Samuel J. Himmelstein's affidavit in opposition (*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]), it was not cured with respect to the other plaintiffs.

The disclaimer of warranties also precludes the claim for breach of the implied covenant of good faith and fair dealing (*see Peter R. Friedman, Ltd. v Tishman Speyer Hudson L.P.*, 107 AD3d 569, 570 [1st Dept 2013]), which in any event is duplicative of the breach of contract claim (*Apogee Handcraft, Inc. v Verragio, Ltd.*, 155 AD3d 494, 495-496 [1st Dept 2017], *lv denied* 31 NY3d 903 [2018]; *Shilkoff, Inc. v 885 Third Ave. Corp.*, 299 AD2d 253 [1st Dept 2002]). In addition, plaintiffs identified no contractual provisions that required defendant to update the 2016 edition of the book, notify publishers of errors in it, or issue the 2017 edition sooner that it did.

The GBL § 349 claim was correctly dismissed because the only injury alleged to have resulted from defendant's allegedly deceptive business practices is the amount that plaintiffs paid for the book, which does not constitute an injury cognizable under the statute (*see Small v Lorillard Tobacco Co.*, 94 NY2d 43, 56 [1999]; *Donahue v Ferolito, Vultaggio & Sons*, 13 AD3d 77, 78 [1st Dept 2004], *lv denied* 4 NY3d 706 [2005]; *Rice v Penguin Putnam*, 289 AD2d 318 [2d Dept 2001], *lv dismissed in part, denied in part* 98 NY2d 635 [2002]). In addition, the complaint fails to allege that the individual plaintiff and plaintiff Housing Court Answers, Inc. ever saw the allegedly deceptive representations that purportedly harmed them (*see Gale v International Bus.*

Machines Corp., 9 AD3d 446, 447 [2d Dept 2004]).

We do not reach plaintiffs' argument, raised for the first time in their appellate reply brief, that defendant's representations as to the contents of the book constitute a fraud (*see Mehmet v Add2Net, Inc.*, 66 AD3d 437, 438 [1st Dept 2009]).

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

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

ENTERED: MAY 2, 2019

CLERK

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

9199 Juanita Young, Index 23975/16E
Plaintiff-Respondent,

-against-

The Associated Blind Housing
Development Fund Corporation,
et al.,
Defendants-Respondents,

Procida Construction Corp.,
Defendant-Appellant.

_____

Rivkin Radler LLP, Uniondale (J'Naia L. Boyd of counsel), for appellant.

Burns & Harris, New York (Jason S. Steinberg of counsel), for Juanita Young, respondent.

Manning & Kass, Ellrod, Ramirez, Trester LLP, New York (Marguerite L. Jonak of counsel), for the Associated Blind Housing Development Fund Corporation, Associated Blind Foundation, Inc., ARCO Management Corp. and Multifamily Management Services, respondents.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered June 28, 2018, which denied the motion of defendant Procida Construction Corp. (Procida) for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff seeks to recover for injuries sustained when she tripped and fell on an alleged sidewalk defect. Procida, which

had been hired to perform renovation work on the abutting premises, established that it did not perform any work on the sidewalk prior to plaintiff's accident (*see Torres v Consolidated Edison Co. of N.Y. Inc.*, 127 AD3d 656 [1st Dept 2015]; *Amini v Arena Constr. Co., Inc.*, 110 AD3d 414 [1st Dept 2013]). Procida showed that it was only contracted to make repairs to the sidewalk after exterior scaffolding and a sidewalk shed were removed upon completion of the renovation project, and the evidence shows that at the time of plaintiff's accident, the scaffolding and shed were still in place (*see Flores v City of New York*, 29 AD3d 356 [1st Dept 2006]).

In opposition, neither plaintiff nor the other defendants raised a triable issue of fact as to whether the subject sidewalk was narrowed, forcing plaintiff to walk onto the defect. The representative of the premises' owner testified that the portion of the sidewalk where plaintiff fell was not narrowed, and plaintiff testified that she could not see the sidewalk where she was walking, due to a visual impairment and because a pizza box she was holding obstructed her view. The remaining record is bereft of evidence that the scaffolding and sidewalk shed

diverted her toward the uneven sidewalk flag (*see Roimesher v Colgate Scaffolding & Equip. Corp.*, 77 AD3d 425 [1st Dept 2010]; *see also Betances v 700 W. 176th St. Realty Corp.*, 250 AD2d 504 [1st Dept 1998]).

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

ENTERED: MAY 2, 2019

CLERK

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

9200-
9201 The People of the State of New York,
Respondent,

-against-

Raymond Mayrant,
Defendant-Appellant.

Ind. 305/13

_____

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

Darcel D. Clark, District Attorney, Bronx (Cynthia A. Carlson of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Alvin M. Yearwood, J.), rendered January 5, 2016, as amended February 11, 2016, convicting defendant, after a jury trial, of murder in the second degree and attempted murder in the second degree, and sentencing him to consecutive terms of 25 years to life and 25 years, respectively, unanimously affirmed.

The court properly granted the People's challenge for cause to a prospective juror. This issue turns on whether certain clearly disqualifying statements made by a panelist not identified in the record were, in fact, made by the panelist who was the subject of the challenge. The voir dire record, viewed as a whole, supports the inference that it was the panelist in question who made these statements. Accordingly, the court

providently exercised its discretion in excusing the panelist for cause, because her answers cast "serious doubt on [her] ability to render an impartial verdict" (*People v Arnold*, 96 NY2d 358, 363 [2001]).

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The surviving victim's account of the incident was plausible, and was corroborated by other evidence, while defendant's testimony was incredible.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 2, 2019

CLERK

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

9202 The People of the State of New York, Ind. 3775/14
Respondent,

-against-

Johnny Sydney,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Juan M. Merchan, J. at suppression hearing; Marcy L. Kahn, J. at nonjury trial and sentencing), rendered February 23, 2016, convicting defendant of criminal possession of a controlled substance in the seventh degree, and sentencing him to time served and a conditional discharge, unanimously affirmed.

The court properly denied defendant's motion to suppress the drugs recovered from him. There was probable cause for an arrest, based on a detailed radioed description of defendant, which was sufficiently connected to a subsequent "positive buy" transmission, especially in that the arresting officer personally observed defendant interacting with the undercover officer who made the purchase (*see People v Ketcham*, 93 NY2d 416, 419 [1999];

People v Wilson, 260 AD2d 325 [1st Dept 1999], *lv denied* 93 NY2d 1007 [1999]). Accordingly, the police were entitled to arrest and search defendant, even before the undercover officer made a confirmatory identification.

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

ENTERED: MAY 2, 2019

CLERK

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

9203 In re Elijah R.,

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

_____

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

Zachary W. Carter, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about September 20, 2017, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of grand larceny in the fourth degree, petit larceny and criminal possession of stolen property in the fifth degree, and placed him on probation for a period of 12 months, unanimously modified, on the law, to the extent of dismissing the petit larceny count, and otherwise affirmed, without costs.

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

and credibility. The evidence established that the victim was very familiar with appellant, who was her fellow student.

The court providently exercised its discretion in imposing probation rather than granting appellant's request for an adjournment in contemplation of dismissal. Probation was the least restrictive alternative consistent with appellant's needs and those of the community (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). The seriousness of the offense as well as appellant's poor academic, attendance and disciplinary record at school and at home warranted a 12-month period of supervision.

However, we dismiss the petit larceny count as a lesser included offense of grand larceny in the fourth degree.

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

ENTERED: MAY 2, 2019

CLERK

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

9204 Debbie Pappas, as personal representative of the Estate of Louis Pappas, individually and derivatively on behalf of The 38-40 LLC,
Plaintiff-Appellant,

-against-

The 38-40 LLC, et al.,
Defendants-Respondents,

Nick Glendis, et al.,
Defendants.

Index 650251/17

Camarinos Law Group, LLC, New York (John M. Mavroudis and Michael D. Camarinos of counsel), for appellant.

Rosenberg & Estis, P.C., New York (Bradley S. Silverbush of counsel), for the 38-40 LLC, respondent.

Pryor Cashman LLP, New York (David C. Rose of counsel), for Philip Kirsh, respondent.

Judgment, Supreme Court, New York County (Saliann Scarpulla, J.), entered May 4, 2018, dismissing the complaint, and bringing up for review an order, same court and Justice, entered February 23, 2018, which granted defendants' cross motion to dismiss the derivative claims with prejudice and dismiss the individual claims without prejudice, and denied plaintiff's motion for a preliminary injunction and appointment of a temporary receiver, unanimously affirmed, without costs.

Under the terms of the LLC's operating agreement, plaintiff

is a successor in interest to her decedent's membership interest in the LLC. As such, she is not a member of the LLC (*see MFB Realty LLC v Eichner*, 2016 NY Slip Op 31242[U] [Sup Ct, NY County 2016), *affd* 161 AD3d 661 [1st Dept 2018]). Defendants' grant of access to books and records and issuance of a K-1 did not constitute admissions by defendants that plaintiff was a member.

Plaintiff, who held an interest only in decedent's estate, was not the "legal or equitable owner" of a membership interest (*Estate of Calderwood v Ace Group International LLC*, 157 AD3d 190, 194 [1st Dept 2017] [under the terms of the operating agreement, upon the death of a LLC member, the estate as successor-in-interest only retains the rights to distributions]).

Because plaintiff's individual claims were substantially identical to her derivative claims, the IAS court did not err in dismissing them without prejudice as impermissibly mingled (*see Barbour v Knecht*, 296 AD2d 218, 227-228 [1st Dept 2002]).

Since plaintiff's complaint was dismissed, her motion was properly denied.

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

ENTERED: MAY 2, 2019

CLERK

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

9205-
9205A The People of the State of New York, Respondent,

Ind. 767/14
354/15

-against-

Luis Pena, also known as Manuel Pena,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Ryan J. Foley of counsel), for respondent.

_____

Judgments, Supreme Court, Bronx County (Ethan Greenberg, J. at motions to controvert search warrants; Albert Lorenzo, J. at pleas and sentencing), rendered November 21, 2016, convicting defendant of two counts of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to concurrent terms of two years, unanimously affirmed.

Regardless of whether defendant made a valid waiver of the right to appeal, we find, based on our in camera review of the sealed search warrant documents, that there was probable cause for the issuance of both warrants.

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

ENTERED: MAY 2, 2019

CLERK

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

9207 Miriam Vazquez, etc., et al., Index 302183/10
Plaintiffs, 84001/13

-against-

Beth Abraham Health Services, et al.,
Defendants.

- - - - -

Beth Abraham Health Services,
Third-Party Plaintiff-Appellant,

-against-

New York City Health and Hospital, etc.,
Third-Party Defendant,

Ross Friedman, M.D., et al.,
Third-Party Defendants-Respondents.

_____

Kaufman Borgeest & Ryan LLP, Valhalla (Jacqueline Mandell of counsel), for appellant.

Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Elliot J. Zucker of counsel), for Ross Friedman, M.D., respondent.

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for Regional Physicians Services, P.C., respondent.

_____

Order, Supreme Court, Bronx County (George J. Silver, J.), entered on or about August 24, 2018, which granted third-party defendant Ross Friedman, M.D.'s motion for summary judgment dismissing the third-party complaint as against him and granted third-party defendant Regional Physicians Services d/b/a Matrix Medical Network's (Matrix) motion for summary judgment to the extent of dismissing the third-party claims for common-law

indemnification and contribution as against it, unanimously reversed, on the law, without costs, and the motions denied.

Dr. Friedman failed to make a prima facie showing that he did not commit medical malpractice, because his expert's affidavit was based on a disputed issue of fact (*see Carey v St. Barnabas Hosp.*, 162 AD3d 435 [1st Dept 2018]). The expert asserted that, although Nurse Hughes had noted in the medical chart that the patient was momentarily unresponsive upon returning from physical therapy, Dr. Friedman had never been so informed, and that Dr. Friedman also did not know that the patient had been given oxygen after physical therapy. The expert opined that Dr. Friedman reacted timely and appropriately.

However, Nurse Hughes testified that she called Dr. Friedman at around noon, i.e., shortly after giving the unresponsive patient oxygen, and informed him of this. Dr. Friedman testified that he did not recall receiving a phone call advising him that decedent was dizzy and was not responsive. Dr. Friedman stated that has he received a call that the patient was unresponsive, even momentarily, he would have had the patient immediately transferred to the hospital. Accordingly, the third-party action should not have been dismissed as to Dr. Friedman.

Matrix failed to make a prima facie showing that it is not liable for Dr. Friedman's alleged malpractice, because it did not

establish that Dr. Friedman was an independent contractor, rather than an employee (*see Melbourne v New York Life Ins. Co.*, 271 AD2d 296, 297 [1st Dept 2000]; *Marino v Vega*, 12 AD3d 329 [1st Dept 2004]). The record shows both that Dr. Friedman reported to defendant/third-party plaintiff Beth Abraham Health Services's medical director and that Matrix paid Dr. Friedman and was responsible for his employment benefits. Moreover, Matrix did not submit its contract with Dr. Friedman, a key piece of evidence in determining Dr. Friedman's status as an employee or an independent contractor (*see Felter v Mercy Community Hosp. of Port Jervis*, 244 AD2d 385, 386 [2d Dept 1997]).

We have considered Dr. Friedman's and Matrix's remaining arguments and find them unavailing.

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

ENTERED: MAY 2, 2019

CLERK

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

9208 The People of the State of New York, Ind. 1454/16
Respondent,

-against-

Noel Alfonso,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Larry R.C. Stephen, J.), rendered November 30, 2016, convicting defendant, upon his plea of guilty, of robbery in the first degree, and sentencing him to a term of seven years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to five years, and otherwise affirmed.

We do not find that defendant made a valid waiver of his right to appeal, and we find the sentence excessive to the extent indicated.

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

ENTERED: MAY 2, 2019

CLERK

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

9209-
9210 Index 155762/15

Susan Forman,
Plaintiff-Appellant,

-against-

The Whitney Center for Permanent
Cosmetics Corp, et al.,
Defendants-Respondents.

_____

Antin, Ehrlich & Epstein, LLP, New York (Melissa Kobernitski of counsel), for appellant.

Steinberg & Cavaliere, LLP, White Plains (Robert P. Pagano of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Lynn R. Kotler, J.), entered April 17, 2018, and bringing up for review an order, same court and Justice, entered on or about March 30, 2018, which granted defendants' motion for summary judgment, unanimously affirmed, without costs. Appeal from aforementioned order, unanimously dismissed, as subsumed in the appeal from the judgment, without costs.

Defendants' motion for summary judgment was properly granted (*see generally Zuckerman v New York*, 49 NY2d 557, 562 [1980]). Defendants established that plaintiff, who had been getting cosmetic eyebrow tattoos periodically for over twenty years, signed a consent form indicating that she understood the risks involved in getting eyebrow tattoos and that she was responsible

for the placement and shape of her eyebrows. Prior to performing any pigmentation work, the eyebrows were drawn on and plaintiff explicitly approved of the proposed shape and location on her forehead. Defendants then tattooed plaintiff where she had approved. In opposition, plaintiff failed to raise a triable issue of fact concerning defendants' alleged negligence.

Even assuming that plaintiff preserved her argument that defendant Melany Whitney's affidavit was invalid for lack of certification, as required by CPLR 2309(c), the trial court properly considered the affidavit. Courts are not rigid with this certification requirement. Provided that the oath was duly given (which it was here), authentication of the oathgiver's authority may be secured later and given nunc pro tunc effect (*Matapos Tech. Ltd v Compania Andina de Comercio Ltda*, 68 AD3d 672, 673 [1st Dept 2009]).

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

ENTERED: MAY 2, 2019

CLERK

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

9211-
9212 The People of the State of New York,
Respondent,

-against-

John Wilson,
Defendant-Appellant.

Ind. 4902/13

Seymour W. James, Jr., The Legal Aid Society, New York (Alan S. Axelrod of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Michael D. Tarbutton of counsel), for respondent.

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered June 27, 2014, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the first degree and conspiracy in the second degree, and sentencing him, as a second felony drug offender, to an aggregate term of 12 years, unanimously affirmed.

The court correctly denied, on the ground of lack of standing as well as on the merits, defendant's motion to controvert two search warrants. Defense counsel's equivocal, vague and conclusory statements that defendant had standing to challenge the searches of two separate locations based upon information and belief that defendant resided in both of those premises failed to allege facts sufficient to demonstrate a

reasonable expectation of privacy in either place (*see* CPL 710.60[1]; *People v Holder*, 149 AD2d 325, 326 [1st Dept 1989], *lv denied* 74 NY2d 794 [1989]). Based on, among other things, our review of sealed materials, we also find that the warrants were based on probable cause.

Defendant's claim that his guilty plea was rendered involuntary by the court's allegedly coercive remarks and inaccurate description of the sentencing exposure is unpreserved (*see People v Ali*, 96 NY2d 840 [2001]; *see also People v Conceicao*, 26 NY3d 375, 382 [2015]), and we decline to review it in the interest of justice. As an alternative holding, we find that the court made remarks that should have been avoided, but that the record as a whole, including the fact that defendant had already received an extensive opportunity to consider the plea offer and confer with counsel, establishes the voluntariness of the plea (*see People v Luckey*, 149 AD3d 414, 415 [1st Dept 2017], *lv denied* 29 NY3d 1082 [2017]).

Defendant was properly adjudicated a second felony drug

offender. The record established the necessary sequentiality of convictions, and defendant's argument to the contrary rests on a typographical error in the predicate felony offender statement as to the date of the predicate conviction.

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

ENTERED: MAY 2, 2019

CLERK

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

9213 Sau-Kuen Shek, Index 151934/18
Plaintiff-Respondent,

-against-

Stefanie M. Gachineiro,
Defendant-Appellant,

Nissan-Infinity, L.T.,
Defendant.

_____

McCabe, Collins, McGeough, Fowler, Levine & Nogan, LLP, Carle Place (Barry L. Manus of counsel), for appellant.

Caesar and Napoli, P.C., New York (Kelsey M. Crowley of counsel), for respondent.

_____

Order, Supreme Court, New York County (Adam Silvera, J.), entered on or about November 7, 2018, which granted plaintiff's motion for partial summary judgment on the issue of liability as against defendant Gachineiro, unanimously reversed, on the law, without costs.

Plaintiff established her prima facie entitlement to judgment as a matter of law on the issue of liability.

In opposition, Gachineiro's affidavit raised a triable issue of fact. We note that depositions have not yet been held.

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

ENTERED: MAY 2, 2019

CLERK

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

9215-
9216N Index 23437/15E

Camille Hendrickson,
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

_____

Burns & Harris, New York (Jason S. Steinberg of counsel), for appellant.

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

_____

Orders, Supreme Court, Bronx County (Laura G. Douglas, J.), entered January 9, 2018, and November 8, 2018, which, to the extent appealed from as limited by the briefs, granted defendant's motion for discovery-related penalties or sanctions to the extent of precluding plaintiff from offering evidence of head injury at trial, and denied plaintiff's motion for leave to renew, unanimously affirmed, without costs.

The motion court providently exercised its discretion in precluding plaintiff from presenting evidence of head injury at the trial of this action. In a June 15, 2017 stipulation, plaintiff represented that her claim for exacerbation and/or aggravation of preexisting injuries was confined to her asymptomatic back and neck injuries. In addition, plaintiff

admitted that, despite court orders and so-ordered stipulations, she failed to timely provide defendant with authorizations to obtain medical records pertaining to a preexisting head injury. Plaintiff contends that her failures to provide the medical authorization and the stipulation limiting her claim were inadvertent errors; she stated that the medical authorization was inadvertently placed in the file and that the stipulation was signed by an attorney who was not assigned to the case. However, the extent of these errors and the time that elapsed before they were corrected fully justify the remedy imposed by the court (*see Williams v Shiva Ambulette Serv. Inc.*, 102 AD3d 598, 599 [1st Dept 2013]).

Plaintiff admitted that she failed to present new facts in support of her motion to renew (*see* CPLR 2221[e][2]). She also failed to demonstrate that the denial of her motion resulted in the defeat of substantial fairness (*see Rancho Santa Fe Assn. v Dolan-King*, 36 AD3d 460, 461 [1st Dept 2007]).

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

ENTERED: MAY 2, 2019

CLERK

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

9219 In re Juan M. Vazquez, Ind. 3517/17
[M-366] Petitioner, O.P. 170/19

-against-

Hon. Curtis Farber, etc., et al.,
Respondents.

_____

Juan M. Vazquez, petitioner pro se.

Letitia James, Attorney General, New York (Melissa Ysaguirre of counsel), for Hon. Curtis Farber and Letitia James, respondents.

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes of counsel), for Shira Arnow, respondent.

_____

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

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

ENTERED: MAY 2, 2019

CLERK

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

9347 & M-1611 Angel Leonides Cashbamba, Plaintiff-Appellant, Index 306059/12

-against-

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

- - - - -

[And a Third Party Action]

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

Havkins Rosenfeld Ritzert & Varriale, LLP, Mineola (Gail L. Ritzert of counsel), for respondents.

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Order, Supreme Court, Bronx County (George J. Silver, J.), entered on or about November 21, 2018, which granted defendants' post-note-of-issue motion for discovery-related relief to the extent of directing plaintiff to appear for an independent neurological examination, to provide authorization for the release of plaintiff's employment file, and to respond to defendants' demands for authorizations pursuant to *Arons v Jutkowitz* (9 NY3d 393 [2007]), unanimously modified, on the law, to deny defendants' request for an independent neurological examination and otherwise affirmed, without costs.

Defendants failed to comply with the requirement of 22 NYCRR 202.7 to submit an affirmation of good faith in support of their disclosure-related motion. Contrary to their contention, their

counsel's affirmations are insufficient, because they do not include the time, place, and nature of the consultations that counsel had with plaintiff's counsel to try to resolve the issues raised by the motion (22 NYCRR 202.7[c]; *see 241 Fifth Ave. Hotel, LLC v GSY Corp.*, 110 AD3d 470, 471-472 [1st Dept 2013]; *see also Loeb v Assara N.Y. I, L.P.*, 118 AD3d 457, 457-458 [1st Dept 2014]). To the extent defendants rely on letters exchanged between their counsel and plaintiff's counsel, the letters are insufficient, because they relate to only one of the items sought by defendants and do not reference any discussions between counsel. Moreover, the record does not support defendants' contention that the parties have historically been unable to resolve discovery disputes without court intervention.

Furthermore, defendants failed to provide an adequate explanation for their delay in seeking to compel the examination after plaintiff failed to appear. They also failed to explain why they did not move to reargue and/or appeal the court's decision of June 15, 2017, wherein it denied defendants' motion to vacate the note of issue. In its decision, the court stated that the motion was denied as moot as "[a]ll discovery sought in the motion has now been provided." Instead, defendants waited until August 27, 2018, to move to strike the complaint or to preclude plaintiff from providing evidence of his neurological

injuries or for an order compelling plaintiff to appear for an independent neurological examination and to provide authorizations.

This Court notes that at oral argument on April 24, 2019, plaintiff conceded his willingness to provide authorizations for the release of plaintiff's employment file and as well as his obligation to respond to defendants' demands for authorizations in accordance with *Arons v Jutkowitz*, 9 NY3d at 393.

M-1611 - *Angel Leonides Cashbamba v 1056 Bedford LLC*

Motion for a stay denied.

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

ENTERED: MAY 2, 2019

CLERK

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

8356 Foday Bajaha, Index 304970/15
Plaintiff-Respondent,

-against-

Mercy Care Transportation, Inc., et al.,
Defendants-Appellants,

Robert Rivera,
Defendant.

_____

Cascone & Kluepfel, LLP, Garden City (Beth L. Rogoff Gribbins of counsel), for appellants.

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

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Order, Supreme Court, Bronx County (Donald A. Miles, J.), entered on or about June 20, 2018, which granted plaintiff's motion for partial summary judgment on the issue of liability, reversed, on the law and the facts, without costs, and the matter remanded for further proceedings.

This personal injury action arises from an incident occurring on November 15, 2014 at shortly after 10 a.m. in an ambulette that was transporting a nonparty disabled patient from the Staten Island Care Center, a rehabilitation facility, to a hospital. Plaintiff was a health care aide employed by the facility. Defendant Rivera was employed as a driver for the ambulette by defendant Mercy Care Transportation, Inc.

Plaintiff, who was assigned by the facility to accompany the patient to the hospital, testified that when he entered, the patient was already inside the ambulette in a wheelchair. The factual accounts of what occurred next diverge in a manner that precludes summary judgment as to liability against defendants.

Plaintiff testified at his deposition that when he arrived at the ambulette, the driver was already seated inside and was using his phone. Plaintiff entered the compartment of the ambulette through the side door on the passenger side of the vehicle. The patient was in a wheelchair in the middle of the ambulette. Plaintiff testified that he did not have his seat belt on; subsequently, though, he testified that there was no seat belt, and that "it's just a chair, you just sit." He testified that as the vehicle pulled out fast he may not have been sitting yet, causing him to fall to the floor and the wheelchair to tip over onto him, at which point, plaintiff claimed, he blacked out for four or five seconds, impairing his memory. Plaintiff testified that he could not recall how the wheelchair came to fall onto him or the direction in which it fell, except that it flipped over, falling onto and scratching his left knee, and that the patient called out in fright.

It took about a half block before the vehicle came to a gradual stop. When the driver opened the side door to see what

had happened, plaintiff claimed that he had already uprighted himself, had lifted the wheelchair off of him and was sitting in his seat. The patient, who sustained a bump on his head and was screaming, had been strapped into the wheelchair and so had not fallen out. Plaintiff was unaware whether the wheelchair had been fastened to the vehicle. The driver called in the incident to a supervisor who, when plaintiff was handed the phone, tried to blame plaintiff for the accident.

In his affidavit in support of his motion for summary judgment, plaintiff claimed that the driver had "abruptly started the ambulette, before I could secure myself within the vehicle causing me to be thrown violently and precipitously within the vehicle," as a result of which he "came into contact with the patient's wheelchair," and thereby was injured.

In stark contrast, Rivera, the driver, testified at his deposition that he had wheeled the patient into the ambulette, secured the wheelchair by locking the wheels and further secured it with four hooks attached to tie-downs fastening the wheelchair to the vehicle, which when tightened to prevent its movement in all four directions. After exchanging pleasantries, Rivera saw plaintiff enter the ambulette and sit down. He then showed plaintiff to his seat in the rear of the ambulette, and made certain he fastened his seatbelt. This is in factual conflict

with plaintiff's testimony that there were no seat belts, and, variously, that he had either been standing or sitting. Rivera testified that after plaintiff was seated, he left the ambulette for 5 to 10 minutes as he reentered the building to retrieve his cell phone. This, too, is factually inconsistent with plaintiff's testimony. When Rivera returned, plaintiff and the patient were in the same place as when he had left and he reinspected the hooks. Here, too, a factual inconsistency is presented.

Rivera testified that he pulled out of the parking lot slowly and turned right onto a street that had a sharp uphill gradient, but within a few seconds heard the patient shout "[W]hat the f— is going on here?" Rivera "tapped" on the brakes as he looked in the rear view mirror. He observed that the wheelchair had turned over backwards, with its back on the floor and the patient's feet in the air. Rivera found a flat location about 30 to 50 feet ahead and pulled off of the road. When he opened the door he observed plaintiff, who seemed to still be sitting, engaging in a "pulling" motion and trying to pick up the patient in the wheelchair. The patient was still on his back with his feet still in the air at this time; plaintiff gave no indication that he, himself, felt any pain. Plaintiff and Rivera together returned the wheelchair to an upright position. Rivera

observed that two hooks in the front of the wheelchair had been undone, but had no idea how that could have occurred. Upon inquiry about whether he was hurt, the patient responded, "I think I hit myself on the head." By contrast, plaintiff responded "no" when Rivera inquired whether he had been injured. Plaintiff, who had been frightened rather than angry, became angered in a phone conversation with Rivera's dispatcher, and then related to Rivera that the dispatcher was trying to blame plaintiff for the accident. Plaintiff told Rivera that since "nobody got hurt," he had not intended to report the incident but, angered, now declared, "I'm injured." Rivera testified that he filled out an accident report immediately thereafter.

Rivera denied having pulled out of the parking lot at a high speed before plaintiff had a chance to sit down, and, rather, claimed that he had shown the plaintiff to his seat and made sure that the aide fastened his seat belt. Rivera further averred that when he returned from retrieving his cell phone in the building he checked that plaintiff was seated and reminded him to fasten his seat belt, after which the door was firmly closed. Rivera claimed that he had pulled out of the parking lot slowly and heard a shout after he had gone only a short distance. Rivera averred that both the patient and plaintiff assured him that they were okay.

These two sworn accounts present unresolved factual inconsistencies in many respects that raised triable issues as to how the accident occurred and preclude summary judgment against defendants. Here, whether plaintiff's alleged injuries were caused by Rivera's driving, and whether he even suffered injuries as a consequence of the driver's conduct, are contested issues requiring a trial.

Plaintiff was not merely a passenger relatively immobilized in a vehicle's rear seat; he had relative mobility in carrying out his responsibilities for a disabled third party, which requires further fact-finding, and potentially a credibility evaluation. The granting of summary relief with the existence of the above-noted factual issues could result in holding the driver liable without adequate proof of fault, and would be at the expense of fact-finding on a more complete record. Furthermore, the driver's claimed absence from the vehicle during what may prove to be a consequential time period with respect to the wheelchair being secured, and even potential evidence pertaining to the structural soundness of the tie-downs attached to the wheelchair itself, which became undone without explanation, require further factual review and may also likely present triable issues of credibility. What transpired in the ambulette between plaintiff and the patient during the time Rivera left the

vehicle and returned to the building to retrieve his cell phone is unknown. The record on appeal does not include either testimony or an affidavit by the patient, nor do we know if the patient will be a witness at trial.

We disagree with the dissent's statement that "defendants have failed to offer any explanation of the proximate cause of the accident." It is plaintiff's burden as the moving party for summary judgment to establish defendants' negligence as a proximate cause of plaintiff's injuries. Here, defendants adequately rebutted plaintiff's claim of negligence on their part, and thus plaintiff has failed to establish defendants' negligence and proximate cause. If a trier of fact finds defendants' version of events to be credible, then no liability should be imposed on them.

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

KAHN, J. (dissenting)

On this appeal, the record clearly shows that plaintiff Foday Bajaha was an innocent passenger in defendants' ambulette. Furthermore, defendants have failed to offer any explanation for the accident that does not involve their negligence. I therefore respectfully dissent and would affirm Supreme Court's order granting partial summary judgment to plaintiff.

In support of plaintiff's motion for partial summary judgment on the issue of liability, plaintiff averred that as he was entering defendants' ambulette to accompany his wheelchair bound patient and before he was able to secure himself in the vehicle, the driver, Robert Rivera, abruptly drove the ambulette away, causing plaintiff to be violently thrown about the interior of the vehicle. He claimed that he fell down on the floor and was rendered unconscious for 5 to 10 seconds, and that when he regained consciousness, his patient's wheelchair had fallen on top of him, with the patient still in the chair, causing him serious injuries.

In opposition, defendants submitted the affidavit of defendant Rivera, the ambulette driver. In his affidavit, Rivera averred that he secured the patient by locking the wheels of the wheelchair and securing the knobs on the tie-downs to ensure that the wheelchair was in locked position in the ambulette, then

showed plaintiff his seat and made certain that plaintiff fastened his seat belt. He further stated that he then left the ambulette and, a few minutes later, checked to ensure that plaintiff was seated and reminded him to fasten his seat belt. Rivera averred that he then began to drive away slowly, but stopped the vehicle after having driven only a short distance upon hearing shouting. He stated that he then saw that the wheelchair had fallen over and that plaintiff was trying to right it with the patient still seated in it. He further averred that he then checked on the patient and plaintiff, both of whom advised him that they were "okay."

At Rivera's deposition, taken two and one-half weeks after the submission of his affidavit, Rivera testified that no one other than himself had secured the patient in the ambulette, that his job required to him to prevent anyone else from doing so, and that he did so before driving the ambulette up the hill prior to the accident. He further testified that he had no recollection of wheeling the patient into the ambulette, although he acknowledged that it was his job to do so. He stated that he locked the wheelchair and secured it with tie-downs, but had no specific recollection of seeing plaintiff fastening his seat belt or instructing him to do so, although he routinely gave such instructions to patients and aides who were his ambulette

passengers and believed that he must have done so in this case because of "force of habit." Rivera further stated that he drove away slowly up a "very steep" hill that was not a "safe place." He further stated that after hearing shouting, he slowly stopped the ambulette and looked in the rearview mirror to see that the wheelchair had fallen over, with the patient still in it, lying on his back with his feet in the air.

Rivera averred that when he opened the ambulette doors, he saw plaintiff sitting in about the same spot where he had been sitting, facing sideways toward the patient. Rivera further stated that plaintiff was not complaining of pain or injury and that, working together, he and plaintiff were able, with some difficulty, to dislodge the wheelchair and place it upright again. Rivera further testified that he had secured many wheelchairs inside ambulettes, but had no idea why the wheelchair tipped over in this case. He noted, however, that the two hooks securing the front of the wheelchair had come undone. Rivera further averred that he never saw plaintiff attempt to secure the wheelchair or the tie-downs. In his reply affidavit submitted subsequent to Rivera's deposition, plaintiff argued that Rivera repeatedly testified that he could not recall details about the day of the incident and that his affidavit represented a feigned attempt by defendants' counsel to create an issue of fact to

avoid the granting of partial summary judgment in plaintiff's favor.

The motion court granted plaintiff's motion in full, finding that plaintiff had made a prima facie showing that he was an innocent passenger in defendants' ambulette, citing *Garcia v Tri-County Ambulette Serv.* (282 AD2d 206 [1st Dept 2001]) and *Johnson v Phillips* (261 AD2d 269 [1st Dept 1999]), and that as such, he could not be found responsible for the accident in the absence of defendants' showing that he had interfered with the operation of the vehicle, which defendants had not done. The court further found that defendants had failed to meet their burden of providing a nonnegligent explanation for the accident. The court concluded that the only logical explanation for the accident was that Rivera was negligent in securing the wheelchair and driving recklessly, causing the wheelchair to fall over.

On this appeal, defendants' principal arguments are that plaintiff failed to establish his own freedom from fault, given Rivera's account that he ensured that plaintiff was seated and belted; that issues of fact remain as to how the incident occurred, in that the motion court's conclusion that no such issues exist was based on the court's making credibility determinations in plaintiff's favor and thereby usurping the exclusive province of a jury to make such determinations; and

that any injury to plaintiff would have resulted from plaintiff's attempt to move the wheelchair. Defendants further argue that even if plaintiff had established his freedom from fault, he failed to show that defendants were negligent, or that their negligence proximately caused plaintiff's injuries, citing *Huerta-Saucedo v City Bronx Leasing Inc.* (147 AD3d 695 [1st Dept 2017]). Plaintiff responds that the alleged issues of fact raised by Rivera's deposition conflicted with Rivera's own affidavit and were clearly feigned.

At the outset, the record makes abundantly clear that plaintiff was an innocent passenger in defendants' ambulette. Defendants have failed to raise triable issues of fact on the issues of whether plaintiff played any role in driving the ambulette, securing the wheelchair or attempting to move the wheelchair after Rivera had secured it and prior to the accident. Indeed, Rivera's two accounts of the accident are consistent with each other, as well as with plaintiff's account, to the extent of plaintiff's lack of involvement in causing the accident. Specifically, in both of Rivera's accounts of the accident, and in plaintiff's testimony, plaintiff neither drove the ambulette nor secured the wheelchair with locks and tie-downs. Rivera's and plaintiff's accounts of the accident are also in accord that plaintiff neither touched the wheelchair, its locks or its tie-

downs prior to the accident, nor could he have prevented the accident from occurring. Exercising our authority, pursuant to CPLR 3212(g), "to limit issues of fact for trial, by specifying which facts are not in dispute," we should find that plaintiff was "free from culpable conduct on the issue of liability" (*Garcia v Tri-County Ambulette Serv., Inc.*, 282 AD2d at 207).

Furthermore, defendants have failed to offer any explanation of the proximate cause of the accident which does not involve their negligence. In this case, only one vehicle was involved in the accident, a vehicle owned and operated by defendants (*cf. Jarrett v Claro*, 161 AD3d 639 [1st Dept 2018] [summary judgment on the issue of defendants' liability precluded by question as to the comparative fault of two defendants, each aligned with a different vehicle]; *Huerta-Saucedo v City Bronx Leasing Inc.*, 147 AD3d 695 [same]). And here, it is conceded that the proximate cause of the injury to plaintiff's knee was his contact with the wheelchair. Although there may be conflicting theories as to whether that injury was attributable to the negligent driving of the vehicle, or to the negligent locking and securing of the wheelchair inside the vehicle, or both, in any case, it was negligent action by Rivera – and no one else – that caused plaintiff's contact with the wheelchair. Moreover, neither Rivera's affidavit nor his deposition testimony contains any

evidence that plaintiff or anyone other than he was responsible for the accident. Rivera admitted at his deposition that he alone had secured the wheelchair and that he had no explanation as to why it had tipped over, although he acknowledged seeing that the two hooks securing the front of the wheelchair had come undone. Thus, regardless of the inconsistencies in Rivera's two versions of events, the fault lies with defendants, the driver and owners of the single vehicle that caused plaintiff's injury, and not with plaintiff or any other driver.

Defendants' argument that the motion court erred in crediting plaintiff's version of the facts while discounting defendant Rivera's affidavit and testimony, thereby usurping the jury's exclusive province in making such determinations, is unavailing, as the court may make such a determination on a finding that a party's factual allegations are "so implausible as to permit the conclusion that [the] allegations are necessarily feigned" (*see Black v Chittenden*, 69 NY2d 665, 669 [1986]).

Here, Rivera's deposition testimony contradicts his earlier affidavit statement that he recalled checking twice to ensure that plaintiff was seated and belted before he started to drive. Specifically, Rivera testified a mere 2½ weeks later that he did not recall ensuring that plaintiff had fastened his seat belt, although he routinely advised his patient and aide passengers to

do so, and that he believed that he did so in this case out of "force of habit." Thus, Rivera's affidavit was "directly contradict[ed by] deposition testimony [later] given by the same witness, without any explanation accounting for the disparity, [and therefore] 'create[d] only a feigned issue of fact . . . insufficient to defeat a properly supported motion for summary judgment'" (*Telfeyan v City of New York*, 40 AD3d 372, 373 [1st Dept 2007], quoting *Harty v Lenci*, 294 AD2d 296, 298 [1st Dept 2002]).

The majority's view that plaintiff may have taken some action during the time that Rivera, by his own account, departed from the ambulette to retrieve his cell phone, as well as defendants' arguments that plaintiff's injuries are either attributable to his post-accident efforts to right the wheelchair or, alternatively, could have resulted from some defect in the wheelchair or in its locks and tie-downs are based on nothing more than sheer speculation (*see Martinez v Cofer*, 128 AD3d 421, 422 [1st Dept 2015] [defendant's "bare speculation" did not raise issue of fact]). Accordingly, I disagree with the majority's conclusion that issues of fact are raised by bare speculation as to what occurred during Rivera's purported absence from the vehicle. I also reject defendants' attempts to create issues of fact by presenting implausible accounts of the accident and bare

speculation as to the proximate cause of plaintiff's injuries.

Moreover, even if this case did present an issue of comparative fault on plaintiff's part, plaintiff would not be required to make a prima facie showing that he was free from comparative fault in order to be awarded partial summary judgment (*see Rodriguez v City of New York*, 31 NY3d 312, 324-325 [2018] ["To be entitled to partial summary judgment a plaintiff does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault"]; *accord Chan v Choi*, 165 AD3d 498, 499 [1st Dept 2018]). Rather, it would suffice for plaintiff to eliminate all material issues of fact that defendant Rivera was the proximate cause of the accident, as, in my view, plaintiff has done here.[1]

[1] To the extent plaintiff argues that defendants may be found liable under the doctrine of res ipsa loquitur, I am in accord with the majority's refusal to consider this argument, as it was first raised before the motion court in plaintiff's reply papers, and is based in part upon Rivera's deposition testimony, which was not available to defendants at the time they filed their opposition papers (*see Matter of Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380, 381-82 [1st Dept 2016]).

Accordingly, I would affirm the order of Supreme Court granting plaintiff's motion for partial summary judgment on the issue of liability.

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

ENTERED: MAY 2, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Kahn, Gesmer, JJ.

8622- Index 155334/12
8623 Michael Cutaia,
Plaintiff-Appellant,

-against-

The Board of Managers of the 160/170 Varick Street Condominium, et al.,
Defendants,

The Rector, Church Wardens and Vestrymen of Trinity Church in the City of New York, et al.,
Defendants-Respondents.

- - - - -

Michilli Construction, Inc., et al.,
Third-Party Plaintiffs-Respondents,

-against-

A+ Installations Corp.,
Third-Party Defendant-Respondent.

- - - - -

[And Other Actions]

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Law Offices of Louis Grandelli, P.C., New York (Louis Grandelli of counsel), for appellant.

Law Office of James J. Toomey, New York (Michael J. Kozoriz of counsel), for The Rector, Church Wardens and Vestrymen of Trinity Church in the City of New York, Michilli Construction, Inc. and Michilli Inc., respondents.

O'Connor Reed Orlando LLP, Port Chester (Peter L. Urreta of counsel), for A+ Installations Corp., respondent.

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Amended order, Supreme Court, New York County (Carol R. Edmead, J.), entered August 9, 2018, which, to the extent appealed from, denied plaintiff partial summary judgment on his

Labor Law § 240(1) claim as against defendants The Rector, Church Wardens and Vestrymen of Trinity Church in the City of New York, Michilli Construction, Inc., and Michilli, Inc., reversed, on the law, without costs, and the motion granted. Appeal from order, same court and Justice, entered August 3, 2018, dismissed, without costs, as academic.

There is nothing in the statute that indicates that the Legislature intended to exempt from the protections of Labor Law § 240(1) a worker who falls from an unsecured ladder after receiving an electric shock. Indeed, our directive is to construe the statute "as liberally as may be for the accomplishment of the purpose for which it was thus framed" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 521 [1985]).

The purpose of section 240(1) is to protect the worker from worksite injuries attributable to gravity-related risks. "It is sufficient for purposes of liability under section 240(1) that adequate safety devices to prevent the ladder from slipping or to protect plaintiff from falling were absent" (*Orellano v 29 E. 37th St. Realty* Corp., 292 AD2d 289, 291 [1st Dept 2002]).

The "safety device" provided to plaintiff was an unsecured and unsupported A-frame ladder that was inadequate to perform the assigned task. The ladder could not be opened or locked while

plaintiff was performing his task, and the only way plaintiff could gain access to his work area on the ceiling at the end of the room was by folding up the ladder and leaning it against the wall. It is undisputed that the ladder was not anchored to the floor or wall. There were no other safety devices provided to plaintiff. Plaintiff's expert opined that had the ladder been supported or secured to the floor or wall by anchoring, it would have remained stable when plaintiff was shocked. He further opined that given the nature of plaintiff's work, which involved cutting pipes and the use of hand tools at an elevated height, plaintiff should have been furnished with a more stable device such as a Baker scaffold or a man lift. It is well settled that the failure to properly secure a ladder and to ensure that it remain steady and erect is precisely the foreseeable elevation-related risk against which section 240(1) was designed to protect (*see Plywacz v 85 Broad St. LLC*, 159 AD3d 543 [1st Dept 2018]; *Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173 [1st Dept 2004]).

The fact that the fall was precipitated by an electric shock does not change this fact. This case is distinguishable from *Nazario v 222 Broadway, LLC* (28 NY3d 1054 [2016]), relied on by the dissent. The plaintiff in *Nazario* fell while "holding the ladder, which remained in an open locked position when it landed"

(135 AD3d 506, 507 [1st Dept 2016]). Thus, there was no evidence that the ladder was defective or that another safety device was needed. Here, on the other hand, it is undisputed that the ladder provided was not fully open and locked, nor was it otherwise secured, as plaintiff's expert opined it ought to have been.

The Court of Appeals in *Nazario* never suggested that all elevated falls following electrical shocks were carved out of the protections of the statute (*see Faver v Midtown Trackage Ventures, LLC*, 150 AD3d 580 [1st Dept 2017]; *DelRosario v United Nations Fed. Credit Union*, 104 AD3d 515 [1st Dept 2013] [plaintiff entitled to partial summary judgment where ladder wobbled and moved after he came into contact with a live wire, causing him to fall]; *Vukovich v 1345 Fee, LLC*, 61 AD3d 533 [1st Dept 2009] [plaintiff entitled to partial summary judgment where unsecured ladder inadequate to prevent him from falling to the floor after being shocked]).

Plaintiff suffered not only electrical burns but injuries to his spine and shoulders that necessitated multiple surgeries and are clearly attributable to the fall, and not to the shock, presenting questions of fact as to damages, but not liability (*see O'Leary v S&A Elec. Contr. Corp.* (149 AD3d 500, 502 [1st Dept 2017]).

Defendants do not challenge the court's finding that plaintiff is entitled to partial summary judgment on his Section 241(6) claim based on evidence that defendants violated Industrial Code provisions requiring an employer to, inter alia, inspect electrical sources, undertake measures and provide appropriate protective wear to insulate workers against live electrical sources, and post proper warning signs of nearby electrical hazards (*see* 12 NYCRR 23-1.13[b][3], [4]). Whether plaintiff was at all at fault for the accident must await the trial on damages (*see Rodriguez v City of New York*, 31 NY3d 312 [2018]).

All concur except Tom and Kahn, JJ. who dissent in a memorandum by Tom, J. as follows:

TOM, J. (dissenting)

Plaintiff seeks summary judgment pursuant to Labor Law § 240(1) on the basis that while working on a ladder propped against a wall he fell when his hand came into contact with a live wire, the shock from which jolted him and knocked him off the ladder. However, in the absence of any evidence that the ladder was defective or that other particular safety devices would have prevented the accident, I conclude that summary judgment in favor of plaintiff is precluded under the authority of *Nazario v 222 Broadway, LLC* (28 NY3d 1054 [2016]), which applies to the facts of the present case.

At the time of the accident, plaintiff, a plumbing mechanic, had been employed by third-party defendant A+ Installations Corp. to install plumbing piping in premises leased by third-party plaintiff Michilli, Inc., for a renovation project for which Michilli acted as its own general contractor. Plaintiff, directed to relocate some piping in the 12-foot-high ceiling of a bathroom by Michilli's project manager, Joseph Renna, used a 10-foot rubber-footed A-frame ladder to accomplish the work. On two prior occasions during this phase of the project, plaintiff accessed the ceiling area by opening the ladder and ascending and descending the ladder several times with no incident. He had previously observed electrical BX cable as

well as yellow wires near the copper pipes that he was cutting. For his third use, he concluded that the ladder would not open completely in the particular location where he had to work. As a result, he folded the ladder, leaned it against the wall with the feet positioned about two feet from the bottom of the wall on an even cement surface, and he climbed to an upper rung to continue his pipe-cutting. Plaintiff testified that under similar circumstances in the past he would solicit the help of someone to hold the ladder while he worked on it, but on this occasion, determining that the ladder was "sturdy up against the wall," he declined to seek the assistance of his nearby coworker. Notably, the ladder did not slip.

Upon inspecting, plaintiff did not observe any wires or electrical cables near the piping. Plaintiff testified that the ladder remained steady as he cut the piping over the course of several minutes. However, when he grabbed onto piping as he maneuvered a pipe joint into place, plaintiff received an electric shock that knocked him off of the ladder. Thus, it can be concluded from plaintiff's own testimony that he was propelled from where he had been located on the ladder by the force of the electrical charge rather than by the force of gravity, which was not a result of any defect in the ladder. Renna's post-accident inspection of the location revealed that a cap was missing from

the end of a yellow electrical line, used only for temporary power and lighting, which was hanging about one foot beneath the piping on which plaintiff had been working.

Evidence of a fall from a ladder alone is not proof that the ladder was defective or inadequate and as such a proximate cause of the fall. A claim under section 240(1) still requires proof that an injurious fall from a height, even when induced by an electrical shock, was proximately caused by the inadequacy of the safety devices provided. Here, there was no credible proof that the A-frame ladder was defective or an inadequate device for the plumbing work that plaintiff was performing. Addressing a contractor's fall from a rubber-footed ladder described by the plaintiff as steady and in proper working condition in *Blake v Neighborhood Hous. Servs. of N.Y. City* (1 NY3d 280 [2003]), the Court of Appeals, in recounting the legislative history and purposes of the current Labor Law § 240(1) and judicial embellishments on the statutory text, emphasized that the fall from a ladder or scaffold does not itself support strict liability. Rather, strict liability is defeated in the absence of a violation of section 240(1). As stated elsewhere, if the safety device is sound and in place, the statutory language "must not be strained" in support of a strict liability standard that is not legislatively required (*Martinez v City of New York*, 93

NY2d 322, 326 [1999][internal quotation marks omitted]). When an electrical shock causes a worker to fall from an A-frame ladder in the absence of evidence that the ladder was defective or that another safety device was required, factual issues pertaining to causation and liability are presented for trial, precluding strict liability favoring the plaintiff. This was the outcome in *Nazario v 222 Broadway, LLC* (28 NY3d 1054 [2016], *supra*), as has been reflected more recently in *Jones v Nazareth Coll. of Rochester* (147 AD3d 1364 [4th Dept 2017]) and previously in the case law of other judicial departments (*Weber v 1111 Park Ave. Realty Corp.*, 253 AD2d 376 [1st Dept 1998]; *Gange v Tilles Inv. Co.*, 220 AD2d 556 [2d Dept 1995]; *Grogan v Norlite Corp.*, 282 AD2d 781 [3rd Dept 2001]). Our prior rulings in *DelRosario v United Nations Fed. Credit Union* (104 AD3d 515 [1st Dept 2013]) and *Vukovich v 1345 Fee, LLC* (61 AD3d 533 [1st Dept 2009]) necessarily must yield to *Nazario* to the extent they are inconsistent with it.

Plaintiff has the burden of establishing a prima facie violation of the statute in the first instance. His evidence included an expert opinion by his engineer, Fuchs, who opined that the closed A-frame ladder was inadequate and that other safety devices such as a scaffold, a manlift, ladder anchors, a lanyard, or a harness could have been provided to afford

plaintiff proper protection for the elevated plumbing work he was undertaking near electrical sources. However, Fuchs did not demonstrate from the facts in the record how the suggested alternative safety devices could have been employed to prevent what plaintiff describes as an "electrocution," the factor that the record strongly suggests caused his fall, or how these devices would have protected him under these circumstances.

Since plaintiff cannot show that the ladder was defective, his strategy was to seek strict liability on the basis that, he argues, an A-frame ladder was, in effect, the wrong safety device for the location, in that the area was too confined for its full expansion. Plaintiff testified at his deposition:

> "I picked up the ladder. Originally, I tried to — I opened the ladder and I was trying to position it where I could get to the pipe that I was working on but I couldn't. So I had to fold the ladder and lean it up against the wall and that's what I did."

There are three major flaws in plaintiff's theory in support of summary judgment. First, plaintiff's expert, Fuchs, did not elaborate on how a scaffold or manlift could have even fit into such a confined space and thus could have even been used for the assigned plumbing task. Rather, the record suggests that if an A-frame ladder could not be opened in the subject location, assembling a scaffold would have been precluded, as would the use

of a manlift under similar dimensional factors. As a result, on the basis of this record we are left to speculate as to the feasibility of alternative safety devices, presenting an unresolved factual issue. Second, to the extent Fuchs opined that the closed A-frame ladder should have been anchored or otherwise secured to keep it from tipping or shifting, witnesses testified that the ladder was "sturdy" and "stable." Plaintiff himself, who had set up the ladder, even found it to be stable with no movement. The record is bereft of evidence plausibly explaining why plaintiff fell, apart from his having been shocked and having momentarily lost consciousness as a direct result of the electrical shock. Hence, the record does not allow us to conclude as a matter of law that the ladder somehow slipped. Third, plaintiff's evidence failed to explain how the proposed alternative safety devices could have prevented the fall of a worker who apparently had come into contact with a live wire or his consequential injuries. To the contrary, assigning proximate causation as a matter of law to the essentially unexplained inadequacy of the safety device dodges the more relevant, and I suggest the glaringly obvious, causative explanation provided by the electrical shock. Electrical jolts have been known to thrust a person across a distance, opened ladder or not. As such, notwithstanding Fuchs's conclusory opinion that other safety

devices could have protected plaintiff from his fall under the circumstances of this case, there is no evidence, speculation excepted, that the alleged inadequacy of the A-frame ladder used by plaintiff was a proximate cause of his fall.

Finally, contrary to the characterization of the majority, I am not suggesting that *Nazario* has carved out from the protection of section 240 all elevated falls following electrical shocks. To the contrary, by imposing strict liability because a worker fell from a non-defective ladder after suffering a shock, the logic of the majority's position would seem to, itself, create a special category of injury that circumvents a plaintiff's responsibility in the first instance of establishing a prima facie case of causation.

For these reasons I conclude that the record does not support a finding as a matter of law that Labor Law § 240(1) was violated.

Accordingly, I would affirm, and deny plaintiff partial summary judgment on his Labor Law § 240(1) claim.

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

ENTERED: MAY 2, 2019

CLERK

Sweeny, J.P., Gische, Webber, Kahn, Moulton, JJ.

9162 The People of the State of New York, Ind. 2172/15
Respondent,

-against-

Dayvon Bedeau,
Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Angie Louie of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (R. Jeannie Campbell-Urban 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 Zweibel, J.), rendered June 9, 2016,

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

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

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

ENTERED: MAY 2, 2019

CLERK

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

Sweeny, J.P., Gische, Webber, Kahn, Moulton, JJ.

9164 In re Virgilio M.,
Petitioner-Appellant,

-against-

Jasmin R.,
Respondent-Respondent.

_____

Larry S. Bachner, New York, for appellant.

Christopher L. Esposito, Bronx, for respondent.

Janet Neustaetter, The Children's Law Center, Brooklyn (Louise Feld of counsel), attorney for the children.

_____

Order, Family Court, Bronx County (Jennifer S. Burtt, Referee), entered on or about February 10, 2017, which, inter alia, denied respondent father's petition to terminate an order of guardianship issued on June 19, 2013, which committed custody of the two subject children to respondent Jasmin R., and granted the father supervised visitation, unanimously affirmed, without costs.

Family Court properly found that extraordinary circumstances warranted awarding custody of the children to a non-parent, respondent Jasmin R., the children's half-sister, and that continuation of the guardianship was in the children's best interests (*see Matter of Bennett v Jeffreys*, 40 NY2d 543, 544 [1976]). Testimony by the father's adult daughter and two adult

step-daughters demonstrated that the father had a long history of inappropriate sexual conduct with them, which eventually resulted in his pleading guilty to endangering the welfare of a child and issuance of a five-year order of protection in favor of his oldest daughter when she was a teenager. The court-appointed evaluator concluded that the daughter and step-daughters were telling the truth and testified that the father's prior conduct was a strong predictor of future conduct. The referee found the women's testimony, and that of the forensic evaluator, to be highly credible, and the father's denials to be incredible, and we defer to those credibility determinations (*see Eschbach v Eschbach*, 56 NY2d 167, 173-174 [1982]).

Moreover, the record establishes that, as a result of the terms of the father's criminal probation, which precluded him from having contact with minor children, and the death of the children's mother in 2010, the subject children have been cared for by relatives since 2010 and by respondent Jasmin R. since early 2013. Given that the subject children are now adolescent females, and have endured substantial instability in their lives and a lengthy disruption of the father's custody, extraordinary circumstances continue to dictate that guardianship by Jasmin R. is in their best interests (*see Matter of Bennett v Jeffreys*, 40 NY2d 543, 544 [1976]; *Friederwitzer v Friederwitzer*, 55 NY2d 89

[1992]). For the same reasons, as well as the evidence that the children are well-cared for by Jasmin and her husband, and the children's expressed preferences to remain in their care, we find that it is in their best interests to maintain the guardianship order.

We agree with the Family Court's determination that the father's visitation with his two youngest daughters requires supervision (*see Matter of Helles v Helles*, 87 AD3d 1273, 1273-1274 [4th Dept 2011]).

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

ENTERED: MAY 2, 2019

CLERK

Sweeny, J.P., Gische, Webber, Kahn, Moulton, JJ.

9165 In re Jack Montag, et al., Index 101420/14
Petitioners,

-against-

Environmental Control Board,
Respondent.

_____

Tenenbaum Berger & Shivers LLP, Brooklyn (Michel Cohen and Warren S. Hecht of counsel), for petitioners.

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

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Determinations of respondent, Environmental Control Board of the City of New York, dated July 31, 2014, upholding Notices of Violations issued to petitioners for violations of Administrative Code of the City of New York § 28-105.1, unanimously annulled, without costs, and the petition in this proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Alice Schlesinger, J.], entered on or about May 27, 2016), granted.

Respondent failed to present substantial evidence to support a determination that petitioners violated Administrative Code of the City of New York § 28-105.1, by not obtaining permits before installing doorframes and doors on their premises. The letters relied upon by petitioners establish that the openings predated petitioners' ownership of the relevant properties. While the

letters were silent on whether the doors and frames were replaced by petitioners after taking ownership, the testimony that the doors and frames were new was purely speculative and not supported by competent evidence.

In light of our determination, we need not reach petitioners' remaining contentions.

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

ENTERED: MAY 2, 2019

CLERK

Sweeny, J.P., Gische, Webber, Kahn, Moulton, JJ.

9166 Hercilia Gonzalez, Index 161880/14
Plaintiff-Respondent,

-against-

Franklin Plaza Apartments, Inc.,
Defendant-Appellant.

_____

Mischel & Horn, P.C., New York (Christen Giannaros of counsel), for appellant.

White Werbel & Fino, LLP, New York (Matthew I. Toker of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered September 24, 2018, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant failed to satisfy its prima facie entitlement to judgment as a matter of law in this action where plaintiff was injured when she slipped and fell on an accumulation of snow and ice on a sidewalk abutting defendant's building. Notably, defendant failed to proffer an affidavit or testimony based on personal knowledge of when its employees last inspected the sidewalk prior to plaintiff's accident (*see Simpson v City of New York*, 126 AD3d 640, 640-641 [1st Dept 2015]; *Lebron v Napa Realty Corp.*, 65 AD3d 436, 437 [1st Dept 2009]).

Even if we were to find that defendant met its initial

burden, plaintiff raised a triable issue of fact based on her testimony that at the time of her fall, the sidewalk was covered with snow. Plaintiff's subsequent affidavit did not flatly contradict her prior deposition testimony, and thus was sufficient to raise an issue of fact (*see Red Zone LLC v Cadwalader, Wichersham & Taft LLP*, 27 NY3d 1048, 1049 [2016]; *Santiago v Pioneer Transp. Corp.*, 157 AD3d 451 [1st Dept 2018]). Furthermore, to the extent that plaintiff's affidavit was inconsistent with her deposition testimony, this raises credibility issues that are properly left for trial (*see Piraeus Jewelry v Interested Underwriters at Lloyd's*, 246 AD2d 386, 387 [1st Dept 1998]).

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

ENTERED: MAY 2, 2019

CLERK

Sweeny, J.P., Gische, Webber, Kahn, Moulton, JJ.

9167 The People of the State of New York, Respondent, Ind. 2111/15

-against-

Marquety Castillo Sosa, Defendant-Appellant.

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

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

Judgment, Supreme Court, Bronx County (Robert Torres, J. at plea; Denis Boyle, J. at sentencing), rendered June 24, 2016, convicting defendant of attempted assault in the second degree, and sentencing him to a term of one to three years, unanimously affirmed.

Defendant's challenge to his plea is unpreserved, and we decline to review it in the interest of justice. The exception to the preservation rule set forth in *People v Lopez* (71 NY2d 662, 666 [1988]) does not apply because defendant did not say anything during the plea colloquy or sentencing proceeding that negated an element of the crime or raised the possibility of a defense (*People v Pastor*, 28 NY3d 1089, 1090-91 [2016]).

Defendant asserts that he made exculpatory statements to the police suggesting that he had a justification defense. However,

a plea court's duty to make a sua sponte inquiry is not triggered by a defendant's postarrest statements when the defendant does "not reiterate those statements at [the] plea allocution" (*People v Martorell*, 88 AD3d 485, 486 [1st Dept 2011], *lv denied* 18 NY3d 926 [2012]). Defendant further asserts that he made statements reflected in his presentence report suggesting both justification and intoxication defenses. However, there is likewise no duty on the part of a sentencing court to inquire into such out-of-court statements (*see e.g. People v Rojas*, 159 AD3d 468 [1st Dept 2018], *lv denied* 31 NY3d 1086 [2018]). Moreover, although not required to do so, the sentencing court referred to the statements defendant made in his presentence interview and confirmed, through counsel in defendant's presence, that defendant was not moving to withdraw his plea.

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

ENTERED: MAY 2, 2019

CLERK

Sweeny, J.P., Gische, Webber, Kahn, Moulton, JJ.

9168 The People of the State of New York, Ind. 4791/15
Respondent,

-against-

Katrina Goode,
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 (Ronald Zweibel, J.), rendered August 11, 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: MAY 2, 2019

CLERK

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

Sweeny, J.P., Gische, Webber, Kahn, Moulton, JJ.

9170 B and H Florida Notes LLC, Index 850263/13
Plaintiff-Respondent,

-against-

Alexander Ashkenazi, et al.,
Defendants,

Amit Louzon,
Defendant-Appellant.

_____

McLaughlin & Stern, LLP, Great Neck (John M. Brickman of counsel), for appellant.

Marc E. Scollar, Staten Island, for respondent.

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Order, Supreme Court, New York County (Judith N. McMahon, J.), entered March 6, 2018, which granted plaintiff's order to show cause to vacate the order dismissing the complaint, unanimously affirmed, without costs.

Plaintiff's allegations of law office failure, i.e., that plaintiff's counsel failed to appear for the rescheduled conference in that he inadvertently scheduled the wrong date, constituted a reasonable excuse for the default (*see Dokmecian v ABN AMRO N. Am.*, 304 AD2d 445 [1st Dept 2003]). Plaintiff also demonstrated that he had a meritorious defense (*see* CPLR 5015[a][1]; *Matter of Jones*, 128 AD2d 403, 404 [1st Dept 1987]). In a prior appeal we denied defendant's motion for summary judgment (149 AD3d 401 [1st Dept 2017]). Consistent with that

decision we find that plaintiff has a claim that warrants a determination after trial.

The order granting the motion to vacate the default was appealable under CPLR 5512(a) and was appealable as of right under CPLR 5513(a) and 5701(a)(2). Contrary to defendant's contention, the inclusion of "without prejudice" does not render an order nonappealable (*see Moleon v Kreisler Borg Florman Gen. Constr. Co.*, 304 AD2d 337, 339 [1st Dept 2003]). Notably, the order granting the motion to vacate the default does not include the language "without prejudice," as that language is only included in the dismissal order.

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

ENTERED: MAY 2, 2019

CLERK

Sweeny, J.P., Gische, Webber, Kahn, JJ.

9171-
9172-
9173-
9174-
9175-
9176 Index 300341/14

Anna Condo,
Plaintiff-Appellant,

-against-

George Condo,
Defendant-Respondent.

_____

Dentons US LLP, New York (Anthony B. Ullman of counsel), for appellant.

Blank Rome LLP, New York (Sheila Ginsberg Riesel of counsel), for respondent.

_____

Order, Supreme Court, New York County (Matthew F. Cooper, J.), entered July 17, 2017, which, to the extent appealed from as limited by the briefs, purportedly excluded plaintiff wife's counsel from reviewing sold artwork created by defendant husband for purposes of equitable distribution, unanimously affirmed, with costs. Order, same court and Justice, entered October 23, 2017, which, to the extent appealed from as limited by the briefs, determined that defendant met his preliminary burden to designate certain undated artwork as his separate property and purportedly excluded plaintiff from reviewing certain sold artwork with counsel, unanimously affirmed, with costs. Order,

same court (Michael L. Katz, J.), entered on or about April 20, 2018, which, to the extent appealed from as limited by the briefs, precluded plaintiff from making any future claims on artwork she did not properly dispute, unanimously affirmed, with costs. Order, same court and Justice, entered May 9, 2018, which determined that certain undated artwork was defendant's property, unanimously affirmed, with costs. Order, same court (Matthew F. Cooper, J.), entered October 23, 2018, which denied plaintiff's motions to compel additional discovery with respect to defendant's artwork, unanimously affirmed, with costs.

The orders on appeal are directives and decisions issued by the Special Master (SM) appointed by Supreme Court to determine disputes related to artwork created by defendant and so-ordered by the court. In a prior appeal, we upheld the SM's authority to act as derived from the agreement made by the parties (__ AD3d__, 2019 NY Slip Op 02483 [1st Dept 2019]). We now reject plaintiff's argument that the court was not empowered to so-order the SM's directives and decisions. The order appointing the SM, pursuant to so-ordered stipulation upon the parties' joint motion, expressly states that the SM "shall have the power to take all steps necessary" to resolve the disputes referenced therein and that all the SM's determinations "shall be so ordered by the Court and shall be deemed a final order, binding upon the

parties."

We reject plaintiff's argument that the SM abused her discretion in imposing certain conditions on plaintiff's ability to review defendant's inventory of sold artwork. Significantly, as the SM noted subsequently, plaintiff failed to timely object to the two directives that imposed the conditions, and therefore waived this claim (*see e.g. 1199 Hous. Corp. v Jimco Restoration Corp.*, 77 AD3d 502, 502 [1st Dept 2010]). In any event, contrary to plaintiff's contention, neither directive expressly prohibited plaintiff from reviewing the sold artwork with her counsel.

The SM properly precluded plaintiff from making future marital property claims to sold artwork, after plaintiff failed, as directed by the SM, to provide an evidentiary basis for claiming sold artwork as marital property, according to the procedures set forth by the SM for each party to lay claim to pieces of sold artwork and dispute whether they constituted marital property.

Plaintiff also failed to timely object to, and thus waived her claim that, the SM's determination that defendant, as the artist, met his burden to substantiate his claims that certain undated artwork was his separate property, thus shifting the burden to plaintiff to provide an evidentiary basis for finding that it was marital property. In any event, we perceive no error

in the SM's procedure for determining the parties' claims, given the sheer volume of artwork to be distributed, the SM's authority under her appointment to effect this distribution, and the SM's rationale that defendant, as the artist, possessed the specific knowledge of when the artwork was created. Plaintiff's sworn affidavit attesting in general to her intimate familiarity with defendant's work, standing alone, was not sufficient to meet her evidentiary burden. We note that the SM considered and ruled on plaintiff's claims to those pieces as to which she provided specific evidence.

We reject plaintiff's contention that the SM erred in delaying a decision on plaintiff's motions for additional discovery until after making her determinations regarding the sold and undated artwork. Plaintiff did not object to the timing, and much of the relief she sought was implicitly addressed by the SM as she made those determinations. Further, the parties had already engaged in more than two years of discovery before the note of issue was filed in 2016, and after the judgment of divorce was entered, they engaged in extensive negotiations over the distribution of defendant's artwork. Under these circumstances, permitting further discovery would have been prejudicial to defendant (*see generally Cuprill v Citywide Towing*

& Auto Repair Servs., 149 AD3d 442 [1st Dept 2017]).

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

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

ENTERED: MAY 2, 2019

CLERK

Sweeny, J.P., Gische, Webber, Kahn, Moulton, JJ.

9177 In re Melanie S., and Another,

Children Under the Age of
Eighteen Years, etc.,

Albert A.,
Respondent-Appellant,

The Administration for
Children's Services,
Petitioner-Respondent.

_____

Carol I. Kahn, New York, for appellant.

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

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

_____

Order of disposition, Family Court, Bronx County (Monica D. Shulman, J.), entered on or about June 12, 2018, which, inter alia, found that respondent sexually abused the subject children, for whom he was legally responsible, unanimously affirmed, without costs.

The determination that respondent sexually abused the subject children is supported by a preponderance of the evidence (*see* Family Ct Act § 1046[b]). The children's detailed out-of-court statements were sufficiently corroborated by each other's

statements, and by medical records (*see Matter of Nicole V.*, 71 NY2d 112, 124 [1987]; *Matter of David R. [Carmen R.]*, 123 AD3d 483 [1st Dept 2014]).

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

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

ENTERED: MAY 2, 2019

CLERK

Sweeny, J.P., Gische, Webber, Kahn, Moulton, JJ.

9178-
9179 The People of the State of New York,
Respondent,

-against-

Robert Brown,
Defendant-Appellant.

Ind. 170/15

_____

Robert S. Dean, Center for Appellate Litigation, New York (Jacqueline A. Meese-Martinez of counsel), for appellant.

Robert Brown, appellant pro se.

Cyrus R. Vance, Jr., District Attorney, New York (Samuel Z. Goldfine of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Gregory Carro, J. at suppression hearing and severance motion; Michael R. Sonberg, J. at jury trial and sentencing), rendered August 1, 2016, convicting defendant of burglary in the third degree (seven counts), grand larceny in the third degree (two counts), grand larceny in the fourth degree (four counts), unauthorized use of a vehicle in the second degree (seven counts), tampering with physical evidence and reckless endangerment in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 10 to 20 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of vacating the burglary conviction under the first count of the indictment

and the unauthorized use of a vehicle conviction under the third count, and dismissing those counts, and otherwise affirmed; and order, same court (Michael R. Sonberg, J.), entered on or about October 25, 2017, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

Except as indicated, the verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant's challenges to the proof of value regarding the third-degree grand larceny convictions are unavailing. In each instance, the victim was a knowledgeable businessperson familiar with the value of the tools and materials of his trade. The jury could reasonably infer from each victim's testimony that the expensive property in question could not have depreciated to such a small fraction of its original value by the time of the thefts that the $3000 statutory was not met.

However, we agree with defendant's unpreserved argument that there was insufficient evidence of burglary and unauthorized use of a vehicle regarding the June 12, 2014 incident. As to that incident, the evidence, even when viewed in the light most favorable to the People, only established that defendant was one of the men who unloaded a stolen van, but not that he entered or operated it.

Defendant was charged in a single indictment with counts relating to seven incidents involving stolen vans, and these incidents involved mutually admissible evidence, including videotapes, that established defendant's identity (*see e.g. People v Mitchell*, 24 AD3d 103, 104 [1st Dept 2005], *lv denied* 6 NY3d 778 [2006]; *People v Scott*, 276 AD2d 380 [1st Dept 2000], *lv denied* 96 NY2d 738 [2001]). Joinder of these counts was proper under both CPL 200.20(2)(b) and (2)(c), and the court providently exercised its discretion in denying defendant's motion for severance.

The hearing court properly denied defendant's motion to suppress identification testimony. We have examined the photo array at issue, in which the photographs depict persons of varying skin tones and display varying lighting effects. We conclude that any difference in the skin tones and lighting effects was not noticeable enough to create a substantial likelihood that defendant would be singled out for identification (*see generally People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]). Moreover, although suggestiveness does not turn solely on this factor (*People v Perkins*, 28 NY3d 432 [2016]), the alleged deficiencies in the photo array were unrelated to the description that had been provided by the identifying witness.

The court properly exercised its discretion in denying defendant's CPL 440.10 motion without holding a hearing (*see People v Samandarov*, 13 NY3d 433, 439-440 [2009]). The submissions on the motion, along with the trial record, were sufficient to support the conclusion that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]. Defendant has not shown that any of counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived him of a fair trial or affected the outcome of the case, or that a hearing was necessary to resolve any such issues.

We perceive no basis for reducing the sentence.

Defendant's pro se contentions are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits.

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

ENTERED: MAY 2, 2019

CLERK

Sweeny, J.P., Gische, Webber, Kahn, Moulton, JJ.

9180 Jesus Serrano, Index 26802/16
Plaintiff-Appellant,

Aracelis Rivera,
Plaintiff,

-against-

DTG Enterprise Inc., et al.,
Defendants-Respondents.

_____

Richard T. Lau & Associates, Jericho (Christine A. Hilcken of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Marjorie E. Bornes of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered August 3, 2018, which denied plaintiff Jesus Serrano's motion for summary judgment dismissing defendants' counterclaim for negligence, unanimously reversed, on the law, without costs, and the motion granted.

It is undisputed that Serrano made a prima facie showing that he was entitled to summary judgment by establishing that the vehicle he was driving was stopped when it was rear-ended by the vehicle driven by defendant Castillo (*Morgan v Browner*, 138 AD3d 560 [1st Dept 2016]). Defendants failed to set forth any non-negligent explanation for the accident. The accident occurred at the intersection of two local roads controlled by a traffic

light. There are no facts giving rise to any reasonable belief by defendant driver that the traffic would have continued unimpeded (*See Tutrani v County of Suffolk*, 10 NY3d 906 [2008]; *Baez-Pena v MM Truck & Body Repair, Inc.*, 151 AD3d 473 [1st Dept 2017]). Defendants' allegation that Serrano did not use his turn signal to indicate he intended to turn left was irrelevant to liability because his vehicle was stopped at the time of the collision (*Chame v Kronen*, 150 AD3d 622 [1st Dept 2017]).

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: MAY 2, 2019

CLERK

Sweeny, J.P., Gische, Webber, Kahn, Moulton, JJ.

9181 Karen Walker Richards, Index 303620/16
Plaintiff-Appellant-Respondent,

-against-

Nicklas Mitchell, et al.,
Defendants-Respondents-Appellants,

Francis Varrone,
Defendant-Respondent.

_____

Hogan & Cassell, LLP, Jericho (Michael D. Cassell of counsel), for appellant-respondent.

Law Offices of Tobias & Kuhn, New York (Michael V. DiMartini of counsel), for respondents-appellants.

Downing & Peck, New York (Marguerite D. Peck of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (John R. Higgitt, J.), entered on or about October 29, 2018, which denied plaintiff's motion for partial summary judgment on the issue of liability as against defendant Francis Varrone, and denied the motion of defendants Nicklas Mitchell and Tyrone Walker for summary judgment dismissing the complaint and cross claims as against them, unanimously affirmed, without costs.

In this personal injury action arising out of a rear-end collision, Supreme Court properly denied the respective summary judgment motions. The deposition testimony presented triable issues of fact as to how the accident happened, including who was

driving the vehicle plaintiff was traveling in when the collision occurred; whether that vehicle was moving at about 50 miles per hour, moving slowly or stopped when it was struck by Varrone's vehicle; and if plaintiff's vehicle was stopped at the time of the accident, whether the claimed suddenness of the stop without brake signals was the cause of the collision (*see Moreno v Golden Touch Transp.*, 129 AD3d 581 [1st Dept 2015]; *Vitale v V&D Transp.*, 281 AD2d 209 [1st Dept 2001]).

Even if we were to find that plaintiff, Mitchell and Walker met their initial burden, Varrone has set forth a nonnegligent explanation for the rear-end collision. Varrone's testimony establishes that he could not see in front of a large SUV that was traveling in front of him before the accident and he did not know until it changed lanes that the vehicle plaintiff was riding in was either stopped or stopping in front of him, which raises a triable issue as to whether he was entitled to expect that traffic would continue unimpeded (*see Baez-Pena v MM Truck & Body Repair, Inc.*, 151 AD3d 473, 477 [1st Dept 2017]). Varrone's failure to plead the emergency doctrine as an affirmative defense

does not preclude him from raising the issue in response to the respective summary judgment motions (*see e.g. JP Morgan Chase Bank, N.A. v Salmon*, 154 AD3d 603 [1st Dept 2017]).

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

ENTERED: MAY 2, 2019

CLERK

Sweeny, J.P., Gische, Webber, Kahn, Moulton, JJ.

9183 In re Vsevolod Garanin, Index 160880/16
Petitioner-Appellant,

-against-

City of New York Department of Housing Preservation and Development, et al.,
Respondents-Respondents.

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Gallet Dreyer & Berkey, LLP, New York (Michelle P. Quinn of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ellen Ravitch of counsel), for the City of New York Department of Housing Preservation and Development, respondent.

Jackson Lewis P.C., New York (Adam S. Gross of counsel), for Gotham Organization Inc., Gotham West Affordable, LLC and 44th Street Development LLC, respondents.

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Judgment (denominated an order), Supreme Court, New York County (Arthur F. Engoron, J.), entered December 27, 2017, which denied the petition seeking an order annulling a final determination of respondent New York City Department of Housing Preservation and Development (HPD), dated May 9, 2017, finding petitioner ineligible for occupancy in a middle-income apartment due to excessive household income, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

It was both consistent with the governing "Marketing Guidelines" and rational for HPD to project wage income from a

company 99% owned by petitioner using the two years of W-2 tax forms supplied, while using petitioner's accountant's current year projection (for 2015) to estimate the amount of business income anticipated in what the accountant referred to as a "K-1 distribution" (*see Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 428-429 [1st Dept 2007], *affd* 11 NY3d 859 [2008]; *Matter of 31171 Owners Corp. v New York City Dept. of Hous. Preserv. & Dev.*, 190 AD2d 441, 446 [1st Dept 1993]). It would have been impossible to use only historic income, since no tax return information was supplied for the K-1 distribution income. Meanwhile, using only projected information (in the form of letters from petitioner's accountant) would have resulted in ignoring the consistent history of wages, as the accountant's latest (March 2015) letter reported only an anticipated K-1 distribution, in contradiction to the documented history of wages and the accountant's previous (October 2014) letter anticipating wages for the following year. Indeed, examples given in the governing guidelines call for precisely this sort of mixing and matching of past and projected income when warranted by the circumstances.

The fact that Gotham and HPD reached differing estimates of petitioner's 2015 household income does not render HPD's

determination arbitrary or capricious. Indeed, given the enabling statute's provision for estimates of "probable aggregate annual income" (Priv Hous Fin Law § 576[1][b]), the guidelines expressly call for the exercise of discretion in preparing estimates of future income, making it unsurprising that two rational reviewers passing on the same set of documentation might arrive at two different projections. In any event, as noted, HPD's determination, the only one on review, was rationally based in the record and not affected by any error of law.

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

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

ENTERED: MAY 2, 2019

CLERK

Sweeny, J.P., Gische, Webber, Kahn, Moulton, JJ.

9184 The People of the State of New York, SCI 452/17
Respondent,

-against-

Angel Rivera,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Steven Hornstein, J. at plea; Julio Rodriguez III, J. at sentencing), rendered March 28, 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: MAY 2, 2019

CLERK

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

Sweeny, J.P., Gische, Webber, Kahn, Moulton, JJ.

9185 Mikhail Fridman, et al., Index 154895/17
Plaintiffs-Appellants,

-against-

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

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Carter Ledyard & Milburn LLP, New York (Alan S. Lewis of counsel), for appellants.

Davis Wright Tremaine LLP, New York (Nathan Siegel of counsel), for respondents.

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Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered May 7, 2018, which, insofar as appealed from, denied plaintiffs' motion to dismiss defendants' first affirmative defense, unanimously affirmed, without costs.

As in *Gubarev v BuzzFeed, Inc.* (2018 US Dist LEXIS 97246 [SD Fla 2018]), the motion court properly denied plaintiffs' motion to dismiss defendants' first affirmative defense--the fair and true report privilege as codified in New York Civil Rights Law section 74--which shields publishers from civil liability for claims of defamation when the alleged defamatory statements are published to report accurately about official government activity. While the instant case involves a different set of alleged defamatory statements than *Gubarev*, we find that, as in that case, an ordinary reader of the publications at issue here,

a BuzzFeed article, which hyperlinked a CNN article and the embedded dossier compiled by Christopher Steele, which included a confidential report containing the alleged defamatory statements about plaintiffs, would have concluded that there were official proceedings, such as classified briefings and/or an FBI investigation concerning the dossier as a whole, including the confidential report relating to plaintiffs.

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

ENTERED: MAY 2, 2019

CLERK

Sweeny, J.P., Gische, Webber, Kahn, Moulton, JJ.

9186 Guicha Inc., et al., Index 162291/15
Plaintiffs-Appellants,

-against-

A.M.A.A. Realty Corp., et al.,
Defendants-Respondents,

Chamun Koo, et al.,
Defendants.

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Solomon Zabrowsky, New York, for appellants.

Sperber Denenberg & Kahan, P.C., New York (Jacqueline Handel-Harbour of counsel), for respondents.

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Order, Supreme Court, New York County (John J. Kelley, J.), entered March 16, 2018, which granted defendants-respondents' motion for summary judgment dismissing the claims asserted against them, unanimously affirmed, without costs.

Respondents met their prima facie burden on summary judgment of submitting evidence demonstrating their entitlement to summary judgment dismissing the causes of action asserted against them, and plaintiff failed to raise an issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

There is no evidence supporting any elements of plaintiffs' fraud claims (*see Pasternak v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 827 [2016]; *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). In particular, plaintiffs

cannot establish reliance on respondents' alleged misrepresentations or any collusion concerning a lease entered into with defendant AMAA, as a matter of law, since they successfully argued in a prior proceeding brought by AMAA to collect rent that the lease was invalid, and thus are judicially estopped from taking a contrary position (*see Becerril v City of N.Y. Dept. of Health & Mental Hygiene*, 110 AD3d 517, 519 [1st Dept 2013], *lv denied* 23 NY3d 905 [2014]).

Plaintiffs failed to raise an issue of fact concerning any injury resulting from any alleged notarial misconduct (*see Mars v Grant*, 36 AD3d 561, 562 [1st Dept 2007], *lv denied* 9 NY3d 810 [2007]; *Amodei v New York State Chiropractic Assn.*, 160 AD2d 279, 282 [1st Dept 1990], *affd* 77 NY2d 890 [1991], 77 NY2d 891 [1991]; Executive Law § 135).

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

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

ENTERED: MAY 2, 2019

CLERK

Sweeny, J.P., Gische, Webber, Kahn, Moulton, JJ.

9187 The People of the State of New York, Respondent,

Ind. 2343/13

-against-

James Thomas,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, Bronx County (Judith Lieb, J.), rendered September 18, 2015, convicting defendant, after a jury trial, of robbery in the first and second degrees, criminal use of a firearm in the first degree, and criminal possession of a weapon in the second and third degrees, and sentencing him, as a second violent felony offender, to an aggregate term of 21 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of vacating the criminal use of a firearm conviction, dismissing that count, and remanding for resentencing on the remaining convictions, and otherwise affirmed.

Defendant validly waived his right under *People v Antommarchi* (80 NY2d 247 [1992]) to be present at bias-related conferences with prospective jurors. Although defendant did not

expressly waive his right to be present at those particular times, he confirmed his understanding of the court's advice about his right to be present at all stages of trial, but he chose not to do so (*see People v Flinn*, 22 NY3d 599 [2014]; *People v Williams*, 15 NY3d 739 [2010]).

The court properly rejected defendant's peremptory challenge to a juror, which counsel sought to exercise after the parties had accepted the juror and moved on to challenges for cause and peremptory challenges to another round of panelists (*see People v Brown*, 52 AD3d 248 [1st Dept 2008], *lv denied* 11 NY3d 735 [2008]). Defendant did not provide any legitimate excuse, and the court correctly concluded that granting the challenge at that point would have been prejudicial to the People under the circumstances of jury selection at that stage.

Recordings of prison phone calls were sufficiently authenticated through testimony by a Department of Correction investigator "establishing that the recordings were what they purported to be based on the standard procedures employed by" the correctional facility, which included a policy against making any alterations to phone call recordings and retaining the recordings pursuant to a chain of custody protocol (*People v Rodriguez*, 166 AD3d 459, 460 [1st Dept 2018], *lv denied* __ NY3d __, 2019 NY Slip Op 97470(U) [2019]; *see generally People v Ely*, 68 NY2d 520, 527-

528 [1986]). This knowledgeable witness gave detailed testimony about the recording process. It was not necessary for him to have acquired any knowledge of the particular phone calls or recordings at issue before he examined the relevant records in preparation for his testimony, because "[g]aps in the chain of custody may be excused when circumstances provide reasonable assurances of the identity and unchanged condition of the evidence" (*People v Hawkins*, 11 NY3d 484, 494 [2008]).

The court providently exercised its discretion in denying defense counsel's request to redact from the recorded phone calls defendant's repeated use of profanity and an offensive racial term that applied to the racial identity of defendant himself and the other party to the conversation. Redacting these individual words from the recording would have disrupted the flow of conversation and lead to speculation by the jury as to these gaps. In any event, any error in this ruling was harmless in light of the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230, 242 [1975]).

Defendant's claim of a mode of proceedings error as to two jury notes arises from a clerical error in the omission of the relevant portion of the transcript from the record. The supplemental record establishes that the court complied with *People v O'Rama* (78 NY2d 270 [1991]) as to both jury notes.

The record supports the court's determination that, notwithstanding a suppressed identification procedure, the victim had an independent source for his identification of defendant. The victim observed the two perpetrators with no obstructions for about three to five minutes, in a well-lit area (*see People v Williams*, 222 AD2d 149, 153 [1st Dept 1996], *lv denied* 88 NY2d 1072 [1996]), and "gave a detailed and accurate description of defendant" (*People v Walker*, 132 AD3d 568, 569 [1st Dept 2015], *lv denied* 27 NY3d 1008 [2016]). The victim deliberately established eye contact with the perpetrators during the robbery in an attempt to calm them and persuade them to leave (*see Williams*, 222 AD2d at 153). Moreover, the suppressed showup was conducted almost immediately after the robbery, providing no time for the victim's memory to fade (*see id.*).

As the People concede, the criminal use of a firearm count should be dismissed in the interest of justice because it was

predicated on the same display of a firearm that supported the first-degree robbery conviction. We find that resentencing on the remaining convictions in light of the dismissal would be appropriate in this case.

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

ENTERED: MAY 2, 2019

CLERK

Sweeny, J.P., Gische, Webber, Kahn, Moulton, JJ.

9188N- Index 653118/14
9189N- 162075/14
9190N-
9191N

Lukasz Gottwald previously known as Dr. Luke, et al.,
Plaintiffs-Respondents,

-against-

Kesha Rose Sebert previously known as Kesha,
Defendant-Appellant.

- - - - -

Lukasz Gottwald previously known as Dr. Luke, et al.,
Plaintiffs,

-against-

Kesha Rose Sebert previously known as Kesha,
Defendant-Respondent.

- - - - -

Sony Music Entertainment,
Nonparty Appellant.

- - - - -

Lukasz Gottwald previously known as Dr. Luke,
Plaintiff-Appellant,

-against-

Mark Geragos, et al.,
Defendants-Respondents.

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O'Melveny & Myers LLP, New York (Leah Godesky of counsel), for Kesha Rose Sebert, appellant/respondent.

Gibson, Dunn & Crutcher LLP, New York (Gabrielle Levin of counsel), for Sony Music Entertainment, appellant.

Mitchell Silberberg & Knupp LLP, New York (Jeffrey M. Movit of counsel), for Lukasz Gottwald, appellant.

Mitchell Silberberg & Knupp LLP, New York (Christine Lepera of counsel), for Lukasz Gottwald, Kasz Money, Inc. and Prescription Songs, LLC, respondents.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Cory D. Struble of counsel), for Mark Geragos, respondent.

Thomas & LoCicero PL, Tampa, FL (James J. McGuire of the bar of the State of Florida and District of Columbia, admitted pro hac vice of counsel), for Geragos & Geragos, respondent.

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Orders, Supreme Court, New York County (Jennifer G. Schecter, J.), entered July 2 and August 6, 2018, which, in a defamation action brought by plaintiff Lukasz Gottwald (p/k/a Dr. Luke) against Kesha Rose Sebert (p/k/a Kesha), granted Kesha's motion to compel nonparty Sony Music Entertainment to identify the individuals it interviewed in connection with its internal investigation regarding claims of sexual misconduct made by Kesha against plaintiffs, and, upon Sony's motion to renew and reargue the prior order, granted renewal and adhered to its original decision and denied reargument, unanimously affirmed, without costs. Order, same court and Justice, entered August 31, 2018, which denied Kesha's motion to strike plaintiffs' amended bill of particulars and granted plaintiffs' cross motion for leave to serve a third amended complaint in the defamation action against Kesha, unanimously affirmed, without costs. Order, Supreme

Court, New York County (Robert R. Reed, J.) which, in a separate defamation action brought by Gottwald against defendants Mark Geragos and Geragos & Geragos, a Professional Corporation, to the extent appealed from as limited by the briefs, granted portions of defendants' motions to compel Gottwald to respond to their discovery demands and denied portions of Gottwald's motion to compel responses to his interrogatories, unanimously affirmed, without costs.

The court providently granted Kesha's motion to compel Sony to disclose its interview list (*see Brooklyn Union Gas Co. v American Home Assur. Co.*, 23 AD3d 190 [1st Dept 2005]). Although Sony's outside counsel stated that he prepared the interview lists for Sony's defense of Kesha's allegations, there was no legal advice, no legal recommendations or attorney thought processes revealed in the interview lists (*see e.g. State of N.Y. ex rel. Murray v Baumslag*, 134 AD3d 451 [1st Dept 2015). Nor do they appear to have been solely or primarily prepared for preparation of Sony's defense to Kesha's counterclaims against it (*see e.g. Bank of N.Y. Mellon v WMC Mtge., LLC*, 140 AD3d 585 [1st Dept 2016]).

The court properly granted plaintiffs leave to amend the second amended complaint to include allegations concerning recent dissemination of defamatory statements by Kesha's agents and

related allegations (*see* CPLR 3025[b]).

We find no basis for disturbing the court's discovery order directing Gottwald to comply with the Geragos defendants' requests for production (*see Anonymous v High School for Envtl. Studies*, 32 AD3d 353 [1st Dept 2006]). We have considered Gottwald's remaining arguments in that appeal and find them unavailing.

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

ENTERED: MAY 2, 2019

CLERK