SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 21, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

10135 The People of the State of New York, Ind. 1563/15
Appellant,

-against-

Anthony Lora,
Defendant-Respondent.

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Darcel D. Clark, District Attorney, Bronx (Paul A. Andersen of counsel), for appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Jan Hoth of counsel) and Milbank LLP, New York (Will B. Denker of counsel), for respondent.

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Order, Supreme Court, Bronx County (Ralph Fabrizio, J.), entered on or about December 6, 2017, which granted defendant’s speedy trial motion and dismissed the indictment, reversed, on the facts, and the matter remanded for consideration of defendant’s CPL 30.30 motion.

Under all the circumstances, the court improvidently exercised its broad discretion over calendar matters when it refused to accept the People’s untimely opposition papers and refused to reconsider its decision to grant defendant’s motion as unopposed. Defendant was arrested on May 13, 2015 and arraigned on a felony complaint. He was indicted five days later on

charges of criminal possession of a weapon in the second degree (Penal Law § 265.03[3]) and criminal possession of a firearm (Penal Law § 265.01-b[1]), both felonies, as well as a misdemeanor, criminal possession of weapon in the fourth degree (Penal Law § 265.01[1]). The indictment was filed on June 3, 2015. The People assert that they filed and served a statement of readiness on June 4, 2015. Defendant was arraigned on the indictment 13 days later, on June 17, 2015.

Thereafter, there were adjournments for motion practice, a motion by the People to compel the production of DNA evidence, an adjournment for defendant to obtain new counsel, and adjournments due to defendant's failure to appear, which ultimately resulted in a bail jumping indictment. During this period of approximately two years, there were periods when the People stated that they were ready to proceed to trial as well as periods when they stated that they were not ready to proceed.

On or about October 30, 2017, defendant moved pursuant to CPL 30.30(1)(a) and 210.20(1)(f) to dismiss the indictment on speedy trial grounds, arguing that more than six months chargeable to the People had elapsed since the commencement of the action. The People's opposition papers were due November 21, 2017, and the case was adjourned to December 6, 2017 for the court's decision on the motion. The People did not file any

opposition until December 6, 2017, the same day the matter had been calendared for decision. That the People failed to request an extension to file their response is undisputed. However, defense counsel acknowledges that the assigned Assistant District Attorney contacted him prior to the date for response and informed him that he would be requesting an adjournment. The contact was by text message with the Assistant requesting counsel's email so he could email the court and request an extension of time. The People do not argue, as suggested by the dissent, that they thought they had included the court in an email requesting an adjournment. Rather, they concede that while apparently inadvertent, no request for an adjournment was made to the court.[1]

When the parties appeared in court on December 6, 2017, defense counsel informed the court that the assigned Assistant District Attorney had advised him that the People's opposition papers had been filed that day. However, neither the court nor defense counsel had received a copy of the opposition papers.

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[1]While the dissent points to a statement by the judge in the transcript of the December 6, 2017 proceedings that he had made it "very clear if the DA needs more time they can't come in on the day of the decision and say, I need more time," it is unclear as to when and specifically to whom this was made very clear. Additionally, it is somewhat of a stretch to refer to this statement as a court rule.

The court responded, “I have a decision. I have no response. It’s granted on default.”

The court explained that “when the case is on for decision and I have to write a decision and I hear nothing, my assumption is the DA is conceding the 30.30 and why would I hold up writing a decision if I don’t have any reason. I can’t operate in the dark on this and no Court should ever have to operate that way.”

When asked by the court if he had received a copy of the response, defense counsel stated that he had seen the assigned Assistant that day and was informed that the Assistant was on trial but that the response had been filed that day and a copy would be handed to him in court. Later in the colloquy with the court, defense counsel related the prior text message communication with the assigned Assistant. The court stated that it did not have a copy of the response and had completed the decision the night before after not having any contact with the Assistant District Attorney. The court noted that the motion had been pending since October 2017 and there had not been any contact with the People.

Prior to setting an adjourn date for the bail jumping indictment, the People asked for time to file a motion to reconsider the CPL 30.30 dismissal of the indictment. The People also asked that the court accept the late filing of the

opposition to defendant's CPL 30.30 motion. The court denied both applications by the People.

In its written decision, dated December 6, 2017, the court stated that defendant had identified 204 days that the People were not ready for trial, and by failing to respond, the People had failed to meet their burden to contest the allegations. The court also noted that the People had failed to indicate prior to the decision date that they needed additional time to respond.

Clearly, trial courts have considerable discretion in administering litigation and managing their dockets (*People v Brewer*, 91 NY2d 999 [1998]). We agree with the dissent that parties are obligated to honor court-imposed deadlines. However, it is also axiomatic that justice is best served when cases are decided on the merits. Indeed, in *People v McCann* (149 AD2d 814, 815 n 2 [3d Dept 1989], *lv denied* 74 NY2d 747 [1989], 74 NY2d 743 [1989]), the Third Department, while acknowledging that it was "disturbed by the extreme tardiness in the People's service of their affirmation in opposition," nonetheless concluded that the motion court had not abused its discretion in accepting and considering the late filing by the People.[2]

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[2] In *McCann*, the Court specifically distinguished *People v Cole* (73 NY2d 957 [1989]), noting that in *Cole*, the People failed to submit any opposition papers (149 AD2d at 815 n 2).

Here, the People sought to file their opposition papers on the decision date, some 15 days after the due date. This was not the situation in *People v Cole*, 73 NY2d 957 [1989], which was cited by the motion court, where the People failed to submit any opposition papers. Further, there is nothing in the record to suggest that there was any history of dilatory conduct or a blatant disregard of court directives on the part of the People. Rather, this appears to be an isolated lapse.

While we are certainly cognizant of the frustration occasioned by the failure of the People to adhere to the motion schedule, summarily granting the defense motion to dismiss without considering the merits of the response the People had prepared was improper. As the People argue, the charges here are serious. Defendant was indicted on numerous weapons possession charges. Dismissal of those charges without a full and complete determination of the motion to dismiss on its merits was unduly harsh. Less drastic remedies, including charging the People for the 15-day delay, were available (*see People v Commack*, 194 AD2d 619 [2d Dept 1993]). As was noted by the Court of Appeals,

> “[N]ot every postreadiness default by the People not generated by exceptional circumstances or resulting from action of the defendant will permit a Trial Judge to dismiss the criminal action. There is no inherent power to dismiss and the purposes motivating enactment of CPL 30.30 do not mandate posteadiness dismissal when a lesser sanction is available (*People v Anderson*, 66 NY2d 529, 537 [1985] [internal citation omitted]).”

Further, the additional time that would have been necessary for a full determination of the motion by the court would not have resulted in any prejudice to defendant, as he was not incarcerated on the weapons indictment and was awaiting trial on the bail jumping indictment.

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

ACOSTA, P.J. (dissenting)

I dissent because in order for trial parts to function effectively, parties are obligated to honor court-imposed deadlines (*see Miceli v State Farm Mut. Auto Ins. Co.*, 3 NY3d 725, 726 [2004] [deadlines "are not options, they are requirements, to be taken seriously by the parties"]). Concomitantly, "[t]rial courts have considerable discretion in administering litigation and in managing their dockets" (*People v Brewer*, 91 NY2d 999, 1000 [1998]). Here, the court, in the proper exercise of its discretion, advised the parties that it would not entertain a request for an extension of time for a response to a motion if the request was made on the date designated for decision on the motion. Specifically, December 6, 2017, the court stated, "I made it very clear that I do not, on the day that a decision is on, I make it very clear if the DA needs more time they can't come in on the day of the decision and say, I need more time." Significantly, neither party disputed this statement.[1] Notwithstanding the court's rule, the People

[1] The majority makes light of this statement by asserting that "it is unclear as to when and specifically to whom this was made very clear." As noted above, however, neither party disputed this statement. The majority also claims that it is a "stretch to refer to this statement as a court rule." I am baffled by this argument. Although it may not be a rule codified in a rule book, in the motion judge's part, it certainly was his rule.

sought to respond to defendant's CPL 30.30 motion 15 days late, on the date designated by the court for a decision on the motion. In my opinion, the People defaulted on the motion, and accordingly, the court properly dismissed the indictment (*People v Cole*, 73 NY2d 957 [1989).

Defendant was arrested on May 13, 2015 and arraigned on a felony complaint. He was indicted five days later on felony weapons charges. The indictment was filed June 3, 2015, and the People assert that they filed and served a Statement of Readiness on June 4, 2015.[2] Defendant was arraigned on the indictment 13 days later, on June 17, 2015. Thereafter, there were multiple adjournments for various reasons.

On or about October 30, 2017, defendant moved pursuant to CPL 30.30(1)(a) and 210.20(1)(f) to dismiss the indictment on speedy trial grounds, arguing that 204 days chargeable to the People had elapsed since the commencement of the action. The People's opposition was due November 21, 2017. However, they did not file any opposition until December 6, 2017, the same day the matter had been calendared for decision.

When the parties appeared in court that day, defense counsel

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[2] The original record contains a Notices & Voluntary Disclosure Form, dated June 1, 2015, and stating that the People were ready for trial.

informed the court that the assigned ADA had advised him that the People's opposition was filed that day. However, neither the court nor defense counsel had received a copy of the opposition, and the court responded, "I have a decision. I have no response. It's granted on default."

The stand-in ADA attempted to provide the court and counsel with courtesy copies of the opposition and requested a "reprieve" for the court to consider "the People's very tardy" opposition. The court refused, stating that it had already rendered its decision. The court further stated that it had drafted the decision the previous night without having received any opposition or any communication from the People seeking an extension of time or permission to file a late response. Further, the court explained that while it would generally grant extensions in advance, even over defense counsel's objection, "I make it very clear if the DA needs more time they can't come in on the day of the decision and say, I need more time." The court further explained that "when the case is on for decision and I have to write a decision and I hear nothing, my assumption is the DA is conceding the 30.30 and why would I hold up writing a decision if I don't have any reason. I can't operate in the dark on this and no Court should ever have to operate that way."

In the written order, the court determined that defendant

had identified 204 days that the People were not ready for trial, and by failing to respond, the People had failed to meet their burden to contest the allegations. I agree with the trial court for various reasons.

First, where a felony is charged, the People must be ready for trial within six months of the commencement of the criminal action, less excludable periods, or the indictment must be dismissed upon defendant's motion (CPL 30.30[1][a]). A default in responding to a CPL 30.30 motion to dismiss requires dismissal of the indictment (*see People v Cole*, 73 NY2d at 957). Here, the People defaulted on the defendant's CPL 30.30 motion, and the court acted within its authority to dismiss the indictment (*Cole*, 73 NY2d at 957).

Moreover, based on the facts of this case, it cannot be said that the court abused its discretion in refusing to accept the People's untimely opposition and granting the motion as unopposed (*see People v Brewer*, 91 NY2d 999 [1998]), as the majority suggests. The record indicates that the Assistant handling the matter had contacted the defense by text and asked for an email address, stating that he was going to seek an adjournment. The Assistant claimed that he was of "the impression . . . that he included [the judge]'s chambers in that [text]." The record demonstrates clearly, however, that no request was made.

The court checked its emails from the assigned ADA and confirmed that it had never received any such request. As the court explained, when it had not heard from the People by the night before the scheduled decision day, at which it was to issue a written order, it deemed them to have conceded the motion (*see People v Walsh*, 176 Misc 2d 144, 148-149 [Crim Ct, Kings County 1997] [rejecting as untimely the People's opposition to CPL 30.30 motion not served until scheduled decision day and granting motion where People had three times previously failed to adhere to court's deadlines despite warnings]).

The majority's reliance on language in *People v Anderson* (66 NY2d 529 [1985]) is misplaced inasmuch as the court dismissed the indictment in the instant case on the People's failure to answer, not on any arguments the People may have had to excuse any postreadiness delays.

It should also be noted that the People failed to provide, in their appendix, transcripts of the relevant court appearances necessary to determine whether defendant's speedy trial rights were violated. While the People conceded in their untimely opposition that 39 days were chargeable to them, the underlying dispute involves 165 additional days. Significantly, however, the People's appendix does not include transcripts of court appearances that are necessary to determine whether the contested

days are chargeable to them, and no transcripts have been received by this Court. Incredibly, the People assert that in addition to two transcripts not relevant to the contested days, they are relying on their file and the facts presented in the motion and their opposition. However, it is precisely the conflicting recitations of those facts that are at the heart of the dispute as to whether defendant's speedy trial rights were violated. On appeal, the People fail to offer record material supporting their contention that defendant's motion should have been denied on the merits.

Last, since the motion was granted on default, the majority's insistence that there would be no prejudice to defendant is irrelevant.

Accordingly, in my opinion, the order on appeal should be affirmed.

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

ENTERED: NOVEMBER 21, 2019

DEPUTY CLERK

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

10057-
10057A Water Resources Investment Company, LLC, et al.,
Plaintiffs-Appellants,

Index 655966/17

-against-

Giovanni Benedetti, et al.,
Defendants-Respondents,

Euro Mec Water Group, LLC, etc.,
Defendants.

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Appeals having been taken to this Court by the above-named appellants from a judgment of the Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about April 18, 2018, and from an order, same court and Justice, entered on or about April 1, 2019,

And said appeals having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated October 10, 2019,

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

ENTERED: NOVEMBER 21, 2019

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DEPUTY CLERK

Friedman, J.P., Renwick, Richter, Mazzarelli, Oing, JJ.

10386 The People of the State of New York, Ind. 2353/14
Respondent,

-against-

Tyrone Winston,
Defendant-Appellant.

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

Tyrone Winston, appellant pro se.

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

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Judgment, Supreme Court, New York County (Ronald A. Zweibel, J. at suppression hearing; Bonnie G. Wittner, J. at speedy trial motion; Juan M. Merchan, J. at jury trial and sentencing), rendered July 21, 2016, convicting defendant of two counts of robbery in the second degree, and sentencing him, as a persistent violent felony offender, to concurrent terms of 22 years to life, unanimously affirmed.

Defendant did not preserve his statutory speedy trial claims, and we decline to review them in the interest of justice. Defendant made a generalized CPL 30.30 motion merely asserting the People's lack of readiness on various dates, and did not, by way of a reply or otherwise, challenge the People's specifically

claimed exclusions (*see People v Allard*, 28 NY3d 41, 46-47 [2016]; *People v Beasley*, 16 NY3d 289, 292 [2011]). Similarly, defendant never made any specific assertions raising factual disputes that would require a hearing (*see People v Rosa*, 164 AD3d 1182, 1183 [1st Dept 2005], *lv denied* 32 NY3d 1114 [2018]). Furthermore, he did not make a motion covering the time periods he cites on appeal that followed the court's speedy trial decision (*see People v Heine*, 238 AD2d 212 [1st Dept 1997], *lv denied* 90 NY2d 905 [1997]).

As an alternative holding, we find that defendant's statutory speedy trial rights were not violated. Although 28 of the 56 days between April 30 and June 25, 2015, and the 14 days between March 7 and March 21, 2016, should have been included, all the other periods at issue were excludable on the basis of consent, defendant being without counsel, or exceptional circumstances (*see* CPL 30.30[4][b],[f],[g]). When the additional days that should have been included are added to the time the motion court included, defendant's speedy trial claim still falls short of the threshold for dismissal.

Applying the factors in *People v Taranovich* (37 NY2d 442 [1975]), we find that defendant's constitutional right to a speedy trial was not violated. Although the 26-month delay, including a long period of incarceration, was significant, more

than half of the delay is attributable to the defense, the crime was serious and defendant has not demonstrated any specific prejudice.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations, including those relating to the victim's testimony in support of the element of physical injury (*see People v Guidice*, 83 NY2d 630, 636 [1994]).

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters outside the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). To the extent that, in connection with his ineffective assistance claims, defendant independently seeks reversal on concededly unpreserved claims of evidentiary and summation error, we decline to review these claims in the interest of justice. As an

alternative holding, we find no basis for reversal.

The hearing court properly denied defendant’s motion to suppress a lineup identification. Based on our review of a photograph of the lineup in the record, we conclude that defendant was not singled out for identification (*see People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]).

We perceive no basis for reducing the sentence.

We have considered and rejected defendant’s pro se arguments.

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

ENTERED: NOVEMBER 21, 2019

DEPUTY CLERK

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

10394- 10394A   The People of the State of New York, Respondent,   Ind. 4139/12

-against-

Ajamu White,
Defendant-Appellant.

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

Ajamu White, appellant pro se.

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

Judgment, Supreme Court, New York County (Michael J. Sonberg, J.), rendered November 25, 2013, as amended December 12, 2013, convicting defendant, after a jury trial, of robbery in the first degree (two counts), criminal possession of a weapon in the second degree (two counts), grand larceny in the second degree, criminal possession of stolen property in the third degree and criminal impersonation in the first and second degrees, and sentencing him, as a second violent felony offender, to an aggregate term of 27 years, and order, same court and Justice, entered on or about September 26, 2017, which denied defendant's CPL 440.10 motion to vacate the judgment of conviction, unanimously affirmed.

The record, as expanded by way of the CPL 440.10 motion,

establishes that defendant received effective assistance of counsel under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that any of counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case. Regardless of whether counsel should have sought to call an identification expert and taken the other actions set forth by defendant in his present argument, there is no reasonable possibility that counsel could have overcome the overwhelming evidence of guilt. In addition to identification testimony, the People introduced various forms of physical evidence linking defendant to the crime, as well as statements evincing consciousness of guilt that defendant made to the police and in recorded phone calls. Furthermore, defendant testified and gave unbelievable explanations for his connections to the physical evidence. Independent of the identification testimony, the additional evidence and the circumstantial inferences that could be drawn therefrom provided compelling proof of defendant's guilt.

The court providently exercised its discretion when it denied defendant's request for a midtrial continuance to subpoena

certain witnesses (*see Matter of Anthony M.*, 63 NY2d 270, 283-284 [1984]; *People v Foy*, 32 NY2d 473, 476 [1973]). Neither witness had personal knowledge of the relevant facts or had any material testimony to provide. Defendant did not preserve his claims that he was constitutionally entitled to the continuance (*see People v Lane*, 7 NY3d 888, 889 [2006]; *see also Smith v Duncan*, 411 F3d 340, 348-349 [2d Cir 2005]), or that a declaration by one of these witnesses was admissible under one or more exceptions to the hearsay rule, and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits. In any event, any error was harmless under the standards for both constitutional and nonconstitutional error.

Defendant's challenge to the admission of phone calls recorded during his pretrial detention is unavailing (*see People v Diaz*, 33 NY3d 92 [2019]).

We perceive no basis for reducing the sentence.

We have considered and rejected defendant's remaining

arguments, including those contained in his pro se supplemental brief.

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

ENTERED: NOVEMBER 21, 2019

DEPUTY CLERK

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

10395 In Re New York City Asbestos Litigation Index 190099/09

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Robert J. Pecoraro, as Executor for the Estate of Delores Pecoraro, etc.,
Plaintiff-Appellant,

-against-

Union Carbide Corporation,
Defendant-Respondent.

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The Ferraro Law Firm, P.A., White Plains (David A. Jagolinzer of counsel), for appellant.

Orrick, Herrington & Sutcliffe LLP, New York (Naomi J. Scotten of counsel), for respondent.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered May 30, 2018, which granted defendant's motion for summary judgment dismissing the complaint as time-barred, unanimously affirmed, without costs.

The court properly found that the agreement entered into between defendant and plaintiff's former counsel was unambiguous on its face, and that tolling was effective only during the term of the agreement (*see generally MHR Capital Partners LP v Presstek, Inc.*, 12 NY3d 640, 645-646 [2009]). The stand-still provision in paragraph 19(A) of the agreement terminated on December 31, 2009. It is clear that sections (A) and (B) of paragraph 19 should be read together, and the tolling of the

statute of limitations, which was set forth in paragraph 19(B), ended on that date as well. Thus, plaintiff had three years from that date to commence a personal injury action based on exposure to asbestos under CPLR 214-c(1) and two years for a wrongful death action under EPTL 5-4.1(1), and it is undisputed that plaintiff's claim against defendant was not filed until July 30, 2013.

Plaintiff contends that defendant should be barred from asserting a statute of limitations defense based on equitable estoppel, in that after the subject agreement terminated, defendant continued to negotiate with his former attorneys regarding claims raised by persons with asbestos-related injuries. Although courts have the power to bar the assertion of the affirmative defense of statute of limitations where a defendant's affirmative wrongdoing produced the delay between the accrual of the cause of action and the institution of the legal proceeding, plaintiff failed to sustain his burden of showing that there was an issue of fact as to whether he was induced by defendant's fraud, misrepresentation, or deception to delay in adding defendant to the action he had filed against others (*see Zumpano v Quinn*, 6 NY3d 666, 673-674 [2006]). The affidavit of his former attorney cited only defendant's continued participation in settlement negotiations in actions involving

persons claiming asbestos-related injuries. Counsel did not indicate that plaintiff delayed in filing a claim against defendant based on those negotiations, that plaintiff's case was among those being negotiated after the agreement terminated, that he actually participated in those negotiations, or that defendant made any false or deceptive statements to him or others on which plaintiff relied in failing to timely bring an action against defendant.

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

ENTERED: NOVEMBER 21, 2019

DEPUTY CLERK

Manzanet-Daniels, J.P., Gische, Webber, Kern, JJ.

10396 In re Diana A.,
Petitioner-Respondent,

-against-

Kareem E.,
Respondent-Appellant.

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Larry S. Bachner, New York, for appellant.

Curtis, Mallet-Prevost, Colt & Mosle LLP, New York (Hyuna Yong of counsel), for respondent.

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Order, Family Court, New York County (Marva A. Burnett, Referee), entered on or about March 27, 2019, which, after a fact-finding hearing, upon a finding of menacing in the second degree and harassment in the second degree, granted petitioner, Diana A., a final order of protection for a term of three years, unanimously modified, on the law, to vacate the finding of menacing in the second degree and to reduce the order of protection to two years, and otherwise affirmed, without costs.

A fair preponderance of the evidence established that respondent committed the family offense of harassment in the second degree (*see* Family Ct Act § 832; Penal Law § 240.26). Petitioner established that after she terminated the parties' relationship, respondent continued to repeatedly and obsessively call, text and email her, over an extended period of time, despite being told that she no longer wished to have contact with

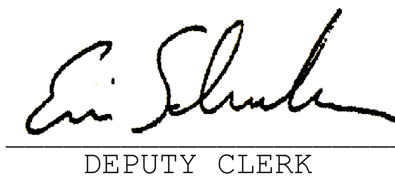
him and her failing to respond (*see Matter of Tamara A. v Anthony Wayne S.*, 110 AD3d 560, 561 [1st Dept 2013]; *Matter of Victor S. v Kareem J.S.*, 104 AD3d 405 [1st Dept 2013]; *Matter of Kritzia B. v Onasis P.*, 113 AD3d 529 [1st Dept 2014]).

However, the record does not support the finding of menacing in the second degree (Penal Law § 120.14[1]). In addition, the order of protection is modified to expire after a term of two years, as there was no finding on the record that aggravating circumstances exist which would warrant an order of protection in excess of two years (*see Matter of Jodi S. v Jason T.*, 85 AD3d 1239 [3d Dept 2011]).

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

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

ENTERED: NOVEMBER 21, 2019



DEPUTY CLERK

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

10397 Francis Coleman, Index 156959/13
Plaintiff-Appellant,

Siobhan Coleman,
Plaintiff,

-against-

URS Corporation, et al.,
Defendants-Respondents.

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Pollack, Pollack, Isaac & DeCicco, New York (Michael H. Zhu of counsel), for appellant.

Shaub, Ahmuty, Citrin & Spratt, LLP, New York (Jonathan P. Shaub of counsel), for respondents.

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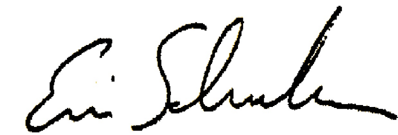
Judgment, Supreme Court, New York County (Erika M. Edwards, J.), entered October 5, 2017, to the extent appealed from as limited by the briefs, dismissing the complaint as against defendant URS Corporation-New York, unanimously affirmed, without costs.

The record demonstrates conclusively that defendant URS Corporation-New York, the program manager on the construction site where plaintiff was injured, did not have the authority to supervise and control the injury-producing work and was therefore not a statutory agent of the project owner or general contractor

for purposes of the Labor Law (*Santos v Condo 124 LLC*, 161 AD3d 650, 653 [1st Dept 2018]; *DaSilva v Haks Engrs., Architects & Land Surveyors, P.C.*, 125 AD3d 480, 481 [1st Dept 2015]).

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

ENTERED: NOVEMBER 21, 2019



DEPUTY CLERK

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

10398 Joanne L. Ebron, Index 22199/12E
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

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

Frekhtman & Associates, LLP, Brooklyn (Eileen Kaplan of counsel), for respondent.

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Order, Supreme Court, Bronx County (Llinét M. Rosado, J.), entered March 16, 2018, which, to the extent appealed from as limited by the briefs, denied defendant's motion for summary judgment dismissing the complaint, and granted plaintiff's cross motion for leave to amend the bill of particulars, unanimously reversed, on the law, without costs, the motion granted, and the cross motion denied. The Clerk is directed to enter judgment dismissing the complaint.

Defendant established prima facie that it did not violate any common-law or statutory duty to plaintiff in failing to insulate the vertical heating pipes in her bathroom, by submitting evidence that the heating system was functioning properly at the time of plaintiff's injury and that the Building Code provision that requires piping to be insulated (*see*

Administrative Code of City of NY § 27-809) does not apply to this building, because the building was constructed before the enactment of the provision (*see* Administrative Code §§ 27-111) and does not fall within an exception to the Code's grandfathering rule (*see id.* §§ 27-115, 27-116).

In opposition, plaintiff failed to raise an issue of fact as to either the proper functioning of the heating system or the exceptions to the Building Code's grandfathering provision. Indeed, as to whether the building fell within any exception to the grandfathering provision, plaintiff's expert noted that defendant's witness on the subject of alterations to the building did not address "alternatively funded or smaller projects that may have involved the heating system." This is sheer speculation.

Plaintiff's motion to amend the bill of particulars to include the allegation that water or condensation on the bathroom floor caused the accident should be denied. Neither the original notice of claim nor the amended notice contained that claim, and

the limitation period of one year and 90 days to assert it against defendant had passed (*see* General Municipal Law § 50-e[5]; *Mahase v Manhattan & Bronx Surface Tr. Operating Auth.*, 3 AD3d 410, 411 [1st Dept 2004]).

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

ENTERED: NOVEMBER 21, 2019

DEPUTY CLERK

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

10399 The People of the State of New York, Ind. 3146/07
Respondent,

-against-

James Miller,
Defendant-Appellant.

____

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

Darcel D. Clark, District Attorney, Bronx (Rossana Gallego-Manzano 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 (Michael A. Gross, J. at plea; Albert Lorenzo, J. at sentencing), rendered May 15, 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 21, 2019

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DEPUTY CLERK

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

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

10400 The People of the State of New York, Ind. 1010/11
Respondent,

-against-

Jose Luis Grau-Arango,
Defendant-Appellant.

____

Janet E. Sabel, The Legal Aid Society, New York (Laura Lieberman Cohen of counsel), for appellant.

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

____

Order, Supreme Court, New York County (Michael R. Sonberg, J.), entered on or about December 14, 2016, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant were

taken into account by the risk assessment instrument and were found not to be outweighed by the seriousness of the underlying crime, in which defendant engaged in a course of sexual conduct over a period of years with a young child.

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

ENTERED: NOVEMBER 21, 2019

DEPUTY CLERK

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

10401-
10401A Index 653282/18

Rebecca Fernie,
Plaintiff-Appellant,

-against-

Wincrest Capital, Ltd., et al.,
Defendants-Respondents.

____

Mischon De Reya New York LLP, New York (Vincent Filardo, Jr. of counsel), for appellant.

Sidley Austin LLP, New York (Christina Prusak Chianese of counsel), for Wincrest Capital Ltd., Barbara Ann Bernard, Joanne Marie Bernard, Francis Joseph Crothers and HedgePort Associates LLC, respondents.

Schulte Roth & Zabel LLP, New York (Hannah M. Thibideau of counsel), for Press Management, LLC, respondent.

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Judgment, Supreme Court, New York County (Barry R. Ostrager, J.), entered April 15, 2019, dismissing the complaint on the ground of forum non conveniens, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered February 28, 2019, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

This is a dispute among residents of the Bahamas, including plaintiff, in which plaintiff alleges fraud and improper ouster from her position in a Bahamian company. All the tortious acts alleged took place in the Bahamas, plaintiff’s injury occurred in the Bahamas, and the company at issue has it principal office in

the Bahamas. Bahamian law will govern at least some of the claims. Therefore, although there are some witnesses and evidence in New York, and one defendant is a New York resident, the court properly determined that New York is an inconvenient forum for this action (CPLR 327[a]; *see Hanwha Life Ins. v UBS AG*, 127 AD3d 618 [1st Dept 2015], *lv denied* 26 NY3d 912 [2015]).

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

ENTERED: NOVEMBER 21, 2019

DEPUTY CLERK

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

10402-
10402A-
10402B In re John Givens, et al.,
Petitioners-Appellants,

Index 161609/15
100016/16
100224/16
151625/17
153763/17

-against-

City of New York, et al.,
Respondents-Respondents.
- - - - - -
[And Other Actions]

____

Tracy J. Harkins, Mount Sinai, for appellants.

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

____

Order and judgment (one paper), Supreme Court, New York County (Lucy Billings, J.), entered February 26, 2018, insofar as appealed from as limited by the briefs, which denied the petitions brought under index Nos. 100016/16 and 100224/16 seeking to annul determinations of the New York City Department of Consumer Affairs (DCA), dated December 28, 2015 and February 17, 2016, denying petitioners' applications to renew their process server licenses, except to the extent the petitions sought to annul DCA's findings that petitioners made false or misleading statements in their recommendations to DCA, and dismissed those proceedings brought pursuant to CPLR article 78, unanimously affirmed, without costs. Order, same court and Justice, entered February 21, 2018, which, insofar as appealed

from as limited by the briefs, granted defendants' motion to dismiss the complaint brought under index No. 161609/15, unanimously affirmed, without costs. Order and judgment (one paper) (denominated decision and order), same court (Verna L. Saunders, J.), entered May 29, 2018, which denied the petition brought under index No. 151625/17 seeking to annul the determinations dated January 19, 2017, denying petitioners' process server license applications, dismissed that proceeding brought pursuant to article 78, and granted respondents' motion to dismiss the complaint in the action filed under index No. 153763/17, unanimously affirmed, without costs.

Petitioners' challenges to DCA's authority to promulgate rules governing process serving in New York City are unavailing. Petitioners fail to establish that state law preempts local laws in this area (*see generally DJL Rest. Corp. v City of New York*, 96 NY2d 91, 95 [2001]), based on either a direct conflict with a state statute (*see e.g.* CPLR 2103[a] ["*Except where otherwise prescribed by law* or order of court, papers may be served by any person not a party of the age of eighteen years or over"] [emphasis added]), or an implied legislative intention to occupy the entire field of process serving (*see* General Business Law § 89-jj; *see generally* Municipal Home Rule Law § 10[1][i]).

The court properly dismissed petitioners' procedural and

substantive due process claims. In light of DCA's discretion as to whether to grant an initial application for a process serving license and whether to grant a renewal license application, the denials of such applications do not implicate any protected property interests (*see New York State Professional Process Servers Assn., Inc. v City of New York*, 2014 WL 4160127, *8, 2014 US Dist LEXIS 115137, *19-20 [SD NY 2014], *affd sub nom Clarke v de Blasio*, 604 Fed Appx 31, 32 [2d Cir 2015]; *Testwell, Inc. v New York City Dept. of Bldgs.*, 80 AD3d 266, 273-274 [1st Dept 2010]).

Petitioners' equal protection claims, based on allegations of selective enforcement, were also properly dismissed. Petitioners failed to establish that the persons who were allegedly treated differently were "similarly situated" (*Bower Assoc. v Town of Pleasant Val.*, 2 NY3d 617, 630 [2004]). Moreover, petitioners do not allege "differential treatment as a constitutionally protected suspect class, or denial of a fundamental right," and failed to show that DCA "singled out" their license applications "with malevolent intent" (*id.* at 630-631).

The court properly dismissed the defamation claims, which were based on absolutely privileged statements made during quasi-judicial proceedings (*see Rosenberg v MetLife, Inc.*, 8 NY3d 359,

365 [2007]).

We find that the denials of petitioners’ applications for process serving licenses or renewal thereof were not shockingly disproportionate to the offense, in light of the seriousness of petitioners’ extensive violations (*see generally Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001]).

We have considered petitioners’ 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 21, 2019

DEPUTY CLERK

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

10403 In re Salil A. Zaveri, Index 100526/18
Petitioner,

-against-

Maria T. Vullo, as Superintendent
of Financial Services, et al.,
Respondents.

Audrey Mars, Lynbrook, for petitioner.

Letitia James, Attorney General, New York (Eric Ross Haren of counsel), for respondents.

Determination of respondent New York State Department of Financial Services (DFS), dated December 19, 2017, which found that petitioner had misled DFS by providing materially incorrect and untrue information in license applications, and fined petitioner $4,500, 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 [Arlene P. Bluth, J.], entered August 7, 2018), dismissed, without costs.

DFS's determination that petitioner had provided materially incorrect and untrue information in his 2010 and 2016 license renewal applications, and thereby demonstrated his untrustworthiness, is supported by substantial evidence (*see*

generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights, 45 NY2d 176, 180-181 [1978]; *Matter of Bonaventure v Perales*, 106 AD3d 665 [1st Dept 2013], *lv denied* 22 NY3d 851 [2013]). After a money judgment was entered against petitioner in 2006 in favor of an insurer, petitioner was asked in license renewal applications whether there were any judgments rendered against him for overdue money by an insurer. Petitioner, who was aware of the prior judgment, informed respondent that there were no such judgments. DFS's determination that petitioner's failure to disclose the judgment in those applications was not merely a mistake is supported by the evidence. The wording of the questions was clear, and petitioner testified as to the specific reasons why he chose not to disclose the judgment in his 2010 and 2016 applications. DFS also wrote to petitioner in 2014 and informed him that it considered petitioner's statements in the 2010 applications, that no judgments had been rendered against him for overdue money by an insurer, to be materially untrue and

incorrect, yet petitioner still failed to disclose the judgment in a subsequent 2016 application.

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

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

ENTERED: NOVEMBER 21, 2019

DEPUTY CLERK

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

10405 The People of the State of New York Ind. 1977/17
Respondent,

-against-

Shu Ng,
Defendant-Appellant.

____

Gotlin & Jaffe, New York (Daniel J. Gotlin of counsel), for appellant.

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

____

Judgment, Supreme Court, New York County (Cassandra M. Mullen, J.), rendered November 28, 2018, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him, as a second violent felony offender, to a term of seven years, unanimously affirmed.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*People v Danielson*, 9 NY3d 342, 349 [2007]). The People established beyond a reasonable doubt that defendant intentionally caused physical injury to the victim (*see* Penal Law § 120.05[1]). During an argument between defendant and his girlfriend, defendant, without provocation, approached the victim and punched him in the face with such force that the victim was knocked back onto the pavement, causing permanent catastrophic brain injuries. The

jury was entitled to draw the reasonable inference that defendant intended the natural consequences of his acts (*see generally People v Getch*, 50 NY2d 456, 465 [1980]), and the evidence also supports the jury's rejection of defendant's intoxication defense (*see e.g. People v Fawzi*, 155 AD3d 548 [1st Dept 2017], *lv denied* 30 NY3d 1104 [2018]). Defendant's argument that a fist cannot qualify as a dangerous instrument is irrelevant, because defendant was not convicted of a crime containing the element of use of a dangerous instrument.

The court providently exercised its discretion in admitting limited evidence of defendant's athletic and martial arts abilities, consisting of an Instagram photo posted by defendant and a document in which he reported his martial arts skills. This evidence was not received to establish a nonexistent "dangerous instrument" theory. Instead, it was relevant to the element of intent in that it tended to show that serious physical injury was a natural consequence of defendant's act and that defendant was aware of this (*see People v Scott*, 47 AD3d 1016, 1020-1021 [3d Dept 2008], *lv denied* 10 NY3d 870 [2008]; *see also People v Ford*, 114 AD3d 1273, 1274 [4th Dept 2014], *lv denied* 23 NY3d 962 [2014]). To the extent that defendant is arguing that the particular evidence admitted by the court lacked probative value on this issue, we conclude that the considerations raised

by defendant went to the weight to be given by the jury to this evidence, not its admissibility.

Defendant did not preserve his claim that a witness improperly testified as an expert, or his challenges to the People's summation, and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits.

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

ENTERED: NOVEMBER 21, 2019

DEPUTY CLERK

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

10406 The People of the State of New York, Ind. 2597/15
Respondent,

-against-

Michael Williams,
Defendant-Appellant.

____

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

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

____

Judgment, Supreme Court, New York County (Laura A. Ward, J. at suppression hearing; Ellen N. Biben J. at plea; Charles H. Solomon, J. at sentencing), rendered August 17, 2017, convicting defendant of kidnapping in the second degree, and sentencing him, as a second violent felony offender, to a term of 10 years, unanimously affirmed.

The record supports the hearing court's finding that the lineup at which defendant was identified was not unduly suggestive (*see People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]). Although defendant was the only person wearing shorts in the lineup conducted several days after the crime, a fair reading of the investigating detective's testimony fails to support defendant's assertion that the identifying witness had described defendant as wearing shorts,

let alone that this was a “prominent” feature of the witness’s detailed description. In any event, the shorts (worn in July), and the other clothing features that defendant cites as suggestive were generic and ordinary articles of clothing (*see People v McBride*, 14 NY3d 440, 448 [2010]; *People v Gilbert*, 295 AD2d 275, 277 [1st Dept 2002], *lv denied* 99 NY2d 558 [2002]), and there is no reason to believe that defendant was singled out for identification.

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

ENTERED: NOVEMBER 21, 2019

DEPUTY CLERK

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

10408 The People of the State of New York, Ind. 5665/99
Respondent,

-against-

Lloyd Greene,
Defendant-Appellant.

____

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

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

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Order, Supreme Court, Bronx County (Efrain Alvarado, J.), entered on or about November 6, 2017, which denied defendant's Correction Law § 168-o(2) petition to modify his sex offender classification, unanimously affirmed, without costs.

Initially, we conclude that the order is appealable as of right (CPLR 5701[a]; *People v Shaljamin,* 164 AD3d 1169 [1st Dept 2018]).

The court providently exercised its discretion in denying a modification of defendant's level three classification, because defendant failed to establish by clear and convincing evidence the requisite basis (*see People v Lashway*, 25 NY3d 478 [2015]; *People v Lopez*, 154 AD3d 531, 61 NYS3d 883 [1st Dept 2017]). Although defendant adequately documented the mitigating factors he cited, the court appropriately weighed the positive strides

that defendant had made against the relatively short time he had been without supervision. The court's finding that insufficient time had passed since his release to reliably predict his risk of re-offense is supported by the record.

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

ENTERED: NOVEMBER 21, 2019

DEPUTY CLERK

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

10409 Anonymous, Index 110905/11
Plaintiff-Appellant,

-against-

Anonymous,
Defendant-Respondent.

____

Law Office of Howard Benjamin, New York (Howard Benjamin of counsel), for appellant.

Glenn S. Koopersmith, Garden City, for respondent.

____

Order, Supreme Court, New York County (Douglas E. Hoffman, J.), entered on or about July 25, 2018, which, to the extent appealed from as limited by the briefs, awarded plaintiff mother additional child support of $2,895 per month for the parties' third child, unanimously affirmed, without costs.

The parties, who were never married and never lived together, entered into a child support agreement in 2011 that required the father to pay a flat $9,000 per month, inclusive of all add-ons, in child support for their two children, who lived exclusively with the mother. The parties waived application of the Child Support Standards Act's (CSSA) prescription for determining the combined parental income cap (from which the basic child support obligation is derived) (Family Court Act § 413[1][c][2]), implicitly setting the cap at $432,000. Calculated according to the CSSA, which sets the child support

percentage of combined parental income up to the cap at 25% for two children (*see id.* at § 413[1][b][3][ii]), $108,000 per year ($9,000 per month) is 25% of $432,000.

In 2015, the parties reaffirmed the father's $9,000 monthly child support obligation in an amended agreement. Later that year, the parties had another child, who also lives exclusively with the mother. However, the parties could not reach agreement about the father's child support obligation for their third child, and the mother commenced this proceeding for a determination of that obligation.

In calculating the award of child support to be paid by the father for the third child, the trial court properly determined that, under the CSSA, the presumptive amount of child support for three children in the same household is 29% of the combined parental income up to the cap (*see id.* at §§ 413[1][b][3][iii]; 413[c][2]; *Matter of Thomas v DeFalco*, 270 AD2d 277 [2d Dept 2000]; *Matter of Commissioner of Social Servs. of City of N.Y. v Raymond S.*, 180 AD2d 510 [1st Dept 1992]). The court also properly applied a 12% cost of living increase to the combined parental income cap of $432,000 to arrive at a combined parental income cap of $483,840. The court then determined the father's additional basic child support obligation for the third child by calculating 29% of $483,840 and subtracting the amount the father

currently pays for the first two children, arriving at the figure $2,895.

Contrary to the mother's contention, taking the statutory 29% of the combined parental income up to the cap and dividing by three does not shortchange the first two children, thereby improperly effecting a downward modification of the father's obligation. The statutory percentage, which the court was required by the CSSA to use (Family Court Act § 413[1][a]), "reflect[s] the effect of economy of scale, which works like this: If one child requires 17 percent of income, two children in the same household do not require 34 percent. This is because there are duplicated costs, and the cost *per child* is less when two or more children live in the same household. Hence, the figure of 25 percent for two children, rather than 34 percent" (*Matter of Commissioner of Social Servs. of City of N.Y. v Manuel S.*, 180 AD2d 510, 514 [1st Dept 1992] [internal quotation marks omitted]).

Nor, contrary to the mother's contention, did the court set the combined parental income cap arbitrarily. The court fully articulated its rationale, including its reasoning that the parties implicitly projected the lifestyle of their children in common when they effectively set the cap at $432,000 in 2011.

The mother failed to prove that the third child's actual needs exceeded the additional child support award.

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

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

ENTERED: NOVEMBER 21, 2019

DEPUTY CLERK

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

10410 Emaar Rak F.Z.E., Index 650864/18
Plaintiff-Appellant,

-against-

Rak Tourism Investment F.Z.C.,
Defendant-Respondent.

____

Moore International Law, PLLC, New York (Scott M. Moore of counsel), for appellant.

Hoguet Newman Regal & Kenney, LLP, New York (Damian R. Cavaleri of counsel), for respondent.

____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered November 29, 2018, which denied plaintiff's motion for summary judgment in lieu of complaint, and granted defendant's motion to dismiss, unanimously affirmed, with costs.

In a New York action to enforce a foreign judgment where a defendant raises a colorable, nonfrivolous ground for denying the judgment recognition, the plaintiff must show some basis – whether arising from the defendant's residence, conduct, consent, the location of its property, or otherwise – to justify defendant's being subject to the New York court's power (*see AlbaniaBEG Ambient Sh.p.k. v Enel S.p.A.*, 160 AD3d 93, 111-112 [1st Dept 2018]; *see also id.* at 94 & 110 n 19). Defendant raised a colorable, nonfrivolous ground for denying the foreign judgment recognition, *viz.*, that it had already paid it. Hence,

the IAS court properly found that it needed to have personal jurisdiction over defendant.

Defendant is organized under the laws of the United Arab Emirates (U.A.E.) and has its principal office address there. Defendant's manager submitted an affirmation saying that its business was conducted exclusively in the U.A.E. and that defendant had no connection to New York and no assets here. Plaintiff claims New York has personal jurisdiction over defendant because Orascom Development owns 73% of defendant's shares, and Orascom has four U.S. shareholders, one of which is a New York investment firm. This is unavailing for two reasons. First, plaintiff cannot impute Orascom's New York contact to defendant simply because defendant is Orascom's subsidiary (*see Insurance Co. of N. Am. v EMCOR Group, Inc.*, 9 AD3d 319, 320 [1st Dept 2004]). Second, even if such contact could be imputed, plaintiff cites no authority for the proposition that having a New York shareholder subjects a foreign corporation to jurisdiction in this state.

Plaintiff contends that it properly served defendant pursuant to CPLR 311(a)(1) by personally delivering a package addressed to defendant's general manager to a Federal Express cashier. This argument is unavailing (*see Matter of Jiggetts v MTA Metro-N. R.R.*, 121 AD3d 414 [1st Dept 2014] [statute

"requires that the process server tender process directly to an authorized corporate representative"]; *A.R.D. Group v Rubin Group, Inc.*, 44 Misc 3d 144[A], *1 [App Term, 1st Dept 2014] ["The method of service used by plaintiff – delivery upon defendant's agent by Federal Express overnight mail – was ineffectual"]; *see also Fashion Page v Zurich Ins. Co.*, 50 NY2d 265, 273 [1980] ["Delivering the summons to a building receptionist, not employed by the defendant, without any inquiry as to whether she is (defendant's) employee, would not be sufficient"]).

Plaintiff's belated request to re-serve the summons "is both unpreserved and untimely" (*A.R.D.*, 44 Misc3d 144[A] at *1).

In light of the foregoing, plaintiff's remaining arguments are academic.

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

ENTERED: NOVEMBER 21, 2019

DEPUTY CLERK

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

10411 Esther Consuelo Porto, Index 162585/15
Plaintiff-Appellant,

-against-

Golden Seahorse LLC, et al.,
Defendants-Respondents.

____

Greenberg Law P.C., New York (Jennifer A. Shafer of counsel), for appellant.

RAS Associates, PLLC, Purchase (Paul E. Carney of counsel), for Golden Seahorse LLC, respondent.

Litchfield Cavo LLP, New York (Patricia A. Carbone of counsel), for Amazon Restaurant and Bar, respondent.

____

Order, Supreme Court, New York County, (Kathryn E. Freed, J.), entered January 4, 2019, which, to the extent appealed from as limited by the briefs, granted defendants Golden Seahorse LLC's (Golden) and Amazon Restaurant & Bar, Inc.'s (Amazon) respective motions for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Golden and Amazon established entitlement to judgment as a matter of law in this action where plaintiff alleges that she was injured when she fell down a stairway on the premises owned by Golden and operated by Amazon. Golden and Amazon submitted an expert engineer report that the stairway, which was part of a premises renovation in 1987, was properly maintained in a safe condition and violated no enforceable New York City Building Code

requirements. In particular, the report concludes that under the applicable 1968 Building Code, the access stairway did not require handrails (see *Cusumano v City of New York*, 15 NY3d 319 [2010]) and the measured lighting was adequate and that no structural modification was required after the original certificate of occupancy was issued. In addition Golden and Amazon submitted a surveillance video which showed that plaintiff's head was turned away from the stairway just prior to her fall, and established that her inattentiveness was a proximate cause of her fall (*see Pinkham v West Elm*, 142 AD3d 477, 477 [1st Dept 2016] *lv denied* 28 NY3d 909 [2016]; *Baker v Roman Catholic Church of the Holy See*, 136 AD3d 596, 597 [1st Dept 2016]).

In opposition, plaintiff failed to raise an issue of fact. Plaintiff's expert's opinion was insufficient to raise any issue that the stairway was dangerous or defective. He acknowledges that the 1987 certificate of occupancy was issued when the premises were renovated. Nonetheless, the expert relies on inapplicable 2008 Building Code sections violations. No legal or factual basis exists in the record to retroactively apply the 2008 Building Code to this stairway. The expert did not measure the lighting, he only made an "estimate" based on personal observation. Although the 1968 Building Code requirement for

handrails is referenced, it is well established that the cited requirement only applies to internal stairs that serve as a required exit, but not to the access stairs which were involved in this accident (*Cusumano, supra*; *Pwangsunthie v Marco Realty*, 136 AD3d 502 [1st Dept 2016]).

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

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

ENTERED: NOVEMBER 21, 2019

DEPUTY CLERK

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

10413N Keith E. Carter, Index 161730/15
Plaintiff-Respondent,

-against-

Daimler Trust,
Defendant-Appellant,

Bernice P. Deleo,
Defendant.

____

Montfort, Healy, McGuire & Salley LLP, Garden City (Donald S. Neumann, Jr. of counsel), for appellant.

Law Offices of Michael S. Lamonsoff, New York (Daniel Niamehr of counsel), for respondent.

____

Order, Supreme Court, New York County (Adam Silvera, J.), entered on or about November 30, 2018, which denied the motion of defendant Daimler Trust (Daimler) to vacate an order, same court (Leticia M. Ramirez, J.), entered March 18, 2016, granting plaintiff's unopposed motion for summary judgment on the issue of liability, and, upon vacatur, to dismiss the complaint as against Daimler, unanimously affirmed, without costs.

Daimler's motion to vacate the order entered on its default in opposing plaintiff's summary judgment motion was properly denied since Daimler did not move within one year of being served with the prior order and notice of its entry (*see* CPLR 5015[a][1]; *Vaca v Village View Hous. Corp.*, 170 AD3d 619, 620 [1st Dept 2019]). Nor did Daimler present a valid excuse for its

failure to do so within the prescribed time limitation (*see Rosendale v Aramian*, 269 AD2d 209, 210 [1st Dept 2000]).

In view of the foregoing, we do not reach Daimler's remaining contentions.

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

ENTERED: NOVEMBER 21, 2019

DEPUTY CLERK

Friedman, J.P., Renwick, Oing, Singh, JJ.

10414 The People of the State of New York, Ind. 513/12
Respondent,

-against-

Alejandro Delacruz,
Defendant-Appellant.

____

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

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

____

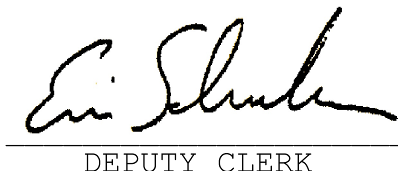
Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered June 20, 2013, convicting defendant, after a nonjury trial, of attempted gang assault in the second degree and assault in the second degree, and sentencing him to concurrent terms of two years, unanimously modified, on the law, to the extent of vacating the attempted gang assault conviction and dismissing that charge, and otherwise affirmed.

"[A]ttempted gang assault in the second degree is a legal impossibility for trial purposes" (*Matter of Cisley G.*, 81 AD3d 508, 508 [1st Dept 2011]; *see also People v Campbell*, 72 NY2d 602, 605-606 [1988]). "One cannot attempt to create an unintended result" (*People v Prescott,* 95 NY2d 655 [2001}). The People's arguments for revisiting our determination in *Cisley G.* are unpersuasive.

Defendant failed to preserve, or affirmatively waived, his argument that the court erred in admitting two pieces of evidence that were allegedly the fruits of what the court, in suppressing other evidence, had determined to be an unlawful arrest, and we decline to review this claim in the interest of justice. As an alternative holding, we find no basis for reversal. Defendant's argument that defense counsel was ineffective because he failed to seek exclusion of this evidence at trial is unreviewable on direct appeal because it involves matters not reflected in, or fully explained by, the record, regarding counsel's strategic decision to concede the element of identity while raising other issues in this nonjury trial (*see People v Rivera*, 71 NY2d 705, 709 [1988]). To the extent the claim can be reviewed on the present record, defendant has failed to establish ineffective assistance (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

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

ENTERED: NOVEMBER 21, 2019



DEPUTY CLERK

Friedman, J.P., Renwick, Oing, Singh, JJ.

10415 Atlantis Management Group II LLC, Index 651598/17
Plaintiff-Respondent,

-against-

Rajan Nabe, et al.,
Defendants-Appellants.

____

Robinson Brog Leinwand Greene Genovese & Gluck, P.C., New York (John D. D'Ercole of counsel), for appellants.

Speigel Legal, LLC, Florida (Steven J. Spiegel of counsel), for respondent.

____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered October 1, 2018, which, to the extent appealed from, granted plaintiff Atlantis Management Group II LLC (Atlantis)'s motion for partial summary judgment on its cause of action for an accounting, unanimously affirmed, with costs.

Supreme Court correctly found that Atlantis may seek an equitable accounting at common law (*see Gottlieb v Northriver Trading Co. LLC*, 58 AD3d 550, 551 [1st Dept 2009]). As the managing members of the LLCs, the individual defendants owed plaintiff — a nonmanaging member — a fiduciary duty (*see Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014]). "To be entitled to an equitable accounting, a claimant must demonstrate that he or she has no adequate remedy at law" (*Unitel Telecard Distrib. Corp. v Nunez*, 90 AD3d 568, 569 [1st Dept 2011]). In view of the

fiduciary relationship between Atlantis and the individual defendants, and the allegations that defendants denied demands for an accounting and access to their books and records, an accounting is appropriate in this case (*see Mohinani v Charney*, 156 AD3d 443, 444 [1st Dept 2017]; *Adam v Cutner & Rathkopf*, 238 AD2d 234, 242 [1st Dept 1997]). Costs and attorneys' fees were also correctly awarded pursuant to section 6.4.5 of the operating agreements.

Although the right to an accounting is distinct from a claim for an equitable accounting (*see DPB Family LLC v Eutychia Group LLC*, 2018 NY Slip Op 32655(U),*4 [Sup Ct, NY County 2018]), Supreme Court correctly found that it was because defendants repeatedly refused to respond to demands for access to books and records that an equitable accounting was warranted (*see Morgulas v Yudell Realty*, 161 AD2d 211, 213-214 [1st Dept 1990] [finding that defendant's denial to plaintiffs of access to its books in violation of its obligations as a fiduciary was sufficient to

warrant an accounting]). The fact that Atlantis allegedly voluntarily gave up its right to receive financial information about the defendant LLCs does not preclude this equitable remedy.

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

ENTERED: NOVEMBER 21, 2019

DEPUTY CLERK

Friedman, J.P., Renwick, Oing, Singh, JJ.

10416 In re Devin C.,
Petitioner-Respondent,

-against-

Chantelle R.,
Respondent-Appellant.

____

Steven N. Feinman, White Plains, for appellant.

Aleza Ross, Patchogue, for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the children.

____

Order, Family Court, New York County (Karen I. Lupuloff, J.), entered on or about October 20, 2017, which granted petitioner father sole legal and physical custody of the subject children, unanimously affirmed, without costs.

The court's determination, after a full evidentiary hearing, that the award of sole legal and physical custody to the father would serve the best interests of the children has a sound and substantial basis in the record (*see* Domestic Relations Law § 70[a]; *Eschbach v Eschbach*, 56 NY2d 167, 171-174 [1982]). The evidence shows that while both parties have cared for the children, the children have lived with the father since February 2016, and he takes care of their physical, emotional, financial, educational, and medical needs. He has enrolled the children in school, updated their immunizations, moved them to a spacious

home, and enrolled them in numerous activities. The evidence also showed that respondent mother's history does not necessarily reflect that she would provide a more stable home environment (*see Matter of Celina S. v Donald S.*, 133 AD3d 471 [1st Dept 2015]). The court credited the evidence that showed that the mother was incarcerated for a short time in 2013 resulting in the father taking care of the children. She also failed to have the children immunized in a timely manner, would disappear for short periods of time while the children were visiting with their father, and chose to move away from the father to Pennsylvania.

While there was some evidence that the mother was more likely to foster a continued relationship between the children and their father, this one factor is not determinative and the court must consider the totality of the circumstances (*Eschbach* at 173-174; *Melissa C.D. v Rene I.D.*, 117 AD3d 407, 408-409 [1st Dept 2014]). Furthermore, there was no indication that the father would not follow a court-ordered visitation schedule or

would violate a court order regarding phone and video contact with the mother.

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

ENTERED: NOVEMBER 21, 2019

DEPUTY CLERK

Friedman, J.P., Renwick, Oing, Singh, JJ.

10417 Kirse R. Estrella, Index 303888/11
Plaintiff-Respondent,

-against-

Fujitec America, Inc.,
Defendant-Appellant,

Joseph Neto and Associates, Inc.,
et al.,
Defendants.

____

Swartz Law Offices, New York (Gerald Neal Swartz of counsel), for appellant.

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

____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered or about April 10, 2019, which denied the motion of defendant Fujitec America, Inc. for summary judgment dismissing the complaint and cross claims as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff was injured when she attempted to exit a service elevator in the building where she worked after the elevator stalled near the top floor of the building. A coworker testified that the elevator shook and the lights went out for a few seconds. Plaintiff testified that she used the intercom in the elevator to contact the building’s doorman, who said he would

call the elevator mechanic. A few minutes later, another coworker, who was also in the stalled elevator, pried the door open. Plaintiff saw that the elevator was about 2½ feet above the floor level, and decided to jump out, believing she could do so safely. Under these circumstances, plaintiff's act of jumping from the stalled elevator was an unforeseeable, superseding cause of her accident, which terminates any potential liability of defendant elevator maintenance company for negligent maintenance or repair of the elevator (*see Egan v A.J. Constr. Corp.*, 94 NY2d 839, 841 [1999]; *Clifford v Plaza Hous. Dev. Fund Co., Inc.*, 105 AD3d 609 [1st Dept 2013]). Given the evidence that the elevator had been stalled for only a few minutes and that the doorman had been contacted, there was no emergency situation necessitating plaintiff's jump from the elevator (*Clifford* at 610).

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

ENTERED: NOVEMBER 21, 2019

DEPUTY CLERK

Friedman, J.P., Renwick, Oing, Singh, JJ.

10418 Prof-2013-S3 Legal Title Trust II, by U.S. Bank National Association, as Legal Title Trustee, Plaintiff-Respondent, Index 382625/09

-against-

Maria C. Guaman, Defendant-Appellant,

New York City Environmental Control Board, et al., Defendants.

____

Zeltser Law Group, Brooklyn (Naomi Zelster of counsel), for appellant.

Gross Polowy LLC, Westbury (John J. Ricciardi of counsel), for respondent.

____

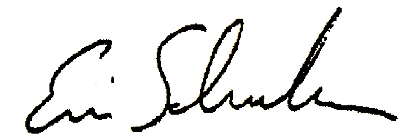
Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr. J.), entered May 23, 2018, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment on its foreclosure complaint, and denied defendant's cross motion for summary judgment to dismiss the complaint as against her, unanimously reversed, on the law, without costs, to deny plaintiff's motion and grant defendant's cross motion to dismiss. The Clerk is directed to enter judgment accordingly.

In her cross motion papers, defendant Maria Guaman irrefutably established that the plaintiff lender failed to mail the required default notice under the terms set forth in the

parties’ 2006 mortgage agreement. Plaintiff purports to have mailed the 30-day notice, but the address used was not the notice address referenced in the parties’ mortgage agreement. Accordingly, the complaint should be dismissed, without prejudice (*see Nationstar Mtge., LLC v Cogen*, 159 AD3d 428, 429 [1st Dept 2018]).

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

ENTERED: NOVEMBER 21, 2019



DEPUTY CLERK

Friedman, J.P., Renwick, Oing, Singh, JJ.

10419 The People of the State of New York, Ind. 3007/14
Respondent,

-against-

Willie Tookes,
Defendant-Appellant.

____

Christina A. Swarns, Office of the Appellate Defender, New York (Rosemary Herbert of counsel) and Pierce Bainbridge Beck Price & Hecht LLP, New York (Stephen P. Farrelly 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 (Daniel P. Conviser, J.), rendered September 22, 2015 convicting defendant, after a jury trial, of burglary in the first degree (two counts), robbery in the first degree, robbery in the second degree (two counts) and assault in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 15 years, unanimously affirmed.

The court providently exercised its discretion in admitting testimony by the victim, defendant's ex-fiancée, concerning defendant's prior bad acts. The evidence was relevant to defendant's motive for his criminal conduct, and it provided necessary background to explain the relationship between the

defendant and the victim (*see People v Dorm*, 12 NY3d 16, 19 [2009]; *People v Steinberg*, 170 AD2d 50, 72-74 [1991], *affd* 79 NY2d 673 [1992]). In addition, the evidence was interconnected with the charged crimes and tended to place the People's case in a believable context (*see People v Nevaro*, 139 AD3d 525, 526 [1st Dept 2016], *lv denied* 28 NY3d 934 [2016]). The probative value of this evidence outweighed its prejudicial effect.

Defendant did not preserve his claims that the court should have made individualized rulings as to allegedly separate uncharged crimes and should have given limiting instructions to the jury, or any of his challenges to the prosecutor's summation, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: NOVEMBER 21, 2019

DEPUTY CLERK

Friedman, J.P., Renwick, Oing, Singh, JJ.

10420 In re Alonzo Owens, Index 100223/18
Petitioner-Appellant,

-against-

New York City Human Resources Administration, Department of Social Services, Office of Child Support Enforcement, Support Collection Unit,
Respondent-Respondent.

____

Alonzo Owens, appellant pro se.

Georgia M. Pestana, Acting Corporation Counsel, New York (Anna B. Woloncíej of counsel), for respondent.

____

Judgment, Supreme Court, New York County (Carmen V. St. George, J.), entered September 19, 2018, denying the petition to annul respondent's determination, dated October 19, 2017, which denied petitioner's appeal of respondent's decision to offset his tax refund to pay child support arrears, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The petition to reverse respondent's determination that petitioner's tax refund would be offset to pay child support arrears was properly denied as moot. After the petition was filed, respondent independently determined that petitioner did not in fact owe any money, removed the arrears from his account,

and stopped enforcement of the offset (*see generally Matter of Newton v Police Dept. of City of N.Y.*, 183 AD2d 621, 624 [1st Dept 1992] [a matter is moot where "the relief being sought is supplied during the pendency of litigation"]).

To the extent petitioner seeks to be reimbursed for his overpayment of child support obligations, these damages may not properly be recovered in this proceeding, as they are not "incidental to the primary relief sought" or "otherwise recover[able]" (CPLR 7806). The overpayment is not incidental to the relief petitioner seeks because it occurred prior to and was not dependent on the determination under review, which merely determined that petitioner's future tax refunds would be garnished to pay arrears, and respondent had no obligation to reimburse the funds, which had already been disbursed (*see Metropolitan Taxicab Bd. of Trade v New York City Taxi & Limousine Commn.*, 115 AD3d 521, 522 [1st Dept 2014], *lv denied* 24 NY3d 911 [2014]). At any rate, restitution or recoupment for overpayment of child support is generally not permitted, as it is against public policy, except in limited circumstances not applicable here (*see Matter of McGovern v McGovern*, 148 AD3d 900, 902 [2d Dept 2017]; *People ex rel. Breitstein v Aaronson*, 3 AD3d 588, 589 [2d Dept 2004]).

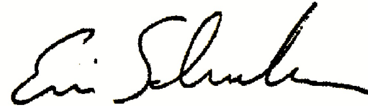
Contrary to petitioner's contention, respondent did not

default by failing to appear by a proper attorney. In general, New York City agencies, such as respondent, must be represented by the Corporation Counsel (*see* NY City Charter § 394[a]). However, the Corporation Counsel is empowered to appoint assistant counsels, including at City agencies, which are also empowered to employ staff counsel (*see id.* §§ 392[a], 395). Respondent's attorney was agency staff counsel and was of counsel to someone designated as a Special Assistant Corporation Counsel.

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 21, 2019



DEPUTY CLERK

Friedman, J.P., Renwick, Oing, Singh, JJ.

10422 U.S. Bank National Association, etc., Index 850116/14
Plaintiff-Respondent,

-against-

Nilufar Hossain,
Defendant-Appellant,

Mohammed Hossain, et al.,
Defendants.

____

The Law Office of Lawrence A. Garvey & Associates, P.C., White Plains (Joseph Reiter of counsel), for appellant.

Roach & Lin, P.C., Syosset (Michael C. Manniello of counsel), for respondent.

____

Order, Supreme Court, New York County (Judith Reeves McMahon, J.), entered October 17, 2018, which, upon the motion by Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust, not in its individual capacity but solely as trustee for Winsted Funding Trust 2015-1 (Wilmington), granted summary judgment to plaintiff, unanimously affirmed, without costs.

Plaintiff’s standing to bring this mortgage foreclosure action was established by the submission of a copy of the mortgage, a copy of the note, indorsed in blank, on which it is undisputed that defendant defaulted, and a copy of the mortgage

assignment, which were all attached to the complaint (*Wilmington Savings Fund Society, FSB v Moran*, 175 AD3d 1196 [1st Dept 2019]). Also submitted was an affidavit by an employee of plaintiff's servicing agent with personal knowledge of its business records, who averred that the note was in plaintiff's physical possession at the time the action was commenced (*see PNC Bank, N.A. v Salcedo*, 161 AD3d 571 [1st Dept 2018]).

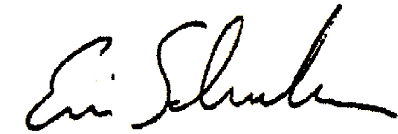
Wilmington, as assignee and the current holder of the note, indorsed in blank, and mortgage, is permitted to "continue [the] action in the name of the original mortgagee, even in the absence of a formal substitution" (*Central Fed. Sav. v 405 W. 45th St.*, 242 AD2d 512, 512 [1st Dept 1997]; CPLR 1018). Wilmington's standing is demonstrated by an affidavit by an employee of its servicing agent with personal knowledge of its business records who averred that it currently has possession of the original note

(*see e.g. PNC Bank*, 161 AD3d at 572; *U.S. Bank N.A. v Askew*, 138 AD3d 402 [1st Dept 2016]; *Wells Fargo Bank, N.A. v Ndiaye*, 146 AD3d 684 [1st Dept 2017]).

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

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

ENTERED: NOVEMBER 21, 2019



DEPUTY CLERK

Friedman, J.P., Renwick, Oing, Singh, JJ.

10423 Jason McCarthy, et al., Plaintiffs-Appellants, Index 651959/11 590445/12

-against-

New York Kitchen & Bathroom Corp., Defendant-Respondent.

- - - - -

[And a Third-Party Action]

Kishner Miller Himes P.C., New York (Scott Himes of counsel), for appellants.

The Edelsteins, Faegenburg & Brown, LLP, New York (Paul J. Edelstein of counsel), for respondent.

Judgment, Supreme Court, New York County (Margaret A. Chan, J.), entered August 30, 2018, upon a jury verdict in favor of defendant New York Kitchen & Bathroom Corp. (NYKB), unanimously affirmed, without costs.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see generally Cohen v Hallmark Cards*, 45 NY2d 493, 498-499 [1978]). Plaintiffs' argument that the verdict was flawed because plaintiffs were not awarded damages despite the jury's finding that NYKB breached the contract with them, is unavailing. The jury rationally concluded that NYKB's performance was excused because plaintiffs prevented the completion of the work. Plaintiffs and NYKB's principal testified that the job was delayed in part by the constant

increases in the scope of work requested by plaintiffs and delays in obtaining permits and awaiting inspections by the City. Plaintiffs' expert acknowledged that these factors could cause a delay in completion of a job. There was also testimony that due to the change in building management, approval for the work and the necessary permits could not be obtained until about eight months after the contract was executed. Plaintiff Jason McCarthy also testified that he shut down the job for two weeks due to the birth of the couple's child. Despite these delays, plaintiffs were still willing to have NYKB complete the job as recently as two weeks before they terminated the contracts.

Furthermore, the jury's finding that NYKB was not liable under the FCC contracts was rational and supported by the evidence that plaintiffs knew that third-party defendant Catanzarite was acting independently and outside the scope of his employment with NYKB (*see Kirschner v KPMG LLP*, 15 NY3d 446, 468 [2010]). The evidence included the differences between the NYKB and FCC contracts; the separate payments made to NYKB and Catanzarite; emails to plaintiffs from their project manager concerning Catanzarite's conflict of interest and not wanting to work until the "coast [was] clear"; and NYKB's principal's testimony that he was not aware that Catanzarite was working on the side for plaintiffs. The jury rationally inferred from this

evidence that plaintiffs were aware that Catanzarite was not acting on behalf of NYKB, and that NYKB was not responsible for the work required under the FCC contracts. Catanzarite's status as an officer of NYKB was not relevant to his execution of the FCC contracts, which were on the letterhead of his own company, FCC.

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

ENTERED: NOVEMBER 21, 2019

DEPUTY CLERK

Friedman, J.P., Renwick, Oing, Singh, JJ.

10424 In re Yvette F.,
Petitioner-Appellant,

-against-

Corey J.G., Sr.,
Respondent-Respondent.

____

Steven N. Feinman, White Plains, for appellant.

William Whalen, DC 37 Municipal Employees Legal Services, New York (Joan A. Foy of counsel), for respondent.

Law Office of Lewis S. Calderon, Jamaica (Lewis S. Calderon of counsel), attorney for the child.

____

Order, Family Court, New York County (Gail A. Adams, Referee), entered on or about September 4, 2018, which, after a hearing, denied petitioner mother's petition to modify a custody order and granted her liberal visitation, unanimously affirmed, without costs.

It is well established that to modify a custody order, there must have been a sufficient change of circumstances and a showing that the change would be in the best interests of the child *(see Matter of Jose M.C. v Liliana C.*, 150 AD3d, 514, 514 [1st Dept 2017]. Here, the mother has not provided support for any of the allegations in the petition. Although she contends that she has transformed her life to the extent that there has been a sufficient change of circumstances, she has not provided

documentary evidence to substantiate her claim of entering into and completing a drug rehabilitation program. In fact, the mother admitted to using drugs during the pendency of the proceeding, and thus has failed to establish a change of circumstances in this vein (*see Matter of Paul P. v Tonisha J.*, 149 AD3d 409 [1st Dept 2017]). Regardless, any changes that the mother made to her own life did not amount to a sufficient change of circumstances to warrant a change of custody (*see e.g. Matter of Walter C. v Jovanka F.*, 58 AD3d 537 [1st Dept 2009]).

Furthermore, the record shows that respondent father has had custody of the child since she was five years old, and has proved himself to be a committed parent who is involved with her education and recreational activities and meets her daily needs without any assistance from the mother. Conversely, the mother admitted to not having contact with the child, other than sporadic telephone calls, for more than five years. The mother did not provide evidence showing that the father was unfit, or that his continued custody would not be in the child’s best interests. The mother also admitted to the court that she

intended to move back to Georgia if she were to be granted custody, which would not be in the child's best interests under the circumstances.

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

ENTERED: NOVEMBER 21, 2019

DEPUTY CLERK

Friedman, J.P., Renwick, Oing, Singh, JJ.

10425 The People of the State of New York, Ind. 4939/15
Respondent,

-against-

Scott Hogan,
Defendant-Appellant.

____

Janet E. Sabel, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Rebecca Hausner 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 (Daniel Conviser, J.), rendered November 22, 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 21, 2019

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DEPUTY CLERK

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

Friedman, J.P., Renwick, Oing, Singh, JJ.

10426-
10426A Beatrice Investments, LLC, et al., Index 654052/13
Plaintiffs-Respondents,

-against-

511 9th LLC, et al.,
Defendants-Appellants.
- - - - -
940 Realty LLC, et al.,
Nominal Defendants.

____

Lazarus & Lazarus, P.C., New York (Harlan M. Lazarus of counsel), for appellants.

Ford O'Brien LLP, New York (Matthew Aaron Ford of counsel), for respondents.

____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 22, 2018, which denied defendants' motion to dismiss the second amended complaint, and sua sponte granted plaintiffs leave to amend the complaint to add direct causes of action for breach of fiduciary duty, and order, same court (Jennifer G. Schecter, J.), entered March 28, 2019, which, to the extent appealed from, denied defendants' motion to dismiss so much of the third amended complaint as alleges that defendants made certain payments to Orchedia, an affiliate of defendant Salim Ossa, and the direct causes of action for breach of fiduciary duty, unanimously affirmed, with costs.

This appeal is not rendered moot by the filing of the fourth

amended complaint in the action, given that each iteration of the complaint has maintained the allegations now at issue before this Court (*Munn v New York City Hous. Auth.*, 202 AD2d 210, 211 [1st Dept 1994]).

The motion court providently exercised its discretion in permitting plaintiffs to file a third amended complaint to replead their breach of fiduciary duty claims as direct causes of action (CPLR 3025[b]). The breach of fiduciary duty claims were not dismissed with prejudice. Contrary to defendants' contention, the law of the case doctrine does not apply to the court's comment at oral argument, particularly because the court's earlier determination was based on a different iteration of the complaint (*see Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 39 [1st Dept 2012]).

Plaintiffs have sufficiently alleged both direct and derivative causes of action for breach of fiduciary duty, because the harm to them, namely, diluting their interest to weaken their voting rights and revoking their rights to pari passu distributions, is separate from the harms allegedly suffered by the nominal defendant limited liability companies as a result of issuing the preferred equity shares for allegedly insufficient consideration (*see Gentile v Rossette*, 906 A2d 91, 99-100 [Del 2006]; *Tooley v Donaldson, Lufkin & Jenrette, Inc.*, 845 A2d 1031,

1035 [Del 2004]; *see also Yudell v Gilbert*, 99 AD3d 108 [1st Dept 2012]).

Defendants' documentary evidence does not flatly contradict the allegations in the third amended complaint (*see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 432 [1st Dept 2014]). Moreover, defendants failed to demonstrate that the payments to Republic Food, the backdated extension of the payments of the administrative and development fees, and the attorney and broker payments were permitted by the respective operating agreements, and not, as the complaint alleges, arm's-length transactions that redounded to the benefit of the individual defendant manager and his affiliates (*see Feeley v NHAOCG, LLC*, 62 A3d 649, 661 [Del Ch 2012]; *Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014]). Given that the individual defendant is alleged to have engaged in the misconduct personally and was a fiduciary of the respective defendant manager entities, the causes of action for breach of fiduciary

duty against him will lie under both New York and Delaware law (*Arfa v Zamir*, 75 AD3d 443 [1st Dept 2010]).

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

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

ENTERED: NOVEMBER 21, 2019

DEPUTY CLERK

Friedman, J.P., Renwick, Oing, Singh, JJ.

10427 Mark Franklin, Plaintiff, Index 161510/14 595451/15 595664/15

-against-

T-Mobile USA, Inc., et al.,
Defendants.

- - - - -

T-Mobile USA, Inc., et al.,
Third-Party Plaintiffs-Appellants,

-against-

Energy Design Service Systems, LLC,
Third-Party Defendant-Respondent.

- - - - -

Energy Design Service Systems, LLC,
Second Third-Party Plaintiff,

-against-

Tarec, LLP,
Second Third-Party Defendant.

____

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Daniel Y. Sohnen of counsel), for appellants.

Vigorito, Barker, Patterson, Nichols & Porter, LLP, Valhalla (Adonaid C. Medina of counsel), for respondent.

____

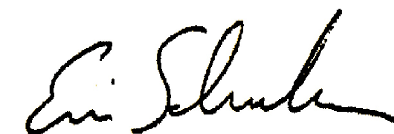
Order, Supreme Court, New York County (Gerald Lebovits, J.), entered May 9, 2018, which, to the extent appealed from as limited by the briefs, denied defendants/third-party plaintiffs T-Mobile USA, Inc. and Dyckman Realty Associates L.P.'s motion for summary judgment on their claim for contractual indemnification against third-party defendant Energy Design

Service Systems, LLC, unanimously affirmed, without costs.

On this record, there are issues of fact as to the negligence of defendants/third-party plaintiffs, who seek to enforce the subject indemnification provision (*Rodriguez v Heritage Hills Socy., Ltd.*, 141 AD3d 482 [1st Dept 2016] [owner failed to make prima facie showing that it did not create or have notice of allegedly dangerous condition]; *Cruz v Kowal Indus.*, 267 AD2d 271 [2d Dept 1999] [owner's "fault could be predicated upon actual or constructive notice of a dangerous condition, such as a defective ladder present on the site"]; *see also Powers v Plaza Tower LLC*, 173 AD3d 446, 446-447 [1st Dept 2019] [owner had a duty to keep the premises safe or to warn workers of the hazards]; *Colozzo v Natl. Ctr. Found., Inc.*, 30 AD3d 251 [1st Dept 2006]). Accordingly, their motion for summary judgment as to liability on their contractual indemnification claim was properly denied.

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

ENTERED: NOVEMBER 21, 2019



DEPUTY CLERK

Friedman, J.P., Renwick, Oing, Singh, JJ.

10428 Gregory Graves, as Administrator of the Estate of Lovely Graves, deceased, Index 306857/08
Plaintiff-Appellant,

-against-

Brookdale University Hospital and Medical Center, et al.,
Defendants,

David Tavdy,
Defendant-Respondent.

____

Stevens, Hinds & White, P.C., New York (Aaron David Frishberg of counsel), for appellant.

Brown, Gaujean, Kraus & Sastow, PLLC, White Plains (Joan Ruddy of counsel), for respondent.

____

Order, Supreme Court, Bronx County (Joseph E. Capella, J.), entered on or about July 26, 2018, which granted the motion of defendant David Tavdy, M.D. for summary judgment dismissing the complaint as against him, unanimously affirmed, without costs.

The court properly dismissed the complaint as against Tavdy as time-barred (CPLR 214-a). The statute of limitations on the medical malpractice cause of action began to run on October 30, 2006, when plaintiff was appointed the decedent's guardian, and expired in April 2009, and the subject action was not commenced until October 2016. Moreover, since the statute of limitations on the malpractice action expired before the decedent's death and

the wrongful death action was predicated on malpractice, that cause of action was also time-barred (*see Bevinetto v Steven Plotnick, M.D., P.C.,* 51 AD3d 612, 615 [2d Dept 2008]).

Plaintiff failed to raise an issue of fact as to whether the statutes of limitation on the causes of action against Tavdy were otherwise inapplicable (*see Wilson v Southampton Urgent Med. Care, P.C.*, 112 AD3d 499 [1st Dept 2013]). Although plaintiff attempted in invoke the relation-back doctrine, he did not show that defendant hospital and Tavdy were so united in interest that Tavdy could be charged with notice of the first action that plaintiff commenced against the hospital or that Tavdy knew or should have known that he intended to sue him (*see Buran v Coupal*, 87 NY2d 173, 178 [1995]; *Garcia v New York-Presbyt. Hosp.*, 114 AD3d 615, 616 [1st Dept 2014]; *compare Rivera v Wycoff Hgts. Med. Ctr.*, 175 AD3d 522 [2d Dept 2019]).

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 21, 2019

DEPUTY CLERK

Friedman, J.P., Renwick, Oing, Singh, JJ.

10429 The People of the State of New York, Ind. 836/16
Respondent,

-against-

Jeffrey Lorenzo,
Defendant-Appellant.

____

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

Cyrus R. Vance, Jr., District Attorney, New York (Brent Ferguson 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 (Michael J. Obus, J.), rendered April 7, 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.

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DEPUTY CLERK

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

Friedman, J.P., Renwick, Oing, Singh, JJ.

10430 The People of the State of New York, Ind. 3681/14
Respondent,

-against-

Wilson Maldonado,
Defendant-Appellant.

____

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

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

____

Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered May 20, 2016, convicting defendant, after a nonjury trial, of criminal contempt in the second degree, and sentencing him to a term of one year, unanimously affirmed.

Defendant did not preserve his contention that the count charging second-degree criminal contempt was rendered duplicitous, or his related claim that the People's summation constructively amended the indictment and deprived defendant of fair notice of the charges, and we decline to review these claims in the interest of justice. As an alternative holding, we also reject them on the merits. It was the People's theory throughout that the altercation between defendant and the victim was a single continuous violation of an order of protection, as reflected in all relevant documents. It was permissible for the

entire course of conduct to be charged as a single count of contempt (*see People v Alonzo*, 16 NY3d 267, 270 [2011]), and for the People to argue that theory (*see People v Tucker*, 41 AD3d 210, 211 [1st Dept 2007], *lv denied* 9 NY3d 882 [2007], *cert denied* 552 US 1153 [2008]).

We have considered and rejected defendant's ineffective assistance of counsel claims relating to the unpreserved issues (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

Defendant failed to preserve, and expressly waived, his claim that his right to a public trial was violated when the court heard legal arguments, outside the presence of spectators, in a room adjacent to the courtroom, and we decline to review it in the interest of justice (*see People v Roberts*, 31 NY3d 406, 426 [2018]).

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

ENTERED: NOVEMBER 21, 2019

DEPUTY CLERK

Friedman, J.P., Renwick, Oing, Singh, JJ.

10431-
10431A Meghan Ann Perez, as Administratrix of the Estate of Prudence Wehmeyer, Deceased, and Meghan Ann Perez, Individually,
Plaintiff-Respondent,

-against-

Riverdale Family Medical Practice, P.C., et al.,
Defendants,

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

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____

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

Kahn Gordon Timko & Rodriques, P.C., New York (Nicholas I. Timko of counsel), for respondent.

____

Orders, Supreme Court, Bronx County (Lewis J. Lubell, J.; George J. Silver, J.), entered October 11, 2018 and April 16, 2019, which denied the motion of defendants New York Presbyterian Hospital and Mark Silberman, M.D. (collectively NYPH) for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

NYPH established prima facie entitlement to judgment as a matter of law. NYPH submitted evidence showing that it did not commit medical malpractice in the treatment of decedent when she

presented at the emergency room with complaints of back pain.

In opposition, plaintiffs failed to raise a triable issue of fact by submitting a nonconclusory opinion by a qualified expert (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]). Plaintiffs' expert failed to profess personal knowledge of the standard of care in the field of emergency medicine, whether acquired through practice, studies or in some other manner (*see Nguyen v Dorce*, 125 AD3d 571, 572 [1st Dept 2015]). In any event, the expert offered only conclusory assertions and mere speculation that decedent's aortic dissection would have been successfully diagnosed and treated had NYPH referred her for a pulmonary or cardiac consult (*see Rivera v Greenstein*, 79 AD3d 564, 568-569 [1st Dept 2010]). Plaintiffs' expert did not refute the opinion of NYPH's expert that decedent's clinical picture supported the diagnosis of musculoskeletal pain, and decedent did not exhibit the classic symptoms of aortic dissection to warrant further investigation (*see David v Hutchinson*, 114 AD3d 412 [1st Dept 2014]; *Zeldin v Michaelis*, 105 AD3d 641 [1st Dept 2013]).

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: NOVEMBER 21, 2019

DEPUTY CLERK

Friedman, J.P., Renwick, Oing, Singh, JJ.

10432 The People of the State of New York, Ind. 5904/12
Respondent,

-against-

Mohd Norazam Muhammad,
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 (Jonathan Cantarero of counsel), for respondent.

Order, Supreme Court, New York County (Gregory Carro, J.), entered on or about October 26, 2017, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court's assessment of 15 points for causing physical injury was supported by clear and convincing evidence. The victim's grand jury testimony and medical records demonstrated that, in two violent sexual assaults, defendant caused physical injury (*see People v Chiddick*, 8 NY3d 445, 447-448 [2007]; *People v Guidice*, 83 NY2d 630, 636 [1994]).

The court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant were

adequately taken into account by the risk assessment instrument and were outweighed, in any event, by the seriousness of the underlying offense.

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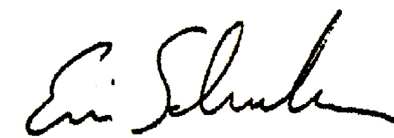

DEPUTY CLERK

Friedman, J.P., Renwick, Oing, Singh, JJ.

10433 Marisol Morales, Index 21130/15E
Plaintiff-Respondent,

-against-

Cesar Cabral,
Defendant,

Elsie Morales,
Defendant-Appellant.

____

Thomas Torto, New York (Jason Levine of counsel), for appellant.

Law Offices of Stuart M. Kerner, P.C., Bronx (Stuart M. Kerner of counsel), for respondent.

____

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered on or about April 12, 2018, which, to the extent appealed from, denied defendant Morales's motion for summary judgment dismissing the complaint as against her on the threshold issue of serious injury under Insurance Law § 5102(d), unanimously modified, on the law, to grant the motion as to the claims of "permanent consequential" injury to the cervical and lumbar spine, serious injury to the left shoulder, and a 90/180-day injury, and, upon a search of the record, to grant summary judgment to defendant Cabral to the same extent, and otherwise affirmed, without costs.

Defendant Morales established prima facie that plaintiff did not sustain a serious injury to her cervical spine, lumbar spine

or left shoulder in the June 2014 automobile accident through the reports of physicians who examined plaintiff and found no indications of limitations in use of the subject body parts. Although one examiner measured limitations in motion, she opined that these were subjective and unrelated to any objective evidence of injury (*see Macdelinne F. v Jimenez*, 126 AD3d 549, 551 [1st Dept 2015]). Morales also submitted radiologists' reports finding either no injury or preexisting conditions and an emergency room medical expert's finding that plaintiff's post-accident complaints and treatment were inconsistent with her claims (*see De La Rosa v Okwan*, 146 AD3d 644 [1st Dept 2017], *lv denied* 29 NY3d 908 [2017]). Morales further relied on records of plaintiff's primary care physician, which reflect no contemporaneous complaints by plaintiff and show that plaintiff had a normal range of motion a year after the accident (*see Perl v Meher*, 18 NY3d 208, 217-218 [2011]). The physician's records also show that plaintiff ceased treating at that time (*see Pommells v Perez*, 4 NY3d 566, 574 [2005]).

In opposition, plaintiff submitted no objective physical findings to support her claim that she suffered any limitations in use of her left shoulder (*Henchy v VAS Express Corp.*, 115 AD3d 478, 479 [1st Dept 2014]). As to her cervical and lumbar spine injuries, plaintiff submitted admissible reports of her

radiologist and treating chiropractor. The radiologist opined that the MRIs showed herniated discs and no evidence of degeneration, which, given the absence of evidence of preexisting conditions in plaintiff's own medical records, is sufficient to rebut the findings of defendant Morales's radiologist (*see Hayes v Gaceur*, 162 AD3d 437 [1st Dept 2018]; *Yuen v Arka Memory Cab Corp.*, 80 AD3d 481 [1st Dept 2011]). The chiropractor's report also provided evidence of contemporaneous treatment of plaintiff's claimed injuries and of limitations in range of motion shortly after the accident (*see Bonilla v Vargas-Nunez*, 147 AD3d 461 [1st Dept 2017]), as well as one year later and recently.

However, neither plaintiff's affidavit nor her chiropractor's report provided a reasonable explanation for her complete cessation of treatment about one year after the accident "even though she had health insurance and saw a regular primary care doctor" (*see Bogle v Paredes*, 170 AD3d 455, 455 [1st Dept 2019]). The cessation of treatment is particularly noteworthy because plaintiff continued to see her primary care physician after June 2015, and the physician found full range of motion at examinations in August 2015 and July 2016. Thus, plaintiff's own medical records show both that she was able to continue seeing a doctor after No Fault benefits ceased and that she no longer had

symptoms related to her alleged injuries, and plaintiff's chiropractor failed to explain the conflict between these facts and his findings (*see Acosta v Vidal*, 119 AD3d 408 [1st Dept 2014]; *Jno-Baptiste v Buckley*, 82 AD3d 578 [1st Dept 2011]). Thus, plaintiff failed to raise an issue of fact as to whether she sustained a permanent injury to her cervical or lumbar spine as a result of the accident. However, her medical submissions are sufficient to raise an issue of fact as to whether she sustained a "significant limitation of use" injury (*see Holmes v Brini Tr. Inc.*, 123 AD3d 628, 629 [1st Dept 2014]; *see also Vasquez v Almanzar*, 107 AD3d 538, 539 [1st Dept 2013] ["a significant limitation need not be permanent in order to constitute a serious injury"] [internal quotation marks omitted]).

Morales established prima facie that there was no 90/180-day injury by submitting plaintiff's own testimony that she returned to work the day after the accident for one month (*see Anderson v Pena*, 122 AD3d 484, 485 [1st Dept 2014]; *see also Tsamos v Diaz*, 81 AD3d 546 [1st Dept 2011]). Plaintiff's submissions failed to raise an issue of fact.

If a jury determines that plaintiff has met the threshold for serious injury, it may award damages for any injuries causally related to the accident, including those that do not

meet the threshold (*Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549 [1st Dept 2010]).

Although defendant Cabral did not appeal from the denial of his motion for summary judgment, Morales having demonstrated that plaintiff cannot meet the threshold for serious injury as to her claims of "permanent consequential" injury to the cervical and lumbar spine, serious injury to the left shoulder, and a 90/180-day injury, we grant summary judgment to that degree to defendant Cabral as well (*see Lall v Ali*, 101 AD3d 439 [1st Dept 2012]).

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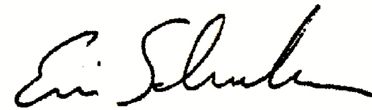

DEPUTY CLERK

Friedman, J.P., Renwick, Oing, Singh, JJ.

10434 The People of the State of New York, Respondent, Ind. 4518/14

-against-

William Rada, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Laura A. Ward, J. at suppression hearing; Ruth Pickholz, J. at nonjury trial and sentencing), rendered May 2, 2016, as amended May 11, 2106 and November 3, 2016, convicting defendant of criminal contempt in the first degree, menacing in the second degree, stalking in the fourth degree, criminal mischief in the fourth degree and aggravated harassment in the second degree, and sentencing him to an aggregate term of two to four years, unanimously affirmed.

The court properly denied defendant’s motion to suppress his statement, directed at the victim, who was still present after defendant was arrested, that he was going to kill her. This threat, directed against a person covered by an order of protection, formed the basis of the contempt charge. Here, although the threat was made while defendant was in custody and

before he received *Miranda* warnings, it was plainly spontaneous and not the product of a custodial interrogation (*see People v Mojica*, 81 AD3d 506, 507 [1st Dept 2011] *lv denied* 17 NY3d 808 [2011]; *People v Read*, 74 AD3d 1245, 1246 [2d Dept 2010]).

We reject defendant's arguments concerning the sufficiency and weight of the evidence supporting the first-degree criminal contempt conviction (Penal Law § 215.51[b][v]). The evidence, viewed as a whole, supports the conclusion that defendant made a true threat of violence.

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

ENTERED: NOVEMBER 21, 2019

DEPUTY CLERK