SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rosalyn H. Richter, J.P.
Peter Tom
Ellen Gesmer
Cynthia S. Kern
Peter H. Moulton, JJ.

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Index 100887/17

_____x

In re Leonard Street Properties Group, Ltd.,
Petitioner-Respondent,

-against-

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

Jamie Lawenda,
Intervenor-Respondent-Appellant.
_____x

Respondent Jamie Lawenda appeals from the order and judgment of the Supreme Court, New York County (Arlene P. Bluth, J.), entered May 7, 2018, to the extent appealed from as limited by the briefs, granting the article 78 petition to the extent of permitting petitioner landlord to eliminate elevator service in the building.

Ween & Kozek, PLLC, Brooklyn (Andrew D. Cassady and Michael P. Kozek of counsel), for appellant.

Kucker & Bruh, LLP, New York (Robert H. Berman of counsel), for respondent.

TOM, J.

On this appeal from an order permitting petitioner landlord to eliminate elevator service in a residential building, we reverse based on statutory and regulatory constraints which leave no room for equitable treatment outside of the requirements of the Rent Stabilization Code, with some necessary reference under the facts of this case to provisions of the Loft Law that were previously applicable to the subject building. Notwithstanding the expense that the petitioner will bear, we cannot hold that respondent New York State Division of Housing and Commmunity Renewal's (DHCR) ultimate determination was legally irrational in the interpretation and application of its own regulations, which is the standard by which we are governed in undertaking a CPLR article 78 review.

DHCR has not appeared on this appeal. Respondent-intervenor is a tenant, Jamie Lawenda, who has occupied an apartment under a lease in the building owned by petitioner since 1979. The eight-unit premises, identified by the Department of Buildings as a C-7 walk-up apartment building, had a single elevator which was regularly used by Lawenda, although the regularity of its use by other tenants, who are not parties to this proceeding, is disputed and cannot be conclusively resolved on this record. The building eventually fell under the regulatory auspices of Article

7-C of the Multiple Dwelling Law, more commonly termed the Loft Law, until July 31, 2009. After that date, four of the units, including apartment 3S, were rent-stabilized and thereby fell under the jurisdiction of respondent DHCR. The present dispute arises over petitioner landlord's obligations with respect to the repair or the replacement of the elevator.

A rider to the lease assigned to Lawenda in 1979, when residency was not a lawful use, stated that the landlord "will not furnish a manned elevator service at any time during the term of this lease," and that should the landlord exercise the right to eliminate elevator service, any elevator service previously provided by the landlord "shall not, however, be considered a waiver by the landlord of the right to remove such service at any time and without any notice." The rider further provides that if the elevator "for whatever reason becomes inoperative, it shall not be the responsibility of the landlord to repair" it, although the tenants may do so at their own expense upon the landlord's written approval. The landlord relies on this lease provision as one reason to disclaim its legal responsibility to provide elevator service, a position that is untenable as will be noted below.

However, the nature of the elevator service is central to this case, warranting our review even if, upon review, we reject

the petitioner's position. Supreme Court characterized this case as not involving "normal" elevator service as measured by current residential standards. Lawenda presently argues, however, that such a characterization is irrelevant to regulatory requirements central to this case mandating that elevator service, which had been provided during the critical period relevant herein, be continued and maintained.

The record indicates that the sole elevator servicing this eight-unit building was close to a century old, reflected the design and operation of that much earlier period and the former legal use of the building and potentially presented a safety hazard as will be noted below. The elevator became inoperable in 2009, although whether it broke down – the petitioner landlord's claim – or the landlord simply terminated its operation without prior regulatory approval and eventually dismantled it – Lawenda's contention – remains in dispute. The parties dispute the distinction between mere inoperability, with the related consideration whether the elevator could have been repaired versus the dismantling of the elevator and, upon subsequent removal, whether a code compliant new elevator had to be installed to comply with regulatory mandates. These issues were central to the analysis applied during the administrative and civil proceedings below.

The sequence of the relevant applications and the proceedings is important. Different regulatory regimes and their respective enforcement agencies also must be kept in mind. The building was an interim multiple dwelling initially falling under the auspices of the Loft Law codified in the Multiple Dwelling Law, which then became rent-stabilized and thereby came under the jurisdiction of DHCR. As noted above, we can use July 31, 2009 as the date when the building effectively fell within DHCR's jurisdiction.

Before the regulatory transition, the landlord applied to the Loft Board in early 2009 to establish a base rent that would then be incorporated into the legal rent for four residential tenants for rent stabilization purposes. By Loft Board order dated June 18, 2009, the monthly base rent for Lawenda's residence was set at $745.06, which she unsuccessfully challenged. Both parties subsequently sought administrative relief before DHCR, the Department of Buildings, and in court. Two different DHCR determinations in 2010 and 2017, which reached different conclusions, as well as two article 78 orders and a violation issued by the New York City Department of Buildings ensued.

During the period of transition from the building's interim multiple dwelling status to rent-stabilized status, the issue of

the elevator's operability arose. On or about August 20, 2009, the landlord applied to DHCR for permission to reduce services with respect to the elevator which, it claimed, could no longer be maintained in a cost-effective manner. The landlord stated that the manually operated freight elevator, which served only a single tenant on a lower floor, was at least 75 years old and constantly broke down, and spare parts were no longer being manufactured. The landlord emphasized that the Department of Buildings classified the building as a C-7 walk-up apartment building. The landlord relied on an attached inspection report by an elevator engineer recommending that the only viable options were to remove and/or replace the elevator, the cost of which was estimated to be $150,000.

The landlord contended that this could not be justified by the elevator's limited use. Recoupment by a Major Capital Improvement (MCI) rent increase would be capped at 6% and would be charged only to the two south side tenants who could access the elevator. Since most of the rent-regulated tenants did not utilize the elevator, the landlord characterized its removal as only a minor reduction in service. However, this application did not explicitly state that the elevator presently was inoperable, an omission that became relevant for the 2017 DHCR determination adverse to the landlord and relied on by Lawenda for the present

appeal.

The elevator inspection report dated August 10, 2009 described the manual operation of the elevator as requiring an operator to maintain a hand on either an up or down button to bring the elevator to the floor level desired, where the elevator sill had to be lined up with the hallway sill, with the door remaining locked until that was accomplished from the inside. This presented a safety hazard since in the event of a fire, the passenger could not exit the locked elevator. The inspector also noted that the elevator door was a scissor gate through which a child's arm or foot, or a passenger's clothing, could pass, potentially causing serious injuries. Hence, the inspector noted that the existing elevator was a safety hazard. In view of these hazards to life and safety, and especially since the building was classified as a walk up, the inspector recommended leaving the elevator out of service, and that it be removed or replaced. However, the inspector's report did not address the feasibility or likelihood of repairing the elevator, nor even explicitly state that it was broken.

A DHCR decision was not immediately forthcoming. The New York City Department of Buildings' Environmental Control Board (ECB), meanwhile, issued a notice of violation against petitioner dated September 25, 2009 in connection with a termination of

elevator service. Although DHCR was now the state agency for rent regulation purposes, the Department of Buildings was authorized to enforce housing standards in New York City. The ECB concluded that petitioner failed to maintain the building in a manner compliant with applicable New York City regulations in that the single elevator was out of service, creating a condition hazardous to human health, in violation of 1 RCNY 11-02 (a)(1). Hence, the conclusion to be drawn is that the landlord had already removed the elevator from operation, although the manner of the removal - either a mere cessation of operations or a mechanical removal of functional equipment - was not specified.

The ECB scheduled a hearing for October 15, 2009. By order dated October 21, 2009, the ECB directed that until DHCR granted the landlord permission to remove the elevator it must be maintained to avoid injury to tenants and visitors. As Lawenda argues and DHCR in its 2017 determination, *infra*, found, the landlord had not yet established that the elevator was broken, inoperable and not repairable.

By application dated October 23, 2013, the landlord then applied to the Department of Buildings to amend its elevator permit to permit it to dismantle the elevator. The application seemingly was approved on November 20, 2013. A Mechanical Data Query dated March 25, 2014 reflected that the "freight elevator"

had been approved for dismantling on March 6, 2014. This, of course, created some confusion in the administrative record since this order was inconsistent with ECB's directive.

Meanwhile, Lawenda and another rent-stabilized tenant commenced a proceeding in Civil Court's Housing Part by order to show cause dated November 6, 2009 to require the restoration of elevator service. The Housing Part stayed that proceeding pending the outcome of the DHCR application. As noted above, the other tenant is not a party to the present proceeding.

By a supplemental submission to DHCR dated February 16, 2010, the landlord, responding to the tenants' December 9, 2009 opposition to the application, now claimed that the application "is clearly premised upon the sudden breakdown of the elevator device in August 2009," that it was "immediately filed with DHCR upon the occurrence of the breakdown and the owner's receipt of an estimate from its elevator contractor that repair of the elevator was not feasible," and that "an expensive overhaul that will cost $150,000 is the only alternative, short of discontinuing the service." These precise statements, however, are not reflected in the earlier submissions summarized above and seemed more in the nature of a tactical afterthought.

The landlord now claimed that this evidence remained unrebutted by the tenants, nor was it rebutted that the elevator

only directly affected two rent-stabilized tenants. The landlord noted that the two rent-stabilized tenants on the north side of the building had not even responded to the application, compelling the conclusion that the elevator serviced, at most, the two south side rent-stabilized tenants. Moreover, the landlord argued, the tenants had not rebutted the description of the manually operated elevator as outdated and unsafe, or that Lawenda basically monopolized it by keeping it parked on her floor. The landlord therein also disputed whether any residue of regulation under the Loft Law, specifically pertaining to maintaining the elevator as a required service, had regulatory relevance.

By administrative order dated April 13, 2010, DHCR's rent administrator granted the landlord's application to eliminate elevator service, but ordered a reduction of five percent in the rent for the four rent-stabilized apartments with no distinction made for whether all of those tenants actually used the elevator. The rent administrator, categorizing the application as one to decrease tenant services, noted that such an application ordinarily would not be granted. However, the rent administrator noted the age of the elevator and that it had thus "outlived its useful life." As will be noted below, DHCR in its 2017 order in rejecting the 2010 analysis found that these were not relevant

standards applicable to a discontinuation of required services. The rent administrator seemed to accept that replacement would cost approximately $150,000 without making further findings as to the costs or the feasibility of repairs, omissions that also became relevant for purposes of the later 2017 DHCR order. The rent administrator also noted that the nature of its manual operation made it, in effect, unavailable for use by tenants "as normal elevator service would be." The rent administrator further found that the tenants even conceded that given the configuration of the building those on the north side could not use it unless they were granted access through the south side lofts. Hence, the rent administrator found that the elimination of the "tenant operated, manually operated" elevator was not inconsistent with the Rent Stabilization Code and should be granted. Finding that the discontinuation of the service was neither significant nor de minimis, the rent administrator found that a rent reduction of 5% was appropriate. If the owner decided to replace the elevator, a further rent adjustment could be made at that time.

By administrative order dated August 29, 2013, DHCR, finding the evidence to be unrebutted that the elevator had not been working and there was little likelihood that it could be in working order, denied both parties' petitions for administrative

review (PAR).

Lawenda thereafter commenced the first article 78 proceeding challenging the DHCR determination. DHCR, rather than adhering to its original determination, cross-moved to have the matter remitted for further factual review upon allowing the parties to enlarge the record to address the feasibility of restoring elevator service and the attendant costs.

By order dated December 5, 2014, New York County Supreme Court (Margaret A. Chan, J.), concluded that the rent administrator for DHCR had not sufficiently addressed the possibility and cost of rehabilitating the elevator as contrasted with its outright removal. The court also noted that DHCR, in its submissions, evinced an intention of revisiting Lawenda's claim that the elevator could have been repaired without great expense, which the agency had not initially fully addressed. Hence, Supreme Court concluded that remand to DHCR was necessary because further factual review could lead to a different outcome. The court, however, rejected Lawenda's challenge to DHCR's jurisdiction since at the time of the landlord's application to eliminate the elevator service, the Loft Board's jurisdiction over the terms and conditions of the tenancy had terminated. This order was not appealed, placing beyond present review any issue that DHCR lacked jurisdiction.

Upon remand, the landlord submitted a 13-page proposal from an elevator repair company dated September 22, 2009 detailing the components necessary for the installation of a new "modern generic type solid state" automatically operated elevator, for an estimated cost of $349,000. The landlord also submitted a new letter opinion dated April 30, 2015 from the previously retained elevator inspector explaining why the existing elevator was unserviceable owing to its age, the resulting wear and tear and the unavailability of both the parts and expertise necessary to return the device and its components to safe service. The letter referenced a provision of the current National Elevator Code ostensibly requiring that it be dismantled and/or removed from service. The letter further explained that the existing hoistway, overhead space, and the dimensions of the machine room and pit did not meet current code requirements, so that a replacement was not feasible without major reconstruction of that area of the premises. On this basis, the engineer estimated the total costs of a replacement as ranging from $260,000 to $300,000 after estimated initial pre-installation construction costs of $150,000. Hence, the point made by the landlord and its specialists was that the elevator service as it had existed could not be *maintained,* but only replaced by a new service with attendant, and unreasonable, costs.

By order dated May 3, 2017, DHCR, on remand, granted the tenant's PAR and reversed its prior order granting the landlord's request for termination of elevator service. DHCR ordered the landlord to *restore* elevator service as a required ancillary service for the building. DHCR cited to 29 RCNY section 2-04(b)(9) as requiring the landlord, for interim multiple dwellings under the Loft Law, to provide freight or passenger elevators in good working order. DHCR then referenced section 2520.6(r)(1) of the Rent Stabilization Code, defining required services as those that the landlord maintained or was required to maintain on the base date when the building transitioned to rent-stabilized status, and subsection (r)(3) defining ancillary services as those not within the individual housing unit but which nevertheless were provided on the base date, or should have been or thereafter were legally required. Although the objection was made that the broken elevator thereby was not *in service* on the base date, the record is not clear on that point as is noted elsewhere, but it also is irrelevant if elevator service had been mandated by the Loft Law, a mandate that carried over under rent stabilization, which is addressed below.

DHCR took the position that no reduction in services is permissible prior to DHCR's approval of the application. DHCR found that the Code prohibits a landlord's "unilateral" action of

decreasing or eliminating a service prior to DHCR approval since there is no textual provision for a retroactive approval, which provided an additional basis for what DHCR now concluded was an erroneous earlier determination. Additionally, DHCR found no textual relevance in either the Rent Stabilization Law or Code to whether the elevator had exceeded its "useful life," a term pertinent only to MCI approvals and correlating rent increases but not applicable to a reduction of service.

DHCR now found that the rent administrator and initial DHCR denial of the PAR had failed to link its reasoning with particular rent stabilization regulations. To the contrary, DHCR, addressing the landlord's economic objections to restoring elevator service, noted that it "has not developed standards to measure the cost of repair or replacement of elevators as a separate equitable basis to discontinue a required service." Rather, DHCR pointed out that the Major Capital Improvement program is designed to facilitate repairs and the upgrading of outdated equipment by establishing formulas for correlating rent increases. Nor, DHCR found, did the landlord demonstrate a financial hardship that would have made repairs impossible at the time the landlord's application was filed in 2009.

The landlord appealed this second DHCR determination in a second article 78 proceeding. Supreme Court (Arlene P. Bluth,

J.), reinstating the earlier 2010 DHCR determination, granted the landlord's petition to the extent of allowing it to eliminate elevator service at the building but denied it to the extent of remanding the rent reduction to DHCR. In a strongly phrased decision, the court found the 2017 DHCR determination to be irrational. Supreme Court focused on various facts placing in doubt the continuing utility of the now-discontinued elevator: the north side tenants had no ready access to the elevator unless they were allowed to cross through the south side units, access that was contingent on the availability as well as the willingness of the south side tenants; only two rent-stabilized tenants were on the south side of the building and of those only one, Lawenda, who resided on the third floor (the second tenant was on the second floor), regularly used the elevator; the building was classified by the Department of Buildings as a walk-up, and in view of its manual operation in which the elevator could not be sent to or summoned from a floor, it effectively operated as a walk-up, basically undermining the need for elevator service. The court found that DHCR, which "treated the elevator as if it were a normal elevator," had "utterly failed to consider how the elevator is actually used by the tenants."

The court also found that the 100 year-old elevator was no longer operable because of its age, justifying the original 2010

decision of the rent administrator to allow discontinuation of service. The court rejected Lawenda's contention as unsupported speculation that the repair costs would have been minimal. Although Lawenda contended that the elevator was dismantled in 2014, the court acknowledged the landlord's argument that, in contrast to the 2017 DHCR findings, it did not unilaterally terminate service. Rather, the court found, the elevator stopped working, it was not repairable, and the expense of installing a new one was unreasonable. The court construed the recommendation by the elevator inspector, suggesting that even returning the elevator as it had existed to operability would have presented a safety risk, to be essentially unrebutted, further supporting DHCR's 2010 determination. Hence, on the facts, the court found the 2017 DHCR determination to be unreasonable.

On the law, the court found that the 2017 determination failed to establish why the prior determination was inconsistent with the Rent Stabilization Law and Code. To the contrary, the court found, the rent administrator upheld the purposes of the law in 2010 by reaching a result that attended to tenant safety and resolved the unreasonable cost factor by decommissioning the elevator and reducing rents. The court also rejected as irrational and unsupported the 2017 DHCR conclusion that the landlord had violated the Rent Stabilization Code by unilaterally

taking the elevator out of commission. The court rejected as irrational DHCR's 2017 conclusion that the Loft Law governed the issue insofar as the landlord's October 9, 2009 application for a reduction in services was filed after the Loft Board's jurisdiction ended 35 days after mailing the June 18, 2009 determination of the base rent. The court noted that DHCR had not explicitly found as a predicate for Loft Law jurisdiction that the building was an interim multiple dwelling, so that DHCR's reliance on 29 RCNY 2-04(b)(9) was unavailing. The practical effect of DHCR's 2017 determination, which, the court found, "simply ignored the crucial facts and ordered [the landlord] to restore elevator service," forced the landlord under these circumstances to install a new elevator since, even if it had not been dismantled, restoring it to service would have presented safety hazards. Hence, the court held, DHCR's focus on the "theoretical cost ... to fix a century-old elevator" was itself an immaterial endeavor. Without itself endeavoring to evaluate whether the landlord had the resources to install a new elevator, the court found the order directing the landlord to install an expensive new elevator for a single rent-stabilized tenant in a walk-up building to be irrational under these circumstances, especially when MCI increases to mitigate the costs would be capped at six percent for tenants whose average

2009 monthly rent at the time of the order was $976.37.

Although Supreme Court may have sought to be practical, in an article 78 proceeding a court is governed by whether the administrative agency, interpreting its enabling legislation and applying its own regulations, acted irrationally (*Matter of Tockwotten Assoc. v New York State Div. of Hous. & Community Renewal*, 7 AD3d 453 [1st Dept 2004]). As we have held, "[O]nce it has been determined that an agency's conclusion has a sound basis in reason ... the judicial function is at an end" (*Matter of Partnership 92 LP & Bdlg. Mgt. Co., Inc. v State of NY Div. of Hous. & Community Renewal*, 46 AD3d 425, 428 [1st Dept 2007], *affd* 11 NY3d 859 [2008] [internal quotation marks and citation omitted]). Even if the court reasonably could have reached a different result, the administrative determination, if rational, must be upheld (*Matter of West Vil. Assoc. v Divsion of Housing & Community Renewal*, 277 AD2d 111, 112 [1st Dept 2000]).

Since DHCR was interpreting its own regulations, it was entitled to deference (*Matter of IG Second Generation Partners L.P. v New York State Div. of Hous. & Community Renewal, Off. of Rent Admin.*, 10 NY3d 474, 481 [2008]; *Matter of 900 W. End Ave. Tenants Ass. v New York State Div. of Hous. & Community Renewal*, 53 AD3d 436, 438 [1st Dept 2008]) even if the benefit to a single tenant imposed substantial difficulties on the landlord (*Matter*

of Lite View LLC v New York State Div. of Hous. & Community Renewal, 97 AD3d 105 [1st Dept 2012]) or when an adequate substitute for the diminished service was not provided *(Matter of Joralemon Realty NY, LLC v State of N.Y. Div. of Hous. & Community Renewal*, 102 AD3d 965 [2d Dept 2013]). Nor would we reject DHCR's findings on the basis espoused by Supreme Court, that the elimination of the sole elevator service is a de minimis reduction of services, regardless of whether a single tenant, or two or more would be adversely affected thereby since this, too, would be a matter within DHCR's purview. When a landlord applies to DHCR to reduce required services, DHCR "has broad discretion in evaluating pertinent factual data and inferences to be drawn therefrom" (*Matter of 333 E. 49th Assoc., L.P. v New York State Div. of Hous. & Community Renewal, Off. of Rent Admin.*, 40 AD3d 516 [1st Dept 2007], *affd* 9 NY3d 982 [2007]).

The procedural route this case has taken manifestly was not straightforward. However, when the appeal is shorn of some of the administrative diversions, the statutory and regulatory directives which DHCR applied are fairly direct. Initially, we can quickly dispatch any contention that the disclaimer of responsibility for elevator services set forth in the lease displaces regulatory requirements. To the contrary, the private agreements documented in the lease dating back at least to 1979,

when the building ostensibly operated under a different legal use, necessarily must yield to housing and rent regulations. Subsequently, the building and this tenancy were governed by the New York City Loft Law until the unit became rent-stabilized on or about July 31, 2009. The Loft Law was a legislative device to transition former manufacturing and commercial buildings to residential use which previously had been unlawfully occurring, which, for interim multiple dwellings, superseded prior inconsistent lease provisions.

The Loft Law was "designed to integrate ... uncertain and unregulated residential units, converted from commercial use, into the rent stabilization system" and "to provide for the transition of unregulated loft dwelling units into the rent stabilization system and to harmonize with, rather than supplant, existing forms of regulation" (*Blackgold Realty Corp. v Milne*, 119 AD2d 512, 515, 513 [1st Dept 1986], *affd* 69 NY2d 719 [1987]). During the time when respondent's apartment was classified as an interim multiple dwelling it was subject to the minimum housing standards set forth in 29 RCNY 2-04(b). The New York City Loft Law therein directs that the landlord "must provide ... to residential occupants qualified for the protection of Article 7-C of" the Multiple Dwelling Law specified building services which are mandatory requirements that apply regardless of the absence

of specific lease provisions or notwithstanding lease provisions to the contrary. Section 2-04(b)(9) of the Loft Board's regulations directs that the landlord "must not diminish nor permit the diminution of legal freight or passenger elevator service and must maintain this service in good working order." The landlord may also provide services pursuant to the lease that are in addition to the mandated services, but these, too, may not thereafter be diminished.

If the prior services, such as elevator services in this case, fall below those mandated by section 2-04(b), then these mandated services must be provided (29 RCNY section 2-04[c]). The Loft Board is empowered "to take all steps necessary to enforce the minimum housing maintenance standards" (*id.*, section 2-04[e][1]). The Loft Board has interpreted section 2-04 to prohibit the diminution of services that had been provided even if they were not required by the lease (*Matter of 29 John St. Tenants' Assoc.*, OATH Index No. 1982/96 [Nov. 20, 1996], *affd in part and revd in part on other grounds*, Loft Bd. Order No. 2058 [Jan. 30, 1997]).

When the building transitioned to rent stabilization, the requirements of the Loft Law did not become obsolete but were carried over to the succeeding regulatory regime. Under the Rent Stabilization Code, "required services" are defined as those,

including elevator services, that the owner "was maintaining or was required to maintain ... and any additional … services provided or required to be provided thereafter by applicable law" (9 NYCRR 2520.6[r][1]), dating to when the Loft Board established the initial rent (*id.*, 2520.6[r][4][ix]). As previously noted, the record does not support a conclusion that the landlord had not provided elevator service while the building was governed by the Loft Law, whether dated to the determination of base rent or the date when the building passed from Loft Law regulation to rent stabilization, or even that elevator service as such was nonexistent by virtue of the elevator being permanently inoperable, a circumstance that would be irrelevant in any event. Moreover, as DHCR noted, 9 NYCRR 2522.4(e) only authorizes a reduction in required services on one of three grounds: if the landlord and tenant both agree; if the reduction is necessary for the operation of the building in order to comply with the law; or if the reduction in required services is not inconsistent with the Rent Stabilization Law or Code. DHCR found that none of these grounds applied.

DHCR in its 2017 determination interpreted its own regulations to require that if elevator service was required under the Loft Law, it was also required under the Rent Stabilization Code upon the transition of the building to rent

stabilization. This interpretation by DHCR of its own regulations should be upheld to the extent it is rational and not an arbitrary and capricious reliance on the facts of the case (*Matter of Lite View, LLC v New York State Div. of Hous. & Community Renewal*, 97 AD3d 105, 108-110 [1st Dept 2012]). Certain facts are unclear regarding if and when the elevator broke down, or when the landlord acted on a decision to terminate operations. However, in view of the above, that would seem not to matter under these circumstances. Since elevator service had been provided while the building was regulated as an interim multiple dwelling, that service had to be continued without regard to the economic ramifications. In this sense, the cost to the landlord is not a factor that would displace the regulatory requirements and would not support setting aside the DHCR determination.

The landlord relies on DHCR's initial grant of its application to discontinue elevator service for the reasons outlined above. However, there are some flaws in the rent administrator's findings and analysis which the 2017 DHCR decision noted. DHCR, strictly adhering to the regulatory terminology, now takes the position that a landlord cannot retroactively seek approval for the elimination of a required service that was already terminated, and that the landlord

especially cannot discontinue the service unilaterally. Whether by simply ending the elevator's operations or by proceeding to a complete dismantling of the elevator, the elimination of the service preceded the initial 2010 approval by the rent administrator. In either sense, the landlord's action was unilateral. We find no basis grounded in statutory or regulatory text to controvert DHCR's construction of its own regulations. Nor, even if we might consider an argument that the elevator's breakdown and the impossibility of repair was not an action, let alone a unilateral action, by the landlord, do we find support for such a claim here. As noted above, the landlord's initial application to DHCR did not indicate a breakdown, and if it did, the feasibility and cost of repairs was not identified at that time, placing in doubt the reliability of such an argument. The landlord's later submissions in response to the tenant's opposition, that the breakdown, inoperability and unavailabiliity of repair were unrebutted, did not persuasively cure the initial omission in the application.

In the final analysis, we cannot conclude that DHCR was arbitrary and capricious in its evaluation of the relevant facts or irrational in concluding that in whatever manner elevator service was terminated, that action in the absence of DHCR's approval was inconsistent with rent stabilization, and that

elevator service, as a required service, had to be restored.

Accordingly, the order and judgment of the Supreme Court, New York County (Arlene P. Bluth, J.), entered May 7, 2018, to the extent appealed from as limited by the briefs, granting the article 78 petition to the extent of permitting petitioner landlord to eliminate elevator service in the building, should be reversed, on the law, without costs, the petition denied, and the proceeding dismissed.

All concur.

Order and judgment, Supreme Court, New York County (Arlene P. Bluth, J.), entered May 7, 2018, unanimously reversed, on the law, without costs, the petition denied, and the proceeding dismissed.

Opinion by Tom, J. All concur.

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

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

ENTERED: NOVEMBER 12, 2019

CLERK

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 12, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

10308 The People of the State of New York, Respondent, Ind. 2890N/15

-against-

Keith Ellis,
Defendant-Appellant.

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Steven N. Feinman, White Plains, for appellant.

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

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Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered November 9, 2016, as amended December 13, 2016, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of six years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The various attacks on the officers' credibility that defendant advances on appeal were also presented

to the jury, and we find no basis for disturbing its credibility determinations.

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

ENTERED: NOVEMBER 12, 2019

CLERK

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

10309 Felicida Almodovar, Index 20632/14
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent,

Christian Camacho,
Defendant.
- - - - -
[And a Third Party Action]

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Alpert, Slobin & Rubenstein, LLP, Bronx (Morton Alpert of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Llinet M. Rosado, J.), entered on or about October 24, 2018, which granted the motion of defendant New York City Housing Authority (NYCHA) for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff alleges that while returning to NYCHA's building after walking her dog, she was bitten by an unleashed pit bull owned by defendant, Christian Camacho, who also lived in the building; third-party defendant Antonio Camacho was with the pit bull at the time of the attack. To hold a defendant landlord liable for injuries sustained in a dog bite incident, the

plaintiff must establish the landlord's knowledge of the dog's presence, and its vicious propensities (*see e.g. Suriel v New York City Hous. Auth.*, 294 AD2d 101 [1st Dept 2002]). Knowledge of vicious propensities may be established by proof of prior acts of a similar kind of which the defendant had notice (*see Collier v Zambito*, 1 NY3d 444, 446 [2004]).

Here, viewing the evidence in the light most favorable to plaintiff as the nonmoving party, the record presents triable issues of fact regarding NYCHA's notice of the dog's presence and its vicious propensities. NYCHA's manager at the subject building testified that NYCHA had no knowledge of prior dog bite incidents. However, NYCHA's internal records show that a dog bite occurred at the building about three months prior to the attack on plaintiff. While that internal document does not identify the dog or its owner involved in the prior attack and NYCHA's manager stated that NYCHA does not keep records of complaints involving vicious animals, plaintiff testified that she had seen third-party defendant with the dog on several prior

occasions, and that the dog acted aggressively (*compare Ortiz v New York City Hous. Auth.*, 105 AD3d 652 [1st Dept 2013], *lv denied* 22 NY3d 855 [2013]).

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

ENTERED: NOVEMBER 12, 2019

CLERK

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

10310-
10311-
10312 In re Eve S.P.,
Petitioner-Appellant,

-against-

Steven N.S.,
Respondent-Respondent.

_____

Orrick, Herrington & Sutcliffe LLP, New York (Rene Kathawala of counsel), for appellant.

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

_____

Order, Family Court, New York County (Adetokunbo O. Fasanya, J.), entered on or about December 13, 2018, which, to the extent appealed from as limited by the briefs, denied respondent's objection to a support magistrate's order finding that he willfully violated his child support obligations, and denied petitioner's "Limited Objection" to the order based on the support magistrate's failure to address probation as an additional enforcement remedy, unanimously affirmed, without costs. Order, same court and Judge, entered on or about May 3, 2019, insofar as it confirmed the Support Magistrate's findings on remand as to child support arrears, unanimously reversed, on the law and the facts, and the matter remanded for recalculation of arrears in accordance herewith.

By submitting evidence that respondent was delinquent in his support payments (*see* Family Court Act [FCA] § 454[3][a]), petitioner established prima facie that respondent willfully violated his child support obligations. Respondent failed to rebut this prima facie showing by presenting evidence of his inability to pay (*see Matter of Powers v Powers*, 86 NY2d 63, 69-70 [1995]). He testified to a loss of income but failed to provide evidence of either his lost employment or his efforts to find new employment (*see e.g. Matter of Nancy R. v Anthony B.*, 121 AD3d 555, 556 [1st Dept 2014]). Further, contrary to respondent's contention, whether respondent eventually satisfied his arrears has no bearing on the court's finding of willfulness (*see Matter of Shkaf v Shkaf*, 162 AD3d 1152, 1155 [3d Dept 2018]), particularly in light of his previous violations of his support obligations.

In her "Limited Objection," petitioner argues that, in addition to entering a money judgment against respondent for the arrears, the support magistrate was required to address probation as an additional enforcement remedy, and that the support magistrate's failure to set forth the "facts and circumstances" on which the decision not to place respondent on probation was based violated FCA § 454(4). Section 454(4) provides, "The court shall not deny any request for relief pursuant to this section

unless the facts and circumstances constituting the reasons for its determination are set forth in a written memorandum of decision." As are all enforcement mechanisms under FCA § 454(3), probation is a matter within the sound discretion of Family Court (*Matter of Delaware County Dept. of Social Servs. v Brooker*, 272 AD2d 835, 836 [3d Dept 2000], *citing* FCA § 454[3][a]). The record shows that the possibility of placing respondent on probation was first raised by the support magistrate. Petitioner cites no authority in support of her contention that the support magistrate's aforementioned omission amounts to a statutory violation requiring remand for further proceedings.

Petitioner correctly argues that child support arrears accrued through the date of the hearing on remand, and should be included in the award of arrears, as required by Family Court Act § 459 and in the children's best interests (*see generally Matter of Boden v Boden*, 42 NY2d 210, 212 [1977]). Therefore, we remand for recalculation of the amount in arrears.

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

ENTERED: NOVEMBER 12, 2019

CLERK

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

10313 Leslie Moore Mira, Index 100583/17
Plaintiff-Appellant,

-against-

Beth Harder (Evans), et al.,
Defendants-Respondents.

_____

Leslie Moore Mira, appellant pro se.

Proskauer Rose LLP, New York (Michelle A. Annese of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Gerald Lebovits, J.), entered January 3, 2018, dismissing the complaint pursuant to an order, same court and Justice, entered December 18, 2017, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff's claims of discrimination, hostile work environment, and retaliation, pursuant to the New York State and New York City Human Rights Law are time-barred (CPLR 214[2]; Administrative Code of City of NY § 8-502[d]; *see Herrington v Metro-North Commuter R.R. Co.*, 118 AD3d 544 [1st Dept 2014]). Plaintiff's allegations stem from events that occurred more than three years before she initially commenced the action in federal court in December of 2015. Moreover, the continuing violations doctrine is inapplicable to plaintiff's claims, as she failed to

show proof that the time-barred allegations constituted a pattern or practice of ongoing discriminatory or retaliatory conduct or a continuing hostile work environment (*see Armstrong v Sensormatic/ADT*, 100 AD3d 492, 493 [1st Dept 2012]).

Even if plaintiff's claims were timely, based on alleged postemployment conduct, the complaint failed to state a cause of action (CPLR 3211[a][7]). The complaint contains merely speculative and "inherently incredible" allegations of widespread surveillance, conspiratorial meetings, and eavesdropping involving unidentified persons (*O'Donnell, Fox & Gartner v R-2000 Corp.*, 198 AD2d 154, 154 [1st Dept 1993]), that are insufficient to state the necessary elements of a cause of action for employment discrimination, retaliation, harassment, or intentional or negligent infliction of emotional distress (*see generally Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 311-313 [2004]; *Askin v Dept. Of Educ.*, 110 AD3d 621 [1st Dept 2013]). Furthermore, plaintiff's allegations that defendants violated Civil Rights Law § 52-b are similarly unavailing, since the allegations are conclusory and inherently incredibly. She fails to allege that she had any personal knowledge of defendants disseminating intimate images of her on social media with the intent to harass or annoy her.

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

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

ENTERED: NOVEMBER 12, 2019

CLERK

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

10314 In re Well Done Realty, LLC, Index 570241/17
Petitioner-Respondent,

-against-

Benjamin Epps, et al.,
Respondents-Appellants.

_____

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

Kossoff, PLLC, New York (Steven Y. Steinhart of counsel), for respondent.

_____

Order, Appellate Term, of the Supreme Court, First Department, entered February 28, 2018, which in this non-primary residence holdover proceeding affirmed the judgment of Civil Court, New York County (Jean T. Schneider, J.), entered February 7, 2017, upon a prior order granting landlord's motion for summary judgment, awarding landlord possession of the subject premises, unanimously affirmed, without costs.

Section 2524.4(c) of the Rent Stabilization Code allows a landlord to refuse to renew a stabilized tenant's lease if the tenant does not occupy the premises as his or her primary residence. The courts have interpreted "primary residence" to mean an "ongoing, substantial, physical nexus with the controlled premises for actual living purposes" (*Berwick Land Corp. v Mucelli*, 249 AD2d 18, 18 [1st Dept 1998] [internal quotation

marks and citations omitted]; *East End Temple v Silverman*, 199 AD2d 94, 94 [1st Dept 1993]). Based on the tenants' admitted vacatur of the subject premises in 2003, landlord established its prima facie entitlement to summary judgment against them based on their non-primary residence.

Respondent Sue Monroe, who admittedly resided in the apartment with her daughter and her husband since "mid-2001," failed to sustain her burden of proving that she resided with the tenants of record in the apartment as her primary residence for a period of no less than two years prior to respondents Benjamin Epps and Amy Monroe-Epps (tenants) permanently vacating the apartment (*see* Rent Stabilization Code [9 NYCRR] § 2523.5[b]; *Third Lenox Terrace Assoc. v Edwards*, 91 AD3d 532, 533 [1st Dept 2012]; *68-74 Thompson Realty, LLC v McNally*, 71 AD3d 411, 412 [1st Dept 2010], *lv dismissed* 12 NY3d 813 [2009]). Although the apartment was no longer the tenant's primary residence after 2003, the tenants, having continued to pay the rent and execute renewal leases extending through September 2015, cannot be found to have permanently vacated the apartment at any time prior to the expiration of the last lease renewal on September 30, 2015 (*see East 96th St. Co., LLC v Santos*, 13 Misc 3d 133[A] [App Term, 1st Dept 2006]). Given the tenants' continued involvement with the subject premises, "it does not avail respondents that

the predecessor owner may have known of their presence in the apartment or accepted an unspecified number of rent payments on behalf of respondent" (*PS 157 Lofts LLC v Austin*, 42 Misc 3d 132[A], 2013 NY Slip Op 52241[U] [App Term, 1st Dept 2013], *appeal dismissed* 25 NY3d 1186 [2015]).

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

ENTERED: NOVEMBER 12, 2019

CLERK

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

10315-
10315A-
10315B

Index 190389/17

Danielle Vazquez, et al.,
Plaintiffs-Respondents,

-against-

3M Company, et al.,
Defendants,

Burnham LLC,
Defendant-Appellant.

_____

Clyde & Co US LLP, New York (Peter J. Dinunzio of counsel), for appellant.

Simmons Hanly Conroy, New York (James M. Kramer of counsel), for respondents.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered March 14, 2019, which denied defendant Burnham LLC's motion to vacate plaintiff's note of issue and to extend its time to move for summary judgment until after completion of discovery on the issue of punitive damages, unanimously affirmed, with costs. Order, same court and Justice, entered March 15, 2019, which denied as moot defendant's motion to reverse the decision of the Special Master and compel plaintiff to respond to its discovery requests, unanimously affirmed, with costs. Order, same court and Justice, entered May 6, 2019, which denied defendant's motion to extend its time to move for summary

judgment until after completion of discovery on punitive damages, for summary judgment dismissing the punitive damages claim, or for permission to move for summary judgment once discovery is completed, unanimously affirmed, with costs.

Defendant's contention that the court abused its discretion in denying its motion to vacate the note of issue (*see* 22 NYCRR § 202.21[e]) has been rendered moot by the court's February 20, 2019 order directing plaintiff to submit more detailed discovery responses, plaintiff's subsequent compliance thereof, and the court's finding that the responses were "adequate" and "sufficiently detailed." Insofar as defendant challenges the adequacy of the responses, such is a matter of discretion for the court (*see Gumbs v Flushing Town Ctr. III, L.P.*, 114 AD3d 573, 574 [1st Dept 2014]; *148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486, 487 [1st Dept 2009]), and we perceive no basis to disturb its determination. In any event, the court providently exercised its discretion in declining to vacate the note of issue, as the supplemental responses plaintiff submitted bear out his claim that it was the same evidence that he had previously produced. In any event, the court had discretionary power to direct discovery post-note of issue, absent prejudice to either party (*see Cuprill v Citywide Towing & Auto Repair Servs.*, 149 AD3d 442 [1st Dept 2017]).

The court properly denied defendant summary judgment dismissing the punitive damages claim. Defendant argues the plaintiff has not identified any evidence showing that it engaged in the type of egregious conduct required to support an award of punitive damages. However, defendant cannot meet its prima facie burden by pointing to perceived gaps in plaintiff's proof (*see Ricci v A.O. Smith Water Prods. Co.*, 143 AD3d 516 [1st Dept 2016]; *Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575 [1st Dept 2016]). In any event, even if defendant satisfied its burden, summary judgment dismissing the claim is unwarranted. While the parties strongly dispute whether the evidence sufficiently supports a punitive damages claim, the actual evidence has not been presented to the motion court or this Court. Thus, determination of the issues are better left for the trial court and for a fact-finder to decide.

None of defendant's due process rights were violated. Its contention that its right to notice was violated by plaintiff's failure to timely plead the punitive damages claim is undermined by the fact that plaintiff had informed it of its intention to seek punitive damages by letter dated October 10, 2018. Its contention that it has been deprived of its right to discovery, when the court "terminated" discovery based on the "vague" responses, is undermined by the court's finding that the

responses were "adequate" and "sufficiently detailed." Although the court abused its discretion (*see e.g. Leon v St. Vincent De Paul Residence*, 56 AD3d 265 [1st Dept 2008]), in denying defendant's motion to extend the deadline to move for summary judgment, such denial did not violate defendant's due process rights to discovery and to establish a defense. Defendant ultimately received the requested discovery, which the court found adequate. Further, defendant does not argue, and has not shown that it could have filed a meritorious summary judgment motion had it been afforded more time to do so.

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

ENTERED: NOVEMBER 12, 2019

CLERK

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

10316 In re Nicole Merlino, Index 101176/17
Petitioner-Appellant,

-against-

Teachers' Retirement System
of The City of New York, et al.,
Respondents-Respondents.

_____

Chet Lukaszewski, P.C., Garden City (Chester Lukaszewski of counsel), for appellant.

Georgia M. Pestana, Acting Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for respondents.

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Judgment, Supreme Court, New York County (Nancy M. Bannon, J.), entered on or about September 21, 2018, denying the petition to, inter alia, annul the determination of respondent Teachers' Retirement System of the City of New York, dated April 24, 2017, which denied petitioner's application for accident disability retirement, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The determination to deny petitioner's application for accident disability retirement was not arbitrary and capricious, and was supported by some credible evidence (*see Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 760 [1996]). The finding of respondent's Medical Board that petitioner did not suffer from disabling reflex sympathetic

dystrophy syndrome (RSD) (also known as complex regional pain syndrome [CRPS]) was supported by its physical examination and interview of petitioner, in which she admitted that she was able to drive and walk without assistance, she was found to have "full functional use of both lower extremities," and the color and temperature of her leg were found to be normal (*see Matter of Fusco v Teachers' Retirement Sys. of the City of N.Y,.*, 136 AD3d 450, 451 [1st Dept 2016]). The fact that several of petitioner's own treating physicians diagnosed her with RSD/CRPS based on conflicting accounts of symptoms is not dispositive, as the record reflects that the Medical Board was aware of and considered these medical records but came to a different conclusion (*see Fusco*, 136 AD3d at 451; *Matter of Bell v New York City Employees' Retirement Sys.*, 273 AD2d 119 [1st Dept 2000], *lv denied* 96 NY2d 701 [2001]; *see also Matter of Hannon v New York State Dept. of Human Rights*, 170 AD3d 1175, 1178 [2d Dept 2019]). The fact that the New York City Department of Education granted petitioner's requests for long-term line of duty injury leaves of absence is not binding on the Medical Board (*see Matter of Nemecek v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 99 AD2d 954, 955 [1st Dept 1984]).

The Medical Board's determination that petitioner suffered from a different disabling condition - the psychological

condition of chronic pain syndrome - is not properly reviewed by this Court because petitioner was not aggrieved by it (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 544-546 [1983]; *see also Matter of Goodacre v Kelly*, 96 AD3d 625, 626 [1st Dept 2012], *lv denied* 20 NY3d 860 [2013]). Furthermore, the Medical Board's determination that petitioner's disabling chronic pain syndrome was not causally related to her line of duty injury was based on the absence of any evidence in the record of the cause of that syndrome. Although the burden of proof was on petitioner to show that her disability was either caused or exacerbated by a line-of-duty injury (*see Nemecek*, 99 AD2d at 955), she failed to submit any documentation of her psychological condition, even on remand. Indeed, it was not until after the Medical Board issued its Addendum decision and respondent advised petitioner's attorney that this decision was

final that petitioner even attempted to submit psychological treatment records. At that point it was too late.

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

ENTERED: NOVEMBER 12, 2019

CLERK

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

10317 Adelina Miranda-Lopez, Index 26405/15E
Plaintiff-Respondent,

-against-

The New York City Transit Authority, et al.,
Defendants-Appellants.

_____

Lawrence Heisler, Brooklyn (Timothy J. O'Shaughnessy of counsel), for appellants.

La Sorsa & Beneventano, White Plains (Robert Gilmore of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about March 5, 2019, which, inter alia, denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Summary judgment was properly denied in this action where plaintiff alleges that defendants' bus struck her as she operated her motorized wheelchair on the sidewalk. According to plaintiff, the rear of the bus hit her wheelchair causing it to topple over. Although video evidence may be sufficient to demonstrate the absence of a triable issue of fact (*see Santana v Metropolitan Transp. Co.*, 170 AD3d 551 [1st Dept 2019]; *Lowenstern v Sherman Sq. Realty Corp.*, 165 AD3d 432 [1st Dept 2018], *lv denied* 33 NY3d 906 [2019]), the surveillance video

submitted by defendants is not dispositive of plaintiff's claims. The video shows the bus in the roadway as it passed plaintiff's wheelchair, which was on the sidewalk. However, the accident itself is not clearly depicted, and the video does not, as defendant argues, irrefutably demonstrate that they were not negligent.

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

ENTERED: NOVEMBER 12, 2019

CLERK

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

10318 The People of the State of New York, Ind. 1248/16
Respondent,

-against-

Brandon Garcia,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Ellen N. Biben, J.), rendered May 2, 2017, convicting defendant, upon his plea of guilty, of attempted murder in the second degree and criminal possession of a weapon in the second degree, and sentencing him to concurrent terms of six years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to concurrent terms of five years, and otherwise affirmed.

We find the sentence excessive to the extent indicated.

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

ENTERED: NOVEMBER 12, 2019

CLERK

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

10321 The People of the State of New York, Ind. 1586/17
Respondent,

-against-

Akinola Ibiayo,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Abraham Clott, J.), rendered May 17 2018,

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: NOVEMBER 12, 2019

CLERK

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

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

10323 Joyce Evans, Index 21144/11
Plaintiff-Respondent,

-against-

Darren Esposito, M.D., et al.,
Defendants-Appellants,

Deborah J. White, M.D., et al.,
Defendants.

_____

Brown, Gaujean, Kraus & Sastow, PLLC, White Plains (Bridget Kyle of counsel), for Darren Esposito, M.D., and Advantage Care Medicine, P.C., appellants.

Kaufman Borgeest & Ryan LLP, Valhalla (Rebecca A. Barrett of counsel), for Montefiore Medical Center Weiler/Einstein Division and Akinori Adachi, M.D., appellants.

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

_____

Order, Supreme Court, Bronx County (Lewis J. Lubell, J.), entered on or about July 17, 2018, which denied defendants Darren Esposito, M.D. and Advantage Care Medicine, P.C.'s and defendants Akinori Adachi, M.D., and Montefiore Medical Center Weiler/Einstein Division's motions for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Defendants established prima facie, through medical records, deposition testimony, and expert affirmations, that the alleged malpractice was not the proximate cause of any injury to

plaintiff (*see generally Kristal R. v Nichter*, 115 AD3d 409, 411 [1st Dept 2014]). In opposition, plaintiff raised issues of fact as to defendants' negligence. Plaintiff's expert affirmed that a fistula such as the one with which defendant Adachi diagnosed plaintiff necessarily requires prompt surgical treatment and that a delay in seeking treatment would increase the risk of an infection and cause the fistula symptoms to worsen. Ultimately, plaintiff did not receive surgical treatment for approximately three months after the fistula was diagnosed. Although Adachi received confirmation that plaintiff's test results indicated that she had a fistula, plaintiff testified that Adachi did not initially schedule a follow-up appointment to discuss the results and did not respond to plaintiff's inquiries about scheduling an appointment to discuss them.

Defendant Esposito made appropriate referrals to specialists to diagnose and establish a treatment plan for plaintiff's fistula (*see Wasserman v Staten Is. Radiological Assoc.*, 2 AD3d 713, 714 [2d Dept 2003]). However, the record does not conclusively demonstrate that he was not thereafter involved in that aspect of plaintiff's care (*see Lindenbaum v Federbush*, 144 AD3d 869, 870 [2d Dept 2016]; *Wasserman*, 2 AD3d at 714; *Burtman v Brown*, 97 AD3d 156, 162-163 [1st Dept 2012]). Plaintiff's testimony and affirmation raised an issue of fact as to whether

Esposito or another doctor actually referred plaintiff to a surgeon to treat the fistula in July of 2009.

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

ENTERED: NOVEMBER 12, 2019

CLERK

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

10324 The People of the State of New York, Ind. 399/18
Respondent,

-against-

Jaime Padilla,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Kevin McGrath, J.), rendered March 1, 2018, convicting defendant, upon his plea of guilty, of attempted criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of 4½ years with three years' postrelease supervision, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to 3½ years with 1½ years' postrelease supervision, and otherwise affirmed.

We find the sentence excessive to the extent indicated.

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

ENTERED: NOVEMBER 12, 2019

CLERK

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

10325 Reynaldo Sauceda-Ocampo, Index 158613/12
Plaintiff,

-against-

H&M Hennes & Mauritz LP, H&M,
Defendant-Appellant,

DSJ Port Logistics Group, doing
business as JAFCO,
Defendant-Respondent.

_____

Marshall Dennehey Warner Coleman & Goggin, New York (Daniel W. Levin of counsel), for appellant.

Law Offices of Tromello & Fishman, Latham (Alfred T. Lewyn of counsel), for respondent.

_____

Supreme Court, New York County (Kelly A. O'Neill Levy, J.), entered June 12, 2018, which denied defendant H&M Hennes & Mauritz L.P., H&M's (H&M) motion for summary judgment dismissing the complaint as against it and on its cross claim for contractual indemnification against codefendant DSJ Port Logistics Group d/b/a JAFCO (DSJ), unanimously affirmed, without costs.

This is not one of those rare cases where proximate cause can be found to be lacking as a matter of law (*see Hain v Jamison*, 28 NY3d 524, 528-530 [2016]). H&M failed to establish, as a matter of law, that a missing wheel on its hanger cage could not have caused the accident, or that plaintiff's actions served

as an intervening act (*id.* at 531-532).

H&M failed to make a prima facie showing that it lacked actual or constructive notice of defective wheels on its hanger cages, in light of its employee's testimony that each year several cages were sent to the warehouse to repair loose wheels (*see Rosario v Prana Nine Props., LLC*, 143 AD3d 409, 410 [1st Dept 2016]; *Li Xian v Tat Lee Supplies Co., Inc.*, 170 AD3d 538, 539 [1st Dept 2019]).

Although the record supports a valid line of reasoning from which a jury could conclude that plaintiff's own negligent actions caused or contributed to his damages, there is no basis upon which to resolve that issue as a matter of law (*Johnson v New York City Tr. Auth.*, 88 AD3d 321, 324-325 [1st Dept 2011]). Thus, H&M has failed to prove that its negligence was not the sole proximate cause of the accident, and the court properly denied its summary judgment motion to the extent it sought contractual indemnification from DSJ.

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: NOVEMBER 12, 2019

CLERK

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

10326 Mark L. Sternlicht Revocable Trust, et al., Plaintiffs-Appellants, Index 653882/18

-against-

Daniel Z. Rapoport Associates, L.P., et al., Defendants-Respondents.

Meister Seelig & Fein LLP, New York (Stephen B. Meister of counsel), for appellants.

Pashman Stein Walder Hayden, P.C., Purchase (Sean Mack of counsel), for respondents.

Order, Supreme Court, New York County (Andrew Borrok, J.), entered May 20, 2019, which denied plaintiffs' motion for summary judgment, and granted defendants' cross motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

The motion court correctly dismissed the claim for dissolution of 333 East 54th Street LLC (LLC) based on LLC Member Ben-Zvi's death. The court's interpretation of the LLC's Operating Agreement accords the provisions of the agreement their fair and reasonable meaning (*see Duane Reade, Inc. v Cardtronics, LP*, 54 AD3d 137, 140 [1st Dept 2008]). When Ben-Zvi died, his niece and nephew automatically became Substitute Members under ¶ 10.3(d) of the Operating Agreement, and since 11 years then

elapsed without complaint by plaintiffs, plaintiffs were deemed to have consented to the LLC's continuation for purposes of ¶ 12.1(c), which did not require written consent (*cf.* ¶ 12.1[b]).

Plaintiffs' contention that the court essentially mooted the consent requirement of ¶12.1 is belied by the court's order, which also shows that the court correctly treated the admission of transferees as Substitute Members and the question of the LLC's continuation after a Member dies as separate issues.

Plaintiffs object to the court's assumption that a niece and nephew are "family" for purposes of ¶ 10.3(d). However, there are no limitations on degrees of kinship in the Operating Agreement. Plaintiffs also challenge the court's implied assumption that Ben-Zvi's intestate transfer sufficed for purposes of ¶ 10.3, but they offer no grounds for finding that it would not suffice. Their contention that the requirement of assuming the obligations of a transferor Member is not waived for family transferees is not supported by ¶ 10.3(d).

Plaintiffs' argument that the court's ruling yields absurd results is also unavailing. If a Member wished to bequeath the value of his or her membership interest in the LLC without standing in the way of the LLC's dissolution, then he or she could transfer or bequeath the unit(s) of Membership without the family member transferee also becoming a Substitute Member, a

transaction contemplated in ¶ 10.4.

The court did not address plaintiffs' stated lack of knowledge of Ben-Zvi's death. However, plaintiffs failed to raise an issue of fact on this point. The complaint does not allege that plaintiffs did not know about Ben-Zvi's death at the time he died. To the extent the issue is raised, it is alluded to obliquely, via allegations "on information and belief" about his death in 2007. Moreover, neither in the complaint nor in their affidavits on summary judgment do plaintiffs state when, or how, they actually learned of his death.

Other evidence supports the inference that even plaintiffs did not view the LLC as having been dissolved at any time preceding this litigation. Their 2010 purchase, with other Members, of the interest in the LLC held by deceased Member Boris Lurie strongly suggests that they believed that the LLC could simply continue after Lurie's 2008 death if no contrary steps were taken by Members. Their contention that they bought, at most, an economic interest is unsupported by the record, and their purchase looks no different on the transfer ledger from the membership interest transfers recorded there. Plaintiffs contend that the LLC was already discontinued by then and that it made economic sense to buy an interest in a dissolved LLC in the "winding up phase." However, the record does not show that

plaintiffs believed that the LLC was winding up at the time they bought Lurie's interest, and the fact that it has not yet wound up is part of their claim against defendants.

Moreover, a year later, plaintiffs transferred Mark Sternlicht's "entire membership interest" to plaintiff Sternlicht Trust, and they make no argument that this transfer was limited to economic interests in a dissolved LLC.

The court did not address plaintiffs' alternative request for a declaration that the LLC will dissolve upon the death of the next natural person Member, thereby correctly refraining from engaging in the hypothetical predictions that a ruling would have required (*see Ashley Bldrs. Corp. v Town of Brookhaven*, 39 AD3d 442 [2d Dept 2007]; *Clarendon Place Corp. v Landmark Ins. Co.*, 182 AD2d 6, 10 [1st Dept 1992], *appeal dismissed* 80 NY2d 918 [1992]). There is no present controversy as to the impact of the next natural person Member's death on the continuation of the LLC. Plaintiffs argue reasonably that the death of a natural person Member at some point in the future is inevitable. However, their argument assumes that the next Member to die will be a defendant. The death of a plaintiff Member would have a

very different effect on the likelihood of the LLC's continuation than the death of a defendant Member.

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: NOVEMBER 12, 2019

CLERK

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

10327 The People of the State of New York, Ind. 3258/16
Respondent,

-against-

Shamar Nelson,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Samuel Z. Goldfine 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 (Ellen Biben, J.), rendered July 24, 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: NOVEMBER 12, 2019

CLERK

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

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

10328-
10328A TC Tradeco, LLC,
Plaintiff-Appellant,

-against-

Karmaloop Europe, AG,
Defendant,

Capstone Partners LLC, et al.,
Defendants-Respondents.

Index 651631/15

Epstein Ostrove, LLC, New York (Elliot D. Ostrove of counsel), for appellant.

Casner & Edwards, LLP, Boston, MA (Michael J. Fencer of the bar of the Commonwealth of Massachusetts, admitted pro hac vice, of counsel), for Capstone Partners LLC, CRS Capstone Partners, LLC and Brian Davies, respondents.

Kirsch & Niehaus PLLC, New York (Paul R. Niehaus of counsel), for Greg Selkoe, respondent.

Order, Supreme Court, New York County (Andrea Masley, J.), entered January 4, 2019, which granted defendants Capstone Partners LLC, CRS Capstone Partners, LLC, and Brian Davies's motion for summary judgment dismissing the complaint as against them, granted defendant Greg Selkoe's motion for summary judgment to the extent of dismissing the unjust enrichment cause of action as against him, and denied plaintiff's motion for summary judgment, and order, same court and Justice, entered on or about May 28, 2019, which, upon reargument, vacated the January 4, 2019

order as to defendant Selkoe, and granted Selkoe's motion for summary judgment dismissing the complaint as against him, unanimously affirmed, with costs.

Defendant Karmaloop Europe, AG and two related Karmaloop entities (collectively, Karmaloop), sellers of clothing online, entered into an inventory supply agreement (ISA) with plaintiff, which was formed to purchase inventory for Karmaloop. When it became clear that Karmaloop was facing financial difficulties, in January 2015, plaintiff, Karmaloop, and Karmaloop's restructuring advisor Capstone Partners, LLC entered into a payment protection agreement (PPA), pursuant to which Karmaloop vested Capstone with the authority to pre-authorize payments to "any person or entity," and Capstone agreed that it would not pre-approve Karmaloop to make such payments "if Karmaloop [was] not then current on any and all sums then owed to [plaintiff]" under the ISA. Shortly thereafter, plaintiff entered into an agreement with Karmaloop Inc. whereby Karmaloop paid off most of its debt. It still owed $291,000 to plaintiff, but held a $300,000 credit against that debt. From January to March 23, 2015, Karmaloop paid numerous vendors, and on March 23, 2015, Karmaloop Inc. and Karmaloop TV, Inc. filed for bankruptcy protection. Plaintiff commenced this action, alleging, inter alia, breach of the PPA against Karmaloop Europe, Capstone, Capstone's principal, Brian

Davies, and Karmaloop's principal, Greg Selkoe.

The PPA's broad prohibition against Karmaloop's paying anyone without first satisfying the debt to plaintiff renders the PPA illegal and unenforceable, because it would effectively force Karmaloop to violate wage laws and tax laws, inter alia, to be in compliance. The PPA violates the Massachusetts Wage Act (Karmaloop's principal place of business is in Massachusetts), which provides that employers must pay their employees weekly or bi-weekly (MGL ch 149 § 148) and that violations of that provision are punishable by fine or imprisonment (*id.* § 27C[a][1]) (*see Sturm v Truby*, 245 App Div 357, 359 [4th Dept 1935]; *see e.g. Village Taxi Corp. v Beltre*, 91 AD3d 92, 99-100 [2d Dept 2011]; *Gutfreund v DeMian*, 227 AD2d 234, 234-235 [1st Dept 1996]). The PPA also offends public policy by prohibiting the payment of taxes and other legal obligations to the State prior to satisfying plaintiff's debt (*see Lanza v Carbone*, 130 AD3d 689, 691-692 [2d Dept 2015]; *see also Castellotti v Free*, 138 AD3d 198, 205-206 [1st Dept 2016]).

In view of the foregoing, we do not reach plaintiff's remaining arguments.

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

ENTERED: NOVEMBER 12, 2019

CLERK

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

10329-
10330N-
10330NA

Index 153737/16

BEC Capital, LLC, et al.,
Plaintiffs-Respondents,

-against-

Bojan Bistrovic, et al.,
Defendants-Appellants.

- - - - - -

Bojan Bistrovic, et al.,
Third-Party Plaintiffs-Appellants,

-against-

Nir Ronen, et al.,
Third-Party Defendants-Respondents.

_____

Law Offices of Dean T. Cho, New York (Dean T. Cho of counsel), for appellants.

Rottenberg Lipman Rich, P.C., New York (Stacy L. Ceslowitz of counsel), for respondents.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered December 5, 2018, which, to the extent appealed as limited by the briefs, denied defendants' motion for a protective order and directed them to produce their source code without limiting the production to plaintiffs' counsel and expert eyes only, unanimously reversed, on the law and the facts, without costs, and protection limited to attorney and expert eyes only. Appeal from order, same court (Andrew Borrok, J.), entered February 7, 2019, which again ordered the production of the

source code, unanimously dismissed, as academic. Order, same court (Andrew Borrok, J.), entered April 23, 2019, which, to the extent appealed from as limited by the briefs, denied defendants' motion for leave to amend their counterclaims and denied defendants' motion to compel, unanimously modified, on the law, to the extent of granting defendants leave to amend their answer to assert a counterclaim for defamation, and otherwise affirmed, without costs.

The production of defendants' source code, which is a trade secret (*see e.g. Dynamic Microprocessor Assoc. v EKD Computer Sales*, 919 F Supp 101, 105-106 [ED NY 1996]), should have been ordered to be produced for "attorneys and expert eyes only" (*id*). Plaintiffs' assertion that they have the expertise to review and opine on the source code and should not be subjected to retaining an expert, does not support unfettered access to defendants' confidential algorithm.

Defendants' motion to compel the production of additional documents was properly denied. Plaintiffs maintain that they have produced all responsive, non-privileged documents, and third party defendants maintain that they will produce additional documents once a confidentiality stipulation is executed. The motion court providently directed the parties to enter into a confidentiality stipulation, produce responsive documents and

provide an affidavit stating that all responsive, non-privileged documents have been produced.

Based on this record and the arguments of the parties, defendants are granted leave to amend their answer to assert a counterclaim for defamation. The alleged defamatory statements in the June 2016 email, upon which defendants rely, are not protected by the common-law privilege that applies to statements made in the context of a judicial proceeding or the statutory privilege set forth in Civil Rights Law § 74 (*see Bridge C.A.T. Scan Assocs. v Ohio-Nuclear, Inc*, 608 F Supp 1187, 1194-1195 [SD NY 1985] [applying NY law]; *Williams v Williams*, 23 NY2d 592, 599 [1969]). Nor is the proposed counterclaim barred by the statute of limitations (*see* CPLR 203[d]). Leave to amend the answer to assert a counterclaim for an accounting, however, was properly

denied as defendants have failed to establish that the claim is not palpably insufficient and is, on its face, conclusory.

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

ENTERED: NOVEMBER 12, 2019

CLERK

Acosta, P.J., Renwick, Mazzarelli, Kapnick, JJ.

10497	In re The People of the State of	Index 100885/19
[M-7499]	New York, ex rel. Pamela Roth,	Ind. 5342/15
	on behalf of Roy Taylor,	1614N/17
	Petitioner-Appellant,	3065/17

-against-

Cynthia Brann, Commissioner,
New York City Department of Correction,
Respondent-Respondent.

_____

Roy Taylor, appellant pro se.

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

_____

Judgment (denominated an order), Supreme Court, New York County (Michael Obus, J.), entered on or about July 17, 2019, denying the petition for a writ of habeas corpus and dismissing the proceeding, unanimously affirmed, without costs.

We find that the writ of habeas corpus was properly denied (*see* CPLR 7010).

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

ENTERED: NOVEMBER 12, 2019

CLERK

Friedman, J.P., Renwick, Kapnick, Gesmer, Kern, JJ.

10108 The People of the State of New York, Respondent, Ind. 2606/12

-against-

Quentin F., Defendant-Appellant.

_____

Justine M. Luongo, The Legal Aid Society, New York (Jose David Rodriguez-Gonzalez of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Thomas A. Farber, J.), rendered December 17, 2013, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree, adjudicating him a youthful offender, and sentencing him to a term of five years' probation, unanimously affirmed.

Initially, we conclude that the record fails to support the People's contentions that defendant pleaded guilty before the trial court made a final ruling denying the motion to suppress (*see* CPL 710.70[2]), or that effective appellate review of the ruling would require a remittitur for further proceedings.

The court properly denied defendant's suppression motion because a pursuit and stop did not occur until defendant had discarded his backpack, which contained a a pistol. Prior to that time, the officers made a U-turn against traffic, without

accelerating or without activating their sirens or flashing lights, to approach defendant. Under the circumstances, the officers' conduct did not block defendant's course or otherwise control the direction or speed of his movement so as to rise to the level of a pursuit (*see Matter of Jaime G.*, 208 AD2d 382 [1st Dept 1994]; *see also People v Foster*, 302 AD2d 403 [2d Dept 2003], *lv denied* 100 NY2d 581 [2003]; *People v Thornton*, 238 AD2d 33 [1st Dept 1998]).

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

ENTERED: NOVEMBER 12, 2019

CLERK

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

10164 Jennifer Scholar, Index 300077/14
Plaintiff-Appellant,

-against-

Citadel Estates, LLC,
Defendant-Respondent.

_____

Law Offices of Alexander Bespechny, Brooklyn (Louis A. Badolato of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about October 31, 2018, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff claims that she was injured when she fell while descending a well-lit stairway during daylight hours on August 8, 2013 in a Brooklyn building where she had often previously used the stairway, on which occasions she never noticed any defects. On the day of the accident she was visiting her boyfriend's apartment and when she first ascended the stairway she had not noticed any debris, liquid or defects in the stairway. She testified that as she descended from the second floor landing, holding the handrail and wearing flip flops, she "bumped into something" with her left foot, causing her to fall, and that she

reached for but missed the handrail. She approximated that whatever she bumped into was three, four or five steps down from the landing. Although she had not then observed any impediment, she later noticed a "squiggly crack" less than a quarter inch in width along the width of the side of either the fourth or fifth step. However, she did not know if the crack was what her flip flop had come into contact with. She later testified that a step had moved when she bumped her foot and that this, rather than the crack, had caused her to trip, but then she subsequently reconsidered her testimony to conclude that the bump was caused by the crack.

Plaintiff testified that she had never complained to the owner about the stairs. The building superintendent testified that no one had complained about the condition of the stairs, he was unaware of anyone having fallen on them, and no Department of Buildings violations had been issued. The superintendent testified that he used the staircase several times daily, swept it each day and mopped it on Sundays, and had never observed any cracks in or felt any sensation on the stairs. When he saw plaintiff on a later occasion, when her foot was in a cast, she mentioned that she had fallen on the stairs but did not explain how, and she had never filled out an accident report.

Plaintiff's boyfriend testified that he had never

experienced any difficulty with the staircase. After plaintiff fell, she returned to his apartment with an injured right leg and stated that she had slipped on the steps, but did not state what caused her to slip. He testified that as he descended the staircase to tell the superintendent about the accident, he did not observe any cracks in the steps between the first and second floors, none moved when he stepped on them, and there was no debris.

Supreme Court properly dismissed the action insofar as no evidence established proximate cause for the accident. Plaintiff's testimony, even as amplified by that of her boyfriend, was, at best, speculative as to causation (*Taub v Art Students League of N.Y.*, 39 AD3d 259 [1st Dept 2007]). If there had been a defect on a stair, plaintiff's conjecture failed to establish its causative role (*Kane v Estia Greek Rest.*, 4 AD3d 189 [1st Dept 2004]), especially in view of her testimonial uncertainty (*Lee v Ana Dev. Corp.*, 110 AD3d 479 [1st Dept 2013]; *Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass*, 301 AD3d 63, 68 [1st Dept 2002]). Even if we accepted plaintiff's equivocal speculation that her flip flop was caught in a crack on a stair, such a defect was too trivial to support her claim of proximate causation (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66 [2015]). Plaintiff's own testimony also defeats her

present attempt to predicate liability on the height of the handrail, since on these facts the handrail, regardless of its height, did not cause her fall (*Uppstrom v Peter Dillon's Pub*, 172 AD3d 497 [1st Dept 2019]). Moreover, she had found the handrail to be stable and accessible to her when she had earlier ascended the stairs and as she descended just before she slipped (*Pezzello v Pierre Congress Apts., LLC*, 169 AD3d 403 [1st Dept 2019]). Her bareboned testimony that she missed the handrail does not by itself support a conclusion that the handrail's height caused her fall (*compare Sussman v MK LCP Rye LLC*, 164 AD3d 1139 [1st Dept 2018]). Finally, the evidence sets forth no evidence that defendant had either actual or constructive notice of any defect in the staircase (*Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; *Schulman v City of New York*, 157 AD3d 548 [1st Dept 2018]), especially in the absence of any prior incidents involving the steps (*id.*; *Langer v 116 Lexington Ave., Inc.*, 92 AD3d 597, 598 [1st Dept 2012], *lv denied* 24 NY3d 907 [2014]; *Burke v Canyon Rd. Rest.*, 60 AD3d 558 [1st Dept 2009]).

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

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

ENTERED: NOVEMBER 12, 2019

CLERK

Richter, J.P., Gische, Tom, Gesmer, Moulton, JJ.

10202 In re Malcolm M.L., Jr.,

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

Ruby C.,
Respondent-Appellant,

Cardinal McCloskey Children's Services,
Petitioner-Respondent.

_____

Carol L. Kahn, New York, for appellant.

Geoffrey P. Berman, Larchmont, for respondent.

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

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Order of disposition, Family Court, Bronx County (Monica D. Shulman, J.), entered on or about August 6, 2018, which, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject child and transferred custody of the child to petitioner agency and the Administration for Children's Services for the purposes of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence that the agency made diligent efforts to encourage and strengthen the parental relationship by devising an appropriate service plan for the mother, which included referring her to family therapy and scheduling and facilitating visitation

with the child (Social Services Law § 384-b[7][f]; *Matter of Frank Enrique S. [Karina Elizabeth F.*], 168 AD3d 539, 540 [1st Dept 2019]).

Despite the agency's efforts, including encouraging the mother to commence family therapy with the child and offering to call the family therapist with the mother to schedule intake, the mother failed to comply with the referrals by attending family therapy, a key component to her reunification plan (*Matter of Zariah M.E. [Alexys T.*], 171 AD3d 607 [1st Dept 2019]). The mother also failed to visit the child consistently, attending less than half of the permitted visits, which in itself constituted a ground for the finding of permanent neglect (*Matter of Angelica D.* [Deborah D.], 157 AD3d 587, 588 [1st Dept 2018]).

A preponderance of the evidence supports the determination that termination of the mother's parental rights was in the best interests of the child (*Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). A suspended judgment was not appropriate, given the mother's repeated failure to engage in family therapy, which was an important aspect of her reunification plan, her inconsistency in visiting the child, and the fact that the child's special needs are being met in his foster home, where he has resided for the last eight years and where he has bonded with the foster family, which wishes to adopt him (*Matter of Tion*

Lavon J. [Saadiasha J.], 159 AD3d 579, 580 [1st Dept 2018]).

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

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

ENTERED: NOVEMBER 12, 2019

CLERK

Friedman, J.P., Kapnick, Kern, Singh, JJ.

10251 In re U.S. Bank National Association, etc., Petitioner-Respondent, Index 150183/18

-against-

SBMC Holdings LLC, et al., Respondents-Appellants,

DW Partners, LP, et al., Respondents-Respondents.

- - - - -

Elliott Management Corporation, et al., Objectants-Respondents.

_____

Jenner & Block LLP, New York (Stephen L. Ascher of counsel), for appellants.

Morgan Lewis & Bockius LLP, New York (Susan F. DiCicco of counsel), for U.S. Bank National Association, respondent.

Goulston & Storrs PC, New York (Charles R. Jacob, III of counsel), for DW Partners, LP, respondent.

Venable LLP, New York (Konstantina A. Calabro of counsel), for C-III Asset Management LLC, respondent.

Kasowitz Benson Torres LLP, New York (Michael A. Hanin of counsel), for M.H. Davidson & Co., Davidson Kempner Partners, Davidson Kempner Institutional Partners, L.P., Davidson Kempner International, Ltd., Davidson Kempner Distressed Opportunities Fund LP, Davidson Kempner Distressed Opportunities International Ltd., Davidson Kempner Long-Term Distressed Opportalities Fund II LP, Davidson Kempner Long-Term Distressed Opportunities International Master Fund II LP, OWS COF I Master, L.P., OWS Credit Opportunity I LLC, One William Street Capital Master Fund, Ltd., Baldr Fund Inc., OWS ABS Master Fund II, L.P. and OWS Credit Opportunity I LLC, respondents.

Wollmuth Maher & Deutsch LLP, New York (Thomas P. Ogden of counsel), for Elliott Management Corporation, Elliott Associates, L.P., Elliott International, L.P., and the Liverpool Limited

Partnership, respondents.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered on or about November 15, 2018, which denied the petition brought pursuant to CPLR article 77 for a judicial instruction that the loss of interest on two commercial mortgage loans held by the subject trust must be applied first to reduce the principal balance of the most junior class of certificates in the trust, unanimously reversed, on the law, without costs, the petition granted to the extent of ruling that lost interest was a Realized Loss under Secion 6.6(f) of the Pooling and Servicing Agreement (PSA), and the matter remanded to Supreme Court for further proceedings to calculate the loss allocation.

The court erred in denying the petition on the ground that the trust's governing PSA is ambiguous as to the proper allocation of lost interest (*see Greenfield v Philles Records*, 98 NY2d 562, 569-570 [2002]).

The issue is governed by Section 6.6(f) of the PSA which unambiguously provides that Realized Losses must first be applied to reduce the principal balance of the most junior class of certificates in the trust, until the principal balance of such class is reduced to zero. Section 6.5 only governs the distribution of cash down the waterfall in sequential order, not

the allocation of Realized Losses up in the opposite direction, and the more specific provisions regarding Realized Losses in Section 6.6(f) must control. Moreover, the provisions of the PSA that apply to Real Estate Mortgage Investment Conduit (REMIC) I (which was an internal trust vehicle, as was REMIC II), such as Section 6.6(a), have no application to REMIC III realized losses.[1]

However, the parties agree that the proceeding must be remanded to Supreme Court to determine the loss allocations and payment distributions.

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

ENTERED: NOVEMBER 12, 2019

CLERK

[1] REMIC III issued the original certificates and made payment distributions to the investors.

Gische, J.P., Tom, Kapnick, Kern, Moulton, JJ.

10286 The People of the State of New York, Respondent, Ind. 2912/16

-against-

Kareem Jones, Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered March 16, 2017, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third degree and unlawful possession of marijuana, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of six years and a $100 fine, unanimously modified, as a matter of discretion in the interest of justice, to the extent of vacating the marijuana conviction and dismissing that count of the indictment, and otherwise affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the jury's credibility determinations. When an officer saw defendant drive into a Housing Authority parking lot and park without the required

sticker, as well as in a manner that blocked two parking spaces, this provided an objective credible reason permitting the officer to approach and request information. When the officer, who may have put on his car's turret light, pulled up behind defendant's car and used a loudspeaker to direct him to roll down his windows and put the car in park, those actions did not go beyond the "nonthreatening encounter" (*People v Hollman*, 79 NY2d 181, 191 [1992]) contemplated by an information request. Instead, the police actions were comparable to nonthreatening directions, such as a direction to stop, that may be permissible in connection with a request for information (*see People v Reyes*, 83 NY2d 945 [1994], *cert denied* 513 US 991 [1994]; *People v Cisse*, 149 AD3d 435, 435 [1st Dept 2017], *affd* 32 NY3d 1198 [2019]), and the police actions here were reasonable safety measures in any event.

Counsel did not render ineffective assistance by failing to move to reopen the suppression hearing based on alleged discrepancies between hearing and trial testimony. Defendant has not shown that counsel reasonably should have made such an application, that it would have been granted, or that there was a reasonable possibility that a reopened hearing would have resulted in suppression of any evidence.

The court properly denied defendant's motion to dismiss the indictment, made on the ground that he was deprived of his right

to testify before the grand jury. The record establishes that the People provided defendant with a reasonable opportunity to testify (*see e.g. People v Edwards*, 283 AD2d 219 [1st Dept 2001], *lv denied* 96 NY2d 918 [2001]). Defendant's claims of ineffective assistance of counsel are not apparent on this record (*see People v Wiggins*, 89 NY2d 872 [1996]). We have considered and rejected defendant's remaining arguments on matters relating to the grand jury issue.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). We find no basis for disturbing the jury's credibility determinations.

Defendant did not preserve his challenge to the court's *Allen* charge (*Allen v United States*, 164 US 492 [1896]), and we decline to review it in the interest of justice. As an alternative holding, we find that the charge was not coercive (*see People v Ford*, 78 NY2d 878, 880 [1991]).

Under CPL 160.50(5), effective August 28, 2019, defendant's marijuana conviction became a nullity by operation of law, independently of any appeal, and without requiring any action by this Court. In any event, we vacate that conviction.

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

ENTERED: NOVEMBER 12, 2019

CLERK

Gische, J.P., Tom, Kapnick, Kern, Moulton, JJ.

10288-
10288A In re Krystal R.,
Petitioner-Respondent,

-against-

Kriston L.,
Respondent-Appellant.

- - - - -

In re Kai L.,

A Child Under Eighteen Years of Age, etc.,

Kriston L.,
Respondent-Appellant,

-against-

Administration for Children's Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Andrew J. Baer, New York, for Krystal R., respondent.

Zachary W. Carter, Corporation Counsel, New York (Cynthia Kao of counsel), for Administration for Children's Services, respondent.

Larry S. Bachner, New York, attorney for the child.

_____

Order of disposition, Family Court, Bronx County (David J. Kaplan, J.), entered on or about July 31, 2018, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about July 31, 2018, which found that respondent father neglected the subject child, unanimously affirmed, without costs. Order, same court and Judge, entered on or about July 31,

2018, which denied respondent-father's motion to vacate an order of protection entered against him after an inquest conducted upon his default, unanimously affirmed, without costs.

Respondent failed to demonstrate a reasonable excuse for his failure to appear at the hearing on the family offense petition (*see* CPLR 5015[a][1]). Although respondent contended that he was evicted a month before the hearing and subsequently lost his phone, he also admitted that he "simply forgot the date," which does not constitute a reasonable excuse (*see Matter of Jenny F. v Felix C.*, 121 AD3d 413 [1st Dept 2014]). He was present during the scheduling of the hearing, and it was his responsibility to verify the date with his attorney or the Family Court itself (*see e.g. Matter of Yadori Marie F. [Osvaldo F.]*, 111 AD3d 418, 419 [1st Dept 2013]). Further, the court properly denied respondent's attorney's request for an adjournment where the attorney failed to provide any explanation for respondent's failure to appear (*see Matter of Keith H. [Logann M.K.]*, 113 AD3d 555, 556 [1st Dept 2014], *lv denied* 23 NY3d 902 [2014]). Since respondent failed to offer a reasonable excuse for his default, we need not determine whether he offered a meritorious defense to the family offense petition (*see Matter of Yadori* at 419); in any event, he did not.

Further, a preponderance of the evidence supports the Family

Court's finding that respondent neglected the subject child by engaging in multiple verbal and physical altercations with the child's mother in the child's presence and inflicting physical violence upon the mother and causing an injury to the child, on at least one occasion (*see Terrence B. [Terrence J.B.]*, 171 AD3d 463 [1st Dept 2019]). Impairment or an imminent danger of impairment to the physical, mental, or emotional condition of the child could be inferred from the respondent's conduct because the child was in close proximity to violence directed against his mother, even absent evidence that he was emotionally impacted by it long term (*Matter of Andru G.[Jasmine C.]*, 156 AD3d 456 [1st Dept 2017]).

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

ENTERED: NOVEMBER 12, 2019

CLERK

Gische, J.P., Tom, Kapnick, Kern, Moulton, JJ.

10289 Christopher Parham, Index 21501/17
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

_____

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

Krentsel & Guzman, LLP, New York (Marcia K. Raicus of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Llinét M. Rosado, J.), entered April 10, 2019, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant failed to establish its prima facie entitlement to judgment as a matter of law in this action where plaintiff was injured when he tripped and fell as he ascended the exterior stairs of the building in which he lived. The motion court properly rejected defendant's argument that the defect on the stair was trivial as a matter of law. The photographs in the record show that the subject step has a space between its metal riser and the concrete underneath it that might have been capable

of catching plaintiff's shoe (*see e.g. Abreu v New York City Hous. Auth.*, 61 AD3d 420 [1st Dept 2009]).

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

ENTERED: NOVEMBER 12, 2019

CLERK

Gische, J.P., Tom, Kapnick, Kern, Moulton, JJ.

10291 The People of the State of New York, Respondent, Ind. 2161/14

-against-

Jamie Pugh, Defendant-Appellant.

_____

Christina Swarns, Office of the Appellate Defender, New York (Emma L. Shreefter of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Ann M. Donnelly, J.), rendered November 4, 2015, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant's homicidal intent could be reasonably inferred from his conduct (*see generally People v Getch*, 50 NY2d 456, 465 [1980]).

The court providently exercised its discretion in permitting the People to introduce evidence that, within a period of approximately 20 minutes before the charged fatal attack,

defendant committed three separate uncharged assaults against victims, who, like the homicide victim, were strangers attacked apparently at random. The uncharged assaults were part of the narrative of defendant's state of mind at the critical moment, and their admission provided a fuller and fairer basis for the jury to make a determination (*see People v Till*, 87 NY2d 835, 837 [1995]). Under all the circumstances, the prejudicial impact of the evidence did not outweigh its probative force.

Defendant did not preserve his challenges to the court's jury instructions regarding intent, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. The court's charge, which was materially indistinguishable from the Criminal Jury Instructions, made it clear that the jury was permitted, but not required, to presume homicidal intent if it found that death was a natural and probable consequence of defendant's conduct toward the victim.

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 12, 2019

CLERK

Gische, J.P., Tom, Kapnick, Kern, Moulton, JJ.

10292 Messiah Ali Bey, Index 302595/16
Plaintiff-Appellant,

-against-

Sobro Local Development Corporation,
Defendant-Respondent.

_____

Messiah Ali Bey, appellant pro se.

Lazarus Karp, LLP, New York (Charles J. Seigel of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Robert T. Johnson, J.), entered on or about February 13, 2018, which denied pro se plaintiff Messiah Ali Bey's motion for a default judgment against defendant landlord, extended landlord's time to respond to the complaint, and granted landlord's cross motion to dismiss the complaint, unanimously affirmed, without costs.

Bey's claim for declaratory relief was based on a purported inconsistency between the prior determinations. The February 19, 2013 order, issued in the first holdover proceeding, did not determine that Bey had legal occupancy of the premises, but stated the landlord could not prevail on summary judgment due to issues of fact, which would have to be determined after a trial. The January 27, 2014 judgment of possession in landlord's favor issued in the second holdover proceeding, commenced by landlord

after the first proceeding was dismissed without prejudice due to improper service of process, resulted from Bey's non-appearance at that trial, which non-appearance the Appellate Term found willful (*see Sobro Local Dev. Corp. v Bey et al.*, 46 Misc 3d 133[A][App Term, 1st Dept 2014]). Those determinations are not inconsistent and, in any event, do not create the requisite "justiciable controversy" to support a declaratory relief claim (CPLR 3001). Bey's complaint is an impermissible collateral attack upon the housing court judgment (*see e.g. McLaughlin v Hernandez*, 16 AD3d 344 [1st Dept 2005]; 73 NY Jur 2d, Judgments § 275). His available avenues for relief were to seek leave to reargue or to appeal. He pursued both, without success.

Bey shows no reason to disturb the court's decision to allow for landlord's late-filed answer, which, under the circumstances, was a provident exercise of the court's discretion (CPLR 3012[d]). The landlord's de minimis delay, combined with its reasonable excuse of having lost track of filing deadlines, the absence of any indication that the delay was willful or that it was prejudicial to Bey, the merits of the landlord's defense, and the State's policy of resolving cases on the merits, supported the relief (*see Naber Elec. v Triton Structural Concrete, Inc.*, 160 AD3d 507 [1st Dept 2018]; *Artcorp v Citirich Realty Corp.*, 140 AD3d 417 [1st Dept 2016]). Bey's arguments concerning CPLR

3215(f) are not relevant, as landlord has not asserted improper service as a ground for failure to timely answer the complaint, nor has it argued that Bey's motion should have been denied for failure to annex proof of service. Even assuming service was proper and supported by an affidavit of service, Bey has not shown landlord's delay justified a default judgment in his favor, as stated above.

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

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

ENTERED: NOVEMBER 12, 2019

CLERK

Gische, J.P., Tom, Kapnick, Kern, Moulton, JJ.

10294 Khristina Hamilton, Index 306467/13
Plaintiff-Respondent,

-against-

National Amusements, Inc., doing business as Jamaica Multiplex Cinemas,
Defendant-Appellant,

Mattone Group Jamaica Company, LLC,
Defendant.

_____

Miranda Slone Sklarin Verveniotis LLP, Elmsford (Kevin J. Donnelly of counsel), for appellant.

Sacco & Fillas LLP, Astoria (Albert R. Matuza, Jr. of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about July 3, 2018, which denied as untimely the motion of defendant National Amusements, Inc. for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

The timeliness of a motion is calculated based on the date of service of the motion, and not on the date of filing (*see Derouen v Savoy Park Owner, L.L.C.*, 109 AD3d 706, 706 [1st Dept 2013]; CPLR 2211). Since defendant's motion was served less than 60 days after plaintiff filed her note of issue, it was timely under the motion court's part rules.

On the merits, defendant established its prima facie entitlement to judgment as a matter of law in this action where plaintiff was injured when she slipped and fell as she walked up the escalator in defendant's movie theater. Defendant submitted plaintiff's deposition testimony, in which she stated that she did not see the alleged oily condition on the escalator steps before she fell. Only after the accident, when plaintiff detected what she believed to be an oily substance on her pants and shoe, did plaintiff surmise that she had slipped on oil. Defendant's managers averred that they saw no oily or other foreign substances on the escalator steps on the date in question, and received no reports or complaints about the escalator on that date. Defendant also submitted surveillance video footage showing that numerous persons rode the escalator without any problem for 40 minutes before and about 50 minutes after plaintiff's fall. Accordingly, defendant showed that it did not have actual or constructive notice of the condition that allegedly caused plaintiff's fall (*see Valenta v Spring St. Natural*, 172 AD3d 623, 623 [1st Dept 2019]).

In opposition, plaintiff failed to raise a triable issue of fact on the issue of notice. Plaintiff's arguments, that defendant's summary judgment motion should be denied pursuant to CPLR 3212(f), in order to permit her to depose defendant's

witnesses and test the assertions made in their affidavits, are unavailing. Plaintiff had nearly two years to seek to depose defendant's representative, but did not. Instead, plaintiff filed a note of issue in February 2016, certifying that all discovery was complete. Thus, plaintiff "cannot cite [her] own inaction as justification to deny [defendant's] summary judgment motion" (*Espinoza v Fowler-Daley Owners, Inc.*, 171 AD3d 480, 480 [1st Dept 2019] [internal quotation marks omitted]). Furthermore, plaintiff identifies no facts which she thinks might be clarified or brought to light with further discovery.

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

ENTERED: NOVEMBER 12, 2019

CLERK

Gische, J.P., Tom, Kapnick, Kern, Moulton, JJ.

10295 In re Ece D., etc.,
Petitioner-Appellant,

-against-

Sreeram M., etc.,
Respondent-Respondent.

_____

Cox Padmore Skolnik & Shakarchy LLP, New York (Natalia Gourari of counsel), for appellant.

Sreeram M., respondent pro se.

_____

Order, Family Court, New York County (J. Machelle Sweeting, J.), entered on or about April 1, 2019, which, to the extent appealed from as limited by the briefs, granted joint legal custody, with residential custody of the children to the petitioner mother, and liberal visitation to respondent father, prohibited petitioner from relocating from her current residence without respondent's written consent or permission from the court, and permitted either party to travel with the children internationally with no restrictions, unanimously modified, on the law and the facts, to require that respondent's consent or order of the court must be obtained if petitioner seeks to relocate more than ten (10) miles from her current residence, and otherwise affirmed, without costs.

Family Court's award to respondent of extensive parenting

time with the children is not inconsistent with its determination that, although the parties are to have joint legal authority of the children, the mother would have primary physical custody and final decision-making authority. The parenting schedule set by Family Court is not unduly disruptive to the children's schedule and is consistent with the children's best interests (*Phillips v Phillips*, 146 AD3d 719, 720 [1st Dept 2017]). Since the court's determination has a sound and substantial basis in the record, it must be accorded great respect on appeal (*see Esbach v Esbach*, 56 NY2d 167 [1982]).

The provision that each party may have up to three consecutive weeks of summer vacation with the children also has a sound basis in the trial record. The record shows that both parties are fit to take care of the children and have indicated that they will make the children's well-being their top priority; it contains nothing to suggest that this extended summer vacation plan will have an adverse effect on the children.

There is no basis in the record, however, for the strict relocation provision prohibiting petitioner from moving out of her apartment with the children without first obtaining respondent's written consent or the court's permission. Although a parent will not be permitted to undertake a geographical relocation that does not serve the best interests of the child,

there is no basis for ordering petitioner to stay at her present address; Family Court should have imposed a reasonable radius restriction. Given the parenting schedule established by the court, the ten (10) mile radius proposed by petitioner is reasonable and is an appropriate distance for petitioner's relocation without the need for respondent's consent or court approval.

Petitioner argues that respondent should not be allowed to travel with the children to India because India is not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction. However, the court's implicit finding that respondent is likely not an abduction threat has a sound basis in the trial record. Respondent has substantial real estate holdings, which he manages, in the New York area, he holds a TLC license, and has family in New York. Moreover, respondent testified that he wants the children, who are United States citizens, to remain in the United States.

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

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

ENTERED: NOVEMBER 12, 2019

CLERK

Gische, J.P., Tom, Kapnick, Kern, Moulton, JJ.

10297 Patricia A. Carey, Index 650731/17
Plaintiff-Appellant,

-against-

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

_____

Hegge & Confusione, LLC, New York (Michael Confusione of counsel), for appellant.

Friedman Kaplan Seiler & Adelman LLP, New York (Alexander D. Levi of counsel), for Trustees of Columbia University in the City of New York, Columbia University in the City of New York and Columbia University in the City of New York College of Arts and Sciences, respondents.

Bond, Schoeneck & King, PLLC, New York (Andrea Green of counsel), for Teachers College of Columbia University in the City of New York and Trustees of Teachers College of Columbia University in the City of New York, respondents.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered July 9, 2018, which granted defendants' motion to dismiss the complaint, and denied plaintiff's cross motion for leave to amend the complaint, unanimously affirmed, without costs.

Plaintiff's breach of contract and unjust enrichment claims are barred by the six-year statute of limitations since her claims accrued on November 30, 2010, when she defended her dissertation, and her suit was commenced on February 8, 2017 (CPLR 213[1], [2]; *see Jang Ho Choi v Beautri Realty Corp.*, 135

AD3d 451, 452 [1st Dept 2016]). Plaintiff's claim that defendants breached their obligations to her by failing to provide a suitable dissertation advisor and other services is untimely, as the alleged breaches occurred outside of the six-year statute of limitations period. Plaintiff also failed to show how her only timely claim - that she was wrongly conferred a Ph.D. degree by defendants on February 9, 2011 - was actionable (*see Keefe v New York Law School*, 71 AD3d 569 [1st Dept 2010]).

Plaintiff's invocation of the continuing wrong doctrine to toll the limitations period is unavailing. The alleged improper awarding of the degree was merely a consequence of the purported wrong of failing to provide an appropriate sponsor or adequate support (*see Henry v Bank of Am.*, 147 AD3d 559, 602 [1st Dept 2017]). Although plaintiff alleges damages that include a loss of expected income due to unreasonable delays in her receiving the degree and a resulting stigma, these purported damages reflect only the continuing effects of earlier conduct alleged to have been wrongful (*see id.*; *see also Gibbons v Grondahl*, 161 AD3d 590 [1st Dept 2018])

The court providently exercised its discretion in denying plaintiff's cross motion for leave to amend her complaint. The claims in the amended complaint are also time-barred, and "suffer[] from the same fatal deficienc[ies] as the original

[complaint]" ("*J. Doe No. 1" v CBS Broadcasting Inc.*, 24 AD3d 215, 216 [1st Dept 2005]). In any event, the amended complaint fails to show that the alleged wrongful conferral of the degree itself breached a specific promise made to plaintiff.

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

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

ENTERED: NOVEMBER 12, 2019

CLERK

Gische, J.P., Tom, Kapnick, Kern, Moulton, JJ.

10298 & M-7543 Philippe Buhannic, et al., Plaintiffs-Appellants, Index 653624/16

-against-

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

- - - - -

[And Other Actions]

_____

Philippe Buhannic, appellant pro se.

Morgan. Lewis & Bockius LLP, New York (John M. Vassos Of counsel), for respondents.

_____

Appeal from order, Supreme Court, New York County (Marcy S. Friedman, J.), entered June 8, 2018, which denied plaintiffs' motion to release the bond securing a preliminary injunction, denied plaintiffs' motion to compel discovery, denied plaintiffs' motion seeking leave to serve a proposed second amended complaint, denied plaintiff's motion seeking an expedited hearing, an enlargement of the March 2, 2017 preliminary injunction, and a declaration of contempt, and ruled that the court would grant defendants' motion to seal at an unspecified time in the future, dismissed, without costs as moot.

This action was dismissed with prejudice by order entered on

or about September 18, 2019, rendering this appeal moot (*see Matter of Anonymous v New York City Health & Hosps. Corp.*, 70 NY2d 972 [1988]).

M-7543 ***Philippe Buhannic v Tradingscreen, Inc.***

Motion to dismiss appeal denied as academic.

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

ENTERED: NOVEMBER 12, 2019

CLERK

Gische, J.P., Tom, Kapnick, Kern, Moulton, JJ.

10299 The People of the State of New York, Ind. 2841/15
Respondent,

-against-

Miguel Montalvo,
Defendant-Appellant.

_____

Janet E. Sabel, Legal Aid Society, New York (William Carney of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Jennifer Leung of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Ralph Fabrizio, J.), rendered April 19, 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: NOVEMBER 12, 2019

CLERK

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

Gische, J.P., Tom, Kapnick, Kern, Moulton, JJ.

10302 The People of the State of New York, Ind. 2080/16
Respondent,

-against-

Felix Delaguila,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Aaron Zucker 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 (Maxwell Wiley, J.), rendered August 2, 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: NOVEMBER 12, 2019

CLERK

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

Gische, J.P., Tom, Kapnick, Kern, Moulton, JJ.

10303 In re Willis Avenue Bridge Replacement Index 650/07

- - - - -

82 Willis, LLC,
Claimant-Respondent,

-against-

The City of New York,
Condemnor-Appellant.

_____

Zachary W. Carter, Corporation Counsel, New York (Deborah R. Kerzhner of counsel), for appellant.

Jaspan Schlesinger LLP, Garden City (Andrew M. Mahony of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered on or about July 23, 2018, which, citing outstanding discovery, denied as premature the City's motion to strike claimant's appraisal of its damages caused by flooding of its real property and of an access easement, unanimously reversed, on the law, without costs, the motion granted, and the flooding appraisal stricken.

In March 2007, the City acquired by condemnation various fee and easement interests in connection with its plan to replace the Willis Avenue Bridge, spanning the Harlem River between Manhattan and the Bronx. As relevant to this appeal, the City acquired permanent and temporary easements in a portion of a lot abutting the landlocked lot owned by claimant 82 Willis, LLC. The City

did not obtain a de jure taking of any part of claimant's lot.

In 2008, following the condemnation, claimant filed a notice of claim pursuant to Eminent Domain Procedure Law (EDPL) § 503, asserting a claim for appropriation of an easement over its lot. In 2015, claimant alleged for the first time that the bridge construction was causing flooding of its property. In 2017, claimant submitted the appraisal at issue in this appeal, prepared by Cushman & Wakefield, which determined that during a 31-month period from November 2014 through May 2017, claimant's property and the non-exclusive access easement became flooded after rainfall. It attributed the flooding to a drainage pipe in the access easement area that became blocked by cement during construction of the new bridge. The appraisal provides that subsequent to the discovery of the flooding, claimant leased out its property and received rental income. Claimant's alleged flooding damages, as set forth in the appraisal, consist of reduced rental income and the inability to develop residential towers on the property.

The City moved to strike claimant's appraisal prepared by Cushman & Wakefield, arguing that the flooding damages do not result from the taking of claimant's property and, therefore, are not compensable in this eminent domain condemnation valuation proceeding brought under article 5 of the Eminent Domain

Procedure Law (EDPL). Rather, the City insisted, the flooding claim must be asserted in a separate tort proceeding to recover construction damages. Without addressing the City's legal argument, Supreme Court denied its motion as premature, in light of outstanding discovery.

"When the State takes property by eminent domain, the Constitution requires that it compensate the owner so that he may be put in the same relative position, insofar as this is possible, as if the taking had not occurred" (*Matter of City of New York [Kaiser Woodcraft Corp.]*), 11 NY3d 353, 359 [2008][internal quotation marks and citation omitted]; NY Const, art I, § 7[a]; US Const, 5th Amend).

Because claimant's property was not subject to a de jure taking by the City, it may not pursue a claim to recover just compensation or consequential damages resulting from the flooding in this eminent domain valuation proceeding (*Matter of Culver Contr. Corp. v Humphrey*, 268 NY 26 [1935]; *Matter of Metropolitan Transp. Auth.* 159 AD3d 518 [1st Dept 2018], *lv denied* 31 NY3d 910, 911 [2018]; *Frisbie & Stansfield Knitting Co., Inc. v State of New York*, 189 AD 341 [4th Dept 1919], *affd* 231 NY 523 [1921]; *see also* EDPL 101, 501).

Claimant's claim for a de facto taking or inverse condemnation also fails as a matter of law. Inverse condemnation

is the "manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted" (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 785-786 [2012]). To succeed on an inverse condemnation claim, a property owner must show "that the government has intruded onto the [owner's] property and interfered with the owner's property rights to such a degree that the conduct amounts to a constitutional taking requiring the government to purchase the property from the owner" (*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]). "A de facto taking can consist of either a permanent ouster of the owner, or a permanent interference with the owner's physical use, possession, and enjoyment of the property, by one having condemnation powers" (*Weaver v Town of Rush*, 1 AD3d 920, 923 [4th Dept 2003]; *see City of Buffalo v Clement Co.*, 28 NY2d 241, 255 [1971]). "The *sine qua non* for such a cause of action is that defendant's conduct must constitute a permanent physical occupation of plaintiffs' property amounting to the exercise of dominion and control thereof" (*Reiss v Consolidated Edison Co. of N.Y.*, 228 AD2d 59, 61 [3d Dept 1996], *appeal dismissed* 89 NY2d 1085 [1997], lv denied 90 NY2d 807 [1997], *cert denied* 522 US 1113 [1998]). "In a modern inverse condemnation action, an owner whose property has been taken de facto may sue the entity that took it to obtain

just compensation, and if the action is successful the defendant has no choice in the matter – the compensation must be paid" (*Corsello*, 18 NY3d at 786).

The claim here for inverse condemnation is legally flawed, since the interference with claimant's property rights, as set forth in its own appraisal report, is not sufficiently permanent to constitute a de facto taking as a matter of law (*Greece Ridge, LLC v State of New York*, 130 AD3d 1559, 1560-1561 [4th Dept 2015] [change to storm drainage system near the plaintiffs' property, causing flooding during periods of heavy rainfall, legally insufficient to support claim for inverse condemnation]).

In light of the foregoing decision, the Court will not address the timeliness of claimant's inverse condemnation claim.

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

ENTERED: NOVEMBER 12, 2019

CLERK

Gische, J.P., Tom, Kapnick, Kern, Moulton, JJ.

10304- Index 301469/08
10305N- 260677/16
10306N In re 4042 East Tremont Café Corp., 260292/17
Assignor-Appellant,

-against-

Anthony Sodono, III,
Assignee-Appellant.

- - - - -

Tosca Café, Inc. et al.,
Nonparty Appellants.

- - - - -

In re Frank Berisha,
Petitioner-Respondent,

-against-

4042 East Tremont Café Corp., doing business as Tosca Café, etc., et al.,
Respondents-Appellants.

- - - - -

Frank Berisha,
Plaintiff-Respondent,

Maria Berisha,
Plaintiff,

-against-

Tosca Café, Inc., et al.,
Defendants-Appellants,

- - - - -

4042 East Tremont Café Corp.,
Nonparty Appellant.

_____

Pollack, Pollack, Isaac & DeCicco LLP, New York (Brian J. Isaac of counsel), for 4042 East Tremont Café Corp., appellant.

McElroy, Deutsch, Mulvaney & Carpenter, LLP, New York (Nicholas K. Lagemann of counsel), for Anthony Sodono, III, appellant.

Kenneth J. Gorman, New York, for Tosca Café Inc., Tosca Coal Burning Oven Inc. and Hasim "Eddie" Sujak, appellants.

Bernard D'Orazio & Associates, P.C., New York (Bernard D'Orazio of counsel), for respondent.

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about February 8, 2018, in index no. 301469/08, which denied the motions by defendants Tosca Café, Inc. and Tosca Coal Burning Oven Inc. (Tosca Coal) and nonparty 4042 East Tremont Café Corp. (4042 East Tremont) to vacate a judgment entered on or about August 12, 2013 against Tosca Café, Inc. and Tosca Coal (the Tosca corporations) pursuant to CPLR 5015(a)(3), unanimously affirmed, without costs. Order, same court (Howard H. Sherman, J.), entered on or about April 19, 2018, in index no. 260677/16, which, upon petitioner's motion, inter alia, set aside the transfers of the assets, property, and business of the Tosca Café to Tosca Coal and 4042 East Tremont, granted petitioner leave to attach or levy execution upon the same, granted petitioner's application for attorneys' fees and costs as against respondent Hasim "Eddie" Sujak and referred the amount to a referee, and appointed nonparty Bernard D'Orazio as the receiver of the business, assets, property, and income of the Tosca Café, unanimously modified, on the law, to delete the setting aside of the transfer of the assets, property, and

business of the Tosca Café to 4042 East Tremont and the grant of leave to petitioner to attach or levy execution upon the assets, property, and business of the Tosca Café, without prejudice to his amending the petition to add allegations pertaining to alter ego liability, and to delete the grant of petitioner's application for attorneys' fees and costs against Sujak, without prejudice to petitioner's amending the petition to try to pierce the corporate veil and/or add allegations that Sujak aided and abetted the fraudulent conveyances, and otherwise affirmed, without costs. Tosca Coal's appeal from said order unanimously dismissed, without costs. Order, same court and Justice, in index no. 260292/17, which denied the assignee's petition to commence an assignment for the benefit of 4042 East Tremont's creditors, granted creditor Frank Berisha's cross motion to dismiss the proceeding, and severed Berisha's claim for costs and sanctions and referred it to a referee, unanimously modified, on the law and the facts and in the exercise of discretion, to deny Berisha's motion as to sanctions, and otherwise affirmed, without costs.

Supreme Court providently exercised its discretion in denying the Tosca corporations' and 4042 East Tremont's 2017 motions to vacate the August 2013 judgment against the Tosca corporations pursuant to CPLR 5015(a)(3) on the ground that they

were not made within a reasonable time after discovering the alleged fraud (*see Nash v Port Auth. of N.Y. & N.J.*, 22 NY3d 220, 225 [2013]; *Mark v Lenfest*, 80 AD3d 426 [1st Dept 2011]).

More fundamentally, plaintiff Frank Berisha "did not obtain the default judgment through fraud or through any other wrongdoing" (*Amalgamated Bank v Helsmley-Spear, Inc.*, 109 AD3d 418, 419 [1st Dept 2013], *affd on other grounds* 25 NY3d 1098 [2015]). Rather, the August 2013 judgment resulted from the Tosca corporations' decisions not to pay their first lawyer and not to obtain new counsel in time for the trial (*see id.* at 419-420). By defaulting, the Tosca corporations admitted liability (*see e.g. Brown v Rosedale Nurseries*, 259 AD2d 256, 257 [1st Dept 1999]). Therefore, Berisha's testimony about the incident in which he was injured was unnecessary to establish liability (*compare Oppenheimer v Westcott*, 47 NY2d 595 [1979] [default judgment vacated where the plaintiff testified falsely about damages]).

Tosca Coal's appeal from the April 2018 order is dismissed because Tosca Coal defaulted in Supreme Court (*see* CPLR 5511; *Citibank, N.A. v Kallman*, 172 AD3d 489 [1st Dept 2019]). Because both of the Tosca corporations are judgment debtors, it does not matter – except for the issue of attorneys' fees, which will be discussed below – if the transfer of the Tosca Café from Tosca

Café, Inc. to Tosca Coal in 2006 was fraudulent. Rather, as Supreme Court recognized, the key is whether there was a fraudulent conveyance from a judgment debtor to 4042 East Tremont.

Under the current allegations of the petition, there was no conveyance from either judgment debtor to 4042 East Tremont. Although 4042 East Tremont entered into a lease with nonparty Tremont Realty LLC for the same space that Tremont Realty had previously rented to Tosca Coal, the lease was not an asset that created a substantial income for Tosca Coal (*see Mutual Life Ins. Co. of N.Y. v 160 E. Seventy-Second St. Corp.* (49 NYS2d 927 [Sup Ct, NY County 1944]). On the contrary, it created a liability for Tosca Coal – Tosca Coal had to pay substantial rent to Tremont Realty.

Although respondent Sujak conveyed the fixtures, and perhaps the goodwill, of the Tosca Café to respondent Adis Radoncic in exchange for a promissory note, to deem this a conveyance from Tosca Coal or Tosca Café, Inc. to 4042 East Tremont would require piercing the corporate veil twice: to find that Sujak is the same as Tosca Coal or Tosca Café, Inc. and to find that Radoncic is the same as 4042 East Tremont. However, Berisha makes very clear on appeal that he is not relying on veil-piercing.

The award of attorneys' fees against Sujak pursuant to

Debtor and Creditor Law § 276-a cannot stand. First, as indicated, the 2013 transactions involving 4042 East Tremont did not constitute fraudulent conveyances, at least under the current allegations of the petition. Second, the 2006 transaction between the Tosca corporations was not fraudulent as to Berisha, who was not injured until 2008 (*see Carlyle, LLC v Quik Park 1633 Garage LLC*, 160 AD3d 476, 477 [1st Dept 2018]; *Huntington v Kneeland*, 102 App Div 284, 286 [2d Dept 1905], *affd* 187 NY 563 [1907]). Third, even if a fraudulent transfer occurred, Sujak is neither a debtor nor a transferee. Hence, he "cannot be held liable without piercing the corporate veil unless [he] benefited from the conveyances" (*D'Mel & Assoc. v Athco, Inc.*, 105 AD3d 451, 452 [1st Dept 2013]).

Sujak did not benefit from Radoncic's promissory note, because Radoncic made no payments thereunder. Although Tremont Realty LLC, of which Sujak is a member, received rent payments from 4042 East Tremont, Sujak is not the same as the LLC, and it is not clear that the receipt of rent would constitute a benefit from the conveyance (*see id.* at 452-453 ["receipt of a salary from the transferee corporation as an officer of the corporation is not sufficient to render the officer a transferee or beneficiary of the transfer"] [internal quotation marks omitted]).

Supreme Court providently exercised its discretion in appointing nonparty Bernard D'Orazio as a receiver pursuant to CPLR 5228(a) (*see Hotel 71 Mezz Lender LLC v Falor*, 14 NY3d 303, 317 [2010]). The judgment that Berisha obtained against the Tosca corporations more than six years ago remains unsatisfied. The appointment of a receiver who is unrelated to Sujak will increase the likelihood that the judgment will be satisfied. Moreover, there is a "risk of fraud or insolvency if a receiver is not appointed" (*id.* [internal quotation marks omitted]). Even if the requirements for a fraudulent conveyance have not been satisfied, the transactions involving 4042 East Tremont are suspicious. As for insolvency, the Tosca corporations and 4042 East Tremont have all filed for bankruptcy (the proceedings were dismissed) and have all made assignments for the benefit of creditors (ABCs).

The Tosca corporations and 4042 East Tremont's argument in opposition to the appointment of the receiver based on the law of the case doctrine is unavailing (*see Kleinser v Astarita*, 61 AD3d 597 [1st Dept 2009]).

The assignment for the benefit of 4042 East Tremont's creditors (index no. 260292/17) should not be dismissed on the ground that it violated the temporary restraining order in index no. 260677/16, because the TRO was issued in the absence of a

motion for a preliminary injunction (*see* CPLR 6301; *People v Asiatic Petroleum Corp.*, 45 AD2d 835, 836 [1st Dept 1974]). However, we affirm the dismissal on the alternate ground that, as Supreme Court said, the order appointing the receiver divested 4042 East Tremont of the property that is the subject of the ABC proceeding.

The part of the order entered in index no. 260292/17 that addresses Berisha's claim for costs and sanctions is ambiguous, saying both that the claim is referred to a Referee to hear and report with recommendations and that an order of reference will be issued separately. An order of reference is appealable (*General Elec. Co. v Rabin*, 177 AD2d 354, 356 [1st Dept 1991]). To the extent this order is not appealable, we grant leave to appeal in the interest of judicial economy (*see Serradilla v Lords Corp.*, 12 AD3d 279 [1st Dept 2004]) and in the interest of justice (*see Matter of Britt v City of New York*, 160 AD3d 524 [1st Dept 2018]).

To the extent Supreme Court found or implied that the assignor, the assignee, Radoncic, and their counsel engaged in sanctionable behavior, this was an improvident exercise of discretion (*see generally Gordon Group Invs., LLC v Kugler*, 127

AD3d 592, 594 [1st Dept 2015]). We do not find that 4042 East Tremont's ABC proceeding was commenced in blatant disregard of the TRO.

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

ENTERED: NOVEMBER 12, 2019

CLERK

Gische, J.P., Tom, Kapnick, Kern, Moulton, JJ.

10307N Tarsheka Luckey, et al., Index 18937/03
Plaintiffs-Appellants,

-against-

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

_____

Rubert & Gross, P.C., New York (Soledad Rubert of counsel), for appellants.

Georgia M. Pestana, Acting Corporation Counsel, New York (Jonathan A. Popolow of counsel), for respondents.

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Order, Supreme Court, Bronx County (Douglas McKeon, J.), entered on or about January 8, 2018, which, insofar as appealed from, denied plaintiffs' motion pursuant to CPLR 603 to sever the action against defaulting defendant Connie Rashid, and proceed with a damages inquest against her, unanimously affirmed, without costs.

"The determination of whether to grant or deny a request for a severance pursuant to CPLR 603 is a matter of judicial discretion, which should not be disturbed on appeal absent a showing of prejudice to a substantial right of the party seeking the severance" (*Zawadzki v 903 E. 51st St., LLC*, 80 AD3d 606, 608 [2d Dept 2011]; *see Vecciarelli v King Pharms., Inc.*, 71 AD3d 595 [1st Dept 2010]). Here, the court providently exercised its discretion in denying that branch of plaintiffs' motion to sever

the inquest on damages against Rashid from the action against the nondefaulting defendants (*see* CPLR 603). There are common factual and legal issues involved and the interests of judicial economy and consistency will be served by having a single trial.

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

ENTERED: NOVEMBER 12, 2019

CLERK