SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 26, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Tom, Webber, Gesmer, Oing, JJ.

9968 In re Edgewater Apartments, Inc., Index 152211/18
Petitioner-Appellant,

-against-

New York City Planning
Commission, et al.,
Respondents-Respondents.

____

Morrison Cohen LLP, New York (Y. David Scharf of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jeremy W. Shweder of counsel), for New York City Planning Commission, respondent.

Fried, Frank, Harris, Shriver & Jacobson LLP, New York (Janice Mac Avoy of counsel), for Hospital for Special Surgery, respondent.

____

Judgment, Supreme Court, New York County (Carol R. Edmead, J.), entered August 2, 2018, denying the petition to annul a determination of respondent New York City Planning Commission (the Commission), dated November 13, 2017, which granted an application by respondent Hospital for Special Surgery (HSS) for renewal of a special permit to construct a new hospital building, and dismissing the proceeding brought pursuant to CPLR article

78, affirmed, without costs.

The Commission’s determination that “the facts upon which the ... special permit was granted have not substantially changed” (Zoning Resolution [ZR] § 11-43) was rationally based in the record and not contrary to law (*see Matter of Silverman v Carrion*, 146 AD3d 570, 571 [1st Dept 2017]; *Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 428 [1st Dept 2007], *affd* 11 NY3d 859 [2008]). We accord deference to the Commission’s rational construction of the statute, to mean that the “facts” to be assessed refer to the scope and terms of the permitted project, rather than external factors, such as environmental impacts that may have resulted from area development during the years since the original grant of the special permit (*see Matter of Terrace Ct., LLC v New York State Div. of Hous. & Community Renewal*, 18 NY3d 446, 454 [2012]; *Matter of Goodstein Constr. Corp. v Gliedman*, 117 AD2d 170, 179 [1st Dept 1986] [Sandler, J., concurring] [“the City Planning Commission (is) a body with special experience and competence in land use matters”], *affd* 69 NY2d 930 [1987]). While we do not deprecate petitioner’s view that changes in external factors should have been considered before the permit was renewed, whether a full-scale reassessment of the project’s impact was needed was a matter committed to the

Commission's discretion, which was rationally exercised here.

We likewise agree with respondents' harmonizing of ZR §§ 11-42(d) and 11-43, to provide that initiation of litigation challenging a permit determination defers commencement of a lapse period until entry of the final order in such litigation. In particular, the 10-year cap referred to in section 11-43 does not absolutely limit an aggregate lapse period to 10 years from the original permit's effective date, but rather merely refers to the maximum duration of lapse periods without counting any tolls effected by operation of section 11-42(d). We note that construction of section 11-43 as imposing an absolute 10-year cap would frustrate the statutory scheme's purpose of enabling streamlined permit renewal procedures, by making it possible for determined litigants to destroy the effectiveness of special permits by bringing repeat litigations to delay "substantial construction" until 10 years from the original effective date (*see Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 425 [1986] ["If upon the coming down of the administrative order litigants might demand rehearings as a matter of law because some new circumstance has arisen, . . . there would be little hope that the administrative process could ever be consummated"] [brackets omitted]).

Here, since the prior litigation initiated by petitioner

concluded on June 27, 2013 (*see Matter of Hand v Hospital for Special Surgery*, 107 AD3d 642 [1st Dept 2013]), the four-year special permit lapse period was due to end on June 27, 2017. HSS's permit renewal application on June 19, 2017, was thus timely.

All concur except Tom, J. who concurs in a separate memorandum as follows:

TOM, J. (concurring)

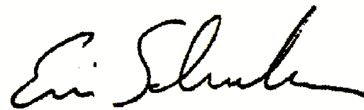
I agree with the majority that the judgment denying the petition and dismissing the proceeding must be affirmed. However, it seems to me that the purpose of SEQRA and CEQR and related regulations would be better served if a new environmental impact study were made. During the decade since the original approval of the project, eight new medical facilities were constructed in the project's vicinity, causing, in addition to the scale and density of these developments, an increase in traffic, noise, pollution and other adverse impacts on the neighborhood that the City Planning Commission did not reach. The better process would have been to examine these impacts in connection with the application to renew the permit after these several years. This strikes me, and likely the public and, manifestly, local residents, as a sounder planning approach even if the legal analysis, grounded in the rationality rather than the wisdom of the determination, proceeds along a much narrower path.

However, I concede that the passage of time is not a dispositive factor in our review and that we afford substantial deference to the land use agency exercising its specialized

knowledge in interpreting the relevant provisions of the zoning resolution as applied to a land use application.

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

ENTERED: NOVEMBER 26, 2019



DEPUTY CLERK

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

10218 Carmen Pira, etc., Index 800224/11
Plaintiff-Appellant,

-against-

Andrei Carasca, M.D., et al.,
Defendants-Respondents,

North Shore Long Island
Jewish Health System, Inc.,
Defendant.

____

Kelner & Kelner, New York (Gerard K. Ryan, Jr. of counsel), for appellant.

Bartlett LLP, Garden City (Robert G. Vizza of counsel), for Andrei Carasca, M.D. and Carasca Neurology, LLC, respondents.

Dopf, P.C., New York (Martin B. Adams of counsel), for Colette M. Spaccavento, M.D. and Colette M. Spaccavento, M.D., P.C., respondents.

Heidell, Pittoni, Murphy & Bach, LLP, New York (Daniel S. Ratner of counsel), for Lenox Hill Hospital, respondent.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered November 15, 2017, which granted defendants' motions for summary judgment dismissing the complaint as against them, unanimously modified, on the law, to deny defendants Andrei Carasca, M.D.'s, Lenox Hill Hospital's, and Carasca Neurology, LLC's motions, and otherwise affirmed, without costs.

In opposition to defendants' prima facie showing, plaintiff submitted the nonconclusory opinion of a qualified expert that the decedent's injuries resulted from Dr. Carasca's performing a lumbar puncture without discontinuing the decedent's Heparin or

administering a platelet transfusion, as had been defendants' plan. Thus, an issue of fact was raised precluding summary judgment in favor of Dr. Carasca, Carasca Neurology, LLC, and Lenox Hill Hospital (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]). Defendants' argument that the expert's averments as to causation were vague and conclusory is unavailing; the expert's opinion was based on the decedent's MRI and CT scans. Moreover, while defendants argue that there is no medical basis for plaintiff's expert's opinion that a leak in the dura caused intradural hemorrhaging and infarct above the level where the puncture was performed, they submitted no further expert affidavits supporting that argument; indeed, in reply, defendants' experts were nearly silent about plaintiff's theory of causation.

Defendants' argument that plaintiff's expert, a neurologist, was unqualified to opine on the circumstances of the procedure performed by Dr. Carasca is unavailing. Their claim of a lack of experience on plaintiff's expert's part is relevant to the weight, not the admissibility, of the expert's opinion (*see Rojas v Palese*, 94 AD3d 557 [1st Dept 2012]). Nor did plaintiff assert a new theory in opposition to defendants' motions. The bill of particulars alleges that defendants were negligent in performing the lumbar puncture and in improperly administering anticoagulants (*see DB v Montefiore Med. Ctr.*, 162 AD3d 478 [1st Dept 2018]).

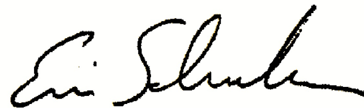
Plaintiff failed to raise an issue of fact whether defendant

Collette M. Spaccavento, M.D., an oncologist, departed from good and accepted medical care. The record demonstrates that Dr. Spaccavento had no role in the timing and performance of the lumbar puncture. The record also demonstrates that Dr. Spaccavento took appropriate measures by directing radiological studies scheduled "STAT" immediately upon observing the decedent's symptoms, and plaintiff fails to identify what other actions Dr. Spaccavento could have taken in light of defendant Lenox Hill Hospital's expert affidavit acknowledging that the hospital staff "was obligated to...follow and carry out orders and directives regarding [the patient's] care and treatment in a medically accepted fashion."

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 26, 2019



DEPUTY CLERK

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

10301 Linda Carroll, etc., Index 805016/14
Plaintiff-Respondent,

-against-

New York City Health and Hospitals Corporation, et al.,
Defendants,

Stephen A. Mezzafonte, M.D.,
Defendant-Appellant.

- - - - -

[And a Third Party Action]

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Gabriele & Marano, LLP, Garden City (Melissa Goldberg of counsel), for appellant.

Phillips & Paolicelli LLP, New York (Yitzchak M. Fogel of counsel), for respondent.

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Order, Supreme Court, New York County (George J. Silver, J.), entered March 21, 2019, which, to the extent appealed from as limited by the briefs, denied defendant Steven A. Mezzafonte, M.D.'s (defendant) motion for summary judgment dismissing claims of negligence alleged to have occurred prior to December 26, 2012 or after January 21, 2013, unanimously reversed, on the law, without costs, the motion granted, and the language "prior or subsequent thereto" stricken from plaintiff's bill of particulars.

The complaint alleges that defendant Dr. Stephen Mezzafonte committed malpractice between January 15-21, 2013 "and prior and

subsequent thereto." The bill of particulars alleges that he failed to properly interpret decedent's echocardiogram (EC) on January 18, 2013, which showed a more dilated aorta than a prior EC taken on August 8, 2011 and interpreted by defendant on August 16, 2011. Both the original and purported supplemental bills of particulars allege that defendant's negligent acts "took place from on or about December 26, 2012 through January 21, 2013, and prior or subsequent thereto."

In opposing defendant's motion for summary judgment, plaintiff submitted an expert opinion which opined that defendant also negligently interpreted the EC taken in 2011.

Contrary to Supreme Court's conclusion, the complaint and bill of particulars were only sufficient to put defendant on notice of an allegation that, in January 2013, he failed to properly compare the 2013 EC with the 2011 EC contained in decedent's medical record, and determine that a dilation in decedent's aorta had increased. Plaintiffs' papers were insufficient to put defendant on notice of plaintiffs' new theory of liability - raised for the first time in her expert's opinion - that he deviated from the standard of care in August 2011, when interpreting the 2011 EC (*see Alvarado v New York City Hous. Auth.*, 302 AD2d 264, 265 [1st Dept 2003]). Here, where negligence is specifically alleged to have occurred only between

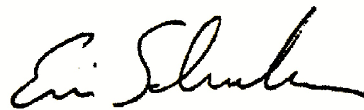
December 2012 and January 2013, we conclude that the vague, ambiguous, nonspecific and open-ended assertion "prior or subsequent thereto" contained in plaintiffs' bill of particulars failed to put defendant on notice of a claim that he acted negligently in August 2011.

Accordingly, Supreme Court should not have considered plaintiffs' expert opinion as to defendant's actions in August 2011 and should not have found that plaintiffs properly alleged malpractice which occurred in August 2011, and should have dismissed claims of negligence alleged to have occurred prior to December 26, 2012 or after January 21, 2013 and should have stricken the language "prior or subsequent thereto" contained in plaintiffs' bill of particulars.

We have considered the remaining arguments, and find them unavailing.

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

ENTERED: NOVEMBER 26, 2019



DEPUTY CLERK

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

10346-
10346A-
10346B-
10346C-
10346D &
M-7622 Index 850218/15

Bosco Credit V Trust Series 2012-1,
Plaintiff-Respondent,

-against-

Derek Johnson also known as
Derek Q. Johnson, et al.,
Defendants-Appellants,

Richard D. Parsons care of Bank of
New York Mellon, et al.,
Defendants.

____

Lambert & Shackman, PLLC, New York (Thomas C. Lambert of counsel), for appellants.

O'Hare Parnagian LLP, New York (Robert A. O'Hare Jr. of counsel), for respondent.

____

Judgment of foreclosure and sale, Supreme Court, New York County (George J. Silver, J.), entered February 25, 2019, in favor of plaintiff, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered February 25, 2019, unanimously dismissed, without costs, as subsumed in the appeal from the judgment. Appeals from orders, same court and Justice, entered July 11, 2018, July 10, 2018, and April 24, 2019, unanimously dismissed, without costs, as abandoned.

Defendants Derek Johnson and Susan Josie Crawford contend

that Supreme Court lacked jurisdiction over this action because a final judgment of foreclosure and sale of the same property was entered in 2007 in an action commenced in 2005, and plaintiff failed to seek leave to commence the instant action pursuant to RPAPL 1301. Defendants waived this argument by failing to raise it in their opposition to plaintiff’s motion for summary judgment, in their reply in further support of their cross motion and opposition to plaintiff’s motion, or during oral argument on the motions (*see New York Commercial Bank v J. Realty F Rockaway, Ltd.*, 108 AD3d 756 [2d Dept 2013]).

Were we to consider the argument, we would find it unavailing. While the 2005 action was not “formally discontinued” or the ensuing 2007 judgment vacated after the instant action was commenced, plaintiff’s assignor, the former mortgage lender, entered into a loan modification agreement with defendants in 2008 that eliminated the basis for the judgment (*see U.S. Bank Trust, N.A. v Humphrey*, 173 AD3d 811, 812 [2d Dept 2019]; *MLB Sub I, LLC v Grimes*, 170 AD3d 992, 994 [2d Dept 2019]; *Credit-Based Asset Servicing & Securitization v Grimmer*, 299 AD2d 887 [4th Dept 2002]). Thus, defendants are not facing “the expense and annoyance of two independent actions at the same time with reference to the same debt” (*Central Trust Co. v Dann*, 85 NY2d 767, 772 [1995] [internal quotation marks omitted]), and

plaintiff's failure to comply with RPAPL 1301(3) "was properly disregarded as a mere irregularity" (*Deutsche Bank Natl. Trust Co. v O'Brien*, 175 AD3d 650, 651 [2d Dept 2019], citing CPLR 2001).

Defendants' argument that plaintiff had "unclean hands" is unavailing, because there is no statute that "requires a lender to take into account the borrower's ability to repay when making a loan, and provides a remedy to the borrower for the lender's failure to meet such requirement" (*HSBC Bank USA, N.A. v Campos*, 55 Misc 3d 1221[A] 2017 NY Slip Op 50695[U], *6 [Sup Ct, Queens County 2017]). To the extent defendants argue that plaintiff's predecessor in interest accepted their borrower contribution without properly crediting it, plaintiff submitted an undisputed affidavit averring that the payment was applied in part to principal and interest, in part to legal and other fees incurred as a result of defendants' default, and in part to property taxes and an unpaid water and sewer bill that would otherwise have resulted in a lien on the property, and defendants offer no

authority for their contention that the payment should have been applied solely to principal and interest.

M-7622 - *Bosco Credit V Trust Series 2012-1 v Derek Johnson*

Motion to compel plaintiff to pay its share of the cost of the record pursuant to 22 NYCRR 1250.9(f)(1)(ii) denied.

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

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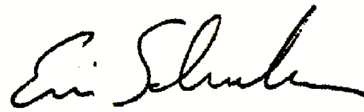


DEPUTY CLERK

Mazzarelli, J.P., Kapnick, Gesmer, Moulton, JJ.

10436 The People of the State of New York, Respondent, Ind. 3971/16

-against-

Norman McKenny, Defendant-Appellant.

____

Justine M. Luongo, The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

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

____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered July 28, 2017, convicting defendant, after a jury trial, of robbery in the second and third degrees, and sentencing him to an aggregate term of 10 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence established defendant's accessorial liability, as well as the "actually present" requirement of second-degree robbery under Penal Law § 160.10(1]). Defendant picked up his two accomplices in a car, got out of the car with them when they found their victim, accompanied them as they followed the victim, and remained on the street until the robbery was in progress, thus staying close in case his accomplices needed help, after which he ran back to the car to pick up the accomplices and drop them off

elsewhere, allowing them to avoid apprehension (*see People v Dennis*, 146 AD2d 708 [2d Dept 1989], *affd* 75 NY2d 821 [1990]; *see also People v Stokes*, 278 AD2d 18, 18-19 [1st Dept 2000], *lv denied* 96 NY2d 763 [2001]). Although defendant offers various innocent explanations for this evidence, we find them unavailing.

A proceeding conducted in the presence of counsel, but not defendant, was a preliminary colloquy with a witness to determine whether she would refuse to testify at trial, and thus whether a *Sirois* hearing to determine the admissibility of her prior statements (*Matter of Holtzman v Hellenbrand*, 92 AD2d 405 [1983]) was needed. Defendant was present for the entire *Sirois* hearing that followed, during which the witness repeated her testimony from the preliminary proceeding, including the threats she received, her safety concerns, and her refusal to testify. Thus, the court essentially held "a de novo hearing on the same matter at which defendant [wa]s present," thereby according him the opportunity to give meaningful input on that matter (*People v Roman*, 88 NY2d 18, 27 [1996]; *see also People v Torres*, 61 AD3d 489, 490 [1st Dept 2009], *lv denied* 12 NY3d 921 [2009]). Defendant has not identified any meaningful difference, bearing on his right to be present, between the witness's testimony taken in defendant's absence and her later testimony in his presence.

Following the *Sirois* hearing, the court properly determined

that admission of the witness's out-of-court statements would not violate defendant's right of confrontation because there was clear and convincing evidence that the witness was "unwilling to testify due to the defendant's own conduct, or . . . the actions of others with the defendant's knowing acquiescence" (*People v Dubarry*, 25 NY3d 161, 174 [2015] [internal quotation marks omitted]; *see also People v Geraci*, 85 NY2d 359, 366-67 [1995]). Contrary to defendant's assertion, the witness was unavailable, in that she unequivocally declared her refusal to testify, rather than a mere disinclination to do so. On recorded calls defendant placed from Rikers Island, his family members referred to the witness by name, and defendant told his mother and sister to make sure she "don't show" before the grand jury by the deadline to release him pursuant to CPL 180.80. Thus, it is a reasonable inference that he knew and endorsed his mother's later threatening conduct. The witness also testified that many of the threats referred to defendant by name, and that defendant and his mother had her contact information, which, along with his stated desire that she be persuaded not to testify, suggests that defendant caused at least some of the other threats she received. Moreover, while incarcerated, defendant himself posted on Instagram a video with several inmates in which he stated that he wanted to kill "rats." Ultimately, at a calendar appearance

where the prosecutor declared her readiness for trial, defendant announced to the prosecutor that "[t]he witness ain't coming," which also supports the inference that defendant, or others with his consent, procured the witness's unavailability.

Defendant's claim of newly discovered evidence is procedurally defective and unreviewable on this appeal. Defendant moved to set aside the verdict under CPL 330.30(1), which deals with trial errors of law, rather than 330.30(3), which deals with new evidence. Defendant did not merely cite the wrong subdivision, he proceeded pursuant to that subdivision. He submitted an affidavit from the witness who had been the subject of the *Sirois* hearing, in which she now recanted her incriminating grand jury testimony and videotaped statement in the context of a claim of trial error. However, under CPL 330.30(1) such a claim is limited to the trial record (*People v Giles*, 24 NY3d 1066, 1068 [2014], *cert denied* __US__, 136 S Ct 32 [2015]). Defendant never claimed that the affidavit was newly discovered or that it would have probably changed the result, requirements set forth in CPL 330.30(3). Accordingly, there was no factual claim before the trial court upon which it could have held a hearing.

In any case, regardless of whether defendant could be deemed to have made a newly discovered evidence motion, it fails on the

merits. Defendant submitted no evidence that the recantation was unavailable prior to trial and could not, by due diligence, have been produced at trial (*see generally People v Salemi*, 309 NY 208, 215-16 [1955], *cert denied* 350 US 950 [1956]). Moreover, in light of recorded phone calls defendant placed from Rikers Island in which he offered to pay that same witness to write or sign an exculpatory affidavit, and in light of her detailed testimony at the *Sirois* hearing of threats and bribe offers, including from defendant's mother, the affidavit was plainly the product of defendant's efforts to influence the witness and of her ongoing fears for her and her family's safety. Accordingly, there is no reason to believe that the recantation "will probably change the result if a new trial is granted" (*id.* at 216).

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 26, 2019

DEPUTY CLERK

Mazzarelli, J.P., Kapnick, Gesmer, Moulton, JJ.

10437 Haim Zitman, Index 652015/18
Plaintiff-Appellant,

-against-

Sutton LLC, et al.,
Defendants-Respondents.

____

Robert Elan, New York, for appellant.

Haim Zitman, appellant pro se.

Cullen & Associates P.C., New York (Wayne L. DeSimone of counsel), for respondents.

____

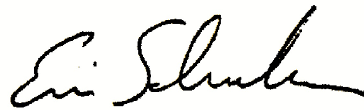
Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered on or about September 6, 2018, which granted defendant's motion to dismiss the complaint as time-barred, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff's claims for rent overcharges during the six years preceding the commencement of this action, based chiefly on an allegedly improper rent increase in about 1986, are timely (*see* CPLR 213-a; *Moore v Greystone Props. 81 LLC*, ___ AD3d ___, 2019 NY Slip Op 07488 [1st Dept 2019]; *Dugan v London Terrace Gardens, L.P.*, ___ AD3d ___, 2019 NY Slip Op 06578, *3 [1st Dept 2019]). Although the complaint was dismissed on September 6, 2018, the action remained "pending" for purposes of retroactive application of CPLR 213-a during the pendency of the

instant appeal (*see* L 2019, ch 36, Part F, § 7; *Dugan*, 2019 NY Slip Op 06578, *1).

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

ENTERED: NOVEMBER 26, 2019



DEPUTY CLERK

Mazzarelli, J.P., Kapnick, Gesmer, Moulton, JJ.

10438 In re Akeemia F.,
Petitioner-Respondent,

-against-

Mark C.,
Respondent-Appellant.

Andrew J. Baer, New York, for appellant.

Akeemia F., respondent pro se.

Order, Family Court, Bronx County (Ruben A. Martino, J.), entered on or about February 26, 2019, which confirmed the finding of the Support Magistrate, after a hearing, that respondent father willfully failed to obey an order of child support, and ordered that he be incarcerated for six months, with a purge amount set at $8,000, unanimously affirmed, without costs.

Petitioner met her prima facie burden of demonstrating the father's willful violation of a lawful support order issued in 2015. In opposition, the father failed to rebut the showing with evidence of his inability to make the required payments (*see Matter of Powers v Powers*, 86 NY2d 63, 69-70 [1995]). His claims that his income had decreased drastically after he lost his job as an accountant and that he had been unable to find new employment other than seasonal tax return preparation were

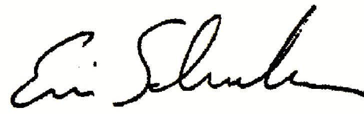
unsubstantiated by any competent, credible evidence documenting his claimed job search and lack of income or other resources (*see Matter of Nancy R. v Anthony B.*, 121 AD3d 555 [1st Dept 2014]; *Matter of Bianca J. v Dwayne A.*, 105 AD3d 574 [1st Dept 2013]). There exists no basis to disturb the Support Magistrate's credibility determinations (*see Nancy R.* at 556).

The court providently exercised its discretion in ordering a period of incarceration or a purge payment of $8,000 (*see id.*).

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

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

ENTERED: NOVEMBER 26, 2019



DEPUTY CLERK

Mazzarelli, J.P., Kapnick, Gesmer, Moulton, JJ.

10441 The People of the State of New York, Ind. 745/16
Respondent,

-against-

Bryan Jones,
Defendant-Appellant.

____

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

Darcel D. Clark, District Attorney, Bronx (Nicole Neckles of counsel), for respondent.

____

Judgment, Supreme Court, Bronx County (Lester B. Adler, J. at motion to controvert warrant; Ralph Fabrizio, J. at plea and sentencing), rendered November 9, 2017, as amended January 11, 2018, convicting defendant of criminal possession of a weapon in the third degree, and sentencing him to a term of one to three years, unanimously affirmed.

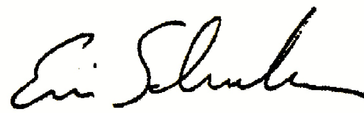
Defendant made a valid waiver of his right to appeal. The court's oral colloquy with defendant established a valid waiver (*see People v Sanders*, 25 NY3d 337 [2015]; *see also People v Bryant*, 28 NY3d 1094 [2016]). Although the written waiver form cannot be located, the oral colloquy was sufficient (*see People v Lopez*, 6 NY3d 248, 257 [2006]).

The waiver forecloses review of defendant's suppression and excessive sentence claims. In any event, upon our review of the

sealed materials we find that the search warrant was based on probable cause, and we perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 26, 2019



DEPUTY CLERK

Mazzarelli, J.P., Kapnick, Gesmer, Moulton, JJ.

10442 Stephanie Olson, Index 350024/13
Plaintiff-Respondent,

-against-

David Olson,
Defendant-Appellant.

David Olson, appellant pro se.

Stephanie Scherr Olson, respondent pro se.

Order, Supreme Court, New York County (Tandra L. Dawson, J.), entered November 1, 2018, which, after a hearing, held defendant in contempt for failure to comply with a pendente lite child support order and committed him to the New York City Department of Correction for 60 days or until he pays child support arrears in the amount of $81,575, unanimously affirmed, without costs.

In its October 25, 2016 pendente lite order, the court imputed income to defendant and found that he was capable of paying $3,625 per month as child support. In the order now on appeal, the court correctly determined that defendant's admitted failure to pay temporary child support constituted a knowing violation of a lawful court order, and that his conduct was calculated to, or actually did, defeat, impair, impede, or prejudice plaintiff's rights or remedies (Judiciary Law §

753[A][3]).

Defendant raises three issues on appeal, all of which we reject. First, contrary to defendant's contention, the court held a full evidentiary hearing on plaintiff's contempt motion. Furthermore, there is no statutory requirement that a motion for a downward modification be decided before a previously filed motion for contempt can be decided.

Second, defendant argues that DRL § 245 requires a showing that less drastic remedies would be ineffective before imposing incarceration as punishment for contempt. However, that statute was amended in 2016 and no longer requires such a showing (DRL § 245; *see also Cassarino v Cassarino*, 149 AD3d 689, 691 [2d Dept 2017]).

Third, defendant argues that the court erred in holding him in contempt because the Judiciary Law only permits a court to punish a party for civil contempt for non-payment of a sum the court has ordered him to pay "in a case where by law execution can not be awarded for the collection of such sum . . . " (Jud L § 753[A][3]). Here, however, plaintiff cannot avail herself of any other enforcement mechanisms for three reasons. First, enforcement of a money judgment might result in defendant's child support arrears being paid from marital assets, thus decreasing their availability for distribution. Second, even if the motion

court accepted defendant's claim that he earned $17 per hour working part time at a Home Depot, income execution would be insufficient to collect the sum of child support awarded. Finally, plaintiff states in her brief, and defendant does not deny, that the motion court ruled on March 19, 2018 that income execution was unavailable.

Accordingly, the motion court properly issued, as punishment for defendant's contempt, an order of commitment directing that defendant remain in the custody of the New York City Department of Corrections for the lesser of 60 days or until he pays support arrears of $81,575 (Jud L §§ 753[A][1]; 774).

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

ENTERED: NOVEMBER 26, 2019

DEPUTY CLERK

Mazzarelli, J.P., Kapnick, Gesmer, Moulton, JJ.

10443 Hiram Hernandez, et al., Index 301466/11
Plaintiffs,

-against-

Metro Management and Development, Inc.,
Defendant.
- - - - -
Metro Management and Development, Inc.,
Third Party Plaintiff-Respondent,

-against-

2075 Wallace Avenue Owners Corp.,
Third Party Defendant-Appellant.
____

Haworth Barber & Gerstman, LLC, New York (Barry L. Gerstman of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (I. Elie Herman of counsel), for respondent.
____

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered on or about October 5, 2017, which granted third-party plaintiff's (Metro) motion for reargument and, upon reargument, denied third-party defendant's (Wallace) motion for summary judgment dismissing the third-party complaint, unanimously affirmed, without costs.

Contrary to Wallace's contentions, Metro's motion complied with CPLR 2221(f) by identifying separately and supporting separately each item of relief sought, and its arguments in support of each were not the same. Considering the arguments,

the motion court recognized that it should not have entertained – and granted – Wallace's request for relief first mentioned in reply, without affording Metro an opportunity to respond (*see e.g. Flores v Nikac*, 121 AD3d 577 [1st Dept 2014]).

Wallace's request in reply is not akin to the demand for alternative or several different types of relief that is permitted in a notice of motion (CPLR 2214[a]). Metro was not given the opportunity to oppose the motion for the relief requested by Wallace.

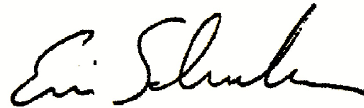
Nor is the relief that Wallace requested on reply, a stay of the third-party action until certain policy limits were exhausted, merely a more lenient form of the relief it sought initially – dismissal of the third-party action. This question was not previously addressed by either party or the court, and the court properly granted reargument to address the unintended consequences of its original determination.

Upon granting reargument, the court correctly reversed its original determination that Wallace was entitled to summary judgment. The record presents issues of fact as to the applicability of the anti-subrogation rule (*see New York City Dept. of Transp. v Petric & Assoc., Inc.*, 132 AD3d 614 [1st Dept 2015]).

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

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

ENTERED: NOVEMBER 26, 2019



DEPUTY CLERK

Mazzarelli, J.P., Kapnick, Gesmer, Moulton, JJ.

10444 The People of the State of New York, Ind. 1436/11
Respondent,

-against-

Emilio Gonzalez,
Defendant-Appellant.

____

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

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

____

Judgment, Supreme Court, Bronx County (Efrain Alvarado, J.), rendered September 16, 2013, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 20 years to life, unanimously affirmed.

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 its resolution of inconsistencies in testimony. The testimony of the two principal witnesses was consistent as to the critical facts.

The court providently exercised its discretion in admitting a tape of a 911 call made after the stabbing, in which screaming and crying, undisputedly qualifying as excited utterances, are heard. “The tape was relevant to corroborate some of the

testimony, and was not so inflammatory that its prejudicial effect exceeded its probative value” (*People v Harris*, 99 AD3d 608, 609 [1st Dept 2012], *lv denied* 21 NY3d 1004 [2013]). Defendant did not preserve his claim that the People failed to lay a proper foundation for admission of the 911 tape, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. A witness’s testimony supported a reasonable inference that, although she was not the caller, she was a participant who could properly authenticate the call, and not merely identify the voices (*see People v Ely*, 68 NY2d 520, 527-528 [1986]).

The only one of defendant’s challenges to the prosecutor’s summation that is arguably preserved is his claim that the prosecutor evoked sympathy by referring to defendant’s potential for a long life, unlike the fate of the victim. The court sustained an objection, and the remark was not so egregious as to warrant a mistrial. Defendant did not preserve any of his other challenges to the summation, or his claims regarding the court’s charge, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

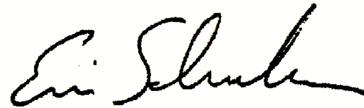
We have considered and rejected defendant’s ineffective assistance of counsel claims relating to the issues we have found

to be unpreserved (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 26, 2019



DEPUTY CLERK

Mazzarelli, J.P., Kapnick, Gesmer, Moulton, JJ.

10445-
10445A In the re Liza F.,
and Another.

Children Under Eighteen
Years of Age, etc.,

Bon F.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

____

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

Zachary W. Carter, Corporation Counsel, New York (Cynthia Kao of counsel), for respondent.

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

____

Order of disposition, Family Court, Bronx County (Patria Frias-Colón, J.), entered on or about April 30, 2018, insofar as it brings up for review a fact-finding order, same court (Ta-Tanisha D. James, J.), entered on or about March 16, 2018, which found that respondent father neglected the subject children, unanimously affirmed, without costs. Appeal from fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

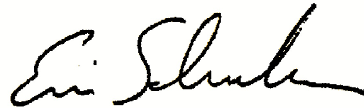
The father's acts of throwing a chair at the younger child, striking his right arm, wrapping his hands around that child's

neck and choking him so as to cause scratches on his neck as documented in the color photographs taken by the caseworker the day after the January 22, 2017 incident and included in the record, constituted excessive corporal punishment (*see Matter of Alysha M.*, 24 AD3d 255, 255-256 [1st Dept 2005], *lv denied* 6 NY3d 709 [2006]). The younger child's out-of-court statements as testified to by the caseworker were corroborated by the color photographs she took depicting the injuries she observed on the child when she interviewed him the day after the father assaulted him (*see Matter of Tyson T. [Latoyer T.]*, 146 AD3d 669, 669 [1st Dept 2017]). The court's credibility determinations are supported by the record (*see Matter of Bobbi B. [Bobby B.]*, 165 AD3d 587, 587 [1st Dept 2018]). Since a single incident of excessive corporal punishment can support a neglect finding (*see Matter of Marelyn Dalys C.-G. [Marcial C.]*, 113 AD3d 569, 570 [1st Dept 2014]; *Matter of Rachel H.*, 60 AD3d 1060, 1061 [2d Dept

2009]), we affirm on this basis, and need not reach the father's arguments about Family Court's additional findings.

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

ENTERED: NOVEMBER 26, 2019



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DEPUTY CLERK

Mazzarelli, J.P., Kapnick, Gesmer, Moulton, JJ.

10446 The People of the State of New York, Ind. 2496/16
Respondent,

-against-

Keiyon Gordon,
Defendant-Appellant.

____

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

____

Judgment, Supreme Court, Bronx County (Marc J. Whiten, J., at plea; Amando Montano, J., at sentencing), rendered March 1, 2018, as amended June 18, 2018, unanimously affirmed.

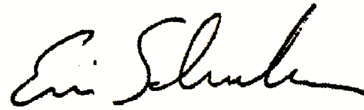
Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised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

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

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

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

ENTERED: NOVEMBER 26, 2019



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DEPUTY CLERK

Mazzarelli, J.P., Kapnick, Gesmer, Moulton, JJ.

10447 The People of the State of New York, Ind. 416/16
Respondent,

-against-

Tyrone Robins,
Defendant-Appellant.

____

David Louis Cohen, Kew Gardens, for appellant.

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

____

Judgment, Supreme Court, New York County (Abraham L. Clott, J.), rendered February 15, 2017, as amended April 7, 2017, convicting defendant, after a jury trial, of burglary in the third degree (four counts), robbery in the third degree and attempted petit larceny, and sentencing him, as a second felony offender, to an aggregate term of 8 to 16 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of directing that all sentences be served concurrently, and otherwise affirmed.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record, with particular regard to counsel's strategic choices (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Although defendant made a CPL 440.10 motion, it was on different

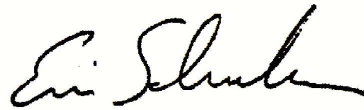
grounds from those raised on appeal, and it is not presently before this Court in any event. Accordingly, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). 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. There is nothing to indicate that the strategy proposed by defendant on appeal had any greater chance of success than the strategy actually employed by trial counsel (*see People v Mendoza*, 33 NY3d 414 [2019]; *People v Zayas*, 89 AD3d 610, 611 [1st Dept 2011], *lv denied* 18 NY3d 964 [2012]).

The court provided a meaningful response to a jury note (*see People v Malloy*, 55 NY2d 296, 302 [1982], *cert denied* 459 US 847 [1982]). Defendant was not prejudiced when the court elaborated on its single-word answer to the jury's question by rereading a statutory definition that had been included in the main charge (*see People v Lourido*, 70 NY2d 428, 435 [1987]).

We find the sentence excessive to the extent indicated.

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

ENTERED: NOVEMBER 26, 2019



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DEPUTY CLERK

Mazzarelli, J.P., Kapnick, Gesmer, Moulton, JJ.

10448 UAH-Mayfair Management Group LLC, et al., Plaintiffs-Respondents, Index 653590/18

-against-

Michael Clark, et al., Defendants-Appellants.

Wick Phillips, Dallas, TX (Brett L. Myers of the bar of the State of Texas, admitted pro hac vice, of counsel), for appellants.

Meister Seelig & Fein LLP, New York (David E. Ross of counsel), for respondents.

Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered October 16, 2018, which granted plaintiffs a preliminary injunction enforcing contractual covenants through the trial of this matter, unanimously affirmed, with costs.

In order to obtain a preliminary injunction, movant must show (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in its favor *(see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]).

The IAS court did not abuse its discretion in finding that defendants violated the restrictive covenants in their various agreements with plaintiffs. Defendants effectively admitted to a

number of violations at the evidentiary hearing.

Because these covenants arose from the sale of defendants' business, irreparable injury is presumed (*Manhattan Real Estate Equities Grp. LLC v Pine Equity, NY, Inc.*, 16 AD3d 292 [1st Dept 2005]). In any event, the diversion of business from plaintiffs in this case would likely lead to damages that could not be calculated with reasonable certainty. For this reason also, plaintiffs are irreparably harmed (*see Ecolab Inc. v Paolo*, 753 F Supp 1100, 1110 [ED NY 1991]).

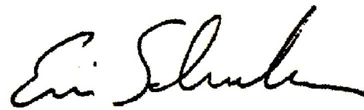
The balance of equities favors plaintiffs. Defendants can pursue consulting work in the affordable housing field, but may not interfere with plaintiffs' relationship with former customers. Moreover, defendants were paid millions of dollars in connection with the sale of the business, and cannot now clawback the good will they sold (*see Reed, Roberts Assoc. v Strauman*, 40 NY2d 303, 307 [1976]).

The IAS court's order, which largely tracks the language in the parties' heavily negotiated agreements, is not unenforceably

vague (*see Xerox Corp. v Neises*, 31 AD2d 195, 197-198 [1st Dept 1968]).

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

ENTERED: NOVEMBER 26, 2019



DEPUTY CLERK

Mazzarelli, J.P., Kapnick, Gesmer, Moulton, JJ.

10449 The People of the State of New York, Ind. 5328/16
Respondent,

-against-

Wayne Kinsey,
Defendant-Appellant.

Christina Swarns, Office of the Appellate Defender, New York (Stephen R. Strother of counsel), for appellant.

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Melissa Jackson, J.), rendered February 2, 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 26, 2019

DEPUTY CLERK

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

Mazzarelli, J.P., Kapnick, Gesmer, Moulton, JJ.

10450 Charles R. Milian, et. al., Plaintiffs-Appellants, Index 26973/15E

-against-

Douglas H. Bailyn, M.D., et. al., Defendants-Respondents.

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

Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Steven C. Mandell of counsel), for respondents.

Order, Supreme Court, Bronx County (Joseph E. Capella, J.), entered August 2, 2018, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff Charles Milan alleges that defendant Douglas H. Bailyn, M.D., was negligent in failing to timely refer him to a urologist and that the delay proximately caused his prostate cancer to worsen and resulted in him having to undergo a radical prostatectomy.

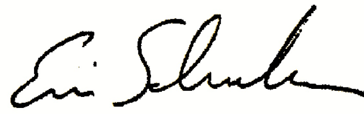
We affirm on the ground that plaintiffs did not raise an issue of fact as to whether Milian's injuries were caused by defendants' alleged negligence. Defendants' expert's affirmation establishes that any delay in diagnosis on defendants' part did

not worsen plaintiff Milian’s prognosis (*cf. Dallas-Stephenson v Waisman*, 39 AD3d 303, 307 [1st Dept 2007]). The affirmation of plaintiffs’ expert is not supported with any scientific data or other medical facts sufficient to rebut defendants’ prima facie showing (*see Colwin v Katz*, 122 AD3d 523, 524 [1st Dept 2014]; *McCarthy v St. Joseph’s Med. Ctr.*, 16 AD3d 243, 244 [1st Dept 2005]; *see also De Jesus v Mishra*, 93 AD3d 135, 138 [1st Dept 2012]).

We have considered the parties’ remaining arguments and find them unavailing.

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

ENTERED: NOVEMBER 26, 2019



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DEPUTY CLERK

Mazzarelli, J.P., Kapnick, Gesmer, Moulton, JJ.

10451 Vasilios Pierrakeas, Index 157414/14
Plaintiff-Respondent,

-against-

137 East 38th Street LLC,
Defendant-Appellant.

____

Carol R. Finocchio, New York, for appellant.

Bisogno & Meyerson, LLP, Brooklyn (Elizabeth Mark Meyerson of counsel), for respondent.

____

Order, Supreme Court, New York County (James E. d'Auguste, J.), entered February 5, 2019, which granted plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim, unanimously affirmed, without costs.

Whether plaintiff slipped from the rung of the ladder or the ladder tipped over as he sought to steady himself while descending it, plaintiff's testimony established prima facie that defendant failed to provide a safety device to insure that the ladder would remain upright while plaintiff used it to perform his statutorily covered work; plaintiff was not required to show that the ladder was defective (Labor Law § 240[1]; *see e.g. Fletcher v Brookfield Props.*, 145 AD3d 434 [1st Dept 2016] [plaintiff not required to demonstrate that unsecured ladder that kicked out while he descended it was defective]; *Caceres v*

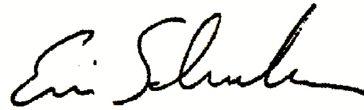
Standard Realty Assoc., Inc., 131 AD3d 433, 433-34 [1st Dept 2015] [liability under Labor Law § 240(1) established where plaintiff fell from non-defective ladder not being held steady by coworker], *appeal dismissed* 26 NY3d 1021 [2015]; *Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 290-291 [1st Dept 2002] [liability established where plaintiff showed absence of safety devices to prevent ladder from slipping or plaintiff from falling; no need to show ladder was defective]).

In opposition, defendant failed to raise an issue of fact as to whether plaintiff's placement of the ladder where he could fall or step onto a stack of sheetrock was the sole proximate cause of his accident, since it presented no evidence that the appropriate equipment was available to plaintiff (*see Nacewicz v Roman Catholic Church of the Holy Cross*, 105 AD3d 402, 402-403 [1st Dept 2013]). Moreover, because plaintiff established that defendant failed to provide an adequate safety device to protect him from elevation-related risks and that that failure was a proximate cause of his injuries, any negligence on plaintiff's

part in placing the ladder near the sheetrock is of no consequence (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]).

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

ENTERED: NOVEMBER 26, 2019



DEPUTY CLERK

Mazzarelli, J.P., Kapnick, Gesmer, Moulton, JJ.

10452 The People of the State of New York, SCI. 633/17
Respondent,

-against-

George Brown,
Defendant-Appellant.

____

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

George Brown, appellant pro se.

Darcel D. Clark, District Attorney, Bronx (Kyle R. Silverstein of counsel), for respondent.

____

Judgment, Supreme Court, Bronx County (Linda Poust-Lopez, J. at plea; Cori Weston, J. at sentencing), rendered May 1, 2017, convicting defendant of attempted assault in the first degree, and sentencing him, as a second felony offender, to a term of seven years, unanimously affirmed.

Defendant made a valid waiver of his right to appeal (*see People v Bryant*, 28 NY3d 1094 [2016]; *People v Sanders*, 25 NY3d 337 [2015]). The court separated defendant's appeal waiver from its discussion of the trial rights that defendant automatically forfeited upon his guilty plea, and the oral colloquy was supplemented by an appropriate written waiver.

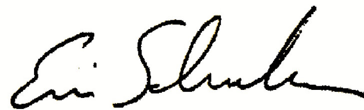
Defendant's waiver of his right to appeal forecloses review of his claims that his sentence was procedurally defective (*see*

People v Fulton, 125 AD3d 511 [1st Dept 2015], *lv denied* 25 NY3d 1072 [2015]; *People v Collier*, 71 AD3d 909, 910 [2d Dept 2010], *lv denied* 15 NY3d 773 [2010]) and excessive. In any event, the claim regarding sentencing procedure requires preservation, and and we decline to review this unpreserved claim in the interest of justice. We also perceive no basis for reducing the sentence.

To the extent that defendant's pro se claims are not either forfeited by his guilty plea or precluded by the waiver of appeal, they are unpreserved or unreviewable on direct appeal 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 26, 2019



DEPUTY CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, Jr., J.P.
Judith J. Gische
Peter Tom
Ellen Gesmer
Anil C. Singh, JJ.

9262
Index 2166/12

____x

The People of The State of New York,
Respondent,

-against-

Drury Duval,
Defendant-Appellant.
____x

Defendant appeals from the judgment of the Supreme Court, Bronx County (Steven Barrett, J. at motion; Alvin M. Yearwood, J. at plea and sentencing), convicting defendant, of criminal possession of a weapon in the third degree, and imposing sentence.

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

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

TOM, J.

Since the warrant in this case adequately described the location to be searched, we uphold the issuance and execution of the warrant and the subsequent search and seizure of the contraband. The warrant was supported in part by testimony and evidence that is available for our in camera review but that is sealed, and, for this reason, will only partially be itemized herein.

On June 29, 2012, at about 6:30 p.m., Police Officer John Toscano executed a search warrant on a private residence on East 211th Street in the Bronx. The items seized included a .45 caliber semi-automatic handgun, seven boxes of .45 caliber and .357 caliber live rounds, a stun gun, two air pistols, a carbon dioxide cartridge canister, two machetes, and marijuana that were taken from, variously, defendant's closet and a nightstand drawer, and fireworks and explosives taken from the living room. Defendant was arrested simultaneously with the seizure of the contraband.

Defendant was indicted for criminal possession of a weapon in the second degree and lesser related counts. Defendant moved to controvert the search warrant and suppress the physical evidence on the basis, inter alia, that the warrant failed to specify which unit in the residence was the target of the warrant

or the items that police expected to seize. The People produced for in camera review evidence that had been submitted in support of the warrant. Bronx County Supreme Court (Steven Barrett, J.) found that the warrant satisfied the particularity requirement of the Fourth Amendment to the United States Constitution and article I, § 12 of the New York Constitution in that it sufficiently identified the premises to be searched and the property to be seized. The court thereupon denied this branch of the suppression motion.

Defendant subsequently moved to reargue on the basis that the court had not decided his request for disclosure of the materials submitted in support of the search warrant application. After reviewing the supporting materials in camera, the court found that on the basis of sworn testimony provided by an informant and the prosecutor's averments, disclosure of the informant's identity and statements would present a risk to the informant's life and would jeopardize future investigations, and that redaction of the materials was not feasible if the informant's identity were to be protected. On this basis, reargument was denied. Defendant subsequently pleaded guilty to criminal possession of a weapon in the third degree, and was sentenced, as a second felony offender, to a term of two to four years.

On appeal, defendant challenges the warrant on the basis that it identified the building as whole, rather than any individual unit, as the target of the search. The face of the warrant identified the premises to be searched as "[XXXX] EAST 211TH STREET, A PRIVATE RESIDENCE CLEARLY MARKED [XXXX]." The detective's affidavit in support described in detail how the residence came to be identified as the location where weapons would be found, and why police could conclude from information about its internal arrangements that it was the residence of a single family. Testimony by the detective and the confidential informant provided additional specific details.

Defendant, however, argues that reversal and suppression are required because the warrant on its face did not give adequate constitutional notice of which particular unit in the house would be searched. Defendant further argues that the motion court was not authorized to rely solely on materials not incorporated into the warrant to uphold its validity, pursuant to *Groh v Ramirez* (540 US 551 [2004]), a position adopted by the dissent. However, since that position does not comport with the facts of this case, *Groh* does not govern our analysis of either the order denying suppression or the facial validity of the warrant itself.

Groh was a *Bivens* (*Bivens v Six Unknown Fed. Narcotics Agents*, 403 US 388 [1971] [civil case brought under 42 USC 1983

wherein a person against whom a warrant was executed sued federal agent who prepared and executed the warrant on the basis that it was insufficiently particular, and the agent sought qualified immunity. As related by the Supreme Court, where the face of the warrant required itemization of the items to be seized, the agent simply described the house. In effect, no items were identified on the face of the warrant, which failed to meet the particularity requirement for a search warrant. Thus, the warrant was constitutionally defective, a defect that could not be cured by information available to the warrant judge that had not been incorporated into the warrant by reference or otherwise. However, the Supreme Court saliently, differentiated that context from one where items were only partially identified, or a few might have been misdescribed, with an adequate identification of other items to be seized. The Supreme Court characterized such omissions as possibly presenting a "mere technical mistake" (*Groh*, 540 US at 558) that did not deprive the target of the warrant adequate notice, in that case, of the items to be seized. Hence, *Groh* should not be construed to categorically invalidate a warrant that provides identifying details sufficient for constitutionally necessary notice purposes but nevertheless omits some details.

In this respect, defendant and the dissent overinterpret the

application of *Groh* to these facts. On its face, the warrant was sufficiently specific as to the place to be searched, because it stated the address and described the premises as a "private residence," which to all appearances it was. The testimony describing the execution of the warrant as well as the nature of defendant's residence therein makes clear that the house was defendant's family home regardless of any reference in city tax records indicating different legal units. This was sufficient to authorize a search of the entire house.

Since the warrant herein was sufficiently particularized and not overbroad on its face, as was the case in *Groh*, the court could refute defendant's claim with additional materials in support of the warrant application, including the in camera materials. The record makes it amply clear that the house was used as a residence for defendant's family, consisting of defendant, his mother, and a young child. Defendant's mother was identified in city records as the sole owner of the house, and her affidavit reflected that she lived on the ground floor and defendant's bedroom was on the third floor. The house could be entered either through a front door or by a kitchen entrance off of the driveway, but these were not separate entrances to separate units. The side entrance entered into the kitchen, and the kitchen led directly into the living room. A bank check in

defendant's name was found in the downstairs kitchen.

The dissent relies on allegations in defense counsel's affirmation to argue for a more differentiated internal living structure. However, since an attorney's affirmation is not evidence, the endeavor is unavailing. The dissent also relies on the affidavit submitted by defendant's mother to counter the position of the People that the house was a private family residence. In view of the obvious likelihood of a compelling personal interest motivating the mother, we also decline to accept this as reliable evidence in the effort to controvert the warrant and the additional material in the record.

The only indication that the house legally could have been occupied as separate units was in the extrinsic materials supplied by defendant in moving to controvert the warrant, consisting of public records showing that the house contained three units. However, the fact that city records reflected that the house could be occupied as three units for tax or zoning purposes does not require a conclusion that it was. There likely are numerous legal two- or three-family residential houses that remain occupied by single families. The classifications of these houses relate to tax or land use matters that have no necessary bearing on the facial validity of a warrant. In view of the evidence available to police and the warrant court and the notice

provided by the warrant itself, it is hard to see how the dissent construes this understanding of city records to be a concession that the warrant was insufficiently specific. The adequacy of the notice provided on the face of the warrant in such cases will be governed by the facts of the case and the information available to the police officers who prepared the warrant and executed it. Those facts in this case do not provide a basis to controvert this warrant.

In any event, the suppression court had the opportunity to consider this evidence, along with the evidence submitted in camera by the People, and reasonably determined that the building in fact did not consist of multiple discrete units (*see People v Danclair*, 139 AD3d 541 [1st Dept 2016], *lv denied* 28 NY3d 928 [2016]). Hence, the dissent's reliance on the Fourth Department's decision in *People v Fulton* (49 AD3d 1223 [4th Dept 2008]), where the brief memorandum decision only indicates that, notwithstanding police information about drug selling in a specific apartment within what obviously was a multifamily dwelling, the overbroad warrant ostensibly allowed the entire building, along with its storage area and curtilage, to be searched, is misplaced. No further information is provided by that decision. In any event, the public records cited by defendant only established that multi-unit occupancy was a

permissible use of the house, as reflected in its registration, not that it was so used at any particular time (*see People v Danclair*, 139 AD3d 541).

Accordingly, the judgment of the Supreme Court, Bronx County (Steven Barrett, J. at motion; Alvin M. Yearwood, J. at plea and sentencing), convicting defendant of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a term of two to four years, should be affirmed.

All concur except Gische and Gesmer JJ. who dissent in an Opinion by Gesmer, J.

GESMER, J. (dissenting)

I respectfully dissent. I would reverse and grant defendant's motion to suppress the evidence seized from his home, because the search warrant did not specify which apartment in the three-unit building was to be searched (*see People v Rainey*, 14 NY2d 35, 37-38 [1964]; *People v Atkins*, 154 AD3d 1064, 1068 [3d Dept 2017], *lv dismissed* 31 NY3d 981 [2018]), and that deficiency was not cured by reference to any other documents that could properly have been considered by the court (*see Groh v Ramirez,* 540 US 551, 557-558 [2004]).

In his motion to suppress, defendant presented appropriate documentation to make out his prima facie case that the warrant did not describe the location to be searched with sufficient specificity. The People submitted no documents to controvert defendant's allegations, but merely referred the motion court to the confidential documents submitted in support of the warrant application. After examining those materials, the motion court denied the motion. However, under *Groh v Ramirez* (540 US 551), it was error for the motion court to consider materials that were not incorporated into the search warrant to cure the deficiency in the warrant. Many trial court decisions have applied *Groh* in this context (*see People v Covlin*, 58 Misc 3d 996, 1003 [Sup Ct, NY County 2018]; *People v Gabriel*, 58 Misc 3d 1230[A], 2017 N.Y.

Slip Op 51985[U], *3 [Sup Ct, NY County 2017]; *People v English*, 52 Misc 3d 318, 325 [Sup Ct, Bronx County 2016]). Since the People did not properly contest defendant's allegation that the building had three units, they conceded that the warrant was insufficiently specific (CPL 710.60[2][a]; *see also People v Gruden*, 42 NY2d 214, 216-217 [1977] [motions to suppress may be decided without a hearing unless papers raise a material dispute of fact]).

Background

On June 29, 2012, the People applied for a search warrant based on a written application and testimony. Bronx Supreme Court signed the requested search warrant, which authorized a search of a building in the Bronx, described only as "[XXXX] East 211th Street, a private residence." The warrant did not refer to or incorporate the materials submitted to the court. Police officers executed the warrant the same day, seized multiple items of contraband, and arrested both defendant and his mother. On July 20, 2012, the People filed an indictment against defendant. The case against his mother was dismissed on January 31, 2013. In an omnibus motion dated February 18, 2013, defendant's trial counsel sought, as relevant here, to suppress "any and all evidence recovered pursuant to the People's search warrant on the grounds that the warrant is defective for failure to meet

Constitutional requirements of particularity." The motion was based on defense counsel's sworn affirmation, in which he affirmed that the building was divided into three separate private residences. Specifically, counsel alleged that defendant's mother, the owner of the building, lived on the ground floor, an unrelated family lived on the second floor, and defendant lived on the third floor, with his fiancee and his two younger children. This affirmation was supported by three documents: 1) a deed showing that the building was owned by defendant's mother; 2) an excerpt from the website of the New York City Department of Housing Preservation and Development (HPD) showing that the building is owned by defendant's mother and that, as of the date of the search, it was registered with HPD as having three "A" units; and 3) an affidavit by defendant's mother stating that she lived on the ground floor and defendant lived on the third floor of the building.[1]

In opposition to defendant's motion, the People did not submit any sworn statement or documents to dispute defendant's factual claim that the building consisted of three separate units. Instead, they argued that the underlying search warrant

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[1]Contrary to the majority's statement, defendant's mother's affidavit does not state that "defendant's bedroom was on the third floor." Rather, it states that defendant "was living at [XXXX] East 211th Street, Third Floor, Bronx, NY."

materials, which the People had provided to the motion court for in camera review, demonstrated that the building did not "contain three separate apartments with unrelated tenants." The People further argued that, to the extent that there was any defect in the warrant's particularity, the defect could be cured by reference to the underlying search warrant materials.

Based on its review of the warrant, the supporting affidavit, and the minutes of the testimony taken before issuance of the warrant, the motion court denied defendant's motion to suppress. On defendant's motion to reargue, the court adhered to its original ruling, without addressing defendant's argument that the warrant's description of the location to be searched was not sufficiently particular. On October 14, 2015, defendant pleaded guilty to criminal possession of a weapon in the third degree, and on December 4, 2015, was sentenced to a term of two to four years of incarceration.[2]

Analysis

Under the Fourth Amendment to the United States Constitution and article I of the New York constitution, "[n]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation,

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[2]The People do not dispute that defendant's purported waiver of his right to appeal was invalid (*People v Santiago,* 119 AD3d 484 [1st Dept 2014], *lv denied* 24 NY3d 964 [2014]).

and particularly describing the place to be searched, and the persons or things to be seized" (US Const Amend IV; *see also* NY Const, art I, § 12). The Court of Appeals has explained that "[t]o protect the right of privacy from arbitrary police intrusion, the 'core' of the Fourth Amendment, nothing should be left to the discretion of the searcher in executing the warrant" (*People v Nieves*, 36 NY2d 396, 401 [1975] [internal citation omitted]; *see also People v Henley*, 135 AD2d 1136 [4th Dept 1987], *lv denied* 71 NY2d 897 [1988]; *People v Yusko*, 45 AD2d 1043, 1044 [2d Dept 1974]). The particularity requirement "'assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search'" (*Groh*, 540 US at 561).

Under New York law, the warrant's description of the place to be searched must be "by means of address, ownership, name or any other means essential to identification with certainty" (CPL 690.45[5]). A warrant "to search a subunit of a multiple occupancy structure is void [for lack of particularity] if it fails to describe the subunit to be searched and only describes the larger structure" (*People v Fulton*, 49 AD3d 1223 [4th Dept 2008]; *see also People v Rainey*, 14 NY2d at 37-38; *People v*

Atkins, 154 AD3d at 1068; *People v Henley*, 135 AD2d 1136).[3]

The United States Supreme Court has held that "[t]he Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents" (*Groh*, 540 US at 557). In *Groh*, the Supreme Court determined that the challenged warrant was constitutionally invalid, and held that the Fourth Amendment's warrant clause requires particularity

> "for good reason: 'The presence of a search warrant serves a high function,' and that high function is not necessarily vindicated when some other document, somewhere, says something about the objects of the search, but the contents of that document are neither known to the person whose home is being searched nor available for her inspection" (*id.* at 557 [internal citation omitted]).

Consistent with this principle, the Supreme Court held that a court considering whether a warrant passes constitutional muster may not consider anything outside the warrant's four corners. Therefore, the suppression court may only consider documents submitted in support of the warrant application if they were incorporated into the warrant by "appropriate words of incorporation" (*id.* at 558). Accordingly, *Groh* repudiated the practice, approved in the earlier cases of *Nieves* (36 NY2d at 401-402) and *Rainey* (14 NY2d at 36), under which a court

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[3]The majority fails to acknowledge that our State's jurisprudence requires this.

determining a challenge to the specificity of a warrant could consider the unincorporated documents submitted in support of the warrant application (*see People v Covlin*, 58 Misc 3d at 1003; *People v English*, 52 Misc 3d at 325; *United States v Zemlyansky*, 945 F Supp 2d 438, 453 [SD NY 2013]).[4]

The majority nevertheless attempts to distinguish *Groh*, citing dicta in that case to support its conclusion that a warrant that "omits some details" may "possibly" be constitutionally adequate. The majority bases its conclusion on two theories. We disagree with both.

First, the majority finds that the warrant in this case was not facially inadequate, since it described the place to be searched as a "private residence." However, in order to be facially adequate, the warrant must "particularly describ[e] the place to be searched, and the persons or things to be seized" (US Const Amend IV; NY Const, art I, § 12). The required specificity eliminates any potential for the searcher to exercise discretion (*People v Nieves*, 36 NY2d at 401) and "assures the individual

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[4]As the majority notes, *Groh* was a civil case. However, the constitutional principle enunciated by the Court in that case is applicable here. Accordingly, contrary to the majority's assertion, *Groh* does not permit a court considering the constitutionality of a search warrant to consider "the information available to the police officers who prepared the warrant and executed it" if, as here, those materials were not expressly incorporated in the warrant.

whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search" (*Groh*, 540 US at 561 [internal quotation marks omitted]). Here, since defendant alleged, and the People failed to rebut, that the building contained three separate private residences, the warrant necessarily required the searcher to exercise discretion in executing the warrant.

Second, the majority notes that the motion court could properly have considered "additional material in the record" to determine that the building was a de facto single unit, occupied as a single residence, rather than three separate units. However, none of the documents in the record supports such a finding.[5]

For example, the majority states that the building could be entered through a front door or a kitchen entrance on the first floor, and that there were not "separate entrances to separate units" from the outside of the building. However, neither the police report nor Officer Toscano's affidavit nor any other document in the record describes the entrance or entrances to the

[5]The suggestion by the majority that *Groh* did not prevent the motion court from looking at the unincorporated warrant application materials because the warrant was sufficiently particular on its face does not clarify the issue; if the warrant were sufficiently particular on its face, there would have been no need to look at the underlying materials.

building.[6] Similarly, the majority notes that a check in defendant's name was found "in the downstairs kitchen." However, the police report states only that a check was "recovered from the kitchen area," without specifying the floor or otherwise describing the interior of the building as containing one unit with a single kitchen or multiple units with separate kitchens. Officer Toscano's affidavit does not refer to a check at all. To the extent that the majority relies on documents that were part of the sealed warrant materials, under *Groh*, neither the motion court nor this Court may consider those in determining the warrant's constitutionality, since they were not incorporated by reference into the warrant.

The majority cites only to *People v Danclair* (139 AD3d 541 [1st Dept 2016], *lv denied* 28 NY3d 928 [2016]) to justify the motion court's consideration of the warrant application materials to support the validity of the warrant. However, *Danclair* does not address *Groh* at all. In any event, we are constrained by the Supreme Court's holding in *Groh* that unincorporated warrant application materials may not be considered when deciding a

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[6]The majority refers to "testimony describing the execution of the warrant." However, there is no such testimony in the record. The only description of the execution of the warrant in the record is in the police report and Officer Toscano's affidavit, both attached to defendant's motion papers.

suppression motion.

Since the motion court could not consider the warrant application materials, and the People presented no facts in their opposition papers to rebut defendant's prima facie showing that the warrant lacked sufficient specificity, the suppression motion should have been granted. Under CPL 710.60(1), a motion to suppress evidence

> "must state the ground or grounds of the motion and must contain sworn allegations of fact, whether of the defendant or of another person or persons, supporting such grounds. Such allegations may be based upon personal knowledge of the deponent or upon information and belief, provided that in the latter event the sources of such information and the grounds of such belief are stated."

A court must summarily grant a motion to suppress evidence under CPL 710.60(2)(a) if "[t]he motion papers comply with [CPL 710.60(1)] and the people concede the truth of allegations of fact therein which support the motion." Where the People fail to contest defendant's allegations in support of a suppression motion, they are deemed to have conceded them (*People v Gruden*, 42 NY2d at 216-217). Indeed as the Court of Appeals stated, these procedures are "followed in connection with nearly every pretrial and posttrial motion made in a criminal action" (*id.* at 216).

Accordingly, I would reverse the denial of the suppression motion and remand for further proceedings.

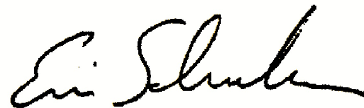
Judgment Supreme Court, Bronx County (Steven Barrett, J. at motion; Alvin M. Yearwood, J. at plea and sentencing), sentencing him, as a second felony offender, to a term of two to four years, affirmed.

Opinion by Tom, J. All concur except Gische and Gesmer, JJ. who dissent in an Opinion by Gesmer, J.

Sweeny, J.P., Gische, Tom, Gesmer, Singh, JJ.

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

ENTERED: NOVEMBER 26, 2019



DEPUTY CLERK