SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 14, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Richter, Mazzarelli, Webber, Kern, JJ.

10154 The People of the State of New York, Ind. 1320/11
Respondent,

-against-

Yenfri Ramirez,
Defendant-Appellant.

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Barry A. Weinstein, Bronx, for appellant.

Darcel D. Clark, District Attorney, Bronx (T. Charles Won of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Barbara F. Newman, J.), rendered May 29, 2014, convicting defendant, after a jury trial, of murder in the second degree, manslaughter in the first degree, assault in the second degree and criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 44 years to life, unanimously affirmed.

The court properly denied defendant's motion to suppress the physical evidence recovered after his arrest. The record establishes that there was probable cause for defendant's arrest. At the suppression hearing, the People presented relevant evidence as follows: On the evening in question, defendant was

stopped by police after the officer heard over the radio, via an anonymous tip, that there had been a shooting and that the shooter was an Hispanic male wearing a black and white White Sox baseball cap and a green jacket. The officer testified that while in his vehicle, about 5 blocks from the shooting location, he observed a person, later identified as defendant, who fit the description of an Hispanic male, wearing a black and white White Sox baseball cap and a green jacket, walking on the street. He testified that he saw defendant slow down behind the police vehicle, momentarily stop walking, take out a cell phone and put it to his ear, and then proceed to walk along the street. The officer further testified that after watching defendant for about 20 seconds, he and another officer exited their vehicle and stopped defendant on the sidewalk, about 10 or 15 feet away from where defendant had stopped and taken out his phone. Defendant was not handcuffed or arrested. The officers searched defendant but recovered no weapons or other evidence on his person so they released defendant, who left and walked away. Shortly thereafter, police officers found a gun approximately one foot away from where defendant had momentarily stopped walking and taken out his phone. Upon the recovery of the gun, defendant was located about one block away from where he was initially stopped. He was then stopped for a second time and arrested.

The court properly determined that there was probable cause to arrest defendant and therefore, properly denied defendant's suppression motion, based on all of the factors known to the police. These factors include that defendant's clothing and physical appearance matched the description of the man involved in the shooting, the close spatial and temporal proximity of where defendant was found in relation to where the shooting had just occurred and the recovery of the gun in the vicinity where defendant, who fit the description of the shooter, had just been observed walking, momentarily stopping and walking again. Inasmuch as the police possessed probable cause to arrest the defendant when they did so, the physical evidence recovered from the defendant's person such as his jacket, scarf, hat and phone, were properly recovered in a search incident to a lawful arrest (*see People v Lane*, 10 NY2d 347, 353 [1961]). Moreover, as the arrest was legal, we reject defendant's argument that the identifications should be suppressed as the fruit of an unlawful detention.

To the extent defendant argues that his motion for suppression should have been granted on the ground that the police did not have reasonable suspicion to conduct the initial stop and frisk, we need not reach such issue as the police did not recover any evidence as a result of the initial stop and

frisk of the defendant (*cf. People v De Bour*, 40 NY2d 210 [1976]). In fact, after the initial stop and frisk, defendant was released and allowed to leave. It was only after defendant had already been released and the police recovered the gun in the vicinity of where defendant had momentarily stopped and put his phone to his ear that defendant was then stopped for a second time and arrested.

Defendant's assertion that his suppression motion should have been granted on the ground that the witnesses at the suppression hearing lacked credibility is without merit as the court's credibility determinations are entitled to deference in light of its opportunity to observe the witnesses (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). In any event, we see no basis to reject the police testimony as incredible.

The court also properly denied defendant's motion to suppress the identification procedures used by the police, specifically, the photo array and the lineup. The People met their initial burden of establishing the reasonableness of the police conduct and the absence of any undue suggestiveness (*see People v Chipp*, 75 NY2d 327, 335 [1990], *cert denied* 498 US 833 [1990]) by, among other things, introducing color copies of the photo array and a lineup photo showing that the fillers used by the police reasonably resembled the defendant. Defendant failed

to meet his burden to show that the procedures were unduly suggestive or that they unfairly singled him out (*see id.; People v Mooney*, 74 AD3d 617, 618 [1st Dept 2010], *lv denied* 15 NY3d 854 [2010]).

Defendant's argument that the verdict was not supported by legally sufficient evidence is unpreserved because defense counsel moved to dismiss the attempted murder count for reasons not raised on appeal and he did not seek dismissal of any other counts (*see People v Hawkins*, 11 NY3d 484, 492 [2008]). In any event, we find that the verdict was supported by legally sufficient evidence and comported with the weight of the evidence (*see People v Denson*, 26 NY3d 179, 188 [2015]; *People v Danielson*, 9 NY3d 342, 348 [2007]).

We find that the evidentiary trial rulings being challenged by defendant were all provident exercises of the court's discretion. In any event, any error involving any of these rulings was harmless in light of the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

The court properly found that the defendant was not deprived of his right to a fair trial due to the prosecutor's summation. While some of the prosecutor's comments might have been inappropriate, his summation as a whole "did not exceed the broad bounds of rhetorical comment permissible in closing argument"

(*People v Galloway*, 54 NY2d 396, 399 [1981]).

Further, the court did not err in finding that juror number nine was not grossly unqualified, after a proper and thorough inquiry. After the court was informed that the juror wanted to speak with the court and that he had made certain Facebook postings about the trial proceedings and his feelings regarding same, the court properly questioned the juror, in the presence of the attorneys, regarding his Facebook postings and whether he could still be fair and impartial (*see* CPL 270.35(1); *People v Buford*, 69 NY2d 290, 299 [1987]). After the inquiry, the court found no reason to disqualify the juror and defendant has not provided any basis for disturbing the court's findings. Finally, we perceive no basis for reducing defendant's sentence.

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

ENTERED: NOVEMBER 14, 2019

CLERK

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

10174 In re Yin Shin Leung Charitable Foundation, et al., Petitioners-Appellants, Index 654290/13

-against-

Maria Seng, et al., Respondents-Respondents.

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Reed Smith LLP, New York (Brian A. Sutherland of counsel), for appellants.

Izower Feldman LLP, New York (Ronald D. Lefton of counsel), for respondents.

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Order, Supreme Court, New York County (Andrea Masley, J.), entered January 4, 2019, which, insofar as appealed from as limited by the briefs, granted respondents' motion for summary judgment dismissing the petition to dissolve Cathay Properties Corp. (Cathay), pursuant to Business Corporation Law (BCL) § 1104-a, and for damages for alleged breaches of fiduciary duty, unanimously modified, on the law, to deny the motion as to so much of the cause of action for breach of fiduciary duty as is premised on a $210,000 loan made to Cathay Import & Export, Ltd., and otherwise affirmed, without costs.

Except for petitioner Yin Shin Leung Charitable Foundation, the parties are children of the late Seng Ping Ling, a Hong Kong businessman.

The breach of fiduciary duty claims are barred by the applicable six-year statute of limitations, since respondents had "openly repudiated" all the fiduciary duties that petitioners allege they breached by no later than November 16, 2007, and petitioners did not commence this proceeding until December 2013 (*see* CPLR 213[1]; *Matter of Twin Bay Vil., Inc.*, 153 AD3d 998, 1001 [3d Dept 2017], *lv denied* 31 NY3d 902 [2018]; *Westchester Religious Inst. v Kamerman*, 262 AD2d 131 [1st Dept 1999]). Moreover, the open repudiation toll doctrine does not apply to the claims asserted for money damages (*Stern v Morgan Stanley Smith Barney*, 129 AD3d 619 [1st Dept 2015]).

With respect to the two rent-free dispositions of corporate properties, the doctrine of continuing wrong does not avail petitioners (*see Henry v Bank of Am.*, 147 AD3d 599, 601 [1st Dept 2017]). As of February 2007, petitioners knew of the two rent-free arrangements based on an investigation that was conducted by a Hong Kong Committee managing the affairs of Seng Ping Ling. Conceding that knowledge, petitioners contend that they were unaware that the rent-free arrangements would continue in the future. However, for each arrangement, a single decision was made to permit the property to be used gratis. The loss of corporate income was merely a continuing effect of the initial decision.

The continuing wrong doctrine is applicable to respondents' use of the disputed "special account." While respondents disclosed the formation of the special account and their intent to use corporate funds diverted thereto to pay expenses in related litigation in Hong Kong, those disbursements were not automatic consequences of the initial decision. Each payment of litigation expenses required a separate exercise of judgment and authority.

Nonetheless, petitioners waived any claims with respect to respondents' use of the special account to pay legal expenses (*see generally Silverman v Silverman*, 304 AD2d 41, 46 [1st Dept 2003]). The use of the special account for that purpose was addressed in a consent order in the Hong Kong litigation. A court-appointed independent trustee thereafter reviewed the matter and, in 2011, presented an accounting upon which all parties agreed. Petitioner David Seng acknowledged in a 2016 deposition that respondents' "use of [Cathay's] funds to pay for their personal legal fees" was "resolved" in that process.

However, unlike the claim related to legal expenses, respondents failed to demonstrate that petitioners knowingly and intentionally abandoned any claim with respect to use of the special account to lend $210,000 to Cathay Import. The loan was not expressly covered by the consent order, and it is not

expressly addressed in any of the independent trustee papers cited by respondents.

Nor are respondents entitled as a matter of law to the protection of the business judgment rule with respect to the Cathay Import loan. The transaction was affected by an inherent conflict of interest arising from respondents' control of the entities on either side; respondents failed to meet their burden to prove its fairness (*see Wolf v Rand*, 258 AD2d 401, 404 [1st Dept 1999]).

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

ENTERED: NOVEMBER 14, 2019

CLERK

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

10217 Kevin Frankel, etc., Index 654501/17
Plaintiff-Respondent-Appellant,

-against-

Board of Managers of the 392
Central Park West Condominium, et al.,
Defendants-Appellants-Respondents,

John Does, et al.,
Defendants.

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The 392 Central Park West Condominium,
Nominal Defendant-Appellant-Respondent.

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Boyd Richards Parker & Colonnelli, P.L., New York (Matthew T. Clark of counsel), for appellants-respondents.

Kevin Frankel, Respondent-appellant pro se.

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Order, Supreme Court, New York County (Robert R. Reed, J.), entered on or about July 27, 2018, which, to the extent appealed from as limited by the briefs, granted in part and denied in part defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

The motion court correctly declined to dismiss the cause of action seeking to inspect the condominium's books and records. Factual disputes regarding whether plaintiff is acting in good faith and has a proper purpose for reviewing the books and records, as well as the scope of documents already provided, whether in electronic form or otherwise, cannot be resolved on a

motion to dismiss (*see Pomerance v McGrath*, 143 AD3d 443, 446 [1st Dept 2016], *lv denied* 32 NY3d 913 [2019]).

The court also correctly declined to dismiss the cause of action seeking a declaration that the results of the 2017 board of managers election are null and void, as the redacted documents, standing alone, do not conclusively resolve the cause of action (CPLR 3211[a][1]). Plaintiff's central contention is that the election procedures in the bylaws were not followed, no quorum was established, and the election results are not valid. Defendants, relying on 85 redacted ballot proxies, claim that they have presented documentary evidence conclusively establishing a defense to plaintiff's claims (*see Carlson v American Intl. Group, Inc.*, 30 NY3d 288, 298 [2017]). The redacted ballots, however, do not qualify as "documentary" evidence that utterly refutes plaintiff's allegations (*see Amsterdam Hospitality Group, LLC v Marshall-Allan Assoc., Inc.*, 120 AD3d 431, 435 [1st Dept 2014]). Not only have the names, signatures and apartment numbers on these ballots been redacted, making it impossible to determine whether the individuals who voted were qualified to do so, but also some ballots are blank, the date on one ballot is obliterated, and one ballot is post-dated. They do not, on their face, support defendants' claim that 139 proxies were submitted before the annual meeting, and

127 of the unit owners purportedly voted for all three candidates. The 85 redacted proxies also do not, on their face, support defendants' claim that 139 proxies counted for purposes of establishing a quorum. Nor do they, on their face, comport with how the bylaws require a quorum to be calculated. Significantly, the bylaws do not allocate votes per unit owned, but do so according to the percentage ownership of the common elements. They fail to conclusively prove defendants' claims that they relied upon a voice vote at the meeting, or disprove plaintiff's allegation that more than one person from the same household voted in the voice vote. The incomplete, redacted proxies are insufficient to warrant dismissal of the 2017 election claims at this time.

The causes of action for breach of fiduciary duty, however, were correctly dismissed, as the complaint fails to allege wrongdoing independent of the individual defendants' conduct as board members (*see Avramides v Moussa*, 158 AD3d 499 [1st Dept 2018]).

The cause of action for a declaration that the annual parking fees must be set by a vote of the unit owners was also correctly dismissed. The complaint alleges that the monthly parking fees for the 103 parking spaces at the condo are set at an impermissibly low rate, by the board members, all but one of

whom has a parking spot. The claim is that the board members are self-dealing and conflicted because they benefit from keeping the fees artificially low, at the expense of more than 300 owners who do not have parking spots. Under the business judgment rule, a court's inquiry is "limited to whether the board acted within the scope of its authority under the bylaws . . . and whether the action was taken in good faith to further a legitimate interest of the condominium" (*Perlbinder v Board of Mgrs. of 411 E. 53rd St. Condominium*, 65 AD3d 985, 989 [1st Dept 2009][internal quotation marks omitted]).

Article V, section 20 of the condominium's bylaws provides that the board shall have the right to rent the parking spaces and set the rent for them. In setting these fees, the board was acting in accordance with powers conferred upon it under the bylaws. The business judgment rule protects the board's setting of parking rates (*see Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 536 [1990]). The fact that any individual board member has access to a parking spot, in the same way that any other building resident has or can seek the right to a parking spot, is not a financial interest that would support a claim of self-dealing. Plaintiff has otherwise failed to plead any facts countering the legitimacy of the board's exercise of authority, or supporting his claims of bad faith, fraud,

self-dealing, unconscionability, or other misconduct that would trigger further judicial inquiry (*see Skouras v Victoria Hall Condominium*, 73 AD3d 902, 904 [2d Dept 2010], *lv denied* 18 NY3d 808 [2012]).

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

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

ENTERED: NOVEMBER 14, 2019

CLERK

Richter, J.P., Webber, Gesmer, Oing, JJ.

10274 Sutton Animal Hospital PLLC, Index 652781/16
Plaintiff-Respondent,

-against-

D&D Development, Inc., et al.,
Defendants,

Joseph Gabriel, et al.,
Defendants-Appellants.

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Sinreich Kosakoff & Messina LLP, Central Islip (Michael Stanton of counsel), for Joseph Gabriel, AIA Architects, P.C., and Joseph Gabriel, appellants.

Byrne & O'Neill, LLP, New York (Thomas J. Cirone of counsel), for Sterling Engineering Services, P.C., appellant.

Fischer Porter & Thomas, P.C., New York (Noelle Robinson of counsel), for respondent.

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Order, Supreme Court, New York County (Debra A. James, J.), entered October 30, 2018, which, to the extent appealed from, upon defendants Joseph Gabriel, AIA, Architects, P.C., and Joseph Gabriel's and Sterling Engineering Services, P.C.'s motions to dismiss the complaint as against them, granted plaintiff leave to file a second amended complaint to plead a cause of action for negligent misrepresentation, unanimously reversed, on the law, without costs, and the grant to plaintiff of leave to amend vacated.

The motion court should not have sua sponte granted

plaintiff leave to file a second amended complaint to assert an unpleaded negligent misrepresentation claim in the absence of a cross motion and an accompanying proposed pleading (CPLR 3025[b]). The lack of a proposed pleading precludes meaningful review of the sufficiency of the allegations, including defendant's contention that such a claim is time barred (*see Crossbeat N.Y., LLC v LIIRN, LLC*, 169 AD3d 604 [1st Dept 2019]).

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

ENTERED: NOVEMBER 14, 2019

CLERK

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

10331 The People of the State of New York, Ind. 489/16
Respondent,

-against-

Ricardo Sullivan,
Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Dana B. Wolfe of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Brent Ferguson 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 (Bonnie G. Wittner, J.), rendered November 17, 2016,

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

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

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

ENTERED: NOVEMBER 14, 2019

CLERK

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

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

10332 Jose Goncalves, et al., Index 150847/15
Plaintiffs-Appellants,

-against-

New 56th and Park (NY) Owner, LLC, now known as 56th and Park (NY) Owner LLC, et al.,
Defendants-Respondents.

_____

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

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (John F. Watkins of counsel), for respondents.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered December 21, 2018, which denied plaintiffs' motion for partial summary judgment on the issue of liability on their cause of action pursuant to Labor Law § 240(1), unanimously reversed, on the law, without costs, and the motion granted.

Supreme Court correctly concluded that plaintiff Jose Goncalves's affidavit submitted in support of the motion should not be considered to the extent that it averred that he was struck by the entire chain hoist system, which contradicted his deposition testimony that he was struck only by the chain itself (*compare Capuano v Tishman Constr. Corp.*, 98 AD3d 848, 851 [1st Dept 2012]). However, the affidavit was consistent with his prior testimony that he was struck by the chain from above, and

the record contains no evidence to the contrary. Accordingly, plaintiffs demonstrated that the chain hoist system at issue failed, causing Goncalves to be struck by an object - either the chain hoist system or just the chain itself - from above, and thereby established their prima facie entitlement to summary judgment on the Labor Law § 240(1) claim (*see Barrios v 19-19 24th Ave. Co., LLC*, 169 AD3d 747 [2d Dept 2019]; *Castillo v 62-25 30th Ave. Realty, LLC*, 47 AD3d 865, 866 [2d Dept 2008]; *Micoli v City of Lockport*, 281 AD2d 881, 882 [4th Dept 2001]). Since defendants failed to raise a triable issue of fact in opposition, plaintiffs' motion should have been granted.

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

ENTERED: NOVEMBER 14, 2019

CLERK

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

10333 In re Anthony A.N.,
Petitioner-Appellant,

-against-

Kiddaly L.,
Respondent-Respondent.

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Leslie S. Lowenstein, Woodmere, for appellant.

_____

Order, Family Court, Bronx County (Tracey A. Bing, J.), entered on or about July 10, 2018, which, after a hearing, dismissed petitioner's family offense petition with prejudice, unanimously affirmed, without costs.

Petitioner failed to establish by a preponderance of the evidence that respondent committed the family offense of harassment in the second degree (Penal Law § 240.26)). There exists no basis to disturb the court's credibility determinations (*see Matter of Everett C. v Oneida P.*, 61 AD3d 489 [1st Dept 2009].

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

ENTERED: NOVEMBER 14, 2019

CLERK

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

10335 Marina Towers Associates, L.P., etc., Plaintiff-Respondent, Index 650086/14

-against-

Edward Shanchien Yu, Defendant-Appellant.

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Catherine Yu, Brooklyn, for appellant.

Kirschenbaum & Philips, P.C., Farmingdale (Ira R. Sitzer of counsel), for respondent.

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered on or about November 26, 2018, which denied defendant's motion to compel discovery and for sanctions, and granted plaintiff's cross motion for summary judgment, unanimously affirmed, without costs.

The affidavit of the vice president of plaintiff's managing partner, which stated that the documents attached to his affidavit were kept in the ordinary course of plaintiff's business and explained that they were necessarily kept in connection with keeping track of charges and credits in that business, was sufficient to support their admissibility as business records (*see* CPLR 4518).

The assignment of the lease by the original tenant/sub-landlord to plaintiff, and the subsequent lease between tenant-

sub-landlord plaintiff and landlord Battery Park City Authority, were sufficient to demonstrate that plaintiff was a successor and/or assignee to the original tenant/sub-landlord (*see Flamingo LLC v Wendy's Old Fashioned Hamburgers of New York, Inc.*, 2013 WL 416050 [SD NY Feb 4, 2013]). Because, by its terms, the guaranty of the sublease provided by defendant inured to the benefit of the original sub-landlord's successors and assignees, it inured to plaintiff's benefit.

In any event, plaintiff had already obtained two judgments for breach of the lease against the subtenant, in Civil Court. Defendant, who had personally guaranteed the sublease, was bound by those determinations (*see APF 286 Mad LLC v Chittur & Assoc. P.C.*, 132 AD3d 610 [1st Dept 2015], *lv dismissed* 27 NY3d 952 [2016]).

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

ENTERED: NOVEMBER 14, 2019

CLERK

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

10336-
10336A The People of the State of New York, Respondent,

SCI 689/13
8/15

-against-

Onandi Richards,
Defendant-Appellant.

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Janet E. Sabel, The Legal Aid Society, New York (Richard Joselson of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Robert C. McIver of counsel), for respondent.

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Order, Supreme Court, Bronx County (George R. Villegas, J.), entered on or about May 4, 2018, which denied defendant's CPL article 440 motion to vacate a judgment of conviction rendered January 30, 2015 and set aside the sentence, unanimously reversed, on the law, the judgment of conviction vacated, and the matter remanded for further proceedings. Appeal from judgment, same court and Justice, rendered January 30, 2015, convicting defendant, upon his plea of guilty, of robbery in the third degree, and sentencing him to a term of one to three years, unanimously dismissed, as academic.

The record of the hearing on defendant's CPL article 440 motion establishes that defendant was denied effective assistance of counsel in regard to immigration-related aspects of plea

negotiations (*see Padilla v Kentucky*, 559 US 356, 373 [2010]; *see also Lafler v Cooper*, 566 US 156, 162 [2012]). The hearing evidence demonstrated that defense counsel had no strategic reason for his failure to seek a sentence "that would result in same overall aggregate prison time for the defendant, but which would have resulted in no mandatory immigration consequences" (*People v Moore*, 141 AD3d 604, 606 [2d Dept 2016]; *see also People v Guzman*, 150 AD3d 1259, 1259-60 [2d Dept 2017]).

At the hearing, defense counsel candidly admitted that he did not know, at the time of defendant's plea, what an aggravated felony was, and that he mistakenly believed that defendant's prior youthful offender adjudication, which resulted in a violation of probation charge that was disposed of at the same time as the instant plea, already rendered him deportable. However, New York YO adjudications are not considered criminal convictions for purposes of immigration law (*Wallace v Gonzalez*, 463 F3d 135, 139, n 3 [2d Cir 2006]).

As a result, counsel focused primarily on ensuring that defendant did not serve extra time on the violation of probation, rather than on the immigration consequences of the plea. Accordingly, he did not attempt to obtain a sentence of less than one year on the third-degree conviction, which would have prevented it from being an aggravated felony, subjecting

defendant, who is in removal proceedings, to mandatory deportation (*see Moncrieffe v Holder*, 569 US 184, 187 [2013]; 8 USC §§ 1101[a][43][G], 1227[a][2][A][iii]). Counsel admitted that he had no strategic reason for not doing so; he simply did not know that defendant's negotiated sentence of one to three years rendered robbery in the third degree an aggravated felony, or that defendant's youthful offender adjudication did not render him deportable.

Because the People had agreed to the total prison time of one to three years to dispose of the robbery and the violation of probation, there was a reasonable probability that they would have agreed to a different, immigration-favorable disposition resulting in the same aggregate prison time (*see Lafler v Cooper*, 566 US at 163-164). Although the People had rejected an offer of one year on the robbery, defense counsel had not proposed a concurrent sentence of one to three years on the violation of probation. There was no evidence that the People actively sought defendant's deportation. Thus, as counsel testified, had he sought a 364-day sentence on the robbery conviction and a concurrent sentence of one to three years on the violation of probation, it would have resulted in the same aggregate sentence, and "would have solved everybody's problem."

Finally, defense counsel testified that although it was his

general practice to advise defendants of the immigration consequences of their pleas, he did not discuss the possibility of a disposition that would not render defendant deportable. Thus, when the court advised defendant that his guilty plea would subject him to deportation, and defendant then agreed to plead guilty, he did not know there was a way in which a disposition involving the same offenses and aggregate term could be structured to avoid deportation.

In light of this determination, we need not reach defendant's remaining arguments.

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

ENTERED: NOVEMBER 14, 2019

CLERK

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

10337 The People of the State of New York, Ind. 955/13
Respondent,

-against-

Marlon Lingo,
Defendant-Appellant.

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Christina A. Swarns, Office of the Appellate Defender, New York (Caitlin Glass 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 (James M. Burke, J.), rendered March 11, 2015, convicting defendant, upon his plea of guilty, of robbery in the first degree and attempted robbery in the first degree, and sentencing him to concurrent terms of seven years, unanimously affirmed.

The court properly denied defendant's suppression motion. The court properly determined that the People met their burden of proving, beyond a reasonable doubt, that defendant's statements to the police, made after receiving and waiving *Miranda* warnings, were voluntary under the totality of circumstances (*see generally Arizona v Fulminante*, 499 US 279, 285-288 [1991]; *People v Anderson*, 42 NY2d 35, 38-39 [1977]). There is no basis for disturbing the court's credibility determinations. Although defendant became sick during the questioning, he was taken to a

hospital, and there is nothing to indicate that he remained in any distress when the interview resumed after he returned. Rather than isolating this 18-year-old defendant from his mother, the police permitted him to call her. There is no evidence of undue delay or deception in this regard, and defendant's assertion that his mother might have brought an attorney into the case had the phone call been made at some earlier point in the interview is speculative. A detective's passing reference, even if inaccurate, to the possibility that there might be incriminating physical evidence did not render defendant's statements inadmissible (*see People v Tarsia*, 50 NY2d 1, 11 [1980]). We have considered and rejected defendant's remaining arguments regarding the statements.

The court providently exercised its discretion when it denied youthful offender treatment, particularly because defendant violated various terms of a plea agreement under which he could have earned such treatment, along with a lenient

sentence (*see e.g. People v Baptiste*, 116 AD3d 588 [1st Dept 2014], *lv denied* 24 NY3d 1081 [2014]). We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 14, 2019

CLERK

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

10338 Public Service Mutual Insurance Company, et al., Plaintiffs-Respondents, Index 652532/16

-against-

Nova Casualty Company, Defendant-Appellant.

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White and Williams LLP, New York (Rafael Vergara of counsel), for appellant.

Havkins Rosenfeld Ritzert & Varriale, LLP, New York (Richard Harms of counsel), for respondents.

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Order, Supreme Court, New York County (Gerald Lebovits, J.), entered April 23, 2018, which granted plaintiffs' summary judgment motion to declare that defendant Nova Casualty Company must defend and indemnify plaintiff Japas Enterprises, Inc. (Japas) in an underlying personal injury action on a sole primary basis, and denied defendant's cross motion for summary judgment for a contrary declaration, unanimously affirmed, without costs.

This declaratory judgment action stems from an underlying personal injury action in which the plaintiff alleged that she sustained injuries while walking on the stairs from the second floor restaurant to the ground floor. At issue is whether the stairwell area where the underlying accident occurred is covered by the additional insured clause in the policy procured by the

nonparty restaurant tenant of plaintiff landlord Japas. The nonparty tenant was insured by defendant Nova Casualty Company (Nova). Japas was insured by plaintiff Public Service Mutual Insurance Company (Public Service).

Coverage exists because the underlying claim arose out of the "maintenance or use" of the leased premises within the meaning of the additional insured clause. The accident occurred in the course of an activity incidental to the operation of the leased space and in an area of the premises that was used for access in and out of the leased space covered under the policy (*see 1515 Broadway Fee Owner, LLC v Seneca Ins. Co., Inc.*, 90 AD3d 436, 437 [1st Dept 2011]; *Jenel Mgt. Corp. v Pacific Ins. Co.*, 55 AD3d 313 [1st Dept 2008]). Nothing in the lease contradicts this definition of "use" under either policy. Nova's contention that the stairwell from the ground floor to the second floor was not part of the leased premises is without merit, as "the finding in the underlying personal injury action that the accident did not occur in the demised premises is not dispositive of the coverage issue" (*Paramount Ins. Co. v Federal Ins. Co.*, 174 AD3d 476, 477 [1st Dept 2019]). Accordingly, the motion court properly granted plaintiffs' motion seeking a declaration that Nova must defend and indemnify Japas in the underlying action.

Because all relevant policies are available for review, priority of coverage can be determined as a matter of law (*1515 Broadway Fee Owner*, 90 AD3d at 437). The language of the Public Service policy endorsement renders its coverage excess where Japas is named an additional insured under a policy issued to its tenant. Accordingly, Nova's policy is primary in the underlying action and Nova must reimburse Public Service for the costs and disbursements paid on Japas's behalf in the underlying action.

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

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

ENTERED: NOVEMBER 14, 2019

CLERK

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

10339 Ney Castillo, Index 305548/12
Plaintiff-Respondent,

-against-

Big Apple Hyundai,
Defendant,

Safeguard NY I LLC,
Defendant-Respondent.

- - - - -

Safeguard NY I LLC,
Third-Party Plaintiff-Respondent,

-against-

Red Hook Construction Group I LLC,
Third-Party Defendant-Appellant.

_____

Carol R. Finocchio, New York, for appellant.

Hach & Rose, LLP, New York (George W. Ilchert of counsel), for Ney Castillo, respondent.

McGaw, Alventosa & Zajac, Jericho (Andrew Zajac of counsel), for Safeguard NY I LLC, respondent.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about January 11, 2019, which, to the extent appealed from, granted defendant/third-party plaintiff Safeguard NY I LLC's motion for summary judgment on its claim against third-party defendant Red Hook Construction Group I LLC (Red Hook I) for contractual indemnification and conditionally granted the motion for summary judgment as to the claim for breach of

contract for failure to procure insurance, denied Red Hook I's motion for summary judgment dismissing those claims, and denied Safeguard NY I's motion for summary judgment dismissing as against it the Labor Law § 241(6) claim predicated on Industrial Code § 23-1.7(e)(2), unanimously modified, on the law, to the extent of denying Safeguard NY I's motion as against Red Hook I, and upon a search of the record, to grant Safeguard NY I's motion dismissing the Labor Law § 241(6) claim predicated on Industrial Code § 23-1.7(e)(2), and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint as against Safeguard.

This appeal centers on Red Hook I's contention that there was no operative written agreement between Safeguard NY I and Red Hook I governing plaintiff's demolition work, and even if there was, Red Hook I had no express written agreement to indemnify Safeguard NY I in connection with plaintiff's accident.

We agree with the motion court that the indemnification provision contained in the AIA Document A201™-2007 General Conditions of the Contract for Construction was expressly adopted by reference and made part of the contract documents (*see Liberty Mgt. & Constr. v Fifth Ave. & Sixty-Sixth St. Corp.*, 208 AD2d 73, 77-78 [1st Dept 1995]; *see generally Maines Paper & Food Serv., Inc. v Keystone Assoc., Architects, Engrs., & Surveyors, LLC*, 134

AD3d 1340, 1342 [3d Dept 2015]).

Summary judgment is not available, however, for either party as to the indemnification provisions because there are ambiguities in the written contracts regarding which of the Red Hook entities were engaged to do the operative work covered by the indemnification provisions (*Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 368 [2005]).

Since Industrial Code (12 NYCRR) § 23-1.7(e)(2) is inapplicable to this case, as the safe over which plaintiff tripped was integral to the work of removing debris from the premises, the Labor Law § 241(6) claim predicated on Industrial Code § 23-1.7(e)(2) should be dismissed (*see Solis v 32 Sixth Ave. Co. LLC*, 38 AD3d 389, 390 [1st Dept 2007]; *Smith v New York City Hous. Auth.*, 71 AD3d 985, 987 [2d Dept 2010]).

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

ENTERED: NOVEMBER 14, 2019

CLERK

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

10340 Mandeep Singh, Index 20334/16E
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

_____

Edelman & Edelman, P.C., New York (David M. Schuller of counsel), for appellant.

Litchfield Cavo LLP, New York (Dennis J. Dozis of counsel), for respondent.

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Order, Supreme Court, Bronx County (Llinet M. Rosado, J.), entered October 10, 2018, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff established prima facie entitlement to partial summary judgment on his Labor Law § 240(1) claim with his deposition testimony, photographic exhibits and expert's opinion, which showed that he fell from a 10-foot high sidewalk bridge that he was helping to assemble on defendant's property, when a pile of heavy wooden planks shifted and struck him on the legs, causing him to lose his balance. Plaintiff testified that the side barriers for the sidewalk bridge were not yet built, and he was not supplied with a safety harness to protect him from

gravity-related harm (*see generally Serrano v TED Gen. Contr.*, 157 AD3d 474 [1st Dept 2018]; *Tzic v Kasampas*, 93 AD3d 438 [1st Dept 2012]; *Morales v Spring Scaffolding, Inc.*, 24 AD3d 42 [1st Dept 2005]).

Defendant's argument that the deposition testimony and photographic evidence were inadmissible is unavailing. A movant's submission of its own deposition testimony is deemed to be an adoption of such testimony as accurate, and therefore admissible (*see* CPLR 3116[a]; *Franco v Rolling Frito-Lay Sales, Ltd.*, 103 AD3d 543 [1st Dept 2013]; *Rodriguez v Ryder Truck, Inc.*, 91 AD3d 935 [2d Dept 2012]). Moreover, plaintiff's submitted deposition transcript was certified, and defendant did not challenge its accuracy (*see e.g. Franco*, 103 AD3d at 543; *Arthur v Liberty Mut. Auto & Home Servs. LLC*, 169 AD3d 554 (1st Dept 2019), and, on reply, plaintiff submitted the missing authentications, with no showing by defendant that it had been prejudiced by the late submission. As for the photographic evidence, plaintiff's testimony at deposition that the photographic exhibits, and in particular respondent's photographic exhibit "B," reflected the sidewalk bridge in question, as well as the location where he fell, which he marked, and that the depicted sidewalk bridge barriers were not in place when he fell, adequately authenticated the photographs for

admissibility purposes (*see e.g. Cuevas v City of New York*, 32 AD3d 372, 373 ([1st Dept 2006]).

Defendant's argument that plaintiff's motion for partial summary judgment was premature where its expert opined that depositions of the contractor's personnel yet to be taken might yield evidence that plaintiff was supplied with a fall-arrest safety harness, and that he was recalcitrant in not using it, lacks factual support in the record, and as such, the expert's opinion in that regard is speculative and non-probative (*see generally Diaz v New York Downtown Hosp.*, 99 NY2d 542 [2002]). The mere hope that additional discovery may lead to sufficient evidence to defeat a summary judgment motion is insufficient to deny such a motion (*see Erkan v McDonald's Corp.*, 146 AD3d 466 [1st Dept 2017]; *DaSilva v Haks Engrs., Architects & Land Surveyors, P.C.*, 125 AD3d 480 [1st Dept 2015]). The record further shows that defendant had a reasonable opportunity to pursue discovery (*see generally McGlynn v Palace Co.*, 262 AD2d 116 [1st Dept 1999]), and defendant has not shown that it was diligent in pursuing discovery in this case (*see generally Voluto Ventures, LLC v Jenkens & Gilchrist Parker Chapin LLP*, 44 AD3d

557 [1st Dept 2007]; *Rodriguez Pastor v DeGaetano*, 128 AD3d 218, 228 [1st Dept 2015]).

For the foregoing reasons, defendant's submissions in opposition failed to raise a triable issue of fact.

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

ENTERED: NOVEMBER 14, 2019

CLERK

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

10341 In re Miguel L.,
Petitioner-Respondent,

-against-

Ashley J.L.,
Respondent-Appellant.

_____

Anne Reiniger, New York, for appellant.

The Bronx Defenders, New York (Miriam Mack of counsel), for respondent.

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

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Order, Family Court, Bronx County (David J. Kaplan, J.), entered on or about December 6, 2017, which denied respondent mother's motion to vacate an order, same court and Judge, entered upon her default, granting petitioner father sole physical and legal custody of the subject child, unanimously affirmed, without costs.

The Family Court providently exercised its discretion in denying respondent's motion to vacate her default, since she failed to demonstrate both a reasonable excuse for the default and a meritorious defense (*see* CPLR 5015[a][1]). There were unexplained ambiguities and glaring gaps in the documents submitted as to the exact dates of respondent's purported hospitalization, which failed to establish that she was unable to

appear in court on May 9, 2017. Respondent failed to submit an affidavit supporting her counsel's conclusory statements (*see Matter of Geoffrey Collin D. v Janelle Latoya A.*, 132 AD3d 438 [1st Dept 2015]), and counsel, not having represented respondent at the time, did not have firsthand knowledge (*see Matter of Samuel V.S. [Shamea L.]*, 89 AD3d 566 [1st Dept 2011]). Furthermore, respondent had a history of failing to appear at critical points during the proceedings (*see Matter of Mariah A. [Hugo A.]*, 109 AD3d 751, 752 [1st Dept 2013], *lv dismissed* 22 NY3d 994 [2013]), and waited five months before filing the motion to vacate, during which time the child had become acclimated to petitioner's care. While this Court need not reach the merits given respondent's failure to establish a reasonable excuse for her default (*see Matter of Ne Veah M. [Michael M.]*, 146 AD3d 673, 674 [1st Dept 2017]), respondent failed to set forth a meritorious defense.

To the extent respondent challenges the order granting the petition for custody, contending that the court erred in granting sole custody of the child to petitioner in light of his history of domestic violence, length of time the child lived with her, separation of siblings, joint custody and the child's wishes,

this issue is not properly before this Court as no direct appeal lies from an order entered on default (*see Matter of Madison Mia B. [Katherine Janet B.]*, 162 AD3d 547 [1st Dept 2018], *appeal dismissed* 33 NY3d 1057 [2019]).

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

ENTERED: NOVEMBER 14, 2019

CLERK

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

10342-
10342A The People of the State of New York,
Respondent,

-against-

Malik Layne,
Defendant-Appellant.

Ind. 2884/13

_____

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

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

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered March 31, 2015, convicting defendant, after a jury trial, of manslaughter in the first degree and two counts of criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 35 years, and judgment of resentence (A. Kirke Bartley, Jr., J.), rendered October 3, 2018, resentencing defendant to a term of 10 years on the second count of second-degree weapon possession, concurrent with the other sentences, unanimously affirmed.

The court providently exercised its discretion when, in response to the People's exception to the court's original justification charge, it added the principle of duty to retreat. The evidence presented a jury question regarding defendant's

ability to retreat safely, and the language employed by the court sufficiently conveyed the principle that the duty to retreat arose at the time defendant used deadly physical force (*see People v Gonzalez*, 38 AD3d 439, 440 [1st Dept 2007], *lv denied* 9 NY3d 865 [2007]). Defendant was not prejudiced by the timing of this instruction, particularly because defense counsel had already made summation arguments on the issue of duty to retreat.

Defendant did not preserve his remaining challenges to the court's instructions regarding justification, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. There was no reasonable view of the evidence to support an instruction on the justifiable use of nondeadly physical force (*see People v Marishaw*, 174 AD3d 401 [1st Dept 2019]). The charge, viewed as a whole, sufficiently instructed the jury that if it found that the justification defense had not been disproven, it was required to stop deliberations on all degrees of homicide (*see People v Velez*, 131 AD3d 129 [1st Dept 2015]).

We reject defendant's arguments regarding the sufficiency and weight of the evidence supporting his manslaughter conviction (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence supports the conclusions that defendant was not justified when he shot the unarmed victim, who had only tried to

punch defendant, and that defendant fired his pistol intentionally, with the intent to at least cause serious physical injury.

Upon granting defendant's CPL 440.20 motion, based on the original sentencing court's failure to pronounce the length of the concurrent sentence it was imposing on one of the weapon possession convictions, the resentencing court properly imposed sentence only on that conviction. Defendant was not entitled to a plenary resentencing (*see People v Lingle*, 16 NY3d 621, 634-35 [2011]), and the resentencing court properly imposed the 10-year term that the original sentencing court plainly intended to impose, as evinced by the commitment sheet, but neglected to pronounce orally. Furthermore, the resentencing court imposed a sentence on the count at issue that had no effect on the existing aggregate term.

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 14, 2019

CLERK

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

10343 Alberto Sanchez, Index 155420/14
Plaintiff-Respondent,

-against-

The Bet Eli Company Delaware LLC,
et al.,
Defendants-Appellants.

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Vigorito, Barker, Patterson, Nichols & Porter, LLP, Garden City (Adonaid C. Medina of counsel), for The Bet Eli Company Delaware LLC and Newmark & Company Real Estate, Inc., appellants.

Milber Makris Plousadis & Seiden, LLP, Woodbury (Lorin A. Donnelly of counsel), for Artisan Construction Partners LLC, appellant.

William Schwitzer & Associates, P.C., New York (D. Allen Zachary of counsel), for respondent.

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Order, Supreme Court, New York County (Robert David Kalish, J.), entered on or about January 18, 2019, which granted plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) cause of action, unanimously affirmed, without costs.

Partial summary judgment was properly granted in this action where plaintiff was injured when he fell from a scaffold. There is no dispute that the scaffold plaintiff was supplied with and directed to use lacked railings, and that he was not provided with any other safety devices (*see Celaj v Cornell*, 144 AD3d 590 [1st Dept 2016]; *Vergara v SS 133 W. 21, LLC*, 21 AD3d 279 [1st

Dept 2005]). Plaintiff was not required to show that the scaffold was defective (*see Ross v 1510 Assoc. LLC*, 106 AD3d 471 [1st Dept 2013]; *see also Kash v McCann Real Equities Devs.*, 279 AD2d 432 [1st Dept 2001]). In opposition, defendants failed to raise a triable issue of fact.

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

ENTERED: NOVEMBER 14, 2019

CLERK

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

10344 M.H.B., an Infant, by His Parents and Natural Guardians, C.B., et al., Plaintiffs-Respondents, -against- E.C.F.S., et al., Defendants-Appellants. Index 23518/18E

Bond, Schoeneck & King, PLLC, New York (Richard G. Kass of counsel), for appellants.

Norman A. Olch, New York, for respondents.

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered March 13, 2019, which denied defendants' CPLR 3211(a)(7) motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiffs, whose son attended defendant school, allege that, after they made complaints concerning race-related problems at the school and issues experienced by their biracial son, defendants retaliated against them by making a false report of child neglect to Child Protective Services (CPS). The complaint alleges with specificity that defendants had no good faith basis for making the CPS report, and that, despite defendant Head of School acknowledging that the reporter had gone "rogue" and not followed school protocol, defendants failed to comply with their

obligation to inform the CPS investigator that the allegations against the parents were untrue. Based on these allegations, plaintiffs assert causes of action for intentional infliction of emotional distress, defamation, violations of the New York State and City Human Rights Laws, and negligent hiring, training and supervision.

Defendants moved to dismiss all of these causes of action on the basis that plaintiffs would be unable to prove any of these claims because they did not know the identity of the CPS reporter and would be unable to learn it in discovery. They rely on the settled law that a mandated reporter is immune from liability for making a good faith child protective report, based on "reasonable cause" to suspect that the child might have been abused or neglected (*Villarin v Rabbi Haskel Lookstein School*, 96 AD3d 1, 6 [1st Dept 2012]; Social Services Law § 419). However, in the context of this motion to dismiss, the Court does not assess the relative merits of the complaint's allegations against defendant's contrary assertions or to determine whether or not plaintiffs can produce evidence to support their claims (*see e.g. Residence on Madison Condominium v W.T. Gallagher & Assoc.*, 271 AD2d 209, 210 [1st Dept 2000]). Whether plaintiffs "can ultimately establish [their] allegations is not a part of the calculus in determining a motion to dismiss" (*J.P. Morgan Sec.*

Inc. v Vigilant Ins. Co., 21 NY3d 324, 334 [2013], quoting *EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]). Thus, regardless of whether plaintiffs will be able to obtain disclosure concerning the identity of the CPS reporter (Social Services Law § 422[4][A]*; see DeLeon v Putnam Valley Bd. of Educ.*, 228 FRD 213 [SD NY 2005]; *Selapack v Iroquois Cent. Sch. Dist.*, 17 AD3d 1169 [4th Dept 2005]), defendants have not demonstrated entitlement to dismissal of the well-pleaded complaint for failure to state a cause of action (*see Oglesby v Eikszta*, 2007 WL 1879723, *5 [ND NY 2007]). Moreover, contrary to defendants' contention, it is not clear that plaintiffs would require the name of the reporter in order to prevail on all of their causes of action or that the circumstantial evidence will be insufficient to support their claims.

Plaintiffs also assert a cause of action for libel based on an email sent to the entire school community by defendant Head of School. The motion court properly denied defendants' motion to dismiss this claim, finding that the contested statements are reasonably susceptible of a defamatory connotation (*Armstrong v Simon & Schuster*, 85 NY2d 373, 380 [1995]; *Aronson v Wiersman*, 65 NY2d 592, 593-594 [1985]), and that the letter does not contain only nonactionable opinions, but "mixed" statements of fact and opinion, which imply they are based upon facts that justify the

opinion but are unknown to the listener or reader (*Steinhilber v Alphonse*, 68 NY2d 283, 289-290 [1986]; *see Davis v Boeheim*, 24 NY3d 262, 273 [2014]).

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

ENTERED: NOVEMBER 14, 2019

CLERK

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

10345 The People of the State of New York, Ind. 1190/16
Respondent,

-against-

Luis Fajardo,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (David A. Slott of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Albert Lorenzo, J.), rendered November 14, 2017, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree (two counts) and criminal possession of a controlled substance in the fourth and seventh degrees, and sentencing him, as a second felony drug offender, to an aggregate term of two years, unanimously affirmed.

Defendant's argument that his plea should be vacated in the event of this Court's reversal of a separate conviction has been rendered academic by our affirmance of that conviction (__AD3d__, 2019 NY Slip Op 07324 [1st Dept 2019]).

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

ENTERED: NOVEMBER 14, 2019

CLERK

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

10347 Derek Wortham, Index 155686/17
Plaintiff-Respondent,

-against-

The Port Authority of New York
and New Jersey,
Defendant-Appellant,

Skanska USA Inc., et al.,
Defendants.

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The Port Authority Law Department, New York (Allen F. Acosta of counsel), for appellant.

Law Offices of Stefano A. Filippazzo, P.C., Brooklyn (Louis A. Badolato of counsel), for respondent.

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Order, Supreme Court, New York County (Gerald Lebovits, J.), entered May 30, 2018, which denied the motion of defendant Port Authority to dismiss the claim as against it alleging violations of Labor Law §§ 240(1), 241(6) and § 241-a, unanimously affirmed, without costs.

"The Port Authority is an interstate compact agency and as such is not subject to New York legislation governing 'internal operations'. . . unless both New York and New Jersey have enacted legislation providing that the same is applicable to the Port Authority" (*Matter of Lopez v Port Auth. of N.Y. & N.J.*, 171 AD3d 500, 501 [1st Dept 2019]). "However, the Port Authority, 'albeit bistate, is subject to New York's laws involving health and

safety, insofar as its activities may externally affect the public'" (*id.*, quoting *Matter of Agesen v Catherwood*, 26 NY2d 521, 525 [1970]). More particularly, courts have repeatedly held that the Port Authority is subject to New York Labor Law (*see e.g. O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27 [2017]; *Nolan v Port Auth. of N.Y. & N.J.*, 162 AD3d 488 [1st Dept 2018]; *Jerez v Tishman Constr. Corp. of N.Y.*, 118 AD3d 617 [1st Dept 2014]; *Verdon v Port Auth. of N.Y. & N.J.*, 111 AD3d 580 [1st Dept 2013]; *Sferrazza v Port Auth. of N.Y. & N.J.*, 8 AD3d 53 [1st Dept 2004]).

Contrary to the Port Authority's interpretation of *Matter of Malverty v Waterfront Commn. of N.Y. Harbor* (71 NY2d 977 [1988]), the Court of Appeals did not, in that case, overrule its holding in *Agesen*.

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

ENTERED: NOVEMBER 14, 2019

CLERK

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

10348 In re Deyanira Nunez, Index 101332/17
Petitioner,

-against-

Shola Olatoye, etc., et al.,
Respondents.

_____

Mobilization For Justice, Inc., Bronx (Emilio Paesano of counsel), for petitioner.

Kelly D. MacNeal, New York City Housing Authority, New York (Andrew M. Lupin of counsel), for respondents.

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Determination of respondents, dated May 26, 2017, which, after a hearing, terminated petitioner's public housing tenancy, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Carmen Victoria St. George, J.], entered February 23, 2018) dismissed, without costs.

Substantial evidence supports respondents' findings that petitioner's ex-boyfriend was an unauthorized occupant of her apartment, that petitioner likely knew of his drug-related criminal activities, and that she installed a hidden camera for use in determining whether police were conducting surveillance (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 179-180 [1978]).

The penalty is not so disproportionate to the offense as to

shock one's sense of fairness (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974]; 24 CFR 966.4[1][5][i][B], [vii][B]).

We decline to reach petitioner's due process arguments, because the charges at issue were not sustained.

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

ENTERED: NOVEMBER 14, 2019

CLERK

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

10349 Anson Barrow, Index 161761/15
Plaintiff-Respondent,

-against-

Hudson Meridian Construction
Group, LLC, et al.,
Defendants-Appellants.

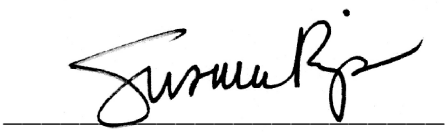
_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Robert D. Kalish, J.), entered on or about December 11, 2018,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated October 21, 2019,

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

ENTERED: NOVEMBER 14, 2019



CLERK

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

10350N-
10350NA In re 215-219 West 28th Street Mazal Owner LLC, et al.,
Petitioners-Appellants,

215-219 West 28th Street Mazal Manager LLC, et al.,
Petitioners,

-against-

Citiscape Builders Group Inc. doing business Citiscape Builders Group,
Respondent-Respondent.

Index 652779/19

_____

Andrea Lawrence, New York, for 215-219 West 28th Street Mazal Owner LLC, appellant.

Morrison & Foerster LLP, New York (Lena H. Hughes of counsel), for 213-227 West 28th LLC, 215 West 28th Street Property Owner LLC and 225 West 28th Street Property Owner LLC, appellants.

Smith, Gambrell & Russell, LLP, New York (Michael R. Glanzman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Andrea Masley, J.), entered May 21, 2019, which, insofar as appealed, denied the petition of 215-219 West 28th Street Mazal Owner LLC (Mazal Owner), 215 West 28th Street Property Owner LLC (215 Property Owner), 225 West 28th Street Property Owner LLC (225 Property Owner) and 213-227 West 28th Street LLC (213-227 West) (together, the non-signatory petitioners) for a permanent stay of

arbitration, without prejudice, so that the issue could be decided by the arbitrator in arbitration, unanimously reversed, on the law, without costs, and the matter remanded to the IAS court for a hearing to determine the threshold issue of whether the non-signatory petitioners are bound by the arbitration agreement. Appeal from the so-ordered transcript granting the same relief as the order, unanimously dismissed, without costs, as subsumed in the appeal from the order.

The issue of whether a party is bound by an arbitration provision in an agreement it did not execute is a threshold issue for the court, not the arbitrator, to decide (*see Matter of County of Rockland [Primiano Constr. Co.]*, 51 NY2d 1, 7 [1980]). The case is remanded to the IAS court for an evidentiary hearing and further factual development on whether the non-signatory petitioners were bound to the arbitration clause (*see Rosplock v Upstate Mgt. Assoc., Inc.*, 108 AD3d 825, 827 [3d Dept 2013]; *see also Matter of Rural Media Group, Inc. v Yraola*, 137 AD3d 489, 490 [1st Dept 2016]).

The cases respondent relies upon in opposition do not change the result. Respondent's cases do not involve situations where there was a dispute as to whether the party sought to be bound to arbitrate had signed the agreement containing the arbitration clause (*see e.g. Matter of Monarch Consulting, Inc. v National*

Union Fire Ins. Co. of Pittsburgh, PA, 26 NY3d 659, 675-676 [2016]; *Garthon Bus. Inc. v Stein*, 30 NY3d 943, 944 [2017]).

While respondent makes extensive arguments as to why the non-signatory petitioners were effectively parties to the agreement and thus bound by the arbitration clause, these arguments are not relevant. The IAS court did not come to a definitive ruling as to whether the non-signatory petitioners were bound by the arbitration agreement, and instead denied the petition without prejudice so that it could be decided by the arbitrator. Absent a ruling on the issue, the only question to be addressed by this Court is whether the IAS court properly declined to do so.

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

ENTERED: NOVEMBER 14, 2019

CLERK

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

10351N Nakia Neely, Index 29170/17
Plaintiff-Respondent,

-against-

Scott A. Felicetti, et al.,
Defendants-Appellants.

_____

Law Office of Jason Tenenbaum, P.C., Garden City (Jason Tenenbaum of counsel), for appellants.

Jones, Wolf & Kapasi, LLC, New York (Benjamin J. Wolf of counsel), and Jaffe & Velazquez, LLP, New York (R. Diego Velazquez of counsel), for respondent.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about January 24, 2019, which, in this action alleging, inter alia, legal malpractice, denied defendants' motion to vacate the default judgment entered against them, unanimously affirmed, with costs.

Defendants' motion to vacate the default judgment entered against them was properly denied. Defendants' explanation that their October 20, 2017 email forwarding plaintiff's summons and complaint to their counsel was not received may explain their failure to timely answer (*see Matter of Rivera v New York City Dept. of Sanitation*, 142 AD3d 463, 464 [1st Dept 2016]). However, defendants failed to explain their continued failure to answer the complaint, or why they did not submit opposition to

plaintiff's motion for a default judgment despite their acknowledgment that they received it. Nor did they seek vacatur of the default judgment until more than nine months after it was entered (*see Hertz Vehs. LLC v Westchester Radiology & Imaging, PC*, 161 AD3d 550 [1st Dept 2018]). Defendants' claim that the parties were engaged in settlement negotiations is not a reasonable excuse for their default (*see Flora Co. v Ingilis*, 233 AD2d 418, 419 [2d Dept 1996]).

In view of the foregoing, this Court need not consider whether defendants demonstrated a potentially meritorious defense to the action (*see Colony Ins. Co. v Danica Group, LLC*, 115 AD3d 453, 454 [1st Dept 2014]).

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

ENTERED: NOVEMBER 14, 2019

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Dianne T. Renwick, J.P.
Sallie Manzanet-Daniels
Jeffrey K. Oing
Anil C. Singh, JJ.

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The People of the State of New York,
Respondent,

-against-

Tysheem McGregor,
Defendant-Appellant.
_____x

Defendant appeals from a judgment of the Supreme Court, New York County (Robert M. Stolz, J.), rendered December 11, 2017, convicting him, after a jury trial, of attempted murder in the second degree, assault in the first degree, criminal possession of a weapon in the second degree (two counts), and conspiracy in the second and fourth degrees, and imposing sentence.

Debevoise & Plimpton LLP, New York (Joshua Cohen, Tara Raam, Colby A. Smith and Jil Simon of counsel), for appellant.

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

RENWICK J.

In this appeal, we must consider whether a juror's misconduct during jury deliberations deprived defendant of his right to a fair trial, and thus whether Supreme Court abused its discretion in denying defendant's postverdict motion to vacate the judgment of conviction. Specifically, a juror, who was admittedly attracted to a People's witness, sought to develop a relationship with that witness during jury deliberations. For the following reasons, we find that this juror misconduct did deprive defendant of a fair trial, and that Supreme Court abused its discretion as a matter of law when it denied defendant's motion to vacate pursuant to CPL 330.30(2). Accordingly, we now grant the motion to vacate the judgment and remand the matter for a new trial.

Defendant was charged with several counts of conspiracy, attempted murder in the second degree (four counts), and related offenses. The indictment alleged that, between May 2014 and June 2016, defendant, along with 19 others, was a member of an East Harlem street gang known as East Army and sought to assert control over gang territory by means including shootings, assaults, and firearms possession and trafficking. The substantive counts charged against defendant related to four shooting incidents, which took place on May 5, June 22, August 6,

and December 21, 2015.

One of the witnesses for the People testified that he was a member of a rival gang and was testifying against defendant as part of a cooperation agreement. He identified defendant as a member of East Army, although he admitted that he had only interacted with defendant three or four times, never spoke with him, and knew him mostly from his music videos, as well as "house parties and a couple of fights." He also identified defendant in surveillance video from the June 22nd incident.

After a six-week trial, which included testimony from nearly 100 witnesses, the jury found defendant guilty on the substantive counts related to the December 21st incident, as well as the conspiracy charges, but acquitted him of the substantive counts related to the remaining three incidents.

After the verdict, but before sentencing, the cooperating witness informed the prosecutor that he had been corresponding with one of the jurors (Juror No. 6), who was currently visiting him in jail. Thereafter, on July 27, 2017, Juror No. 6 sent the prosecutor a letter requesting that the witness's sentence be reduced in view of his cooperation. On August 30, 2017, the witness wrote to the court, asking its assistance in obtaining a marriage license to marry Juror No. 6.

At a hearing on September 7, 2017, the prosecutor shared the

results of her investigation into the relationship between the witness and Juror No. 6. The prosecutor determined that, on June 26, 2017, the juror sent a letter to the witness in jail. The juror stated that she was a juror in defendant's case, that she "fe[lt] for" the witness, that "seeing [him] and hearing [him] up there on the stand made [her] feel some type of way," and that she would like to write or speak to him, and included her phone number. The prosecutor represented that she had retrieved the witness's phone records from jail, which reflected that he had called Juror No. 6 on July 4th but the call was not accepted, and that it was not until after the verdict was reached that they were able to connect.

A CPL 330.30 hearing was held, at which both the witness and Juror No. 6 testified. The witness affirmed that he did not know Juror No. 6 before the trial, that the letter was the first contact he had with her, and that he was not able to get through when he called her on July 4th. He further testified that he and Juror No. 6 now talked 3 to 4 times a day and he had received approximately 50 letters from her.

Juror No. 6 testified that she was inspired to write to the witness because she "felt bad for someone who really did try to change their life and then their history caught up" and "obviously there was a physical attraction." The juror further

testified that she was aware that she was not supposed to "reach out to anybody that is in the trial," but "wasn't even thinking about any of that at that moment" because she was "just being a human being making a mistake."

Juror No. 6 explained that she missed the witness's call on July 4th, but knew from the voicemail that it was from him. However, she was not able to figure out how to call back until a couple of days later.

The juror testified that she did not communicate with any of the jurors about the witness. When asked whether she understood the witness's testimony to be adversarial to defendant, she responded, "In a way. I just didn't see it like that because to me his whole testimony was like irrelevant to Tysheem's trial."

After the hearing, defendant formally moved to set aside the verdict pursuant to CPL 330.30(2) on the ground of juror misconduct. The motion court denied the motion, holding that while the juror's conduct was "unwise," it was "not of the kind which may have [a]ffected the fairness of the proceeding or a substantial right of the defendant." We disagree.

CPL 330.30(2) authorizes a court to set aside a verdict on the ground of juror misconduct that "may have affected a substantial right of the defendant" and "was not known to the defendant prior to the rendition of the verdict." If juror

misconduct of the kind outlined in CPL 330.30(2) is found, the court is not to engage in a separate harmless error analysis (*see People v Estella*, 68 AD3d 1155, 1158 [3d Dept 2009]; *see also People v Crimmins*, 36 NY2d 230, 238 [1975]). However, "[a]bsent a showing of prejudice to a substantial right," CPL 330.30(2) is not implicated in the first place. As such, "[e]ach case must be examined on its unique facts to determine the nature of the misconduct and the likelihood that prejudice was engendered" (*People v Irizarry*, 83 NY2d 557, 561 [1994] [internal quotation marks omitted]; *see also People v Southall*, 156 AD3d 111, 118-119 [1st Dept 2017], *lv denied* 30 NY3d 1120 [2018]).

Both the state and federal constitutions guarantee the accused the right to a fair and "impartial jury" (*People v Johnson*, 94 NY2d 600, 610 [2010]; *People v Blyden*, 55 NY2d 73, 76 [1982]; *People v Branch*, 46 NY2d 645, 652 [1979] ["protections afforded the accused at trial are of little value unless those who are called to decide the defendant's guilt or innocence are free of bias"]; *Irvin v A.F. Dowd*, 366 US 717 [1961] [right to a fair and impartial jury is at the core of due process]). As the Court of Appeals recently reminded us in *People v Neulander*, "nothing is more basic to the criminal process than the right of an accused to a trial by an impartial jury" (__NY3d__, __ [2019], NY Slip Op 07521 *1, quoting *People v Branch*, 46 NY2d at 652

[1979]). Moreover, "the public at large" has a "concomitant right . . . that the jury appear to be impartial" (*People v Hartson*, 160 AD2d 1046, 1048 [3d Dept 1990]).

Juror misconduct includes both "actual bias" and "implied bias." Despite its name, "actual" bias merely requires proof of "a state of mind" that is "likely" to preclude a juror from rendering an impartial verdict (*People v Torpey*, 63 NY2d 361, 365 [1984] [internal quotation marks omitted]). Under CPL 270.20(1)(b), "[a]ctual bias. . . is not limited . . . to situations where a prospective juror has formed an opinion as to the defendant's guilt" (*Torpey*, 63 NY2d at 366). It may be demonstrated where a prospective juror's conduct indicates her inability to follow the court's instructions.

"Implied bias" exists where a juror "bears some ... relationship to any such person [defendant, witness, prosecution] of such nature that it is likely to preclude [the juror] from rendering an impartial verdict" (CPL 270.20[1][c]; *People v Branch*, 46 NY2d at 649-650). "[T]he frequency of contact and nature of the parties' relationship are to be considered in determining whether disqualification is necessary" (*People v Furey*, 18 NY3d 284, 287 [2011).

Implied bias "requires automatic exclusion from jury service regardless of whether the prospective juror declares that the

relationship will not affect [his or] her ability to be fair and impartial" (*People v Furey*, 18 NY3d at 287; *People v Rentz*, 67 NY2d 829 [1986] [juror's statement at posttrial hearing that relationship did not affect his impartiality is ineffective]).

Here, there was both actual and implied bias. The misconduct by Juror No. 6 was willful and blatant - the juror was admittedly attracted to the witness, a cooperating witness testifying on behalf of the People, and sought to develop a relationship with him while jury deliberations were still underway - even though she knew this was not permitted. The juror knew during deliberations that the witness had tried to call her back, suggesting that the interest was mutual, and the juror is now in a very serious relationship with the witness and seeks to marry him. Although the juror denied that her feelings about the witness affected her thinking about defendant, she was at least arguably more likely to credit his testimony and could subconsciously have sought to aide the side with which the witness was aligned (*see People v Rentz*, 67 NY2d at 831).

Indeed, in *People v Southall* (156 AD3d 111 [1st Dept 2017], this Court granted a CPL 440.10(1)(f) motion to vacate a conviction due to a juror's misconduct in an analogous situation. *Southall* involved "[i]mproper and prejudicial conduct" in the form of a juror's failure to reveal during jury selection that

she had submitted an application to work for the District Attorney's office. This Court found that actual bias could be inferred from the juror's concealment of this information, notwithstanding her subjective belief that the pending application had no impact on her decision (*id.* at 121-122). The Court also found that the juror had an implied bias, as her job application "created a relationship between her and the DA's office, which raised a high likelihood that she would be inclined to favor the People" (*id.* at 123-124).

The instant case is similar to *Southall* in that both cases involved an as-yet unanswered request to create some type of relationship (either romantic or professional) with the prosecution or a prosecution witness. The juror's knowledge that she was seeking a relationship with a witness who was testifying against defendant and in favor of the People created a disposition in favor of the People, which was "likely to preclude [her] from rendering an impartial verdict" (CPL 270.20[1][c]). As this Court held in *Southall,* the juror's assertions of impartiality were irrelevant because her bias was incurable, and therefore, the defendant's right to a fair trial before an impartial jury had been violated (*id.* at 124).

The People contend that the juror's misconduct was obviated by the fact that, even without the witness's testimony, the case

against defendant was overwhelming. Recently, in *People v Neulander*, the Court of Appeals rejected a similar argument with regard to a misconduct by a juror who engaged in improper communications during trial. In *People v Neulander* (__NY3d__, __, 2019 NY Slip OP 07521 *3), the juror misconduct, disregarding the court's plentiful instructions as to outside communications, was exacerbated when the juror was examined by the court about the breadth of her outside communications and was repeatedly and deliberately untruthful about the scope of that misconduct. The People contended that however egregious the misconduct was, it was "significantly outweighed by the substantial proof of guilt presented at trial." The Court of Appeals categorically rejected such argument because "'[t]he right to a fair trial is self-standing and proof of guilt, however overwhelming, can never be permitted to negate this right'" (__NY3d__, __, 2019 NY Slip OP 07521 *3, quoting *People v Crimmins*, 36 NY2d at 238) and "'[t]he public at large is entitled to the assurance that there shall be full observance and enforcement of the cardinal right of a defendant to a fair trial'" (*id.*). The same concerns apply to this case where equally egregious juror misconduct undermined defendant's right to a fair trial before an impartial jury.

Finally, the verdict was not legally insufficient or against the weight of the evidence, and there is thus no basis for

dismissal of the indictment. Since we are reversing the judgment and ordering a new trial, and granting the motion to vacate, we need not reach defendant's remaining arguments.

Accordingly, the judgment of the Supreme Court, New York County (Robert M. Stolz, J.), rendered December 11, 2017, convicting defendant, after a jury trial, of attempted murder in the second degree, assault in the first degree, criminal possession of a weapon in the second degree (two counts), and conspiracy in the second and fourth degrees, and sentencing him to an aggregate term of 15 years, should be reversed, on the law, and the matter remanded for a new trial.

All concur.

Judgment Supreme Court, New York County (Robert M. Stolz, J.), rendered December 11, 2017, reversed, on the law, and the matter remanded for a new trial.

Opinion by Renwick, J. All concur.

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

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

ENTERED: NOVEMBER 14, 2019

CLERK