SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 20, 2020

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gische, J.P., Webber, Oing, Singh, JJ.

11060 The People of the State of New York, Respondent, Ind. 4716/13

-against-

Kiasheen Ward,
Defendant-Appellant.

____

Christina A. Swarns, Office of The Appellate Defender, New York (Stephen Chu of counsel), for appellant.

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

____

Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered December 8, 2014, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him to a term of two years, unanimously affirmed.

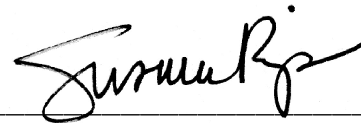
The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence supports inferences that defendant acted with the intent to prevent a police officer from performing a lawful duty and

that he thereby caused physical injury to the officer.

The challenged portions of the prosecutor’s summation generally constituted proper comment on the evidence and responses to defense arguments, and any possible improprieties were sufficiently addressed by the court’s curative actions (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D’Alessandro*, 184 AD2d 114, 118-120 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

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

ENTERED: FEBRUARY 20, 2020



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Gische, J.P., Webber, Oing, Singh, JJ.

11061 In re Anthony Sambula, Index 155876/18
Petitioner-Appellant,

-against-

Triborough Bridge & Tunnel Authority
doing business as MTA Bridges & Tunnels,
Respondent-Respondent.

____

Wolin & Wolin, Jericho (Alan E. Wolin of counsel), for appellant.

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

____

Order and judgment (one paper), Supreme Court, New York County (Lynn R. Kotler, J.), entered March 4, 2019, denying the petition seeking to annul a determination of respondent, dated March 20, 2018, which denied a request for a retiree service letter, and to compel that the letter be issued, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondent's denial was neither arbitrary nor capricious (*see Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). The letter sought would assist petitioner in obtaining a special pistol carrying permit. Petitioner concedes

that he was not authorized to carry a firearm under respondent's policy at the time of his separation from employment, as he surrendered his firearm beforehand due to an injury, and he did not seek reinstatement of such authorization. Thus, he "had no right to issuance of" the retiree service letter "since his authority to carry firearms had been revoked . . . and had not been restored at the time he retired" (*Matter of Laier v McGuire*, 111 AD2d 43, 44 [1st Dept 1985], *affd* 65 NY2d 904 [1985]). The denial did not violate petitioner's Second Amendment rights, since it did not preclude him from applying for a permit under normal legal procedures (*id.* at 44-45; *see* Penal Law § 400.00).

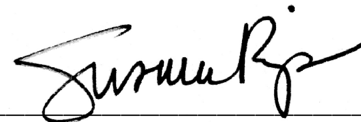
Even assuming there is a private right of action under the Law Enforcement Officers Safety Act of 2004, petitioner cannot demonstrate that he met the qualification standards within one year of retirement.

Petitioner also cannot demonstrate a violation of the Americans with Disabilities Act based on his employer's refusal to issue the retiree service letter, as he concedes that his injury rendered him unable to perform his duties as a law

enforcement officer (*see* 42 USC § 12112[a]; *Capobianco v City of New York*, 422 F3d 47, 56 [2d Cir 2005]). There is no factual basis to conclude that decision was made in bad faith rather than as part of an across the board policy.

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

ENTERED: FEBRUARY 20, 2020



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Gische, J.P., Webber, Oing, Singh, JJ.

11062 In re Messiah C.T., Dkt B-10204/17

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

Eusebio C.T.,
Respondent-Appellant,

The Children's Village,
Petitioner-Respondent.

Andrew J. Baer, New York, for appellant.

Law Office of James M. Abramson, PLLC, New York (James M. Abramson of counsel), for respondent.

Dawne Mitchell, The Legal Aid Society, New York (Raymond E. Rogers of counsel), attorney for the child.

Order of disposition, Family Court, New York County (Patria Frias-Colon, J.), entered on or about July 24, 2018, which, upon a finding of abandonment, terminated respondent father's parental rights to the subject child and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of abandonment is supported by clear and convincing evidence that the father did not visit the child or communicate with the child or the agency, although able to do so

and not prevented or discouraged from doing so by the agency, during the six months immediately preceding the filing of the termination petition (*see* Social Services Law § 384-b[4][b]; [5][a]). "While [an incarcerated] parent of course is not able to visit the child, he or she is still presumed able to communicate absent proof to the contrary" (*Matter of Annette B.*, 4 NY3d 509, 514 [2005]).

Here, the agency showed, through the credible testimony of the caseworker assigned to the case, that while it sent the father three letters, it received no communication from him during the six-month period. The father testified that, to the contrary, he mailed the agency seven letters he wanted forwarded to the child during those six months. The court providently determined that even if it were to credit the father's testimony, his attempts to communicate with the child were too sporadic and insubstantial to defeat the finding of abandonment (*see e.g. Matter of Christie A.M.*, 57 AD3d 225, 225-226 [1st Dept 2008]).

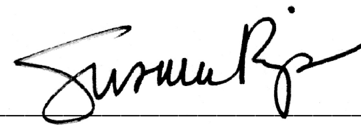
The father's argument that the court improvidently exercised its discretion in failing to hold a dispositional hearing is not preserved for appellate review (*see Matter of Jeremiah M. [Sabrina Ann M.]*, 109 AD3d 736, 737 [1st Dept], *lv denied* 22 NY3d 856 [2013]). In any event, the court providently exercised its

discretion in declining to conduct a dispositional hearing following its finding of abandonment since such hearing is not statutorily required and the father had not seen or communicated with the child for several years (*see Matter of Jayvon Jose R. [Francisco S.]*, 154 AD3d 600 [1st Dept 2017]).

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: FEBRUARY 20, 2020



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Gische, J.P., Webber, Oing, Singh, JJ.

11063 Anna Wachtel, et al., Index 657144/17
Plaintiffs-Appellants,

-against-

Park Ave & 84th St., Inc., et al.,
Defendants-Respondents.

____

Anita Nissan Yehuda, P.C., Greenvale (Anita Nissan Yehuda of counsel), for appellants.

Boyd Richards Parker & Colonnelli, New York (Bryan Mazzola of counsel), for respondents.

____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered February 5, 2019, which, to the extent appealed from, granted defendants' motion to dismiss the causes of action for a declaratory judgment, injunctive relief and breach of contract, unanimously affirmed, with costs.

The motion court correctly found that the cause of action for a declaration that the alterations made to the apartment in 1974 by defendant Park Ave. & 84th St. (the Co-op) are unlawful and that the Co-op is obligated to cure them presents no justiciable controversy (*see Long Is. Light. Co. v Allianz Underwriter Ins. Co.*, 35 AD3d 253 [1st Dept 2006], *appeal dismissed* 9 NY3d 1003 [2007]; *Board of Educ. of Freeport Union Free School Dist. v Nyquist*, 50 NY2d 889, 891 [1980]). As the

New York City Department of Buildings' (DOB) notices of violation were issued against the Co-op, plaintiffs are under no obligation to respond to them, and, as private litigants, they lack standing to enforce the DOB's order to correct the violations (*Matter of Durst Partners L.L.C. v New York City Envtl. Control Bd.*, 33 AD3d 405 [1st Dept 2006]).

Nor are plaintiffs entitled to a declaration that the Co-op is "obligated to restore the ADA-compliant [Americans with Disabilities Act] entrance to the Apartment in the form in which it existed" before 1974. Plaintiffs are not aggrieved parties under the ADA, and therefore do not have standing to bring such a claim (*see Lee v Sutton Garage, LLC*, 2017 US Dist LEXIS 174358, *8-9 [SD NY Oct. 19, 2017]). Further, the proprietary lease provides that plaintiffs are responsible for work performed by their predecessors, that they are responsible for the apartment's interior, and that they are responsible for ensuring that the apartment remains compliant with the Building Code (and other laws, ordinances, rules, and regulations). The lease is unambiguous on this point and must be enforced according to its plain terms (*Greenfield v Philles Records*, 98 NY2d 562, 569-570 [2002]).

In view of the foregoing, the court correctly dismissed the

cause of action for a preliminary injunction and a permanent injunction requiring the Co-op to cure the noticed violations and to restore the ADA-compliant entrance. We note in addition that plaintiffs do not allege any irreparable harm absent an injunction (*SportsChannel Am. Assoc. v National Hockey League*, 186 AD2d 417, 418 [1st Dept 1992]). Indeed, the complaint does not allege any concrete or non-hypothetical damages with respect either to the DOB violations or the non-ADA-compliant entrance.

The court correctly dismissed the cause of action for breach of contract. Plaintiffs' allegations are conclusively refuted by the unambiguous language of the lease and plaintiffs' failure to allege any redressable injury or damages beyond the hypothetical assertion that they might be sued and/or forced to incur expense curing the violations.

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

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

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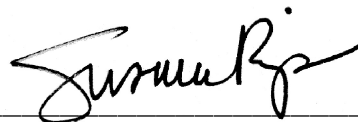

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Gische, J.P., Webber, Oing, Singh, JJ.

11064 Fernando E. Monzac, Index 307395/13
Plaintiff-Appellant,

-against-

1141 Elder Towers LLC,
Defendant-Respondent.

____

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Christopher J. Soverow of counsel), for appellant.

Tara C. Fappiano, Tuckahoe (Tara C. Fappiano of counsel), for respondent.

____

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered on or about August 1, 2018, which granted defendant's motion for a directed verdict, unanimously reversed, on the law, without costs, the motion denied, and the matter remanded for a new trial.

Plaintiff's trial evidence established prima facie that defendant had constructive notice of the water on the floor of the lobby of its building on which plaintiff allegedly slipped and fell (*see Irizarry v 15 Mosholu Four, LLC*, 24 AD3d 373 [1st Dept 2005]). Plaintiff testified that at least four times before his accident, every few months, he observed water leaking from the ceiling onto the floor below in the area where he fell. His former girlfriend, with whom he lived in the building, testified

that before the date of the accident “there were leaks and then afterward it was leaking again.” This testimony established that “an ongoing and recurrent dangerous condition existed in the area of the accident that was routinely left unaddressed by the landlord” (*id.* at 373; *see Talavera v New York City Tr. Auth.*, 41 AD3d 135, 136 [1st Dept 2007]). Issues of credibility were for the jury.

The trial court improvidently exercised its discretion in precluding the testimony of Henry Soto, defendant’s building superintendent at the time of the accident, on the ground that it was prejudicial to defendant. Defendant could not have been prejudiced or surprised by plaintiff’s disclosure of Soto as a witness on the eve of trial, since Soto was defendant’s employee at the time of the accident (*see Sadler v Brown*, 108 AD2d 739 [2d Dept 1985]; *O’Callaghan v Walsh*, 211 AD2d 531 [1st Dept 1995];

Wintermute v Vandemark Chem., Inc., 134 AD3d 1482, 1483 [4th Dept 2015], *lv dismissed* 30 NY3d 1041 [2017]).

We find the remaining contentions unavailing.

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

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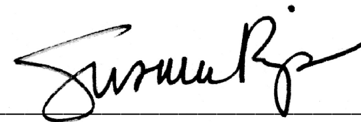

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Gische, J.P., Webber, Oing, Singh, JJ.

11065 The People of the State of New York, Ind. 3336/16
Respondent,

-against-

Dashawn Johnson,
Defendant-Appellant.

____

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

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

____

Judgment, Supreme Court, Bronx County (Marc J. Whiten, J. at suppression motion; Armando Montano, J. at plea and sentencing), rendered May 17, 2018, convicting defendant of attempted criminal possession of a weapon in the second degree, and sentencing him to a term of three years, unanimously affirmed.

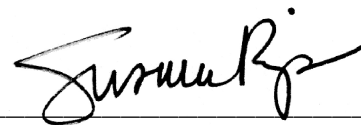
Initially, we find that defendant made a valid waiver of his right to appeal (*see People v Thomas*, ___ NY3d ___, 2019 NY Slip Op 08545 [2019]).

Further, we find that the motion court properly denied defendant's suppression motion, without granting a hearing. Defendant did not sufficiently allege that he had standing to challenge the police seizure of a pistol and a revolver that, according to the felony complaint, were recovered from the

ground. In his vague motion papers, defendant did not allege, even by reference to the felony complaint (*see People v Burton*, 6 NY3d 584, 587 [2006]), that the weapons at issue were recovered from his *person*, or under any other specified circumstances that violated his reasonable expectation of privacy. Defendant had ample information, including facts of his own presumed knowledge and facts stated in the People's opposition, from which he could have made sufficient allegations. While a defendant may rely on the prosecution's proof to establish standing, "[a] defendant must additionally assert that the search was not legally justified and there must be sufficient factual allegations to support that contention" (*Burton* at 591). Defendant failed to assert any factual allegations connecting him to the recovered weapons.

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

ENTERED: FEBRUARY 20, 2020



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Gische, J.P., Webber, Oing, Singh, JJ.

11066 The People of the State of New York, Ind. 2332/16
Respondent,

-against-

Adam D.,
Defendant-Appellant.

____

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

Darcel D. Clark, District Attorney, Bronx (Waleska Suero Garcia 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 (Nicholas Iacovetta, J.), rendered August 23, 2017,

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

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

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

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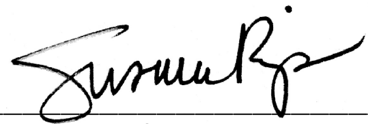

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Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Gische, J.P., Webber, Oing, Singh, JJ.

11067 In re Churches United for Fair Housing, Inc., et al., Petitioners-Appellants, Index 151786/18

-against-

Bill De Blasio, etc., et al., Respondents-Respondents.

____

Communities Resist, Inc., Brooklyn (Adam Meyers of counsel), for appellants.

James E. Johnson, Corporation Counsel, New York (Jeremy W. Shweder of counsel), for Bill De Blasio and the City of New York, respondents.

Fox Rothschild LLP, New York (Karen Binder of counsel), for Harrison Realty, LLC, respondent.

____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered August 1, 2018, which denied the amended hybrid CPLR article 78 petition and declaratory judgment complaint seeking an order annulling respondent City of New York's October 31, 2017, approval of an application brought by respondent Harrison Realty LLC (Harrison) for rezoning of its Pfizer Site housing development project, and dismissed the proceeding, unanimously affirmed, without costs.

As conceded by the parties, there is no express or implied private right of action for enforcement of 42 USC § 3608, the

Federal Housing Act's provision requiring the Department of Housing and Urban Development to affirmatively further fair housing (AFFH) (*see* 42 USC §§ 3602[f], 3613[a][1][A]; *Latinos Unidos De Chelsea En Accion (Lucha) v Secretary of Hous. & Urban Dev.*, 799 F2d 774, 791-792 [1st Cir 1986]; *MHANY Mgt. v County of Nassau*, 843 F Supp 2d 287, 333 [ED NY 2012], *affd in part, vacated on other grounds in part* 819 F3d 581 [2d Cir 2016]).

Because there is no private right of action for enforcement of Section 3608 — let alone any "unambiguously conferred right" — petitioners may not use 42 USC § 1983 as a mechanism to sue for enforcement of section 3608 (*Gonzaga Univ. v Doe*, 536 US 273, 283 [2002]; *accord Matter of George v Bloomberg*, 2 AD3d 294, 294 [1st Dept 2003], *lv denied* 2 NY3d 707 [2004]; *see MHANY*, 843 F Supp 2d at 336-337; *South Middlesex Opportunity Council, Inc. v Town of Framingham*, 2008 WL 4595369, at *17, 2008 US Dist LEXIS 85764, at *51-52 [D Mass 2008]).

Assuming, arguendo, that petitioners may bring a CPLR article 78 proceeding to challenge the City's action (*see Matter of East Ramapo Cent. Sch. Dist. v King*, 29 NY3d 938 [2017]; *cf*. *George*, 2 AD3d at 294), we find that the City amply met its AFFH obligation through facially race-neutral measures to expand the supply of affordable housing, by ensuring that Harrison complied

with the City’s standing ratios of affordable to market housing (*see Texas Dept. of Hous. & Community Affairs v Inclusive Communities Proj., Inc.*, ___ US ___, 135 S Ct 2507, 2522-2525 [2015]). The City also permissibly responded to community concerns about apartment sizes by conditioning approval of the project on another facially race-neutral measure, namely, the developer’s execution of a restrictive declaration — formulated as a covenant running with the land — capping the percentage of three- and four-bedroom affordable units. This measure prudently balanced apartment sizes in order to reflect assessed need among area residents, as reflected in extensive public comment during the many hearings held during the months of overlapping review.

Accordingly, the City’s review comported with its AFFH duties under the FHA under prevailing HUD regulations (*see* 24 CFR § 5.152; 80 Fed Reg 42272, 42349 [2015]). In particular, having taken facially race-neutral measures to promote affordable housing in the project, the City was not required to perform analysis aimed at forecasting the mix of ethnicities expected to occupy units in the development, and the corresponding impact on prevailing area patterns of racial and ethnic concentration.

For the same reasons, the City's review was rational and not contrary to law (*see* CPLR 7803; *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]).

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

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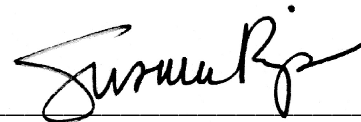

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Gische, J.P., Webber, Oing, Singh, JJ.

11068 John T. Bunn, Index 158841/14
Plaintiff-Appellant,

-against-

City of New York,
Defendant-Respondent,

The New York City Transportation Authority, et al.,
Defendants.

____

Rimland & Associates, New York (Edward Rimland of counsel), for appellant.

Georgia M. Pestana, Acting Corporation Counsel, New York (Janet L. Zaleon of counsel), for respondent.

____

Order, Supreme Court, New York County (Alexander M. Tisch, J.), entered January 10, 2019, which granted the motion of defendant City of New York for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

The City established prima facie entitlement to judgment as a matter of law in this action where plaintiff was injured when a bus stop sign became dislodged from its metal post and struck him in the head. The City demonstrated that it lacked prior written notice of a defective condition in the bus stop sign through a search of records which revealed no complaints (Administrative Code of City of New York § 7-201[c][2]; *see Yarborough v City of*

New York, 10 NY3d 726, 728 [2008]; *Harvey v Henry 85 LLC*, 171 AD3d 531, 532 [1st Dept 2019], *lv denied* 33 NY3d 911 [2019]).

In opposition, plaintiff failed to raise a triable issue of fact as to whether the City created a defective condition within the meaning of the exception to the prior written notice requirement (*see Yarborough* at 728; *Harvish v City of Saratoga Springs*, 172 AD3d 1503, 1504 [3d Dept 2019]). The sign had been installed approximately seven months before the accident, but no complaints had been received and plaintiff did not notice any defect. Plaintiff's speculation that the installation of the sign could have resulted in an immediately apparent defect is insufficient to defeat summary judgment (*see Harvish* at 1504).

Contrary to plaintiff's argument, the doctrine of res ipsa loquitur is inapplicable under the circumstances. An injured plaintiff seeking to apply res ipsa loquitur must establish, among other things, that the accident was caused by an instrumentality within the defendant's exclusive control (*see Ebanks v New York City Tr. Auth.*, 70 NY2d 621, 623 [1987]). Here, the alleged defect in the sign could have been caused by any number of factors, including vandalism and wind/weather conditions, and thus, the City lacked exclusive control (*see e.g.*

Pintor v 122 Water Realty, LLC, 90 AD3d 449, 451 [1st Dept 2011]).

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.

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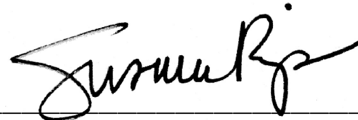

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Gische, J.P., Webber, Oing, Singh, JJ.

11069 Adem Arici, Index 654665/17
Plaintiff-Appellant,

-against-

Andrew Poma,
Defendant-Respondent.

____

Law Office of Michael H. Joseph, PLLC, White Plains (Michael Joseph of counsel), for appellant.

Woods Lonergan, PLLC, New York (Annie E. Causey of counsel), for respondent.

____

Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered on or about June 4, 2019, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment and to dismiss the counterclaim for indemnification, unanimously affirmed, without costs.

The court correctly determined that issues of fact exist as to whether the promissory note issued by a corporation in which defendant was a primary shareholder extinguished the debt balance of the stock purchase agreement whereby defendant had agreed to purchase plaintiff's interest in the corporation. Nothing in the promissory note establishes that plaintiff agreed to accept the note as a novation of defendant's contractual obligations. Nor does anything in the note establish that it is a guaranty. The

documents do not specify the nature of their relationship. Thus, contrary to plaintiff's contention, the parol evidence rule does not apply to the issue whether the stock purchase agreement and the promissory note are distinct or mutually dependent, and the issue cannot be decided on summary judgment (*see National Union Fire Ins. Co. of Pittsburgh, Pa. v Christopher Assoc.*, 257 AD2d 1, 5 [1st Dept 1999]).

Our prior decision in this case on a motion to dismiss (168 AD3d 411 [1st Dept 2019]) is not inconsistent with this summary judgment adjudication (*see Tenzer, Greenblatt, Fallon & Kaplan v Capri Jewelry*, 128 AD2d 467 [1st Dept 1987]). Nor does our prior decision permitting plaintiff's assignee to recover on the note (*Scharf v Idaho Farmers Mkt. Inc.*, 115 AD3d 500 [1st Dept 2014]) preclude these parties' disputes under the stock purchase agreement.

The court correctly declined to dismiss defendant's

counterclaim for indemnification of damages arising out of tax liability that occurred before the stock purchase agreement was executed (*see Feuer v Menkes Feuer, Inc.*, 8 AD2d 294, 297-298 [1st Dept 1959]).

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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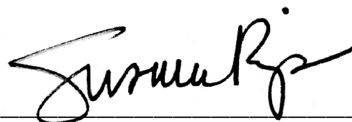

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Gische, J.P., Webber, Oing, Singh, JJ.

11070 The People of the State of New York, Ind. 5333/15
Respondent,

-against-

Alonzo Snider,
Defendant-Appellant.

____

Christina Swarns, Office of The Appellate Defender, New York (Rosemary Herbert of counsel), for appellant.

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

____

Judgment, Supreme Court, New York County (Gilbert Hong, J.), rendered April 4, 2017, convicting defendant, after a jury trial, of attempted assault in the first degree and assault in the second degree, and sentencing him to an aggregate term of five years, 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 and its rejection of defendant's justification defense.

The court providently exercised its discretion in admitting evidence of a prior assault by defendant against the victim. The evidence was probative of defendant's intent as it related to his justification defense under the circumstances of the case (*see*

People v Mehmeti, 279 AD2d 420, 421 [1st Dept 2001] *lv denied* 96 NY2d 832 [2001]). The uncharged crime evidence tended to show that, contrary to defendant's justification claim, his intent from the inception of the incident leading to the charged crime was to harm the victim. The probative value of the evidence exceeded its prejudicial effect, which the court minimized by way of limiting instructions that the jury is presumed to have followed.

Defendant's argument concerning the People's summation is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we find it unavailing.

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

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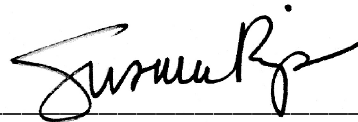


CLERK

Gische, J.P., Webber, Oing, Singh, JJ.

11072 In re Dennis Alves, Index 151600/17
Petitioner,

-against-

New York City Housing Authority,
Respondent.

____

Carbonaro Law, PC, New York (Joseph W. Carbonaro of counsel), for petitioner.

Kelly D. MacNeal, New York (Jane E. Lippman of counsel), for respondent.

____

Determination of respondent, dated February 10, 2017, which, after a hearing, sustained charges of misconduct brought against petitioner and terminated his employment, 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 [Nancy M. Bannon, J.], entered May 18, 2018), dismissed, without costs.

The determination is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). Petitioner did not contest one of the two charges of misconduct. Concerning the other charge, the testimony of petitioner’s supervisor established that petitioner left a work assignment without authorization and then refused to

return to the location when instructed to do so. The supervisor's testimony and time records submitted at the hearing also showed that the supervisor called petitioner shortly after petitioner left the work location, that petitioner was either still at the location or nearby at the time of the call, and that petitioner was dishonest when he said he was already at another work location approximately 40 minutes away and could not return.

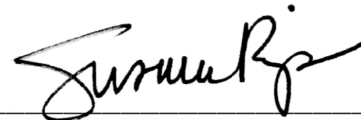
Respondent's consideration of uncharged conduct to refute petitioner's defense, that he left the work location in good faith to perform work at another location closer to his home, was not improper (*see Matter of Rounds v Town of Vestal*, 15 AD3d 819, 822 [3d Dept 2005]). Respondent properly considered such conduct when assessing petitioner's motivation for leaving the work location without authorization, lying to his supervisor about his whereabouts, and then refusing to return (*see Matter of Rodriguez v State Bd. for Professional Med. Conduct*, 110 AD3d 1268, 1272-1273 [3d Dept 2013]).

The termination of petitioner's employment does not shock one's sense of fairness (*see generally Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974]). The sustained charges against petitioner involved findings of

dishonesty and either neglect of petitioner's job responsibilities or refusal to report to a work assignment. For one of the two charges, petitioner's misconduct resulted in a hazardous condition that posed a significant risk of physical danger to residents or visitors at respondent's building.

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

ENTERED: FEBRUARY 20, 2020



CLERK

Gische, J.P., Webber, Oing, Singh, JJ.

11074 Alejo Ramos, Index 152665/13
Plaintiff-Respondent,

-against-

110 Bennett Avenue, LLC, et al.,
Defendants-Appellants.

____

Carol R. Finocchio, New York (Marie Hodukavich of counsel), for appellants.

Law Office of Ephrem J. Wertenteil, New York (Ephrem J. Wertenteil of counsel), for respondent.

____

Order, Supreme Court, New York County (Debra A. James, J.), entered May 9, 2019, which, inter alia, denied the motion of defendant 110 Bennett Avenue, LLC (Owner) for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Owner failed to establish that plaintiff was its special employee when plaintiff’s accident occurred on Owner’s property. Although plaintiff worked as the superintendent of Owner's property, there is no evidence that Owner assumed exclusive control over “the manner, details and ultimate result of the employee's work” (*Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 558 [1991]). Rather, the evidence shows that employees of defendant Rose Associates, Inc. (Rose) supervised and directed plaintiff's work.

Contrary to Owner’s arguments, its general instructions to clean and maintain the building does not establish sufficient control and direction of the manner and details of plaintiff’s work to establish a special employment relationship (*see Bautista v David Frankel Realty, Inc.*, 54 AD3d 549, 553 [1st Dept 2008]). Owner’s representative testified that she visited the property only four times a year, and made only general observations about the property’s condition. Moreover, Owner's reimbursement of plaintiff's wages, benefits, and worker's compensation insurance are insufficient to show that a special employment relationship existed, absent other evidence showing that it directed and controlled plaintiff's duties (*see Ortiz v Rose Nederlander Assoc., Inc.*, 90 AD3d 454, 455 [1st Dept 2011]; *Evans v Citicorp*, 276 AD2d 370 [1st Dept 2000]).

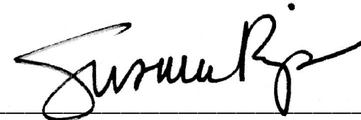
The fact that Rose, as general employer, exerted the amount of control that it did over plaintiff’s work establishes that it did not cede exclusive control to Owner (*see Bayona v Hertz Corp.*, 148 AD3d 608 [1st Dept 2017]. Furthermore, the management agreement between Owner and Rose specifically stated that

plaintiff was deemed an employee of Rose and not an employee of Owner (*see Bautista*, 54 AD3d at 554).

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

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

ENTERED: FEBRUARY 20, 2020



CLERK

Gische, J.P., Webber, Oing, Singh, JJ.

11075 In re New York State Unified Court System, etc., Petitioner, Index 450006/18

-against-

New York State Division of Human Rights, et al., Respondents.

____

John W. McConnell, Office of Court Administration, New York (Pedro Morales of counsel), for petitioner.

Caroline J. Downey, Bronx (Michael K. Swirsky of counsel), for New York State Division of Human Rights, respondent.

Jakub R. Zaic, respondent pro se.

____

Final order of respondent New York State Division of Human Rights (DHR), dated November 15, 2017, which adopted the recommended order of the Administrative Law Judge, and determined, following a hearing, that petitioner New York State Unified Court System, Office of Court Administration (OCA) discriminated against respondent Jakub R. Zaic based on a disability, and directed petitioner to, inter alia, cease and desist from subjecting individuals to blanket exclusions from the court officer-trainee job title based on hearing loss or the use of hearing aids, pay a civil fine and penalty of $30,000, and pay respondent Zaic $5,000 in compensatory damages, unanimously

confirmed, and the proceeding (transferred to this Court pursuant to pursuant to Executive Law § 298 by order of the Supreme Court, New York County [Shlomo Hagler, J.], entered June 8, 2018), dismissed, without costs.

The Commissioner's finding of discrimination is supported by substantial evidence. First, Zaic, currently a per diem court interpreter for OCA in its courts and in other courts, established a prima facie case that OCA discriminated against him on account of his disability of some hearing loss in his right ear (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 112-113 [1st Dept 2012]; *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 35 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]). Zaic sufficiently demonstrated that upon the provision of reasonable accommodation, namely, a hearing aid, he can perform in a reasonable manner the essential functions of a court officer-trainee (Executive Law § 292 [21]; *Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881, 883-884 [2013]).

Among other things, Zaic passed the written test for the court officer-trainee position and was conditionally hired. In addition, although the job duties are different, he adequately performed the functions of court interpreter without a hearing aid and without complaints from those who used his services. OCA

bans the use of hearing aids on the job or for the audiometric test to medically qualify for the position. Zaic was not obligated to be evaluated for and purchase a hearing aid, and to retake the audiometric test, at his expense, to further make his prima facie case after OCA made clear it still would deem him unqualified and reject such test results.

Permitting court officers to wear a hearing aid is a reasonable accommodation and would not, as OCA argues, impose undue hardship on OCA by posing any "direct threat," i.e. "a significant risk of substantial harm to the . . . safety of the employee or others" (9 NYCRR 466.11[g][2][I]; Executive Law §§ 292[21-e], 296[3][a]; *Pimentel v Citibank, N.A.*, 29 AD3d 141, 145 [1st Dept 2006], *lv denied* 7 NY3d 707 [2006]). OCA cites only to the physical demands of the job and the speculative risk that a hearing aid could become dislodged in a scuffle or fail to operate in an emergency. OCA's argument is undermined by its own policy permitting court officer-trainee candidates to meet its vision standard with or without corrective lenses or glasses, which could be lost or become dislodged in a scuffle.

Next, OCA failed to provide any legitimate non-discriminatory reason for its decision. An individual may be denied employment because of a disability only if that condition

will prevent him from performing in a reasonable manner the activities involved in the job or occupation sought, based on an individualized assessment of the specific individual (*Matter of State Div. of Human Rights [Granelle]*, 70 NY2d 100, 106-107 [1987]). No sufficiently individualized assessment occurred here, nor does OCA's formula take into account the ability of someone with asymmetrical hearing loss to perform the essential functions of a court officer-trainee.

Similarly, while OCA's preference for those with a minimal amount of hearing acuity might be a bona fide occupational qualification (Executive Law § 296[1][d]), its preference for hearing acuity without the use of a hearing aid is not.

Given OCA's blanket policy barring hearing-impaired persons from employment as court officers and its failure to accommodate Zaic who had an asymmetric hearing loss, the civil penalty of $30,000 was correctly assessed (Executive Law § 297[4][c] [a civil penalty below $50,000 may be assessed if an entity is found to have committed an "unlawful discriminatory act").

"'Judicial review of an administrative penalty is limited to whether the measure or mode of penalty . . . constitutes an abuse of discretion as a matter of law . . . . [A] penalty must be upheld unless it is 'so disproportionate to the offense as to be

shocking to one's sense of fairness'" (*Matter of County of Erie v New York State Div. of Human Rights*, 121 AD3d 1564, 1566 [4th Dept 2014], quoting *Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001]; *see also Matter of New York State Div. of Human Rights v International Fin. Servs. Group*, 162 AD3d 576 [1st Dept 2018]). Further, we have upheld civil penalties if they were "reasonable" (*Matter of Framboise Pastry Inc. v New York City Commn. On Human Rights*, 138 AD3d 532, 533 [1st Dept 2016]). Here, the civil penalty was not an abuse of discretion. Nor was it was unreasonable.

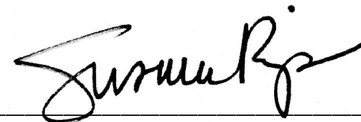
The record contains substantial evidence to support the Commissioner's finding that Zaic is entitled to a compensatory damages award of $5,000 (Executive Law § 297[4][c][iii]; *Matter of Framboise Pastry Inc. v New York City Commn. on Human Rights*, 138 AD3d 532, 533 [1st Dept 2016]; *see Matter of New York City Tr. Auth. v State Div. of Human Rights*, 78 NY2d 207, 216-217

[1991]; *Batavia Lodge No. 196, Loyal Order of Moose v New York State Div. of Human Rights*, 35 NY2d 143, 147 [1974]).

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: FEBRUARY 20, 2020



CLERK

Gische, J.P., Webber, Oing, Singh, JJ.

11076 The People of the State of New York, Ind. 2733/11
Respondent,

-against-

Katia Cambronae, etc.,
Defendant-Appellant.

____

Janet E. Sabel, The Legal Aid Society, New York (Will A. Page of counsel), for appellant.

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

____

Judgment, Supreme Court, Bronx County (Joseph J. Dawson, J.), rendered March 26, 2015, convicting defendant, after a jury trial, of assault in the second degree, and sentencing her to five years' probation, unanimously affirmed.

Defendant's claim that her counsel was ineffective for failing to request a justification charge is unreviewable on direct appeal, because it involves matters of strategy not reflected in the record (*see e.g. People v Perez*, 123 AD3d 592 [1st Dept 2014], *lv denied* 25 NY3d 1169 [2015]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claim may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance of counsel

under the state and federal standards (*see People v Benevento*, 91 NY2d 708 [1998]; *Strickland v Washington*, 466 US 668 [1984]). The record does not establish that trial counsel's choice of defenses was unreasonable or prejudicial.

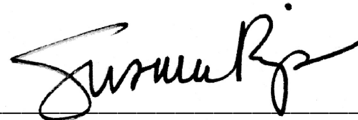
The court providently exercised its discretion in denying defendant's belated request to testify, made for the first time late in jury deliberations (*see People v Olsen*, 34 NY2d 349, 353-354 [1974]). The court was not obligated to appoint a new attorney to represent defendant in connection with that request. Defendant asserted that her counsel had "made the decision," against her wishes, that she would not testify. However, counsel clarified that what actually happened was that he dissuaded defendant from testifying (*see People v Perry*, 266 AD2d 151, 151-152 [1st Dept 1999], *lv denied* 95 NY2d 856 [2000]), and that defendant had agreed with counsel's advice. This clarification did not create a conflict of interest requiring the court to appoint new counsel on the application to testify (*see e.g.*

People v Nelson, 27 AD3d 287 [1st Dept 2006], *affd* 7 NY3d 883 [2006]).

We have considered and rejected defendant's remaining claims.

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

ENTERED: FEBRUARY 20, 2020



CLERK

Gische, J.P., Webber, Oing, Singh, JJ.

11077- Index 157281/17
11078N Ian S. Peck, File 1617/16
Plaintiff-Appellant, 1617A/16
1617B/16

-against-

Liliane Peck, etc.,
Defendant-Respondent.
- - - - -
In re Probate Proceedings, Will of
Norman L. Peck,
Deceased.
- - - - -
Liliane Peck, etc.,
Plaintiff-Respondent,

-against-

Ian S. Peck, et al.,
Defendants.
- - - - -
Lawrence Ingolia,
Proposed Intervenor-Appellant.
- - - - -
Lillian Peck, etc.,
Plaintiff-Respondent,

-against-

Ian S. Peck,
Defendant.
- - - - -
Lawrence Ingolia,
Proposed Intervenor-Appellant.
____

The Majorie Firm Ltd., New York (Francis B. Marjorie of counsel), for Ian Peck, appellant.

Jaspan Schlesinger LLP, Garden City (Sally M. Donahue of counsel), for Lawrence Ingolia, appellant.

Davis Wright Tremaine LLP, New York (Victor A. Kovner of counsel), for respondent.

____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered on or about May 25, 2019, which, in the defamation action, granted defendant's motion to dismiss the complaint, unanimously affirmed, with costs. Order, Surrogate's Court, New York County (Nora S. Anderson, S.), entered on or about February 13, 2019, which denied the motion to intervene, unanimously affirmed, with costs.

In the defamation action, Supreme Court correctly concluded that the alleged defamatory statements about plaintiff made by defendant in affidavits in support of her motion for summary judgment in lieu of complaint (CPLR 3213) are not "obviously impertinent" to the judicial proceedings in which they were made and therefore are absolutely protected by the judicial proceedings privilege (*see Sexter & Warmflash, P.C. v Margrabe*, 38 AD3d 163, 171-173 [1st Dept 2007]). Nor is this a case in which the underlying lawsuit was a sham action brought solely to defame defendant (*see Flomenhaft v Finkelstein*, 127 AD3d 634, 638 [1st Dept 2015]).

The Surrogate correctly denied the motion to intervene brought by the property guardian of the infants, since, in the

absence of the filing of objections to the probate of the will, the infants are not interested parties who have standing to participate in the probate proceedings. Nor did the Surrogate improvidently exercise her discretion in denying intervention based on any purported inadequately represented interest of the infants in the summary proceedings to recover on the notes.

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

ENTERED: FEBRUARY 20, 2020

CLERK

Gische, J.P., Webber, Oing, Singh, JJ.

11079N James Busche, Index 308788/14
Plaintiff-Respondent,

-against-

Madhu Grover,
Defendant-Appellant,

Vijaya Grover, et al.,
Defendants.

____

J. Kaplan & Associates, PLLC, New York (Joseph D. DePalma of counsel), for appellant.

Bradley H. Andrews, New York, for respondent.

____

Order, Supreme Court, New York County (Michael L. Katz, J.), entered November 21, 2018, which granted plaintiff's motion to confirm the report of the Special Referee, dated January 25, 2018, and directed entry of judgment in favor of plaintiff and against defendant Madhu Grover in the principal amount of $1,795,602.63, unanimously affirmed, with costs.

"It is well settled that the report of a Special Referee shall be confirmed whenever the findings contained therein are supported by the record and the Special Referee has clearly defined the issues and resolved matters of credibility" (*Nager v Panadis*, 238 AD2d 135, 135-136 [1st Dept 1997]*; see Steingart v Hoffman*, 80 AD3d 444, 445 [1st Dept 2011]). Here, the Referee's

credibility determinations were amply supported by the record, as defendant's testimony was evasive and contradictory. The Referee also clearly defined the issue to be considered, namely whether defendant managed plaintiff's deferred compensation accounts, and then retained approximately $6 million of these funds for her own benefit. The Referee's finding that defendant owed plaintiff at least the judgment amount of $1,795,602.63 was supported by financial statements entered into evidence, together with the parties' testimony.

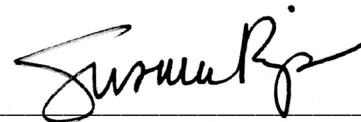
Under the circumstances, the court providently exercised its discretion in not considering further documents entered in opposition to plaintiff's motion to confirm. Such documents included a promissory note from defendant's mother, and certain SEC filings that should have been presented at the hearing so

that plaintiff had the opportunity to testify as to their contents.

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

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

ENTERED: FEBRUARY 20, 2020



CLERK

Renwick, J.P., Mazzarelli, Gesmer, Kern, JJ.

11081 In re Claudio DeMeo, Index 450186/18
Petitioner-Appellant,

-against-

Teachers Retirement System of
the City of New York,
Respondent-Respondent.

____

Arthur G. Nevins, Jr., New York, for appellant.

James E. Johnson, Corporation Counsel, New York (Claibourne Henry of counsel), for respondent.

____

Order and judgment (one paper), Supreme Court, New York County (Verna L. Saunders, J.), entered January 8, 2019, denying the petition to annul respondents' determination, dated May 25, 2017, which denied petitioner's application for accidental disability retirement benefits, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The determination to deny petitioner's application for accident disability retirement was not arbitrary and capricious, and was supported by some credible evidence (*see Matter of Merlino v Teachers' Retirement Sys. of the City of N.Y.*, 177 AD3d 430, 430 [1st Dept 2019], citing *Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 760 [1996]). The

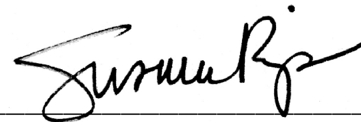
finding of respondent’s Medical Board that petitioner was not disabled was supported by its physical examination and interview of petitioner (*see Matter of Fusco v Teachers' Retirement Sys. of the City of N.Y.*, 136 AD3d 450, 451 [1st Dept 2016]). Upon examination, petitioner was able to move around unassisted, had normal strength and range of motion in his shoulders, elbows, wrists, and hips, and had little or no tenderness in his neck and back. In addition, the Medical Board noted that petitioner had not had standard of care epidural injections, trigger point injections, or any other procedures to improve his current complaints. Petitioner claims that the Medical Board ignored his medical history, but resolution of conflicting evidence was for the Medical Board to resolve (*see Matter of Athanassiou v Kelly*, 101 AD3d 517 [1st Dept 2012]; *Matter of Bell v New York City Employees' Retirement Sys.*, 273 AD2d 119, 120 [1st Dept 2000], *lv denied* 96 NY2d 701 [2001]).

The disability finding of the Social Security Administration was not dispositive of the Medical Board’s disability determination (*see Fusco*, 136 AD3d at 451, citing *Matter of Barden v New York City Employees’ Retirement Sys.*, 291 AD2d 215,

216 [1st Dept 2002]). Nor did the finding of the medical arbitrator, who examined petitioner after the Medical Board made its determination, warrant article 78 relief (*see id.*).

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

ENTERED: FEBRUARY 20, 2020



CLERK

Renwick, J.P., Mazzarelli, Gesmer, Kern, JJ.

11082 In re Kevin X., Dkt B-03854/17

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

Jin Hua X.,
Respondent-Appellant,

Catholic Guardian Services,
Petitioner-Respondent,

The Commissioner of the Administration for Children’s Services of the City of New York,
Petitioner.

____

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

Joseph T. Gatti, New York, for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Riti P. Singh of counsel), attorney for the child.

____

Order, Family Court, New York County (Jane Pearl, J.), entered on or about September 5, 2018, which, inter alia, upon a finding of permanent neglect, terminated respondent father’s parental rights to the subject child and committed custody and guardianship of the child to petitioner agency and the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and

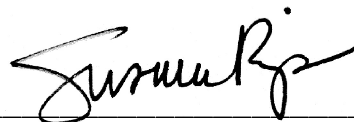
convincing evidence that the agency made diligent efforts to encourage and strengthen the parental relationship by devising and communicating an appropriate service plan for the father, which included referring him to mental health services and dyadic counseling with the child (Social Services Law § 384-b[7][f]; *Matter of Frank Enrique S. [Karina Elizabeth F.]*, 168 AD3d 539, 540 [1st Dept 2019]). Despite the agency's efforts, including encouraging the father to commence individual and family therapy with the child, making referrals, scheduling appointments and accompanying him to the meetings with the service providers, the father failed to comply with the referrals by attending dyadic therapy, a key component to his reunification plan (*Matter of Zariah M.E. [Alexys T.]*, 171 AD3d 607 [1st Dept 2019]).

A preponderance of the evidence supports the determination that termination of the father's parental rights was in the best interests of the child (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). A suspended judgment was not appropriate, given the father's repeated failure to engage in mental health services, both individually and with the child, his limited visits with the child, and the fact that the child's needs are

being met in his foster home, where he resides with his half-sister and has bonded with the foster family, which shares the same background and wishes to adopt him (*Matter of Tion Lavon J. [Saadiasha J.]*, 159 AD3d 579, 580 [1st Dept 2018]).

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

ENTERED: FEBRUARY 20, 2020



CLERK

Renwick, J.P., Mazzarelli, Gesmer, Kern, JJ.

11083 Gertrude Chester, Index 157424/16
Plaintiff-Appellant,

-against-

The Museum of Modern Art,
Defendant-Respondent.

____

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Brian J. Isaac of counsel), for appellant.

Weber Gallagher Simpson Stapleton Fires & Newby, LLP, New York (Robert A. Suarez of counsel), for respondent.

____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered February 4, 2019, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

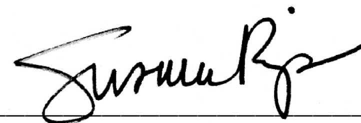
Defendant established prima facie entitlement to judgment as a matter of law in this action where plaintiff was injured when, after walking over a stone bridge in the outdoor garden at defendant museum, she fell when she stepped onto one of the two stairs at the end of the bridge. Plaintiff alleges that the absence of handrails proximately caused her fall. Defendant submitted evidence showing that the steps were well maintained and not defective, and that the stairs did not require handrails under applicable building codes since they were neither interior

nor exterior stairs as those terms are defined (*see DeRosa v City of New York*, 30 AD3d 323, 326 [1st Dept 2006]).

In opposition, plaintiff failed raise a triable issue of fact as to whether the absence of handrails constituted negligence. The affidavit of her expert referred to general standards concerning design of steps and the utility of handrails. Since the expert's opinion was not supported by reference to "specific, applicable safety standards or practices," it was insufficient to defeat the motion (*Griffith v ETH NEP, L.P.*, 140 AD3d 451, 452 [1st Dept 2016], *lv denied* 28 NY3d 905 [2016]; *see Hernandez v Callen*, 134 AD3d 654 [1st Dept 2015]).

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

ENTERED: FEBRUARY 20, 2020



CLERK

Renwick, J.P., Mazzarelli, Gesmer, Kern, JJ.

11084 Commissioners of the State Insurance Fund, Plaintiff-Appellant, Index 403442/10

-against-

Titanium Interiors, Inc., Defendant-Respondent.

Peter Cusick, New York (Isaac N. Guy Okafor of counsel), for appellant.

Lugara PLLC, Brooklyn (Lorenzo Lugara of counsel), for respondent.

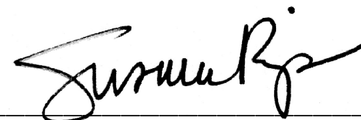
Order, Supreme Court, New York County (Alan C. Marin, J.), entered January 30, 2019, which, to the extent appealed from, denied in part plaintiff's motion for summary judgment on its claim for unpaid workers' compensation premiums with interest to run from the date the policy was canceled, unanimously reversed, on the law, without costs, and the motion granted in its entirety.

Plaintiff's business records, which include the insurance application, audit worksheets, and resulting invoices and statement of accounts for a balance due, establish prima facie that it is entitled to judgment in the full amount that it sought (*see e.g. Commissioners of State Ins. Fund v Allou Distribs.*, 220

AD2d 217 [1st Dept 1995]). In opposition, defendant failed to raise an issue of fact. Defendant claims that plaintiff incorrectly included already insured subcontractors in its premium calculations, but it failed to submit evidence supporting the claim, such as certificates of insurance for those subcontractors claimed to have obtained coverage otherwise (*see Commissioners of State Ins. Fund v Yesmont & Assoc.*, 226 AD2d 147, 148 [1st Dept 1996]). Statutory interest should be calculated from the date of the cancellation of the policy (*see* Workers' Compensation Law § 93[a]; *see also* CPLR 5004).

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

ENTERED: FEBRUARY 20, 2020



CLERK

Renwick, J.P., Mazzarelli, Gesmer, Kern, JJ.

11085 The People of the State of New York, Ind. 5029/15
Respondent,

-against-

Lorenzo Perez,
Defendant-Appellant.

Christina Swarns, Office of The Appellate Defender, New York (Joseph M. Nursey of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered September 14, 2016, convicting defendant, after a jury trial, of four counts of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to concurrent terms of two to four years, unanimously affirmed.

As the People concede, a wanted poster containing a photograph depicting defendant and the codefendant (taken from a surveillance videotape that was also in evidence) was not probative of any issue raised at trial. Nevertheless, any error regarding the poster was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). In its redacted form, the poster only contained factual information otherwise known to the jury through the video and the victim's statement. Defendant's assertion that the jury

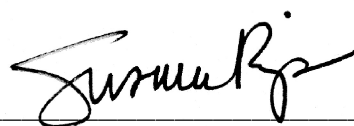
may have found something sinister about the presence of obvious redactions rests on speculation.

The court, which permitted defendant to introduce his codefendant's plea allocution as a declaration against penal interest, providently exercised its discretion in redacting potentially misleading portions (*see generally People v Primo*, 96 NY2d 351, 355 [2001]). The court also providently exercised its discretion in precluding defendant from impeaching the victim with her failure to offer certain information in her first 911 call, because the omission did not qualify as a prior inconsistent statement (*see People v Bornholdt*, 33 NY2d 75, 88 [1973], *cert denied sub nom. Victory v New York*, 416 US 905 [1974]). Defendant's arguments relating to another declaration by the codefendant, and the victim's second 911 call, are waived

or unpreserved, 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: FEBRUARY 20, 2020



CLERK

Renwick, J.P., Mazzarelli, Gesmer, Kern, JJ.

11086 The People of the State of New York, Ind. 3211N/16
Respondent,

-against-

Juan Molina,
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 (Rebecca Hausner of counsel), for respondent.

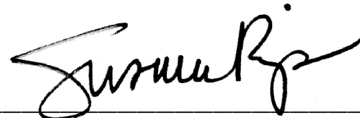
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael Sonberg, J.), rendered January 31, 2017,

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

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

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

ENTERED: FEBRUARY 20, 2020



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

Renwick, J.P., Mazzarelli, Gesmer, Kern, JJ.

11087 Grassi & Co., CPAS, P.C., Index 651673/18
Plaintiff-Respondent,

-against-

Honka, Ronald,
Defendant-Appellant.

Orr Cook, Ponte Vedra, FL (Rene M. Fix of the bar of the State of Florida, admitted pro hac vice, of counsel), for appellant.

Davidoff Hutcher & Citron LLP, New York (Matthew R. Yogg of counsel), for respondent.

Order, Supreme Court, New York County (Tanya R. Kennedy, J.), entered on or about January 16, 2019, which denied defendant's pre-answer CPLR 3211(a)(7) motion to dismiss the complaint, unanimously affirmed, with costs.

When assessing a CPLR 3211(a)(7) motion to dismiss, the pleading is to be afforded a liberal construction, the facts as alleged in the complaint are accepted as true, the plaintiff is accorded the benefit of every possible favorable inference, and the court determines only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Further, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and "the criterion is whether the proponent of the

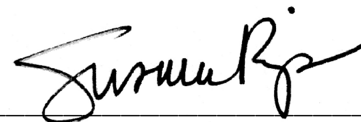
pleading has a cause of action, not whether [they have] stated one" (*id.* [internal quotation marks and citations omitted]).

Under these standards, the complaint sufficiently alleges claims for breach of the employment agreement's non-solicitation provision and tortious interference.

Defendant's attacks on the reasonableness, breadth, legality, and enforceablity of the non-recruitment provision are all premature at this early stage of the litigation, as they are each fact-based determinations (*accord BDO Seidman v Hirshberg*, 93 NY2d 382 [1999]; *Karpinski v Ingrasci*, 28 NY2d 45, 49 [1971]).

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

ENTERED: FEBRUARY 20, 2020



CLERK

Renwick, J.P., Mazzarelli, Gesmer, Kern, JJ.

11088 The People of the State of New York, Ind. 1357/16
Respondent,

-against-

Jamain Rattary,
Defendant-Appellant.

____

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

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

____

Judgment, Supreme Court, New York County (James M. Burke, J.), rendered March 29, 2017, convicting defendant, after a jury trial, of assault in the second degree and criminal possession of a weapon in the third degree, and sentencing him, as a second violent felony offender, to an aggregate term of five years, unanimously affirmed.

The court properly declined to deliver a circumstantial evidence charge, because both direct and circumstantial evidence established defendant’s guilt, even if some of the direct evidence required the drawing of inferences (*see People v Roldan*, 88 NY2d 826 [1996]; *People v Singleton*, 102 AD3d 517, 518 [1st Dept 2013], *lv denied* 21 NY3d 1020 [2013]). Although the victim’s girlfriend did not testify, her undisputedly admissible

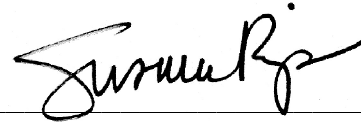
911 call, in which she unequivocally stated that defendant had just stabbed the victim and that the altercation was still in progress in her presence, constituted direct evidence. In addition, the bloody knife recovered in close proximity to defendant was direct evidence of criminal possession of a weapon. In any event, given the overwhelming direct and circumstantial evidence, there is no reasonable possibility that the absence of a circumstantial evidence charge affected the verdict (*see People v Brian*, 84 NY2d 887, 889 [1994]).

Defendant's challenges to the prosecutor's summation are unpreserved because defendant failed to object, only made general objections, or failed to request further relief after the court sustained his objections (*see People v Romero*, 7 NY3d 911, 912 [2006]), and we decline to review these claims in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-120 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]). To the extent the prosecutor's remarks could be viewed as shifting the burden of proof, the court's curative actions were sufficient to

prevent any prejudice. The prosecutor did not vouch for witnesses, but responded to the defense summation with record-based arguments. In any event, nothing in the summation was so egregious as to deprive defendant of a fair trial.

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

ENTERED: FEBRUARY 20, 2020



CLERK

Renwick, J.P., Mazzarelli, Gesmer, Kern, JJ.

11089 Rahamim Kattan, et al., Index 156876/16
Plaintiffs-Appellants,

-against-

119 Christopher LLC, etc.,
Defendant-Respondent.

____

Sutton Sachs Meyer PLLC, New York (Zachary G. Meyer of counsel), for appellants.

Golino Law Group, PLLC, New York (Brian W. Shaw of counsel), for respondent.

____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered on or about October 9, 2019, which denied plaintiffs' motion for summary judgment and granted defendants summary judgment dismissing the action pursuant to CPLR 3212(b), unanimously affirmed, without costs.

The motion court correctly determined that the stipulation of settlement in the prior action was a bona fide effort to resolve a legal dispute within the confines of the Rent Stabilization Code, as plaintiffs and the other parties to the stipulation were represented by counsel in that action (*see* 9 NYCRR 2520.13). We note that, contrary to defendant's contention, plaintiffs' rights under the rent stabilization laws do not arise from the stipulation but under the relevant statutes

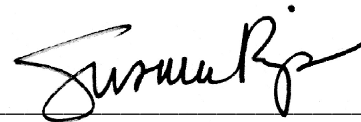
that confer rent stabilization protections on them, and that those rights were not and could not be terminated simply because the previous landlord failed to offer plaintiffs rent-stabilized leases (*see id.*; 9 NYCRR 2525.1). However, given that the stipulation stated that plaintiffs were rent stabilized tenants, calculated in good faith the legal regulated rent for each tenant, and provided compensation for the alleged overcharges, the court correctly determined that the stipulation was not an attempt to circumvent the rent stabilization laws and therefore was enforceable (*see 204 Columbia Hgts., LLC v Manheim*, 148 AD3d 59, 69 [1st Dept 2017], *lv dismissed* 29 NY3d 1119 [2017]). Because plaintiffs did not establish a basis for their overcharge claims outside the stipulation, the court correctly dismissed the cause of action for overcharges.

In view of the foregoing, we do not reach the question

whether the court correctly dismissed the complaint on the ground that necessary parties to the action were not joined (*see* CPLR 1001).

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

ENTERED: FEBRUARY 20, 2020



CLERK

Renwick, J.P., Mazzarelli, Gesmer, Kern, JJ.

11090 The People of the State of New York, Ind. 2480/16
Respondent,

-against-

Shaniqua Jordan,
Defendant-Appellant.

____

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

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

____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered November 2, 2017, convicting defendant, upon her plea of guilty, of identify theft in the first degree (two counts), identify theft in the second degree (two counts), forgery in the second degree (two counts), criminal possession of stolen property in the fourth degree (three counts) and criminal possession of a forged instrument in the second degree, and sentencing her to an aggregate term of 2⅓ to 7 years, unanimously modified, on the law, to the extent of reducing the sentences on the second-degree identity theft convictions to one to three years, and otherwise affirmed.

As the People concede, when the court imposed sentences of 2⅓ to 7 years on the convictions of identity theft in the second

degree, a class E felony, this exceeded the lawful maximum sentence. Accordingly, we reduce those sentences to one to three years.

As we perceive no basis for reducing the remaining sentences, we need not reach the issue of whether defendant’s appeal waiver was valid.

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

ENTERED: FEBRUARY 20, 2020

CLERK

Renwick, J.P., Mazzarelli, Gesmer, Kern, JJ.

11091 Avi Dorfman, et al., Index 652269/14
Plaintiffs-Respondents,

-against-

Robert Reffkin, et al.,
Defendants-Appellants.

Kirkland & Ellis LLP, New York (Atif N. Khawaja of counsel), for appellants.

Susman Godfrey LLP, New York (Arun Subramanian of counsel), and Ganfer Shore Leeds & Zauderer LLP, New York (Mark C. Zauderer of counsel), for respondents.

Order, Supreme Court, New York County (Andrea Masley, J.), entered October 7, 2019, which denied defendants' motion for summary judgment dismissing plaintiffs' claims for breach of contract for monetary damages, unjust enrichment, and quantum meruit, unanimously modified, on the law, to grant defendants summary judgment on the breach of contract claim for monetary damages, and otherwise affirmed, without costs.

On a prior appeal in this case, this Court held that a portion of plaintiffs' claims for unjust enrichment and quantum meruit was not subject to the statute of frauds set forth at General Obligations Law § 5-701(a)(10) (144 AD3d 10, 19-20 [1st Dept 2016]). Specifically, those allegations were that Dorfman

"develop[ed] materials to secure investor backing, recruit[ed] engineers and others to join Urban Compass, and develop[ed] the details of how Urban Compass's software product, web, and mobile applications would be 'architected'" (*id.* at 16).

The documentary evidence in the record shows that Dorfman actually performed at least some of the alleged actions which this Court exempted from the statute of frauds; specifically, he developed materials to secure financial backing from investors - including Goldman Sachs - and the deposition testimony and email evidence showed that Dorfman introduced and recruited Paul Goudas to Urban Compass. In light of this evidence and this Court's prior holding, defendants are not entitled to summary judgment based upon the statute of frauds. Moreover, Supreme Court properly determined that the issue of whether the services were rendered after the company came to fruition was one for the trier of fact. Defendants presented prima facie evidence that Urban Compass had not "come to fruition," because it was not incorporated, did not have an office, did not have any employees, and had not issued equity prior to October 2012. They also submitted evidence that Dorfman acknowledged it was not formed as of September 17, 2012. However, plaintiffs raised a triable issue of fact on this issue by presenting evidence that Reffkin

signed the confidentiality and nondisclosure agreement (NDA) on behalf of Urban Compass (then called Newco Real Estate Venture), Reffkin and Allon were actively engaging potential investors at Goldman Sachs and sharing materials with them regarding Urban Compass, Reffkin and Allon were actively recruiting engineers including Paul Groudas, and they provided commentary on plaintiffs' 120-day plan.

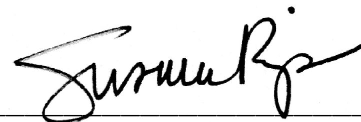
With regard to RentJolt's claim for monetary damages for breach of the NDA, the NDA's section 10 language is unambiguous. Plaintiffs waived their right to seek these monetary damages. While plaintiffs contend that NDA section 11(b)'s language conflicts, as it provides that injunctive relief and equitable relief "shall not be deemed to be the exclusive remedies for a breach by either party of this Agreement, but shall be in addition to all other remedies available at law or equity," this is not the case. To give all provisions meaning and reading the contract as a whole (*see Beal Sav. Bank v Sommer*, 8 NY3d 318, 324-325 [2007]; *see also Diamond Castle Partners IV PRC, L.P. v IAC/InterActiveCorp*, 82 AD3d 421, 422 [1st Dept 2011]), section 11(b) could reasonably be interpreted as allowing either declaratory relief or an award of attorneys fees upon a finding of a breach (as explicitly provided in the following line in

section 11[b]). Section 11(b)'s language does not necessarily contradict section 10's monetary damages waiver language, and all of the NDA's terms should be given their plain and ordinary meaning (*see Burlington Ins. Co. v NYC Tr. Auth.*, 29 NY3d 313, 321 [2017]); *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). To adopt plaintiffs' interpretation of the contract would effectively render the waiver of monetary damages provision meaningless.

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

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

ENTERED: FEBRUARY 20, 2020



CLERK

Renwick, J.P., Mazzarelli, Gesmer, Kern, JJ.

11092 Zulmiria Santana, Index 22321/16E
Plaintiff-Respondent,

-against-

Miguel Melendez, et al.,
Defendants-Appellants,

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

____

Law Office of James J. Toomey, New York (Evy L. Kazansky of counsel), for appellants.

Mallilo & Grossman, Flushing (F. Jason Kajoshaj of counsel), for Zulmiria Santana, respondent.

Georgia M. Pestana, Acting Corporation Counsel, New York (Jesse A. Townsend of counsel), for the City of New York and New York City Department of Sanitation, respondents.

____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered December 11, 2018, which denied the motion of defendants Miguel Melendez and Jason Melendez for summary judgment dismissing all claims and cross claims asserted against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendants demonstrated prima facie that their property abutting the sidewalk where plaintiff allegedly fell was a one-

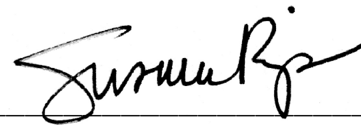
or two-family, owner-occupied residence, exempt from the sidewalk snow-removal obligations imposed by Administrative Code of City of NY § 7-210(b) (*see Rios v Acosta*, 8 AD3d 183, 185 [1st Dept 2004]). Contrary to plaintiff's argument, defendants' deposition testimony established that they resided in the property, and plaintiff offered no evidence to raise an issue of fact. Even if they were required to clear the sidewalk, they would not be liable because plaintiff's accident occurred at 6:30 a.m., and Administrative Code § 16-123 (a) gives landowners a four-hour grace period to clear snow and ice, not including the period between 9:00 p.m. and 7:00 a.m (*Jakubowski v Axton Owner LLC*, 156 AD3d 509 [1st Dept 2017]).

Furthermore, defendants demonstrated that they did not create or cause the alleged hazardous condition (*see Lai-Hor Ng Yiu v Crevatas*, 103 AD3d 691, 691 [2d Dept 2013]; *Rios v Acosta*, 8 AD3d at 184-185). Defendant Miguel Melendez testified that he did not shovel the night before the accident occurred because he did not see any snow, and that he salted the sidewalk at 1:30 a.m., about five hours prior to plaintiff's fall. An employee from co-defendant the City of Department of Sanitation testified that while he did not know whether a crew member he supervised had shoveled the sidewalk, it was possible that the City had

shoveled that area because a record log showed that crew members were working that night to clear snow and ice. On this record, any contention that defendants created or exacerbated a hazardous condition naturally caused by snow is purely speculative (*see Encarnacion v New York City Hous. Auth.*, 161 AD3d 485 [1st Dept 2018]; *Rios v Acosta*, 8 AD3d at 184-185*; compare Lopez v City of New York*, 290 AD2d 539 [1st Dept 2002]).

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

ENTERED: FEBRUARY 20, 2020



CLERK

Renwick, J.P., Mazzarelli, Gesmer, Kern, JJ.

11094 Unisol, Inc., Index 20498/15E
Plaintiff-Respondent, 162276/14

-against-

Adam Elia Kidron,
Defendant-Appellant,

Wells Fargo Bank, N.A., et al.,
Defendants.
- - - - -
Adam Elia Kidron,
Plaintiff-Appellant,

-against-

Unisol, Inc.,
Defendant-Respondent.

____

Kaplan Rice LLP, New York (Joseph A. Matteo of counsel), for appellant.

Santamarina & Associates, New York (Kacy Popyer of counsel), for respondent.

____

Order, Supreme Court, Bronx County (Lizbeth González, J.), entered December 20, 2018, which granted plaintiff Unisol, Inc.'s motion for summary judgment on its claims for breach of contract and account stated, and order, same court and Justice, entered April 9, 2019, which amended the December 20, 2018 order to reflect that the underlying action is disposed of in its entirety and is no longer active, unanimously affirmed, with costs.

Plaintiff Unisol established prima facie that it is entitled to summary judgment on its breach of contract cause of action by submitting evidence that it was entitled to payment for its labor and materials supplied, pursuant to a time and materials arrangement, upon the approval of its invoices by defendant Kidron's architect-agent, who had deemed Unisol's services satisfactory. In opposition, Kidron failed to raise an issue of fact. The parties' agreement did not grant him the right to approve or reject Unisol's work after his agent had signed off on it. Moreover, Kidron's contractual grace period for raising objections to architect-approved invoices had expired before he raised any specific objections to the challenged invoices.

Contrary to Kidron's argument, Unisol's account stated claim is independent of its breach of contract claim (*see Duane Reade v Cardinal Health, Inc.*, 21 AD3d 269 [1st Dept 2005]; *see also Zanani v Schvimmer* 50 AD3d 445 [1st Dept 2008]). Unisol established prima facie that it supplied labor and materials for the project and invoiced Kidron weekly for payment on those services and materials, as the parties' agreement required, and that Kidron paid some of the outstanding invoices pursuant to a subsequently arranged payment plan and then made no further payments. Kidron made no specific objections about the quality

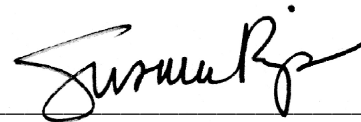
of Unisol’s work until after Unisol had exercised its contractual right to leave the project for non-payment and after Kidron’s lender had denied his pending loan application (*see Mintz & Gold LLP v Diabes*, 125 AD3d 488 [1st Dept 2015]). Kidron’s time to object had already expired. For the same reason, the court correctly dismissed Kidron’s counterclaims alleging that Unisol’s work was substandard.

We reject Kidron’s argument that summary judgment was premature because he did not have the opportunity to take certain discovery. Kidron failed to provide an evidentiary basis for concluding that discovery might lead to relevant evidence (*see* CPLR 3212[4]; *Bailey v New York City Tr. Auth.*, 270 AD2d 156, 157 [1st Dept 2000]). He also failed to demonstrate that the facts he needed were exclusively within Unisol’s knowledge (*see Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 102-103 [1st Dept

2006], *lv denied* 8 NY3d 804 [2007]). Moreover, Kidron delayed unreasonably in pursuing the discovery (*see Unisource, Inc. v Wolfe*, 169 AD2d 567 [1st Dept 1991]).

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

ENTERED: FEBRUARY 20, 2020



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CLERK

Renwick, J.P., Mazzarelli, Gesmer, Kern, JJ.

11095 Robert Carpentieri, et al., Index 159773/13ECF
Plaintiffs-Respondents,

-against-

309 Fifth Avenue, LLC, et al.,
Defendants-Appellants.
- - - - -
[And a Third-Party Action]

____

Law Office of James J. Toomey, New York (Evy L. Kazansky of counsel), for appellants.

Oresky & Associates, PLLC, Bronx (Payne Tatich of counsel), for respondents.

____

Order, Supreme Court, New York County (Robert D. Kalish, J.), entered on or about August 14, 2018, which granted plaintiffs' motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim as against defendants MEPT 309 Fifth Avenue, LLC and Lend Lease (US) Construction, Inc., unanimously affirmed, without costs.

Plaintiff made a prima facie showing that his injuries were caused by a violation of Labor Law § 240(1), by presenting his testimony that he was applying masking tape to a wall fixture to prepare for painting while standing on the top plank of a scaffold about four feet above the floor, when the plank flipped up, causing him to fall to the floor (*see Mendez v Union Theol.*

Seminary in City of N.Y., 8 AD3d 32 [1st Dept 2004]). Plaintiff also presented photos of the scaffold showing that it had no guardrails (*see Celaj v Cornell*, 144 AD3d 590 [1st Dept 2016]; *Vergara v SS 133 W. 21, LLC*, 21 AD3d 279, 280 [1st Dept 2005]), and plaintiff was not supplied with any other safety devices (*see Camacho v Ironclad Artists, Inc.*, 174 AD3d 426 [1st Dept 2019]).

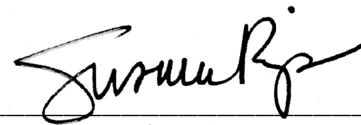
In opposition, defendants failed to raise a triable issue of fact as to whether the scaffold was an inadequate safety device. Testimony by a site safety manager that he saw another scaffold at some unspecified time after the accident, and that it did not appear defective or consistent with plaintiff's testimony or photos, did not raise an issue of fact (*see Haynes v Boricua Vil. Hous. Dev. Fund Co., Inc.*, 170 AD3d 509, 510 [1st Dept 2019]).

Furthermore, even assuming that defendants submitted admissible evidence establishing plaintiff's negligence, he was at most comparatively negligent, which is not a defense to Labor Law § 240(1) (*see e.g. Celaj*, 144 AD3d at 590 [moving

scaffold while standing on it without locking wheels]; *Samuel v Simone Dev. Co.*, 13 AD3d 112 [1st Dept 2004].

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

ENTERED: FEBRUARY 20, 2020



CLERK

Renwick, J.P., Mazzarelli, Gesmer, Kern, JJ.

11096 Joseph Charles, Index 161044/17
Plaintiff-Appellant,

-against-

Summit Glory LLC, et al.,
Defendants-Respondents.

____

Kazmierczuk & McGrath, Forest Hills (Joseph Kazmierczuk of counsel), for appellant.

Cullen & Dykman LLP, New York (Wayne M. Cox of counsel), for respondents.

____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered January 24, 2019, which, insofar as appealed from, granted defendants' motion to dismiss the Labor Law § 241(6) cause of action predicated upon Industrial Code (12 NYCRR) § 23-1.10(a), unanimously affirmed, without costs.

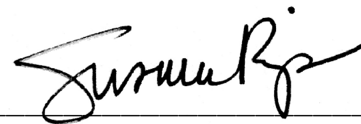
Plaintiff was injured when his right forearm was struck by a metal shard that flew from the "mushroomed" head of a "drift pin" that a coworker was hammering with a sledgehammer. A drift pin is a tapered metal hand tool that is hammered into the holes of steel beams to align them, and once the holes are aligned, the drift pin is removed and a bolt is put through the holes to secure the beams. According to defendants' proof, the subject drift pin was about one foot long, one inch in diameter and

"round."

Plaintiff claims that defendants violated 12 NYCRR 23-1.10(a), which provides that "[e]dged tools shall be kept sharp and shall be maintained free from burrs and mushroomed heads." We have previously found the regulation inapplicable to tools that have "flat and/or round edges" (*Pol v City of New York*, 126 AD3d 526, 526 [1st Dept 2015], *lv denied* 25 NY3d 912 [2015]), and since plaintiff has not submitted any proof showing that the drift pin was a tool with a sharp edge, the claim was properly dismissed.

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

ENTERED: FEBRUARY 20, 2020



CLERK

Renwick, J.P., Mazzarelli, Gesmer, Kern, JJ.

11097 Hicham Aboutaam, Index 156399/17
Plaintiff-Appellant,

-against-

Dow Jones & Company,
Defendant-Respondent.

____

Emery Celli Brinckerhoff & Abady LLP, New York (Richard D. Emery and David A. Lebowitz of counsel), for appellant.

Patterson Belknap Webb & Tyler LLP, New York (Robert P. LoBue of counsel), for respondent.

____

Order, Supreme Court, New York County (Robert D. Kalish, J.), entered March 26, 2019, which, insofar as appealed from as limited by the briefs, granted defendant's motion to dismiss the claim for defamation by implication, unanimously affirmed, without costs.

Plaintiff, a prominent antiquities dealer, alleges that he was defamed by implication in an article in the Wall Street Journal, which is published by defendant (*see Armstrong v Simon & Schuster*, 85 NY2d 373, 380-381 [1995]; *Martin v Hearst Corp.*, 777 F3d 546, 552 [2d Cir 2015], *cert denied* __ US __, 136 S Ct 40 [2015]). The title of the article is "Prominent Art Family Entangled in ISIS [Islamic State of Iraq and Syria] Antiquities-Looting Investigations." The subheading states, "Long-time

dealers Ali and Hicham Aboutaam are under scrutiny, as authorities in multiple countries look into how Islamic State finances itself by trafficking in ancient objects." Plaintiff alleges that, through the juxtaposition of text and photographs of him with unrelated information about ISIS and its art-looting activities, the article implies that he was helping to finance ISIS.

Defendant moved to dismiss. In opposition, plaintiff failed to show that the language of the article as a whole can reasonably be read to impart a defamatory inference and to affirmatively suggest that the author intended or endorsed that inference (*see Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 37-38 [1st Dept 2014]).

Contrary to plaintiff's contention, the motion court properly considered each challenged statement or feature of the article in the context of the article as a whole, after assessing each individually (*see Immuno AG. v Moor-Jankowski*, 77 NY2d 235, 250 [1991], *cert denied* 500 US 954 [1991]).

The article's discussion of investigations by U.S. Immigration and Customs Enforcement (ICE) and by officials in Belgium, Switzerland and France is privileged under Civil Rights Law § 74 as a publication of "a fair and true report of . . .

official proceeding[s]” (*id.*), i.e., its substance is “substantially accurate” (*Sprecher v Dow Jones & Co.*, 88 AD2d 550, 552 [1st Dept 1982], *affd* 58 NY2d 862 [1983]; *see Law Firm of Daniel P. Foster, P.C. v Turner Broadcasting Sys., Inc.*, 844 F2d 955, 960 [2d Cir 1988], *cert denied* 488 US 994 [1988]). Plaintiff raised arguments to the contrary for the first time in reply, and we decline to consider them (*see Shia v McFarlane*, 46 AD3d 320 [1st Dept 2007]).

The photographs in the article are appropriately related to the subject of the article and are accompanied by accurate captions. Their inclusion was a reasonable exercise of editorial discretion (*cf. Rejent v Liberation Publs.*, 197 AD2d 240, 243 [1st Dept 1994] [1st Dept 1994]; *cf. also Ward v Klein*, 10 Misc 3d 648, 653-654 [Sup Ct, NY County 2005]).

Nor does the layout of the article create a defamatory inference. Both the caption beneath the photograph of the gold ring in the print version and the text adjacent to the photograph in the online version state that no dealer was implicated in the disappearance of the ring (*cf. Partridge v State of New York*, 173 AD3d 86, 95 [3d Dept 2019]. Plaintiff’s effort to minimize the significance of this unequivocal and effectively placed language is unavailing (*see Jewell v NYP Holdings, Inc.*, 23 F Supp 2d 348,

366 [SD NY 1988]; *cf. Stanton v Metro Corp.*, 438 F3d 119, 126 [1st Cir 2006]).

Plaintiff does not deny that, as the article reported, the objects at issue were seized from his brother's company, Phoenix Ancient Art, by Belgian authorities, and he failed to eliminate the possibility that the Belgian investigation, or "customs verification procedure," as he calls it, occurred upon suspicion that the objects were connected to ISIS. Indeed, in pre-publication communications with the Wall Street Journal reporter, plaintiff himself referred to the Belgian "investigation." Moreover, the inclusion in the article of certain information that plaintiff gave the reporter before publication supports the conclusion that the article was "fair" for purposes of Civil Rights Law § 74.

Plaintiff failed to establish that any potentially defamatory implication imparted by the description of the ICE investigation would have had any discernibly different impact on readers in light of the Belgian, French, and Swiss investigations that the article also described (*see Greenberg v Spitzer*, 155 AD3d 27, 52 [2d Dept 2017]).

In the context of the article as a whole, it was a reasonable exercise of editorial discretion to omit the minor

facts that plaintiff contends are missing (*see Stepanov*, 120 AD3d at 36; *cf. Verity v USA Today*, 164 Idaho 832, 848, 436 P3d 653, 669 [Idaho 2019]).

The inclusion of the civil forfeiture actions in the article is another reasonable editorial choice, given their connection to larger themes explored in the article, which, moreover, as indicated, stated that no dealers had been implicated. The discussion of a Bulgarian court's exoneration of plaintiff's brother is not actionable, because it is not "of and concerning" plaintiff (*see Three Amigos SJL Rest., Inc. v CBS News Inc.*, 28 NY3d 82, 86 [2016]). Nothing in the article would cause a reasonable reader to doubt the trustworthiness of the family member who was the source of that information. Nor does any defamatory meaning arise from the description of plaintiff's gallery in the article.

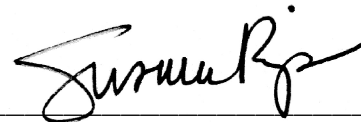
The motion court properly declined to consider the survey proffered by plaintiff. Whether a statement is defamatory is a legal question to be determined by the court, not by survey participants (*see Aronson v Wiersma*, 65 NY2d 592, 593 [1985]). Moreover, the highly prejudicial introduction to the survey

precludes a finding that the participants were the "reasonable readers" contemplated by the test of defamation by implication.

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: FEBRUARY 20, 2020



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Renwick, J.P., Mazzarelli, Gesmer, Kern, JJ.

11098N Christopher J. Lafata, et al., Index 150202/16
Plaintiffs-Respondents,

-against-

Verizon Communications Inc., et al.,
Defendants-Appellants.
- - - - -
[And Other Actions]
____

Morris Duffy Alonso & Faley, New York (Iryna S. Krauchanka of counsel), for appellants.

Arye, Lustig & Sassower, P.C., New York (Robert M. Fiala of counsel), for respondents.
____

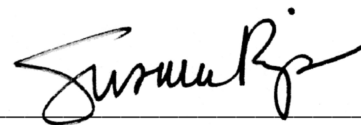
Order, Supreme Court, New York County (Paul A. Goetz, J.), entered on or about June 21, 2019, which, inter alia, in this action where plaintiff was injured when he fell from a scissor lift while working as an electrician, denied defendants' motion to compel plaintiff to provide authorizations for various medical records, unanimously affirmed, without costs.

The motion court did not improvidently exercise its discretion in denying defendants motion to compel plaintiff to produce authorizations for his primary care providers, various specific medical providers, and his pharmacy records on the ground that plaintiff's allegations placed his entire medical condition in issue (*see Gumbs v Flushing Town Ctr. III, L.P.*, 114

AD3d 573 [1st Dept 2014]). Defendants failed to adduce any evidence showing that plaintiff sought treatment from his primary care physician or the named providers for the body parts that plaintiff alleges were injured in the subject accident. Defendants also failed to adduce any evidence showing that plaintiff received prescriptions to treat those body parts (*see Rohan v Turner Constr. Co.*, 158 AD3d 436 [1st Dept 2018]; *Spencer v Willard J. Price Assoc., LLC*, 155 AD3d 592 [1st Dept 2017]; *Diako v Yunga*, 148 AD3d 438 [1st Dept 2017]). Although defendants claim they are entitled to medical records relating to aggravation of injuries sustained in a prior motor vehicle accident (*see McGlone v Port Auth. of N.Y. & N.J.*, 90 AD3d 479 [1st Dept 2011]), they did not tailor their demands accordingly (*compare Colwin v Katz*, 102 AD3d 449 [1st Dept 2013]).

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

ENTERED: FEBRUARY 20, 2020



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Renwick, J.P., Mazzarelli, Gesmer, Kern, JJ.

11099N Bassey B. Ndemenoh, M — 92402
Claimant-Appellant,

-against-

The City University of New York
(CUNY)-City College,
Defendant-Respondent.

____

Bassey B. Ndemenoh, appellant pro se.

Letitia James, Attorney General, New York (David Lawrence III of counsel), for respondent.

____

Order of the Court of Claims of the State of New York (Jeanette Rodriguez-Morick, J.), entered February 21, 2019, which denied claimant's motion for leave to file a late claim, unanimously affirmed, without costs.

The court correctly determined that July 11, 2018, the date when claimant properly served the Attorney General, was the operative date for determining whether his proposed causes of action were time-barred (*see* Court of Claims Act § 10[6]; CPLR 2211, 2214; Uniform Civil Rules for the Supreme Court and the County Court [22 NYCRR] § 202.8; *see also* Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C2211:4). Since the intentional tort claims for false arrest, false imprisonment and malicious prosecution accrued more than one year

earlier, the court correctly held that those proposed causes of action were time-barred (*see* CPLR 215[3]; *Stampf v Metropolitan Transp. Auth.*, 57 AD3d 222, 223 [1st Dept 2008]; *Palmer v City of New York*, 226 AD2d 149 [1st Dept 1996]).

The court providently exercised its discretion in declining to grant claimant permission to file a late claim for alleged civil rights violations as the record does not provide "reasonable cause to believe that a valid cause of action exists" (*Sands v State of New York*, 49 AD3d 444, 444 [1st Dept 2008]; *see Lerner v State of New York*, 72 AD3d 406, 407 [1st Dept 2010], *lv denied* 15 NY3d 703 [2010]).

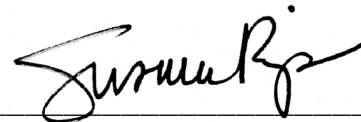
To the extent claimant's proposed causes of action include a claim based on "confiscation of [his electronic] devices" in connection with his arrests, such claim would sound in conversion (*see generally Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]; *Torrance Constr., Inc. v Jaques*, 127 AD3d 1261, 1263 [3d Dept 2015]), and would be subject to a three-year statute of limitations (*see* CPLR 214[3]; *Swain v Brown*, 135 AD3d 629, 631 [1st Dept 2016]). Nevertheless, leave should not be given to file a late claim for conversion because the proposed claim is not viable since there was probable cause for his arrests (*see Stegemann v State of New York*, 163 AD3d 1303 [3d

Dept 2018], *lv denied* 32 NY3d 909 [2018]; *see also Marrero v City of New York*, 33 AD3d 556, 557 [1s Dept 2006]).

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

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

ENTERED: FEBRUARY 20, 2020



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