Acosta, P.J., Manzanet-Daniels, Kapnick, Singh, González, JJ.

11768 The People of the State of New York, Ind. 2375/17
Respondent,

-against-

Kelmiet Vega, also known as Kelmeit Vega,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (John T. Komondorea 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 (Albert Lorenzo, J.), rendered March 22, 2018,

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

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

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

ENTERED: JULY 9, 2020

CLERK

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

Acosta, P.J., Manzanet-Daniels, Kapnick, Singh, González, JJ.

11770 In re Maria S., and Others, Dkt. NA-26991-3/17

Children Under Eighteen Years of Age etc.,

Angel A.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Andrew J. Baer, New York, for appellant.

James E. Johnson, Corporation Counsel, New York (John Moore of counsel), for respondent.

Dawne A. Mitchell, The Legal Aid Society, New York (Amy Hausknecht of counsel), attorney for the children.

_____

Order of fact-finding and disposition (one paper), Family Court, Bronx County (Valerie A. Pels, J.), entered on or about July 10, 2019, which, to the extent appealed from as limited by the briefs, after a hearing, determined that respondent Angel A. abused the child Maria S. and derivatively abused the children Jordanny P. and Swander A., unanimously affirmed, without costs.

The court's determination that respondent sexually abused Maria is supported by a preponderance of the evidence (*see* Family Court Act § 1046[b][I]). The child's in-court testimony, which the court credited, that respondent, her stepfather, digitally penetrated her vagina is sufficient to support the abuse finding (*see Matter of Markeith G. [Deon W.]*, 152 AD3d 424, 424 [1st Dept 2017]). There is no basis for disturbing the court's credibility determinations, which included an evaluation of the alleged

inconsistencies in the child's testimony (*see id.*). Contrary to respondent's contention, sexual gratification can be inferred from the act itself (*People v Leonard*, 29 NY3d 1, 8 [2017]; *see Matter of Shannon K.*, 222 AD2d 905, 906 [3d Dept 1995]). The court's determination that respondent derivatively abused Jordanny and Swander is supported by a preponderance of the evidence. Respondent sexually abused Maria with the other children sleeping in a nearby room while their mother was at work and he was their sole caretaker. Respondent's conduct demonstrates parental judgment and impulse control so defective as to create a substantial risk of harm to the children in his care (*see Markeith G.*, 152 AD3d at 425; *Matter of Taurice M. [Gregory A.]*, 147 AD3d 844, 845 [2d Dept 2017]).

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

ENTERED: JULY 9, 2020

CLERK

Acosta, P.J., Manzanet-Daniels, Kapnick, Singh, González, JJ.

11771-
11771A &
M-1579 Frank Mazzocchi,
Plaintiff-Appellant,

-against-

Vivienne Gilbert, Esq., et al.,
Defendants-Respondents.

Index 154922/18

Frank Mazzocchi, appellant pro se.

Braverman Greenspun, P.C., New York (Tracy Peterson of counsel), for Vivienne Gilbert and Howard J. Lazarus, respondents.

Thomas M. Curtis, respondent pro se.

Anderson Kill, P.C., New York (Grant E. Brown of counsel), for Deborah B. Koplovitz, Alan M. Goldberg, Bruce A. Cholost and Andrew J. Wagner, respondents.

Gallett Dreyer & Berkey, LLP, New York (Morrell I. Berkowitz of counsel), for Morrell I. Berkowitz, respondent.

Order, Supreme Court, New York County (Alan C. Marin, J.), entered on or about March 25, 2019, which, to the extent appealable, granted the motions of defendants Vivienne Gilbert, Esq., Howard J. Lazarus, Esq., Deborah B. Koplovitz, Esq., Morrell I. Berkowitz, Esq., Alan M. Goldberg, Esq., Bruce A. Cholst, Esq., and Andrew J. Wagner, Esq. to dismiss the complaint as against them, unanimously affirmed, without costs. Appeal from portion of the order that sua sponte dismissed the complaint as against defendant Thomas M. Curtis, Esq., unanimously dismissed, without costs, as nonappealable.

Plaintiff fails to state a cause of action for violation of

Judiciary Law § 487(1) against defendants Berkowitz, Gilbert, and Lazarus because he does not allege that they acted as counsel of record in any legal proceeding to which he was a party (*see Sun Graphics Corp. v Levy, Davis & Maher, LLP*, 94 AD3d 669, 669 [1st Dept 2012]; *Siller v Third Brevoort Corp.*, 145 AD3d 595, 596 [1st Dept 2016], *lv denied* 30 NY3d 905 [2017]). Plaintiff also fails to state a cause of action for violation of § 487(1) against defendants Koplovitz, Goldberg, Cholst, and Wagner because the allegations in the complaint do not give rise to the inference that their actions exceeded the bounds of routine advocacy (*see Seldon v Lewis Brisbois Bisgaard & Smith LLP*, 116 AD3d 490, 491 [1st Dept 2014], *lv dismissed* 25 NY3d 985 [2015]; *see also Bill Birds, Inc. v Stein Law Firm, P.C.*, 34 NY3d 1084, [2020]). Plaintiff's claims that Koplovitz submitted affidavits containing misstatements or perjury are not sufficiently egregious to support a cause of action under § 487 because the statements related to immaterial facts (*see Shawe v Elting*, 161 AD3d 585, 588 [1st Dept 2018]).

The portion of the order dismissing the claims against defendant Curtis, which appear to be meritless and time-barred, was issued sua sponte and therefore is not appealable as of right (CPLR 5701[a][2]; *see Sholes v Meagher*, 100 NY2d 333, 335 [2003]; *Hladun-Goldmann v Rentsch Assoc.*, 8 AD3d 73, 74 [1st Dept 2004]).

M-1579 - *Mazzocchi v Gilbert, et al.*

Motion to strike plaintiff's reply brief, denied.

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

ENTERED: JULY 9, 2020

CLERK

Acosta, P.J., Manzanet-Daniels, Kapnick, Singh, González, JJ.

11772 2520 Jerome Avenue, LLC, Index 27270/18E
Plaintiff-Appellant,

-against-

The Corporation of the Rector, Churchwardens and Vestrymen of Saint James Episcopal,
Defendant-Respondent.

_____

Herrick, Feinstein LLP, New York (Scott T. Tross of counsel), for appellant.

Goldstein Hall, PLLC, New York (Brian J. Markowitz of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Ruben Franco, J.), entered on or about October 17, 2018, which, inter alia, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

Plaintiff's breach of contract claim was properly dismissed. The record shows that defendant's obligation under the parties' contract was simply to apply for certain consents, not to obtain them, and there was no triable issue of fact as to defendant's application for the consents. Plaintiff's claimed need for additional discovery was based solely on conjecture and speculation, and is thus insufficient (*see A.H.A. Gen. Constr. v New York City Hous. Auth.*, 92 NY2d 20, 33 [1998]; *Steinberg v Schnapp*, 73 AD3d 171, 177 [1st Dept 2010]).

Because the contract was one for sale of a "Protestant Episcopal" church, the motion court was correct that it could not order specific performance of the contract where the Bishop,

Standing Committee and Diocese had refused to approve the sale (Religious Corporations Law § 12[2]; *Soho Ctr. for Arts & Educ. v Church of St. Anthony of Padua*, 146 AD2d 407, 411 [1st Dept 1989]).

Furthermore, plaintiff's claim for breach of the covenant of good faith and fair dealing was properly dismissed as duplicative of its breach of contract claim (*see Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 [1st Dept 2009]), and the claim for unjust enrichment was precluded by the existence of a valid express agreement with regard to the same subject matter (*see MG W. 100 LLC v St. Michael's Prot. Episcopal Church*, 127 AD3d 624, 626 [1st Dept 2015]).

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

ENTERED: JULY 9, 2020

CLERK

Acosta, P.J., Manzanet-Daniels, Kapnick, Singh, González, JJ.

11773 The People of the State of New York, Ind. 1032/16
Respondent,

-against-

Alden Lee,
Defendant-Appellant.

_____

Jonathan Rosenberg, PLLC, Brooklyn (Jonathan Rosenberg of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Ann E. Scherzer, J.), rendered February 21, 2019, convicting defendant, upon his plea of guilty, of attempted burglary in the second degree, and sentencing him to a term of two years, unanimously affirmed.

Defendant's challenge to his plea does not fall within the narrow exception to the preservation requirement (*see People v Conceicao*, 26 NY3d 375, 381 [2015]), and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. Unlike the facts in *People v Mox* (20 NY3d 936 [2012]), there was nothing in defendant's plea allocution itself that required the court to inquire about a potential psychiatric defense (*see People v Robinson*, 179 AD3d 568 [1st Dept 2020]). Nor was the court's duty to inquire triggered by statements made during the preceding 18 months of plea negotiations with prior counsel (*see People v Rodriguez*, 144 AD3d 498 [1st Dept 2016], *lv denied* 28 NY3d 1188 [2017]).

Defendant made a valid waiver of his right to appeal (*see People v Thomas*, 34 NY3d 545 [2019]; *People v Bryant*, 28 NY3d 1094 [2016]), which forecloses review of his excessive sentence claim. (*see People v Tolbert*, 168 AD3d 498 [1st Dept], *lv denied* 33 NY3d 954 [2019]). Regardless of the validity of defendant's waiver of his right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: JULY 9, 2020

CLERK

Acosta, P.J., Manzanet-Daniels, Kapnick, Singh, González, JJ.

11774 The People of the State of New York, Ind. 2381/16
Respondent,

-against-

Vladimir Gjinaj,
Defendant-Appellant.

_____

Beverly Van Ness, New York, for appellant.

Darcel D. Clark, District Attorney, Bronx (Shera Knight of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Martin Marcus, J.), rendered March 4, 2019, as amended, March 11, 2019, convicting defendant, after a jury trial, of assault in the first degree, and sentencing him to a prison term of five years, unanimously affirmed.

Defendant's conviction was supported by legally sufficient evidence, and was not against the weight of the evidence (*People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence supported the inference that defendant intentionally caused serious physical injury to the victim by slashing him with a box cutter.

Defendant did not preserve any of his challenges to the court's jury instructions, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. The court's adverse inference instruction and its explanation of reasonable doubt conveyed the appropriate

principles. Even assuming, without deciding, that defendant was entitled to an instruction regarding the jury's consideration of certain evidence received as past recollection recorded, any error in failing to charge on that relatively insignificant evidence was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state

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

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

ENTERED: JULY 9, 2020

CLERK

Acosta, P.J., Manzanet-Daniels, Kapnick, Singh, González, JJ.

11775 In re Atiya D.K., Dkt. 0-1672/18
Petitioner-Respondent,

-against-

Curtis J.C.,
Respondent-Appellant.

_____

Andrew J. Baer, New York, for appellant.

Leslie S. Lowenstein, Woodmere, for respondent.

_____

Order of fact-finding, Family Court, New York County (Jacob K. Maeroff, Referee), entered on or about March 15, 2019, which determined that respondent committed the family offenses of disorderly conduct and harassment in the second degree, unanimously affirmed, without costs.

The finding that respondent committed the offenses of disorderly conduct and harassment in the second degree is supported by a fair preponderance of the evidence (*see* Family Court Act § 832). Petitioner testified that respondent confronted her in the vestibule of her apartment building, in the presence of others, and chastised her over her parenting of the parties' older child. Respondent was irate, and yelled at petitioner, poked his finger in her forehead, cursed at her, and spit on her as he exited the lobby of the building (*see* Penal Law § 240.20 [disorderly conduct]; *Matter of William M. v Elba Q.*, 121 AD3d 489 [1st Dept 2014]). Petitioner also testified that, on another occasion, on the street outside her apartment

building, respondent threatened her and the child with physical harm (*see* Penal Law § 240.26[1] [harassment in the second degree]; *Matter of William M.*, 121 AD3d 489).

We perceive no basis for disturbing the court's credibility determinations (*see Matter of Melind M. v Joseph P.*, 95 AD3d 553, 555 [1st Dept 2012]).

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

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

ENTERED: JULY 9, 2020

CLERK

Acosta, P.J., Manzanet-Daniels, Kapnick, Singh, González, JJ.

11776-
11777 Amedeo Angiolillo, et al.,
Plaintiffs-Respondents,

-against-

Christie's, Inc., et al.,
Defendants-Appellants,

Diamfield, Ltd., etc., et al.,
Defendants.

Index 650871/15

_____

Hughes Hubbard & Reed LLP, New York (Daniel Weiner of counsel), for Christie's, Inc., appellant.

Patterson Belknap Webb & Tyler LLP, New York (Catherine A. Williams of counsel), for Pelham Holdings, LLC and Guy Bennett, appellants.

Clarick Gueron Reisbaum LLP, New York (Emily Reisbaum of counsel), for Investel Finance, Ltd, Ishaia Trading Corp., Ishia Gol and David Gol, appellants.

Herbert Smith Freehills, New York LLP, New York (A. Robert Dawes of counsel), for respondents.

_____

Order, Supreme Court, New York County (Andrew Borrok, J.), entered October 17, 2019, which, insofar as appealed from, granted plaintiffs' motion for leave to renew and, upon renewal, granted partial summary judgment to the extent of finding that plaintiffs' father/grandfather, Senator Renato Angiolillo (the Senator), purchased the diamond, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered on or about May 3, 2019, which, insofar as appealed from, denied defendants' cross motion for summary judgment dismissing the complaint (other than the claim for replevin) and denied the

motion by defendant Christie's, Inc. to amend its answer, unanimously dismissed, to the extent subsumed in defendants' appeal from the order entered October 17, 2019, and the order entered May 3, 2019, unanimously affirmed, without costs.

Defendants' appeal as to the conversion claim rests, in part, on arguments concerning plaintiffs' lack of proof of the Senator's purchase of the diamond. However, those arguments fail, given the documents generated in connection with Christie's 2013 pre-auction investigation (investigation documents), which establish that he did.

In granting plaintiffs' motion for leave to renew based upon the investigation documents, and upon renewal, holding that the Senator had purchased the diamond, the court providently exercised its discretion (*Getson v Getson*, 91 AD2d 540 [1st Dept 1982]; *see also John v City of New York*, 260 AD2d 187, 188 [1st Dept 1999]). The unequivocal statements by Christie's outside counsel, set forth in the investigation documents, that the Senator had purchased the diamond, were admissible admissions on Christie's part (*Bellino v Bellino Constr.Co.*, 75 AD2d 630 [2d Dept 1980]).

In arguing the statements are, instead, inadmissible hearsay, Christie's suggests its outside counsel lacked the requisite authority to speak on its behalf, yet Christie's touted the authoritative nature of outside counsel's investigation in opposing plaintiffs' summary judgment motion and advocating

dismissal of the complaint. For Christie's to now aver it did not "adopt" counsel's statements in the investigation documents accordingly rings hollow.

Christie's also argues that, to constitute a party admission, a party's agent's statements must be made to third parties, and not to the principal itself (*see e.g. Fruin-Colnon Corp. v Niagara Frontier Transp. Auth.*, 180 AD2d 222, 234 [4th Dept 1992]). Here, however, Christie's *itself* made its agents' statements to third parties, namely, to plaintiffs, and to the court, to which it argued that its counsel's investigation disproved plaintiffs' position, and buttressed its own.

We accordingly dismiss defendant's appeal of the court's denial of summary judgment dismissing the conversion claim, in its order entered May 3, 2019, to the extent such appeal relies on lack of proof of the Senator's purchase of the diamond. Such appeal is subsumed in defendants' appeal from the order entered October 17, 2019, which we affirm.

All other issues implicated by the conversion claim require a trial. The record does not resolve, as a matter of law, whether defendants assumed or exercised control over plaintiffs' personal property and interfered with their right of possession (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 50-51 [2006]), as it leaves unanswered questions about the Senator's post-purchase ownership, including the key question of whether he owned the diamond at the time of his death or, at some point

before, transferred it to Girani.

That plaintiffs did not include the diamond's value in filings with Italian tax authorities in the years after the Senator's death does not estop them from asserting ownership rights now. Such "tax estoppel" is applied where a party's subsequently-adopted litigation position flatly contradicts express assertions previously made in tax filings (*e.g. Mahoney-Buntzman v Buntzman* (12 NY3d 415, 422 [2009]; *Walsh v Blaggards III Rest. Corp.*, 131 AD3d 854 [1st Dept 2015]; *Matter of Ansonia Assoc. L.P. v Unwin*, 130 AD3d 453 [1st Dept 2015]; *Livathinos v Vaughan*, 121 AD3d 485 [1st Dept 2014]), but the omission of an asset leaves all questions in regard to it open (*see Matter of Seaman* (275 App Div 484 [3d Dept 1949], *affd* 300 NY 756 [1950]; *Shyer v Shyer*, 2020 NY Slip Op 30252(U), *5 [Sup Ct, NY County, Jan. 28, 2020]).

On the issue of governing law, the court properly determined that the relevant interest analysis supports application of New York, not Swiss, law (*see Bakalar v Vavra*, 619 F3d 136, 144-145 [2d Cir 2010]; *Schoeps v MoMA* (594 F Supp 2d 461, 465 [SD NY 2009]). The strong New York contacts, combined with New York's overwhelming interest in protecting the integrity of its market (*Reif v Nagy*, 61 Misc 3d 319, 322-323 [Sup Ct, NY County 2018], *mod.* 175 AD3d 107 [1st Dept 2019]), warrants application of New York law. The motion court correctly denied the Investel defendants' motion to dismiss the conversion claim as time-barred

(*see White v City of Mount Vernon*, 221 AD2d 345 [2d Dept 1995]), as the record showed that the claim accrued when the Investel defendants disposed of the diamond in 2013, and did not suggest that the Investel defendants played a part in Milella's alleged scheme to embezzle the diamond in 2009. Defendants' claims regarding the propriety of the ruling were in any event raised on reply and thus not properly before us. The court's denial of Christie's motion to amend was a provident exercise of discretion (*Gonfiantini v Zino*, 184 AD2d 368, 369 [1st Dept 1992]). The proposed amendments concerned highly material facts, and the court properly determined such material revisions would be prejudicial to plaintiffs.

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

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

ENTERED: JULY 9, 2020

CLERK

Acosta, P.J., Manzanet-Daniels, Kapnick, Singh, González, JJ.

11778 In re Avrie P. and Another, Dkt. NN-14243-4/18

Dependent Children Under Eighteen Years of Age, etc.,

Meliza T.,
Respondent-Appellant,

Administration of Children's Services,
Petitioner-Respondent.

_____

Bryan S. Greenberg, New York, for appellant.

James E. Johnson, Corporation Counsel, New York (Jesse A. Townsend of counsel), for respondent.

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

_____

Order of fact-finding, Family Court, Bronx County (Michael R. Milsap, J.), entered on or about May 20, 2019, which found that respondent mother neglected the subject children, unanimously reversed, on the law and the facts, without costs, the findings of neglect vacated, and the petitions dismissed.

Petitioner failed to establish by a preponderance of the evidence that the mother neglected the children by inflicting excessive corporal punishment upon her daughter and by failing to provide the minium standard of care to supervise her son. The record shows that the mother used force, as a last resort, as an effort to bring her daughter back home. The 10-year-old child had fled the apartment because she wanted to play at the park and was bored at home. The mother was concerned for her safety and ran after her, and although the mother shouted at her to come

back, the child continued running. When the mother caught up with her, she refused to go home. In an attempt to immediately return home to her five-year-old son, who she had left alone in the apartment, the mother pulled her daughter by the arms, attempted to drag her home, and pulled her hair. Under the circumstances presented, the mother's use of force did not constitute excessive corporal punishment (*see Nicholson v Scoppetta*, 3 NY3d 357, 369 [2004]*; Matter of Peter G.*, 6 AD3d 201, 204-206 [1st Dept 2004], *appeal dismissed* 3 NY3d 655 [2004]). Moreover, the medical records and the caseworker's observations show that the daughter's injuries were minor (*see Matter of Dontay B. [Octavia F.]*, 81 AD3d 539 [1st Dept 2011]).

Furthermore, the mother did not neglect her son by leaving him unsupervised in the apartment when she ran after her daughter. Although not ideal, the mother's choice to run after the daughter did not fall below the statutory minimum degree of

care (*see Matter of Andy Z. [Hong Lai Z.]*, 105 AD3d 511 [1st Dept 2013]).

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

ENTERED: JULY 9, 2020

CLERK

Acosta, P.J., Manzanet-Daniels, Kapnick, Singh, González, JJ.

11779- 11779A- 11779B	The People of the State of New York, Respondent, -against- Ruben Rodriguez, Defendant-Appellant.	Ind. 1323/14 2548/16 3834/16

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

Darcel D. Clark, District Attorney, Bronx (Emily Anne Aldridge of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Alvin M. Yearwood, J.), rendered April 13, 2017, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, and judgments (same court and Justice), rendered May 11, 2017, convicting defendant, upon his pleas of guilty, of two counts of assault in the second degree, and sentencing him to a term of three years, to run consecutively to his murder sentence, and a term of five years, to run concurrently with his murder sentence, 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 concerning identification and credibility. Furthermore, defendant was circumstantially linked to the crime by surveillance video.

The court's *Sandoval* ruling, authorizing cross-examination

as to defendant's recent guilty plea to criminal possession of a weapon in the second degree, was a provident exercise of discretion. That conviction was probative of defendant's credibility, and it was not unduly prejudicial (*see People v Sims*, 47 AD3d 494 [1st Dept 2008], *lv denied* 10 NY3d 844 [2008]; *People v Deale*, 26 AD3d 175 [1st Dept 2006], *lv denied* 6 NY3d 893 [2006]).

Defendant's challenge to the criteria employed by the court in imposing sentence is a claim requiring preservation (*see People v Harrison*, 82 NY2d 693 [1993]; *see also People v Samms*, 95 NY2d 52, 58 [2000]), and we decline to review this unpreserved claim in the interest of justice. As an alternative holding, we find that the comments of the court on which defendant relies did not reflect either actual or apparent bias.

We perceive no basis for reducing defendant's sentences.

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

ENTERED: JULY 9, 2020

CLERK

Acosta, P.J., Manzanet-Daniels, Kapnick, Singh, González, JJ.

11780 In re Elizabeth Wages, etc., Index 101186/16
Petitioner-Appellant,

-against-

State of New York State Division of Housing and Community Renewal,
Respondent-Respondent.

_____

Robert A. Katz, New York, for appellant.

Mark F. Palomino, New York (Lauren K. Lipnick of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Lucy Billings, J.), entered March 14, 2018, denying the petition to annul a determination of respondent (DHCR), dated May 27, 2016, which denied the petition for administrative review (PAR) of an order of the Rent Administrator (RA) granting a rent increase based on major capital improvements (MCI) to the owner's building, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The court correctly concluded that DHCR's grant of the owner's MCI application based on new carpeting throughout the building has a rational basis in the record and is not arbitrary and capricious (*see generally Matter of 900 W. End Ave. Tenants Assn. v New York State Div. of Hous. & Community Renewal*, 53 AD3d 436, 438 [1st Dept 2008]; *Matter of West Vil. Assoc. v Division of Hous. & Community Renewal*, 277 AD2d 111, 112 [1st Dept 2000]). Petitioner did not claim in the verified petition that the

application for the carpet installation failed to satisfy any of the criteria set forth in 9 NYCRR 2522.4(a)(2)(i). DHCR also rationally concluded that the owner's misstatement in the application concerning the age of the replaced carpet did not warrant a denial of the application in this case.

The court properly declined to consider petitioner's remaining arguments. Petitioner did not claim in the verified petition that carpeting cannot qualify as an MCI, and improperly raised that issue in reply (*see Matter of McClave v Port Auth. of N.Y. & N.J.*, 134 AD3d 435, 436 [1st Dept 2015]). Petitioner did not argue before either the RA or in the PAR that the MCI application should have been denied because the owner did not obtain a waiver of the useful life requirement as set forth in 9 NYCRR 2522.4(a)(2)(i)(d)-(e) (*see Matter of Basnight v New York City Hous. Auth.*, 132 AD3d 549, 550 [1st Dept 2015]). Petitioner did not argue before the RA that the MCI application should have been denied because of the owner's alleged history of misconduct and because the owner allegedly caused damage to the previous carpeting, and did not establish why it could not have done so (*see* 9 NYCRR 2529.6; *Matter of Croes Nest Realty, LP v New York State Div. of Hous. & Community Renewal*, 92 AD3d 402, 403 [1st

Dept 2012]; *Matter of Chelsea Inn Corp. v New York State Div. of Hous. & Community Renewal*, 306 AD2d 16 [1st Dept 2003]).

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

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

ENTERED: JULY 9, 2020

CLERK

Acosta, P.J., Manzanet-Daniels, Kapnick, Singh, González, JJ.

11781 The People of the State of New York, Ind. 1363/15
Respondent,

-against-

Daquan Collins,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Rachel L. Pecker of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Philip V. Tisne of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered June 21, 2016, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree and criminal possession of a firearm, and sentencing him to 5 years' probation, unanimously reversed, on the law, defendant's suppression motion granted, and the indictment dismissed.

"Police pursuit is regarded as significantly impeding a person's freedom of movement, thus requiring justification by reasonable suspicion that a crime has been, is being, or is about to be committed" (*People v Thornton*, 238 AD2d 33, 36 [1st Dept 1998]). By contrast, "mere surveillance need not be justified by reasonable suspicion" (*id.*).

Although the police actions began as permissible observation, while following defendant slowly in their car without turning on their lights or sirens (*see People v Quentin F.*, 177 AD3d 439 [1st Dept 2019]; *Thornton*, 238 AD2d at 36;

Matter of Jaime G., 208 AD2d 382 [1st Dept 1994]), observation gave way to pursuit when the officers turned on their lights and sirens to cross the street against traffic and pull up ahead of defendant. Even crediting one of the officer's testimony that his intent was to get a better view and alert oncoming traffic, not to cut off, block, or alarm defendant, the objective impact of this maneuver was "intimidating" and communicated "an attempt to capture or . . . intrude upon [defendant's] freedom of movement" (*Michigan v Chesternut*, 486 US 567, 575 [1988]).

Because it is undisputed that the circumstances before this police activity were not sufficient to create reasonable suspicion, it was unlawful and could not be validated by any subsequently acquired suspicion (*see People v William II*, 98 NY2d 93, 98 [2002]). When defendant discarded a handgun during the course of the illegal pursuit, he did not voluntarily abandon it and it should have been suppressed (*see People v Bilal*, 170 AD3d 83, 93-95 [1st Dept 2019], *appeal dismissed* 34 NY3d 1085 [2020]).

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

ENTERED: JULY 9, 2020

CLERK

Acosta, P.J., Manzanet-Daniels, Kapnick, Singh, González, JJ.

11782-
11783-
11784-
11785-
11786 342 East 50th Street LLC,
Plaintiff-Appellant,

-against-

Deborah Privitello,
Defendant-Respondent.

Index 154507/18

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

Dichter Law LLC, Mount Kisco (Joel R. Dichter of counsel), for respondent.

Order, Supreme Court, New York County (Melissa Crane, J.), entered March 19, 2019, which granted defendant's motion to vacate her default and dismiss the complaint (Motion Seq. No. 002), unanimously affirmed, without costs; order, same court and Justice, entered March 19, 2019, which denied plaintiff's motion for contempt and granted defendant's cross motion for damages (Motion Seq. No. 003), unanimously modified, on the law, to vacate the award of damages, and otherwise affirmed, without costs; order and judgment (one paper), same court and Justice, entered June 18, 2019, awarding defendant damages in the amount of $118,712, unanimously reversed, on the law, without costs, and the judgment vacated, and appeals from orders, same court and Justice, entered April 1, 2019 and June 18, 2019 (Motion Seq. Nos. 001 and 005), determining that no trial on damages was

necessary, unanimously dismissed, without costs, as moot in light of the above determinations.

The trial court correctly determined that service of process was improper and dismissed the complaint, as there was no showing by plaintiff of impracticability, as required by CPLR 308(5). The selected method of service at the subject premises was not reasonably calculated to provide defendant with notice of this action, given, inter alia, the vacate order then in effect (*see Mullane v Central Hanover Trust & Co.*, 339 US 306, 314 [1950]; *Bossuk v Steinberg*, 58 NY2d 916, 919 [1983]). Given the dismissal, plaintiff's motion for contempt was properly denied. The trial court, however, improvidently awarded a monetary judgment in favor of defendant, where no answer was filed asserting a counterclaim and the court had dismissed the complaint (*see Pallotta v Perry*, 2002 WL 1798804 [App Term, 9th & 10th Jud Dist 2002]; *4117 15th Ave. Realty Corp. v Hornedo*, 184 Misc 2d 986 [App Term 2d Dept 2000]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: JULY 9, 2020

CLERK

Acosta, P.J., Manzanet-Daniels, Kapnick, Singh, González, JJ.

11788 The People of the State of New York, Ind. 4891/14
Respondent, 1432/15

-against-

Jermaine Williams,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Michael D. Tarbutton 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 (Neil Ross, J.), rendered October 24, 2016,

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

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

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

ENTERED: JULY 9, 2020

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

Acosta, P.J., Manzanet-Daniels, Kapnick, Singh, González, JJ.

11789-
11789A Matthew Feldmann,
Plaintiff-Respondent,

-against-

Scepter Group, Pte. Ltd., et al.,
Defendants-Appellants.

Index 650440/2018

_____

Lewis Brisbois Bisgaard & Smith LLP, New York (Peter T. Shapiro of counsel), for appellants.

Kraus & Zuchlewski LLP, New York (George B. Schwab of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Melissa A. Crane, J.), entered October 2, 2019, awarding plaintiff the total amount of $465,186.81, unanimously modified, on the law and the facts, to vacate so much of the judgment as held defendant Withanage personally liable, and the matter remanded for a determination as to his personal liability, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered or about February 7, 2019, which granted plaintiffs' motion for summary judgment and denied defendants' cross-motion for summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff and defendants signed a settlement agreement that provided for defendants to make five monthly installment payments to plaintiff. After defendants only made one payment, plaintiff commenced this action and moved for summary judgment.

A material breach is a failure to do something that is so

fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the contract (*O & G Indus., Inc. v National R.R. Passenger Corp.*, 537 F3d 153, 163 [2d Cir 2008], *cert denied* 556 US 1182 [2009] [internal quotation marks and bracket omitted]). A breach is material if it strongly tend[s] to defeat the object of the parties in making the contract (*Babylon Assoc. v County of Suffolk*, 101 AD2d 207, 215 [2d Dept 1984] [internal quotation marks omitted]). Here, defendants breached the explicit terms of the agreement by missing the installment payments. Defendants' argument that the agreement's provision of a 14% interest penalty in the event a payment was not timely made precludes a finding of breach, and that instead, defendants were entitled to pay at an undisclosed later date, is unavailing, as it would simply permit defendants to never pay.

Because defendants materially breached the provisions of the contract, plaintiff was entitled to liquidated damages, as provided for in paragraph seven of the agreement. Moreover, the agreements' confidentiality clause provided that a nonbreaching party was entitled to disclose the agreement in order to bring a cause of action for breach. Furthermore, defendants' breach released plaintiff from his contractual obligations, including abiding by the confidentiality clause (*see Old Town Woolen Co., Inc. v Fishman & Son, Inc.*, 218 App Div 472, 474 [1st Dept 1926]).

The court, however, should not have granted plaintiff's motion as it pertained to defendant Withanage's personal liability. The record contains questions as to whether Withanage intended to be personally bound (*see Paribas Props. v Benson*, 146 AD2d 522, 525 [1st Dept 1989]).

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

ENTERED: JULY 9, 2020

CLERK

Acosta, P.J., Manzanet-Daniels, Kapnick, Singh, González, JJ.

11790N U.S. Bank National Association, Index 32573/16E
Successor Trustee to Bank of America,
N.A., etc.,
Plaintiff-Respondent,

-against-

Shakira Hattim,
Defendant-Appellant,

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

_____

Michael Kennedy Karlson, New York, for appellant.

McCalla Raymer Leibert Pierce, LLC, New York (Jane H. Torcia of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered on or about July 12, 2019, which denied defendant's motion to vacate an order entered upon her default, unanimously affirmed, without costs.

The court providently exercised its discretion in denying defendant's motion to vacate her default (*see Berardo v Guillet*, 86 AD3d 459 [1st Dept 2011]). After failing to oppose plaintiff's motion for summary judgment on its mortgage foreclosure complaint and its subsequent motion for the entry of a judgment of foreclosure and sale, defendant moved to vacate the judgment and the underlying order. She then failed to appear for oral argument on her motion to vacate, and the motion was denied. Defendant now appeals from the denial of her motion to vacate the order that denied her first motion to vacate. In support of this

motion, defendant failed to demonstrate any excuse, let alone a reasonable excuse, for her failure to contest the dispositive motions. In the absence of a reasonable excuse, we need not consider whether defendant demonstrated a meritorious defense.

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

ENTERED: JULY 9, 2020

CLERK

Acosta, P.J., Manzanet-Daniels, Kapnick, Singh, González, JJ.

11791N & M-1647 In re Robert Giardina, et al., Petitioners-Appellants, Index 156209/19

-against-

Letitia James, Attorney General of the State of New York, Respondent-Respondent.

Hodgson Russ LLP, Buffalo (Jeffrey C. Stravino of counsel), for appellants.

Letitia James, Attorney General, New York (Ari J. Savitzky of counsel), for respondent.

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered November 1, 2019, which denied the petition to quash subpoenas duces tecum issued by respondent, and granted respondent's motion to dismiss the petition and compel compliance, unanimously affirmed, without costs.

Respondent was authorized to issue subpoenas in connection with an investigation into complaints and allegations that petitioners' employer engaged in fraudulent practices in its merchant cash advance business (see Executive Law § 63[12]; *Matter of American Dental Coop. v Attorney General of State of N.Y.*, 127 AD2d 274, 280 [1st Dept 1987]). The information sought "bears a reasonable relationship to the subject matter under investigation and the public interest to be served" (*id.*). Neither petitioners' vague claims of criminal investigations, nor the civil actions pending against their employer warrant a stay

of the subpoenas (*see Sayre v Hoey*, 113 AD3d 482 [1st Dept 2014]; *New York State Commn. on Govt. Integrity v Congel*, 156 AD2d 274, 280 [1st Dept 1989], *appeal dismissed* 75 NY2d 836 [1990]).

M-1647 - *Giardina, et al. v James*

Motion to relieve counsel, denied with leave to renew.

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

ENTERED: JULY 9, 2020

CLERK

Acosta, P.J., Manzanet-Daniels, Kapnick, Singh, González, JJ.

11792 & M-1647 In re Keith Drew, Petitioner,

-against-

Hon. Juan Merchan, Respondent.

Ind. 2510/18

Keith Drew, petitioner pro se.

Letitia James, Attorney General, New York (Charles F. Sanders of counsel), for respondent.

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules for a writ of mandamus to vacate an order, Supreme Court, New York County (Juan Merchan, J.), entered on or about August 19, 2019 terminating petitioner's participation in a judicial diversion program, and reinstating his plea agreement,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

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

ENTERED: JULY 9, 2020

CLERK

Friedman, J.P., Manzanet-Daniels, Gesmer, González, JJ.

11302 The People of the State of New York, Ind. 3007/14
Respondent,

-against-

Dionny Joaquin,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Diana J. Lewis of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Diane R. Kiesel, J.), rendered June 14, 2017, convicting defendant, after a jury trial, of petit larceny, and sentencing him to a term of one year, unanimously affirmed.

The court properly denied defendant's suppression motion. The evidence adduced at the hearing sufficiently established that even if the victim's spontaneous identification of defendant could be categorized as a police-arranged identification procedure, that procedure was not unduly suggestive (*see People v Duuvon*, 77 NY2d 541, 545-546 [1991]).

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 the conclusion that defendant intentionally deprived the victim of his property, rather than merely attempting to do so.

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

ENTERED: JULY 9, 2020

CLERK

Richter, J.P., Oing, Singh, Moulton, JJ.

11488 In re Miracle Seven H. and Another, Dkt. NN-2652-53/17

Children Under Eighteen Years
of Age, etc.,

Serrice H.,
Respondent-Appellant,

Administration for Children Services,
Petitioner-Respondent.

_____

Larry S. Bachner, New York, for appellant.

James E. Johnson, Corporation Counsel, New York (Elina Druker of counsel), for respondent.

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

_____

Order, Family Court, New York County (Jonathan Shim, J.), rendered on or about August 8, 2018, unanimously affirmed, without costs or disbursements.

Application by appellant's assigned counsel to withdraw is granted (*see Matter of Louise Wise Servs. [Whyte]*, 131 AD2d 306 [1987]). We have reviewed this record and agree with appellant's

assigned counsel that there are no nonfrivolous points that could be raised on this appeal.

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

ENTERED: JULY 9, 2020

CLERK

Richter, J.P., Oing, Singh, Moulton, JJ.

11500-
11500A

In re Claudia B.,
Petitioner-Respondent,

-against-

Darrin M.,
Respondent-Appellant.

Dkt. P-09495/17

Law Office of Brian Esser PLLC, Brooklyn (Brian K. Esser of counsel), for appellant.

Andrew J. Baer, New York, for respondent.

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

Order, Family Court, New York County (Adetokunbo O. Fasanya, J.), entered on or about February 15, 2018, which denied respondent's motion to dismiss petitioner's paternity petition on equitable estoppel grounds and ordered him to submit to DNA testing, unanimously affirmed, without costs. Order of filiation, same court and Justice, entered on or about May 24, 2018, which declared respondent the biological father of the subject child, unanimously affirmed, without costs.

Petitioner filed this paternity petition against respondent seeking to have him declared the father of her child. The pertinent facts as alleged by respondent establish the following. Petitioner and respondent were in a relationship from July to October 2008. After the relationship ended, petitioner asked respondent to donate sperm so that she could conceive a child, and he agreed. In October 2009, petitioner sent respondent a

draft written agreement which stated that respondent would have no parental rights or responsibilities as to the child and would not be named as the father on the birth certificate, and that petitioner would not seek child support from respondent. It further provided that respondent would be paid a total of $5,000 for 10 vials of semen. Petitioner sent respondent another draft dated December 15, 2009 that was largely unchanged from the October version. In between the two agreements, an email exchange between the parties shows that they were still negotiating terms, and that petitioner intended to "legalize" the document with a notary and witness. Although both of the draft agreements contemplated that they be "executed" by the parties, it is undisputed that neither one was signed.

On December 21, 2009, despite the absence of a final agreement, respondent donated 17 vials of semen to a fertility center. On or about December 28, 2009, petitioner sent respondent another draft agreement that, unlike the prior drafts, provided that his name would appear on the child's birth certificate. Respondent contends that the latest draft was not acceptable to him because he only intended to be a donor and not a parent. In a subsequent email, respondent lamented that petitioner was changing the agreement, and expressed the need for a "legitimate contract."

Respondent contends that he stopped participating in the endeavor, but took no further actions because he was purportedly

told by the fertility center that petitioner could not use his semen samples. According to respondent, he learned in the summer of 2012 that petitioner had become pregnant with his sperm. In March 2013, petitioner gave birth to a child. Respondent contends that he has not seen petitioner since he donated the sperm in December 2009, and that he has never met or spoken to the child.

In April 2017, petitioner filed a paternity petition seeking to have respondent declared the father of her child. Respondent argued that petitioner was equitably estopped from bringing the paternity claim because the parties intended that he be a sperm donor only, without any legal rights or obligations to the child. After briefing from the parties and the attorney appointed for the child, the motion court issued a decision finding that respondent's estoppel claim was inconsistent with New York law, and directing that he submit to DNA testing. After testing revealed respondent to be the father of the child, the court entered an order of filiation.

On appeal, respondent maintains that petitioner should be equitably estopped from seeking to have him declared the father of the subject child. We need not decide whether, under New York law, estoppel is available to foreclose a mother from asserting paternity as to a known sperm donor, because even if it were, respondent's claim would fail. To prevail on estoppel grounds, the moving party bears the burden of proving, by clear and

convincing evidence, a right to the relief sought (*see Matter of Department of Social Servs. v Donald A.C.*, 179 AD3d 603 [1st Dept 2020]). Even if we assume the truth of respondent's factual assertions, he failed to meet his burden.[1]

Respondent's estoppel claim rests on the premise that the parties had a binding preconception agreement. Contrary to respondent's contention, there was no binding enforceable oral or written agreement between the parties, either before or after respondent donated his sperm. There is no dispute that a signed contract does not exist. Nor was any final oral agreement reached. Indeed, respondent's own affidavit and exhibits show that at the time he provided his semen samples, the parties were continuing to negotiate terms, and that he knew that there was no finalized agreement in place. Further, a week after he donated his sperm, he acknowledged that there was still no "legitimate contract" between him and petitioner concerning his status. Moreover, the draft agreement that he received after the sperm donation differed from the earlier versions on the critical issue of his recognition as a father. Under the facts presented here, we reject respondent's claim that certain alleged fraudulent conduct on petitioner's part after the sperm donation is sufficient to warrant the invocation of equitable estoppel.

Respondent's reliance on *Matter of Joseph O. v Danielle B.*

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[1] Petitioner presents a different view of some of the critical facts.

(158 AD3d 767 [2d Dept 2018]) and *Matter of Christopher YY. v Jessica ZZ.* (159 AD3d 18 [3d Dept 2018], *lv denied* 31 NY3d 909 [2018]) is misplaced. These cases involved preconception agreements with reciprocal waivers of paternity and child support claims between a same-sex married female couple, on the one hand, and a known sperm donor on the other. The courts in those cases applied equitable estoppel to thwart the donor's paternity claims because they threatened to harm the parent/child bonds that had developed (*see Christopher YY.*, 159 AD3d at 32), a fact pattern not presented here. Neither case supports respondent's claim that an unsigned, nonfinal preconception agreement can be used to equitably estop a mother from asserting paternity as to a known sperm donor. Accordingly, we need not decide whether the motion court was correct in concluding that even if there had been a meeting of the minds, equitable estoppel could not be invoked by a known sperm donor under the circumstances here (*see e.g. Matter of Juanita A. v Kenneth Mark N.*, 15 NY3d 1 [2010]; *see also Ferguson v McKiernan*, 596 Pa 78, 940 A2d 1236 [2007]).

Respondent did not request a hearing during the proceedings before the motion court, and even were we to address his unpreserved argument that the court erred by not granting him one, we would reject it. Respondent does not explain what information he would have elicited on petitioner's cross-examination that would have buttressed his estoppel claim. Although respondent asserts that a hearing was necessary given

the documentary evidence of a meeting of the minds regarding his status as a mere donor, respondent's own submissions show, to the contrary, that no such meeting was reached.

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

ENTERED: JULY 9, 2020

CLERK

CORRECTED ORDER - JULY 15, 2020

Friedman, J.P., Renwick, Gische, Mazzarelli, Moulton, JJ.

11793 The People of the State of New York, Respondent, Ind. 3520/16

-against-

Fomdo Drame, Defendant-Appellant.

_____

Michael D. Horn, Astoria, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Samuel Z. Goldfine of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered March 15, 2018, convicting defendant, after a jury trial, of rape in the first degree and sexual assault in the first degree and sentencing him to an aggregate term of 15 years, unanimously affirmed.

Defendant's challenges to the People's summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find that the challenged remarks generally constituted fair comments on the evidence along with reasonable inferences to be drawn therefrom. These comments were responsive to defense arguments, and the summation did not shift the burden of proof or deprive defendant of a fair trial (*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]).

Defendant's ineffective assistance of counsel claims based on his trial counsel's failure to object to the challenged portions of the prosecutor's summation are unreviewable on direct appeal because they involve matters outside the record concerning possible strategic explanations for not objecting (*see e.g. People v Rios*, 139 AD3d 620 [1st Dept 2016], *lv denied* 28 NY3d 973 [2016]*; People v Almonte*, 90 AD3d 579, 580 [1st Dept 2011] *lv denied* 19 NY3d 956 [2012]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that the absence of objections fell below an

objective standard of reasonableness, or that they deprived defendant of a fair trial or affected the outcome of the case.

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

ENTERED: JULY 9, 2020

CLERK

Friedman, J.P., Renwick, Gische, Mazzarelli, Moulton, JJ.

11795 Marie Saez, et al., Index 112424/10
Plaintiffs-Appellants,

-against-

Sapir Realty Management Corp., et al.,
Defendants-Respondents,

Consolidated Edison of New York, Inc.,
Defendant.

_____

Sciretta & Venterina, LLP, Staten Island (Antonia Sciretta of counsel), for appellants.

Carol R. Finocchio, New York, for respondents.

_____

Order, Supreme Court, New York County (David B. Cohen, J.), entered September 18, 2018, which granted defendants Sapir Realty Management Corp., 11 Madison Avenue, LLC, and 11 Madison Avenue Member LLC's (collectively 11 Madison defendants) motion for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion denied.

The record does not demonstrate conclusively that the owner of the sidewalk vault grate on which plaintiff Marie Saez allegedly tripped was defendant Con Ed, rather than the 11 Madison defendants, who owned the property abutting the sidewalk where the grate was located. There is an affidavit by the president of defendant Sapir Realty Management Corp. averring that the grates were already installed when the 11 Madison defendants acquired the property in 2003 and that the 11 Madison

defendants had never been advised by Con Ed that they had any responsibility for maintaining the grates over Con Ed's utility vaults or presented with any plans concerning the grates. There is also evidence that the 11 Madison defendants' predecessor in interest had purchased and installed the non-standard vault gratings, and there is a note on the plot plan for the vault construction stating that this entity was to "supply, install and maintain" the non-standard gratings it had requested. As issues of fact exist whether Con Ed or the 11 Madison defendants owned the gratings, it cannot be concluded that Con Ed was responsible for maintaining the gratings and the area around them in safe condition (*see* 34 RCNY 2-07[b]; *Jones v 3417 Broadway LLC*, 172 AD3d 551 [1st Dept 2019]; *Storper v Kobe Club*, 76 AD3d 426 [1st Dept 2010]; Administrative Code of City of NY § 7-210).

Issues of fact also exist as to whether the 11 Madison defendants' predecessor's installation of the non-standard vault grates constitutes a special use of the sidewalk by these defendants. Although there is evidence that they had no access to the grates and the vault, the evidence is not conclusive. Moreover, there is evidence that the transformers in the vaults provided electrical service solely to their property (*see generally Karr v City of New York*, 161 AD2d 449 [1st Dept 1990]; *Sheehy v City of New York*, 43 AD3d 336 [1st Dept 2007]).

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

ENTERED: JULY 9, 2020

CLERK

Friedman, J.P., Renwick, Gische, Mazzarelli, Moulton, JJ.

11796 In re Yasmin A., Dkt. V-43149-15/16A
Petitioner-Respondent,

-against-

Patricia S.,
Respondent-Appellant.

_____

Bruce A. Young, New York, for appellant.

Andrew J. Baer, New York, for respondent.

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

_____

Appeal from order, Family Court, New York County (Machelle Sweeting, J.), entered on or about July 19, 2017, which, upon respondent mother's default, granted the grandmother's petition for modification of a 2016 order of custody and visitation, granted the grandmother sole decision-making authority with respect to the subject child, and awarded the mother daytime visits on alternate Saturdays, unanimously dismissed, without costs, as taken from a nonappealable paper.

The appeal is dismissed because the mother failed to appear at two consecutive court appearances, her counsel had no excuse for her absence, and thereafter declined to participate. The

mother never moved to vacate her default (*see* CPLR 5511; *Matter of Michael B.M. v Gnama I.*, 118 AD3d 619 [1st Dept 2014]).

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

ENTERED: JULY 9, 2020

CLERK

Friedman, J.P., Renwick, Gische, Mazzarelli, Moulton, JJ.

11797 & M-1182 — Index 350031/15

E. B.-W., an infant by her mother and natural guardian Dominique Bou, et al.,
Plaintiffs-Respondents,

-against-

New York City Housing Authority,
Defendant-Appellant.

_____

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

Greenberg & Stein, New York (Ian Asch of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Llinet M. Rosado, J.), entered on or about July 18, 2019, which, to the extent appealed from, denied defendant's motion for summary judgment dismissing the complaint insofar as predicated on its alleged violation of Administrative Code of City of NY § 27-809, unanimously affirmed, without costs.

Defendant failed to establish prima facie that Administrative Code § 27-809 did not apply to the building in which infant plaintiff's accident occurred. Defendant's Director for Capital Projects Administration failed to explain how he arrived at his conclusion, or to submit documentation in support thereof, that the building does not fall within an exception to the Code's grandfathering rule, namely where alterations made to the building cost at least thirty percent of the building's value (Administrative Code §§ 27-115, 27-116). Moreover, he compared

"the value of each unit at the time the alterations were performed [with the] average cost of work per unit," and therefore did not establish whether "the cost of making alterations" equaled or exceeded thirty percent of "the value of the building," which is the standard set by the statute (Administrative Code §§ 27-115, 27-116; *see Zabawa v Sky Mgt. Corp.*, 183 AD3d 430, 431 [1st Dept 2020]; *White v New York City Hous. Auth.*, 139 AD3d 579 [1st Dept 2016]; *but see Ebron v New York City Hous. Auth.*, 177 AD3d 530 [1st Dept 2019]). To the extent *Ebron* can be construed as supporting a contrary position, we clarify that *White* is and has been the rule regarding defendant's burden on a prima facie case. Since defendant failed to meet its initial burden, the motion must be denied without regard to the sufficiency of plaintiffs' papers in opposition (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1984]).

Defendant also failed to establish prima facie that, even if Administrative Code § 27-809 applied to the subject building, it did not violate the ordinance because the pipe did not need to be insulated, since it "carrie[d] a fluid not exceeding two hundred fifty degrees Fahrenheit and insulation would [have] interfere[d] with the functioning of the system." The affidavits of defendant's engineer submitted on this issue were notarized without the state and not accompanied by the requisite certificate of conformity, and "the technical defect was not

corrected, despite plaintiff[s'] timely objection in opposition to defendant['s] motion" (*Attilio v Torres*, 181 AD3d 460, 461 [1st Dept 2020]; *see* CPLR 2309[c]). Were we to disregard the technical nonconformity and consider the affidavits, as the motion court did (*see e.g. Wager v Rao*, 178 AD3d 434, 435 [1st Dept 2019]), they still failed to meet defendant's prima facie burden because they merely averred, in conclusory fashion, that insulating the pipe on which the infant plaintiff was burned would have interfered with the functionality of the heating system (*see Zabawa*, 183 AD3d at 431).

The parties' remaining arguments concerning so much of the order as granted defendant's motion for summary judgment dismissing the complaint insofar as predicated on its violation of a common-law duty are not properly before us. Plaintiff did not appeal from that portion of the order despite being aggrieved thereby (*see e.g. Solomon v Pepsi-Cola Bottling Co. of N.Y., Inc.*, 136 AD3d 469 [1st Dept 2016]).

M-1182 - *E. B.-W. v New York City Housing Authority*

Motion for stay, denied as moot.

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

ENTERED: JULY 9, 2020

CLERK

Friedman, J.P., Renwick, Gische, Mazzarelli, Moulton, JJ.

11798 Property Clerk, New York City Police Department,
Plaintiff-Appellant,

-against-

Anthony Nurse,
Defendant-Respondent.

Index 450320/18

Zachary W. Carter, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for appellant.

Order, Supreme Court, New York County (Martin Shulman, J.), entered July 13, 2018, which denied plaintiff's motion for summary judgment on his civil forfeiture action and sua sponte dismissed the complaint, unanimously modified, on the law, to vacate the dismissal, and otherwise affirmed, without costs, and the matter is remanded for further proceedings in accordance herewith.

Defendant was arrested and his vehicle impounded following a traffic stop in which an unlicensed firearm was found beneath the driver's seat of the vehicle. Defendant subsequently pleaded guilty to criminal possession of a firearm, and was sentenced to five years of probation. Some time before this civil forfeiture action was commenced, defendant challenged NYPD's continued possession of his vehicle, and NYPD brought an administrative proceeding, pursuant to *Krimstock v Kelly* (306 F3d 40 [2d Cir 2002], *cert denied* 539 US 969 [2003]), to determine whether it had the right to retain defendant's vehicle pending the outcome

of the anticipated civil forfeiture action. The hearing resulted in a finding that NYPD had established probable cause for the arrest and a likelihood that it would prevail in a civil forfeiture action, but had not established that continued impoundment was necessary to address a heightened public safety risk.

Contrary to the motion court's ruling, the determination made at the *Krimstock* hearing that the defendant's retention of his vehicle pending determination of a forfeiture action does not pose a heightened risk to public safety does not preclude this action (*see generally Buechel v Bain*, 97 NY2d 295, 303 [2001], *cert denied* 535 US 1096 [2002]). The issue in this action is whether the vehicle is actually subject to forfeiture under Administrative Code § 14-140, i.e., whether defendant used it as a means of committing the crime of criminal possession of a firearm (*Matter of Property Clerk of N.Y. City Police Dept. v Ferris*, 77 NY2d 428, 430-431 [1991]). Accordingly, the action should not have been dismissed. However, we affirm the denial of plaintiff's motion for summary judgment.

Plaintiff established by a preponderance of the evidence that defendant, the registered and titled owner of the vehicle, who pleaded guilty to criminal possession of a firearm, used the vehicle as a means of committing the crime of criminal possession of a firearm (*see Ferris*, 77 NY2d at 430; *Property Clerk, N.Y. City Police Dept. v Miranda*, 2010 NY Slip Op 32496[U], *4-5 [Sup

Ct, NY County 2010]; *Property Clerk, N.Y. City Police Dept. v Bongiovanni*, 2013 NY Slip Op 30219[U], *5-6 [Sup Ct, NY County 2013]).

In opposition, defendant, acting pro se, submitted an affidavit and supporting evidence in support of his argument that forfeiture of the vehicle, which he needed for getting to work with his tools and picking up his children from school, would impose an excessive and tremendous hardship on him and his family, particularly given that this is his sole criminal offense, and in light of other mitigating facts. This evidence is sufficient to raise an issue of fact as to whether, under all the factual circumstances, civil forfeiture of the vehicle would be grossly disproportionate to the offense and therefore a constitutionally impermissible excessive fine (*see County of Nassau v Canavan*, 1 NY3d 134, 140 [2003]; *Malafi v A 1967 Chevrolet, Vin No. 135177G120642, Zachary G. Moisan*, 63 AD3d 1112 [2d Dept 2009]; see *Timbs v Indiana*, __US__, 139 S Ct 682 [2019]). Accordingly, the matter is remanded to Supreme Court for a hearing to determine whether forfeiture would be grossly disproportionate to defendant's offense, "consider[ing] such factors as the seriousness of the offense, the severity of the harm caused and of the potential harm had the defendant not been caught, the relative value of the forfeited property and the maximum punishment to which defendant could have been subject for the crimes charged, and the economic circumstances of the

defendant" (*Canavan*, 1 NY3d at 140).

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

ENTERED: JULY 9, 2020

CLERK

Friedman, J.P., Renwick, Gische, Mazzarelli, Moulton, JJ.

11799-
11799A The People of the State of New York,
Respondent,

Ind. 1145/15
2288/15
4763/15
4914/15

-against-

Ibrahim Doumbouya,
Defendant-Appellant.

_____

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

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

_____

Appeals having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Mark Dwyer, J.), rendered March 3, 2017, and from a judgment (same court and Justice), entered October 24, 2019, granting resentencing.

Said appeals 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 judgments so appealed from be and the same are hereby affirmed.

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

ENTERED: JULY 9, 2020

CLERK

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

Friedman, J.P., Renwick, Gische, Mazzarelli, Moulton, JJ.

11800 The People of the State of New York, Ind. 57/06
Respondent,

-against-

Eddy M.,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Philip V. Tisne of counsel), for respondent.

_____

Order, Supreme Court, New York County (Thomas A. Farber, J.), entered on or about October 16, 2018, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-c), unanimously affirmed, without costs.

Clear and convincing evidence supports the court's assessment of 30 points under the risk factor for use of violence (armed with a dangerous instrument). The evidence established that defendant displayed a knife and told the victim to come to him, and then proceeded to rape the victim who was afraid that defendant would stab her. Although defendant was not holding the knife during the actual rape, the evidence amply supports the conclusion that defendant used the knife for the purpose of forcible compulsion in the course of a continuing incident that included the rape (*see People v Parker*, 145 AD3d 523, 523 [1st Dept 2016], *lv denied* 29 NY3d 908 [2017]).

The court providently exercised its discretion in declining to grant a downward departure (*see generally People v Gillotti*, 23 NY3d 841, 861 [2014]). The mitigating factors cited by defendant were adequately taken into account by the risk assessment instrument or outweighed by aggravating factors, including the seriousness of the underlying offense and defendant's criminal record.

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

ENTERED:

CLERK

Friedman, J.P., Renwick, Gische, Mazzarelli, Moulton, JJ.

11801 In re Jahsaraha A. S., Dkt. B-20067/18

A Child Under Eighteen
Years of Age, etc.,

Sheldon S.,
Respondent-Appellant,

Administration for Children's
Services, et al.,
Petitioners-Respondents.

_____

Steven P. Forbes, Jamaica, for appellant.

_____

Order, Family Court, Bronx County (Lynn M. Leopold, J.), entered on or about August 19, 2019, which granted petitioner Abbott House's motion for summary judgment and entered a finding of severe abuse against respondent-appellant Sheldon S., and terminated his parental rights to the subject child, unanimously affirmed, without costs.

Application by the father's assigned counsel to withdraw as counsel is granted (*see Anders v California,* 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). A review of the record demonstrates that there are no nonfrivolous issues which can be raised on this appeal. We agree with counsel that petitioner Abbott House demonstrated that respondent severely abused the child under Social Services Law § 384-b(8), as he was convicted of manslaughter in the first degree under Penal Law § 125.20, and the victim was the child's biological mother. Accordingly, Family Court properly determined that summary

judgment was warranted (*see* SSL § 384- b[8][a][iii][A]; *Matter of Alexander H. [Brenda P.-H.]*, 156 AD3d 561 [1st Dept 2017]).

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

ENTERED: JULY 9, 2020

CLERK

Friedman, J.P., Renwick, Gische, Mazzarelli, Moulton, JJ.

11803 ARRIS International PLC, et al., Index 652724/16
Plaintiffs-Respondents,

-against-

Rovi Corporation,
Defendants-Appellants.

_____

Ropes & Gray LLP, New York (C. Thomas Brown of counsel), for appellants.

Kilpatrick Townsend & Stockton LLP, Atlanta, GA (Joshua H. Lee of the bar of the State of Georgia, admitted pro hac vice, of counsel), for respondents.

_____

Order, Supreme Court, New York County (Andrew Borrok, J.), entered October 31, 2019, which granted plaintiffs' motion for partial summary judgment as to liability and denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

The parties entered into a patent license agreement for defendants' software, used in connection with an "Interactive Program Guide" (IPG) for accessing cable television programming and information, which plaintiffs embedded in set-top boxes that they manufactured and sold to third parties. Plaintiffs contend that defendants breached the covenant not to sue and the forum selection clause in the agreement by bringing actions against them in other jurisdictions.

Sections 2.2 and 2.3 of the agreement provided that defendants would seek to negotiate directly with "Excluded Service Providers" and "Third Party Applications," respectively,

and would not involve plaintiffs in those discussions or in subsequent enforcement actions so long as plaintiffs did not seek to indemnify Excluded Services Providers or Third Party Applications against claims by defendants. Defendants entered into a license agreement with Comcast, an Excluded Service Provider. Claiming that Comcast continued to use their patents after the agreement expired, they brought two patent infringement actions against Comcast in the United States District Court for the Eastern District of Texas, naming plaintiffs as defendants in those actions.

The motion court correctly concluded that, contrary to defendants' contention, the covenants contained in sections 2.2 and 2.3 do not expressly limit plaintiffs' protection to actions arising from "Authorized IPG[s]," i.e., the IPGs that are the subject of their license agreement with defendants. Sections 2.2 and 2.3 do not contain such limiting language, and the phrase "licenses granted hereunder," on which defendants rely, does not impose such a limitation. Notably, section 2.3 appears to refer to software developed not by defendants but by third parties. Indeed, in view of defendants' express agreement that they would negotiate with Excluded Service Providers and third parties directly and not involve plaintiffs in those negotiations, sections 2.2 and 2.3 may be reasonably read to provide plaintiffs with greater, rather than lesser, protection. Moreover, we note that in the patent enforcement actions, defendants alleged, on

information and belief, that plaintiffs were obligated to indemnify Comcast, which suggests that they believed that, absent an indemnification obligation, it was improper to sue plaintiffs in the enforcement actions.

We reject defendants' contention that they did not breach the forum selection clause because the patents that were the subject of the enforcement actions were not covered by plaintiffs' license agreement. We cannot determine from the record whether the patents at issue were covered by the agreement. However, defendants argue that plaintiffs were involved in the enforcement actions because they "manufactured and imported — pursuant to Comcast's specifications and instructions — hardware that was loaded, including by [plaintiffs], with infringing Comcast software." As plaintiffs' right to use defendants' patented software in their set-top boxes was defined and limited by the license agreement, we conclude that the claims asserted in the enforcement actions "are related to [the] agreement," as required by section 9.4 thereof.

To the extent defendants argue that plaintiffs may not

recover damages in the form of counsel fees, we note that the motion court made no determination with regard to damages.

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

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

ENTERED: JULY 9, 2020

CLERK

Friedman, J.P., Renwick, Gische, Mazzarelli, Moulton, JJ.

11804 The People of the State of New York Ind. 4917/15
Respondent,

-against-

Isa Abdul Karim,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered June 27, 2017, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him to a term of 2½ years, unanimously affirmed.

The court providently exercised its discretion in denying defendant's motion for a mistrial, the only remedy requested, because there were "less drastic means of alleviating whatever prejudice may have resulted" (*People v Young*, 48 NY2d 995, 996 [1980]). Although the jury could have reasonably inferred from a prosecution witness's unsolicited passing remark that defendant had been arrested for an unrelated crime while awaiting trial on the present case, a curative instruction would have alleviated any prejudice (*see People v Santiago*, 52 NY2d 865, 866 [1981]). However, defense counsel did not accept the court's offer to give such an instruction (*see e.g. People v Melendez*, 50 AD3d 485, 485

[1st Dept 2008], *lv denied* 10 NY3d 961 [2008]), and defendant therefore should not be heard to complain on appeal about the lack of any curative actions by the court. In any event, any error in this regard was harmless in light of the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

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

ENTERED: JULY 9, 2020

CLERK

Friedman, J.P., Renwick, Gische, Mazzarelli, Moulton, JJ.

11805 In re Annette R., Dkt. V-274-17/18A
Petitioner-Respondent,

-against-

Dakiem E. D.,
Respondent-Appellant.

_____

Law Office of Lewis S. Calderon, Jamaica (Lewis S. Calderon of counsel), for appellant.

Cahill Gordon & Reindel LLP, New York (Cyrus N. Bordbar of counsel), for respondent.

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

_____

Order, Family Court, New York County (Stephanie Schwartz, Referee), entered on or about May 23, 2019, which modified a visitation order to reduce respondent-father's visitation with the subject child, unanimously affirmed, without costs.

Although this Court's authority in custody matters is as broad as that of the trial court, the latter's findings and determination are accorded great deference on appeal (*Victor L. v Darlene L.*, 251 AD2d 178 [1st Dept 1998], *lv denied* 92 NY2d 816 [1998]), since that court had the opportunity to assess the witnesses' demeanor and credibility (*see Eschbach v Eschbach*, 56 NY2d 167, 173 [1982]). Here, there is a sound and substantial basis in the record for the court's determination that the circumstances had changed sufficiently to modify the original visitation order (*see Skidelsky v Skidelsky*, 279 AD2d 356 [1st Dept 2001]). The record clearly establishes that the father

continued to have difficulty with the child's asthma medications, not recognizing or understanding when and how they were to be employed.

As any modification must be based upon a "totality of the circumstances," with the overarching goal of promoting the child's best interests (*see St. Clement v Casale*, 29 AD3d 367, 368 [1st Dept 2006]), this conduct by the father justified the court's modification of the visitation agreement to minimize risk to the child's health, by eliminating back-to-back overnight visitation and requiring that the child was to be in FaceTime contact with the mother every four hours that the child was with the father between 7:00 a.m. and 8:00 p.m.

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

ENTERED: JULY 9, 2020

CLERK

Friedman, J.P., Renwick, Gische, Mazzarelli, Moulton, JJ.

11806-
11806A Raphael DeNiro,
Plaintiff-Respondent,

Index 312334/16

-against-

Claudine DeNiro,
Defendant-Appellant.

_____

Mantel McDonough Riso, LLP, New York (Gerard A. Riso of counsel), for appellant.

Chemtob Moss Forman & Beyda, LLP, New York (Nancy Chemtob of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Laura E. Drager, J.), entered January 3, 2020, which, to the extent appealed from as limited by the briefs, determined plaintiff husband's child support and maintenance obligations, determined plaintiff husband's 14.8% interest in Grenmoor Associates L.P. (Grenmoor) is his separate property not subject to equitable distribution, and awarded plaintiff husband 15% of the appreciation of real property located in East Hampton (Hardscrabble), unanimously modified, on the law and the facts, to the extent of deleting the decretal language adjudging plaintiff husband's entitlement to 15% of the appreciation of Hardscrabble, and remanding the matter to Supreme Court for entry of an amended judgment in accordance herewith, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered September 13, 2019, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The court properly determined that plaintiff's 14.8% interest in Grenmoor, 9.8% of which was acquired during the marriage, was a gift from plaintiff's father, and thus his separate property (Domestic Relations Law § 236[B][1][d][1]). The notarized assignments indicating that plaintiff's father had sold him the interest, and promissory notes executed by plaintiff in which he promised to repay his father specified amounts, do not compel a different result (*see M.M. v D.M.*, 159 AD3d 562, 563 [1st Dept 2018]*; Harned v Harned*, 185 AD2d 226, 228 [2d Dept 1992], *lv denied* 80 NY2d 762 [1992]). The court's conclusion that the interest constituted a gift was based upon the lack of correlation between the notes and the value of the asset transferred and plaintiff's testimony concerning the transaction. The court credited plaintiff's testimony that no money (marital or otherwise) had ever been exchanged, there was no expectation that plaintiff would ever repay the notes (one of which was years overdue) and the documents were for estate planning purposes only. There is no basis to disturb the court's credibility determination (*see Winter v Winter*, 50 AD3d 431, 432 [1st Dept 2008]).

The court properly determined that Hardscrabble, purchased by defendant's father in both his and defendant's names and subsequently held in defendant's father's family trust, is her separate property. Defendant is not only the primary beneficiary of the trust, but has the power to remove and appoint the

trustee, who, in turn, has the "absolute discretion" to terminate the trust (*see Hofmann v Hofmann*, 155 AD3d 442 [1st Dept 2017]; *Markowitz v Markowitz*, 146 AD3d 872, 873-874 [2d Dept 2017]). However, plaintiff was not entitled to 15% of Hardscrabble's appreciation based on occasional payments made toward the upkeep of the property, which was frequently used by the parties as a vacation home. Plaintiff failed to demonstrate the nexus between his contributions and the increase in Hardscrabble's value (*see Gordon v Anderson*, 179 AD3d 402 [1st Dept 2020]).

The court providently exercised its discretion in imputing income to the parties based on its credibility determinations and evidence adduced at trial. Contrary to defendant's contention, the court could consider access to her father's vacation homes, payment of travel and entertainment expenses through work, and employment at her father's businesses in imputing income to her (*see* Domestic Relations Law § 240[1-b][b][5][iv][A-D]; *Nederlander v Nederlander*, 102 AD3d 416, 417-418 [1st Dept 2013]; *Matter of LoCasto v Chiofolo*, 89 AD3d 847, 848 [2d Dept 2011]). Defendant fails to show that the child support award, based on a $600,000 income cap, is insufficient to meet the children's "actual needs" to live an "appropriate lifestyle" (*Matter of Culhane v Holt*, 28 AD3d 251, 252 [1st Dept 2006] [internal quotation marks omitted]), to warrant remand for further proceedings. Notably, defendant does not directly address the court's finding that her claimed expenses were unsupported by

evidence and not credible.

We have considered defendant's remaining arguments, including with respect to the equitable distribution of marital assets, and find them unavailing.

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

ENTERED: JULY 9, 2020

CLERK

Friedman, J.P., Renwick, Gische, Mazzarelli, Moulton, JJ.

11807 The People of the State of New York, Ind. 4745/16
Respondent,

-against-

Zoltan Gorocs,
Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Gabe Newland of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Eric Del Pozo 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 (Ann Scherzer, J.), rendered July 11, 2018,

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

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

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

ENTERED: JULY 9, 2020

CLERK

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

Friedman, J.P., Renwick, Gische, Mazzarelli, Moulton, JJ.

11808 The People of the State of New York, Ind. 1662/16
Respondent,

-against-

Albert Girdner,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Harold V. Ferguson of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Felicia A. Mennin, J.), rendered February 6, 2018, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree, and sentencing him, as a second felony offender, to a term of three years' probation, unanimously affirmed.

Defendant made a valid waiver of his right to appeal (*see People v Thomas*, 34 NY3d 545 [2019]; *People v Bryant*, 28 NY3d 1094 [2016]), which forecloses review of the denial of his suppression motion. The court's oral colloquy with defendant, supplemented by a written waiver, established a knowing, intelligent, and voluntary appeal waiver (*see People v Thomas*, 34 NY3d 545, 560, 563 n 5 [2019]). Although the subject of an appeal waiver came up after defendant had already agreed to plead guilty, the court conducted a thorough allocution and defendant had the opportunity to reject the plea if he did not want to

waive his right to appeal.

Regardless of the validity of defendant's appeal waiver, we find that the court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations.

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

ENTERED: JULY 9, 2020

CLERK

Friedman, J.P., Renwick, Gische, Mazzarelli, Moulton, JJ.

11809 Kemper Independence Insurance Company, Plaintiff-Appellant, Index 155881/16

-against-

Cornerstone Chiropractic, P.C., et al., Defendants,

JS Medical, P.C., et al., Defendants-Respondents.

_____

Goldberg, Miller & Rubin, P.C., New York (Timothy R. Bishop of counsel), for appellant.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered December 20, 2018, which denied plaintiff's motion for summary judgment declaring that defendants JS Medical, P.C. and Wert Specialty Orthopedics, P.C. (together, defendants) have no right to collect no-fault benefits from plaintiff with respect to the subject accident, and granted defendants' cross motion for summary judgment to the extent of dismissing the complaint as against JS, unanimously reversed, on the law, without costs, plaintiff's motion granted and defendants' motion denied, and it is declared that defendants have no right to collect said no-fault benefits.

The claimants' failure to subscribe and return the transcripts of their examinations under oath (EUOs) violated a condition precedent to coverage and warranted denial of the claims (*see Hereford Ins. Co. v Forest Hills Med., P.C.*, 172 AD3d 567 [1st Dept 2019]). This is so notwithstanding plaintiff's

failure to present proof of proper delivery of the denials (*see Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011], *lv denied* 17 NY3d 705 [2011]). Plaintiff is entitled to summary judgment on the additional ground that defendants failed to appear at two scheduled EUOs (*see Hertz Vehs. LLC v Significant Care, PT, P.C.*, 157 AD3d 600 [1st Dept 2018]; *Mapfre Ins. Co. of N.Y. v Manoo*, 140 AD3d 468 [1st Dept 2016], *appeal withdrawn* 29 NY3d 995 [2017]). Considering the brevity of the delay and JS's ultimate failure to appear, we find that plaintiff's "one-day tardiness in issuing its follow-up request for the EUO scheduled for" JS was "a technical defect excusable under 11 NYCRR 65-3.5(p)" (*Z.M.S. & Y. Acupuncture, P.C. v Geico Gen. Ins. Co.*, 56 Misc 3d 926, 930 [Civ Ct, Kings County 2017]).

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

ENTERED: JULY 9, 2020

CLERK

Friedman, J.P., Renwick, Gische, Mazzarelli, Moulton, JJ.

11810 The People of the State of New York, Ind. 1611/14
Respondent,

-against-

Steven Rogers,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Michael D. Tarbutton of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J. at plea; Ellen N. Biben, J. at sentencing), rendered April 4, 2017, convicting defendant of two counts of criminal possession of a controlled substance in the second degree, and sentencing him to concurrent prison terms of six years, with five years' postrelease supervision, unanimously affirmed.

The record establishes that the court pronounced sentence on each of the two counts on which defendant was convicted, thereby satisfying CPL 380.20. In context, the phrasing of the court's oral pronouncement of sentence had no possible meaning other than the imposition of concurrent sentences of six years, with five years' postrelease supervision, and all parties plainly understood the sentence as such (*see People v Schwartz*, 7 AD3d 445, 446 [1st Dept 2004], *lv denied* 3 NY3d 662 [2004]).

Defendant made a valid waiver of his right to appeal (*see*

People v Thomas, 34 NY3d 545 [2019]; *People v Bryant*, 28 NY3d 1094 [2016]), which forecloses review of his excessive sentence claim. Regardless of the validity of defendant's appeal waiver, we perceive no basis for reducing the sentence.

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

ENTERED: JULY 9, 2020

CLERK

Friedman, J.P., Renwick, Gische, Mazzarelli, Moulton, JJ.

11811-
11812N-
11812NA

Index 26343/15E

Jennifer Luciano,
Plaintiff-Appellant,

-against-

Maribel Felix, et al.,
Defendants-Respondents.

_____

Michael T. Altman, Woodmere, for appellant.

Marjorie E. Bornes, Brooklyn, for respondents.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered April 8, 2019, which denied plaintiff's motion to vacate the prior orders and restore the matter pursuant to CPLR 5015 on the basis that she lacked a reasonable excuse for the default, unanimously affirmed, without costs. Appeals from order, same court and Justice, entered May 1, 2018, which granted defendants' unopposed motion for summary judgment dismissing the complaint for lack of a causally related serious injury within the meaning of Insurance Law § 5102(d), and from order, same court and Justice, entered November 19, 2018, which denied plaintiff's motion for leave to renew and reargue, unanimously dismissed, without costs, as taken from nonappealable orders.

Since the order granting summary judgment dismissing the complaint was granted on default, the court properly denied plaintiff's motion to renew and reargue. The proper remedy for plaintiff was to move to vacate the default pursuant to CPLR 5015

(*Bank Leumi Trust Co. of N.Y. v Sibthorpe*, 161 AD2d 325 [1st Dept 1990]; *Vasquez v Koret, Inc.*, 151 AD2d 448 [1st Dept 1989]), which plaintiff ultimately did.

However, Supreme Court providently exercised its discretion in denying plaintiff's motion pursuant to CPLR 5015. Under the circumstances, plaintiff's claim that her failure to submit opposition to defendants' summary judgment motion was caused by law office failure is insufficient to establish a reasonable excuse for the default, because counsel offered no explanation as to why he believed a requested adjournment had been granted by the court and did not seek reargument until three months after the action was dismissed (*see Perez v New York City Hous. Auth.*, 47 AD3d 505, 505-506 [1st Dept 2008]). Furthermore, plaintiff's counsel failed to submit the proposed opposition to the motion, which included medical affirmations prepared months after the proposed adjourn date, with the motion to renew or reargue.

Given plaintiff's prolonged delay, the motion court did not abuse its discretion in finding that it need not decide the issue of whether her action has merit (*see Agosto v Western Beef Retail, Inc.*, 175 AD3d 1192, 1192-1193 [1st Dept 2019]). Because plaintiff failed to provide an acceptable excuse for the default, it is unnecessary for this Court to address whether she demonstrated a meritorious cause of action (*see Fernandez v Santos*, 161 AD3d 473, 474 [1st Dept 2018]).

If we were to review the serious injury threshold issue, we

would find that defendants established their initial burden to show that plaintiff did not sustain a serious injury causally related to the minor accident (*see Riollano v Leavey*, 173 AD3d 494, 495 [1st Dept 2019]; *Moreira v Mahabir*, 158 AD3d 518, 518 [1st Dept 2018]; *Rodriguez v Konate*, 161 AD3d 565, 566 [1st Dept 2018]). Plaintiff's proposed opposition does not contain medical evidence causally relating to the accident, other than the conclusory statement of one provider who relied on the history provided by plaintiff and did not address the evidence of degeneration in plaintiff's own MRI report (*see e.g. Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043, 1044 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]; *Williams v Laura Livery Corp.*, 176 AD3d 557, 558 [1st Dept 2019]).

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

ENTERED: JULY 9, 2020

CLERK

Friedman, J.P., Renwick, Gische, Mazzarelli, Moulton, JJ.

11813N & M-418
Diana Parker, as Trustee of the Henry Rothschild Irrevocable Trust,
Plaintiff-Appellant,

-against-

The American Association of University Women,
Defendant-Respondent.

- - - - -

Diana Parker, as Executor under the Last Will and Testament of Gertrude F. Rothschild and Trustee under the Gertrude F. Rothschild Irrevocable Trust,
Plaintiff-Appellant,

-against-

The American Association of University Women,
Defendant-Respondent.

Index 654069/18
654490/18

_____

DelBello Donnellan Weingarten Wise & Wiederkehr LLP, White Plains (Alfred E. Donnellan of counsel), for appellant.

White and Williams, New York (Eric B. Porter of counsel), for respondent.

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Order, Supreme Court, New York County (Andrew Borrok, J.), entered February 19, 2019, which, inter alia, granted defendant's motions pursuant to CPLR 325(e) to remove index No. 654069/18 to the Surrogate's Court, Bronx County, and index No. 654490/18 to the Surrogate's Court, Westchester County, unanimously affirmed, with costs.

It was not an improvident exercise of the court's discretion (*see Benjamin v Morgan Guar. Trust Co. of N.Y.*, 173 AD2d 373, 375 [1st Dept 1991]) to grant defendant's motions. To be sure, CPLR

325(e) says, "Where an action pending in the supreme court affects the administration of a decedent's estate which is within the jurisdiction of the surrogate's court, the supreme court. . . may remove the action to such surrogate's court." However, that statute made "no change from . . . Civil Practice Act 190(a). . . The Surrogate's Court at the time of the enactment of CPA 190 and CPLR 325 did not have jurisdiction over inter vivos trust[s]" (*Estate of Bialor,* 1991 NYLJ LEXIS 2153, *2 [Sur Ct, Nassau County 1991]; *see also Wagenstein v Shwarts,* 82 AD3d 628, 631 n [1st Dept 2011]). However, "[t]he amendments to the SCPA, beginning in 1980, make clear that the Surrogate possesses jurisdiction to determine matters relating to inter vivos trusts concurrent with the jurisdiction of the Supreme Court" (*id.*). Thus, we agree that CPLR 325(e) "empower[s] the Supreme Court to transfer to the Surrogate's Court any matter over which the Surrogate's Court has jurisdiction" (1991 NYLJ LEXIS 2153 at *2).

Plaintiff's claim that Surrogate's Court lacks subject-matter jurisdiction over the removed actions, which involve lifetime trusts, is unavailing (*see* SCPA 207[1] & 209[6]; *Wagenstein,* 82 AD3d at 629, 631). Similarly, since defendant moved pursuant to CPLR 325(e), plaintiff's complaint that defendant failed to comply with CPLR article 5 is unavailing. In any event, even if New York County is the proper venue, the instant actions may still proceed in Bronx County and Westchester County (*see Kurfis v Shore Towers Condominium,* 48 AD3d 300 [1st

Dept 2008]).

We decline defendant's request to impose sanctions on plaintiffs, as plaintiff's appeal is not frivolous (see 22 NYCRR 130-2.1).

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

M-418 - *Parker v American Assn. of Univ. Women*

Motion for sanctions, denied.

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

ENTERED: JULY 9, 2020

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Judith J. Gische, J.P.
Ellen Gesmer
Jeffrey K. Oing
Peter H. Moulton, JJ.

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Index 450545/19

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In re Letitia James, etc.,
Petitioner-Respondent,

-against-

iFinex Inc., et al.,
Respondents-Appellants.
_____x

Respondents appeal from the order of the Supreme Court, New York County (Joel M. Cohen, J.), entered August 19, 2019, which, insofar as appealed from as limited by the briefs, denied respondents' motion to dismiss.

Steptoe & Johnson LLP, New York (Charles A. Michael of counsel), and Morgan Lewis & Bockius LLP, New York (Zoe Phillips of counsel), for appellants.

New York State Office of the Attorney General, New York (Philip J. Levitz, Scott A. Eisman and Steven C. Wu of counsel), for respondent.

GESMER, J.

This case raises important issues about the scope of the authority of petitioner, the Attorney General of the State of New York, to investigate fraud under the Martin Act. The trial court properly rejected the attempts by respondents to limit petitioner's lawful authority to protect New York residents.

Respondents BFXNA Inc. and BFXWW Inc. are wholly-owned subsidiaries of respondent iFinex (collectively iFinex). iFinex operates a trading platform known as Bitfinex on which virtual currencies can be exchanged. Respondent Tether Holdings Limited is the holding company for respondents Tether Limited, Tether Operations Limited, and Tether International Limited (collectively Tether Holdings). Tether Holdings's main activity is to issue a virtual "stablecoin" currency known as "tether" (referred to below as *tether*). Stablecoin is a type of virtual currency that is designed to minimize price volatility by being pegged to a stable asset or currency. Until on or about March 4, 2019, respondent Tether Holdings represented that every *tether* is "backed" by one U.S. dollar, and any holder of *tether* may redeem it for one U.S. dollar at any time. After that date, Tether Holdings changed its representation on its website to state that, while every *tether* is still valued at one U.S. dollar, *tether* is backed by Tether Holding's "reserves," which include unspecified

currency, "cash equivalents," and "other assets and receivables from loans made by Tether [Holdings] to third parties," including to affiliated entities.

Nonparty Digfinex Inc. is the majority owner of iFinex and Tether Holdings. A small group of executives and employees, some of whom are or have been located in New York, operates all respondents. Each of respondents is incorporated outside of the United States and does not have a central headquarters, and none is registered for service of process in New York.

In November 2018, petitioner commenced an investigation of respondents pursuant to the Martin Act, which gives the Attorney General "broad regulatory and remedial powers" to "investigat[e] and interven[e] at the first indication of possible . . . fraud on the public and, thereafter, if appropriate, to commence civil or criminal prosecution" (*Assured Guar. [U.K.] Ltd. V J.P. Morgan Inv. Mgt. Inc.*, 18 NY3d 341, 350 [2011] [internal quotation marks omitted]; *see* General Business Law [GBL] 352[1]). Petitioner began the investigation as a result of her concern that respondents lacked sufficient liquidity to permit customers to redeem *tether* at the represented value.

Petitioner served subpoenas on third parties pursuant to the Martin Act (GBL 352) and Executive Law § 63(12), seeking information regarding respondents' activities. After learning of

this, respondents' counsel contacted petitioner on November 3, 2018 and agreed to accept service of subpoenas by email on behalf of respondents. Petitioner then delivered subpoenas seeking information and documents from January 1, 2015 forward. Respondents' counsel accepted service of the subpoenas and produced some of the requested documents and information.

In early 2019, petitioner's investigation revealed information that respondents had not disclosed to her, although it came within the scope of the information sought by the subpoenas. Respondents had previously explained to petitioner that many banks and other traditional financial institutions will not do business with unregulated or off-shore companies dealing in virtual currency. As a result, beginning in 2014, iFinex had used a third-party foreign entity to process customer deposits and withdrawals. In or about February 2019, petitioner learned that, since mid-2018, this entity had refused to provide iFinex with close to $1 billion of their commingled client and corporate funds. In addition, respondents advised petitioner that, in November 2018, Tether Holdings had transferred $625 million to iFinex, and that iFinex was planning to take a $900 million line of credit from Tether Holdings. Petitioner expressed concern that the latter transaction might constitute a conflict of interest, but respondents nevertheless went ahead with the

transaction and only told petitioner that they had done so after the deal had closed.

Concerned that these events indicated that iFinex was in serious financial trouble, that Tether Holdings' cash reserves backing *tether* would be dissipated, and that respondents had misled their customers in relation to these events, petitioner sought an order pursuant to GBL 354. That provision of the Martin Act permits the Attorney General to seek an ex parte order in Supreme Court requiring the subjects of an investigation to produce documents and testify under oath, and authorizes the court to issue a "preliminary injunction or stay as may appear to [it] to be proper and expedient" (GBL 354). In response to petitioner's request, Supreme Court issued an ex parte order dated April 24, 2019, which directed respondents to produce certain documents and stayed them from 1) taking any further action to "make any [] claim . . . on the U.S. dollar reserves held by Tether" [Holdings]; 2) making any payments to any individual associated with respondents "from the U.S. dollar reserves held by Tether" [Holdings]; and 3) altering or destroying any documents related to the investigation. Petitioner served the ex parte order on respondents, pursuant to its terms, by sending a copy of it, together with the papers on which it was based, to respondents' counsel by email, overnight

delivery and hand delivery.

On or about April 30, 2019, respondents moved to modify or vacate the ex parte order. By order dated May 16, 2019, Supreme Court granted respondents' motion in part by modifying the temporary restraining order, but denied their motion to vacate it.[1]

On or about May 21, 2019, respondents made the instant motion, which they style as a motion to dismiss on the basis of lack of subject matter jurisdiction (CPLR 3211[a][2]) and lack of personal jurisdiction (CPLR 3211[a][8]). Supreme Court denied the motion by order entered on August 19, 2019, and respondents now appeal.

At the outset, under the Martin Act's statutory scheme, once Supreme Court has issued an order responding to a GBL 354 application, it has no further role in the Attorney General's investigation, except to rule on a motion by either party to vacate or modify the order, as respondents made here. Accordingly, once the court issued the order authorized by GBL 354 on April 24, 2019, and modified it by order dated May 16, 2019, the proceeding before it was concluded and there was no action or proceeding for Supreme Court to "dismiss" on May 21,

[1]Respondents did not appeal from that order and it is not before us.

2019 when respondents filed their motion that resulted in the order now before the court. All that remained was the Attorney General's ongoing investigation, in which, by statute, the courts have no further role at this stage. Indeed, neither party cites to, and this Court is unaware of, any prior case in which the subject of a Martin Act investigation has moved to "dismiss" an application by the Attorney General for an order pursuant to GBL 354. Nevertheless, I consider each of respondents' three arguments in support of their appeal of the motion court's August 19, 2019 order, and reject each for the reasons discussed below.

First, respondents argue that *tether* does not qualify as a security or commodity as those terms are defined in the Martin Act, and that the motion court thus lacked subject matter jurisdiction over them. I disagree for three reasons. As an initial matter, Supreme Court has broad general original jurisdiction, including to hear applications by the Attorney General for orders pursuant to GBL 354 under the Martin Act. Accordingly, as the motion court correctly found, respondents' challenge is actually to petitioner's authority to investigate their activities, rather than the court's jurisdiction to hear a GBL 354 application.

Moreover, the May 16, 2019 order on respondent's motion to vacate or modify the ex parte order rejected respondents' subject

matter jurisdiction argument. Respondents failed to appeal from that order.

Finally, even if the court were to consider respondents' argument on the merits, the Martin Act's definition of commodities as including "any foreign currency, any other good, article, or material" (GBL 359-e[14]) is broad enough to encompass *tether*.[2] Indeed, federal courts and the Commodities Futures Trading Commission have found that virtual currencies are commodities under the Commodities Exchange Act, which defines the term more narrowly than does the Martin Act ("all other goods and articles . . . and all services rights and interests . . . *in which contracts for future delivery are presently or in the future dealt in*" [7 USC § 1a(9) (emphasis added)]; *Commodities Future Trading Commn. v McDonnell*, 287 F Supp 3d 213, 224-226 [ED NY 2018]; *Matter of Coinflip, Inc.*, 2015 WL 5535736, *2, 2015 CFTC LEXIS 20, *6 [Sept. 17, 2015, CFTC Docket No. 15-29]).

Accordingly, the motion court properly denied the branch of respondents' motion to dismiss based on subject matter jurisdiction.

Next, respondents argue that Supreme Court lacked specific

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[2]Because *tether* is easily encompassed by the statute's definition of "commodity," there is no need to reach the issue of whether it may also qualify as a "security" under the Martin Act.

personal jurisdiction over them because petitioner failed to demonstrate a sufficient connection between respondents' activity in New York and the activities she is investigating. This argument is unavailing.

On a motion pursuant to CPLR 3211(a)(8) to dismiss for lack of personal jurisdiction, the party asserting jurisdiction has the burden of demonstrating "satisfaction of statutory and due process prerequisites" (*Stewart v Volkswagen of Am.*, 81 NY2d 203, 207 [1993]). Under CPLR 302(a)(1), New York's long-arm jurisdiction statute, "proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted" *(Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 71 [2006][internal quotation marks omitted], *cert denied* 549 US 1095 [2006]). Due process is satisfied when a foreign entity has "minimum contacts" with the State and exercise of jurisdiction does not "offend traditional notions of fair play and substantial justice" (*International Shoe Co. v Washington*, 326 US 310, 316 [1945] [internal quotation marks omitted]; *see also LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 216 [2000]). It is "rare" for personal jurisdiction to be permitted under the long-arm statute and prohibited by due

process considerations (*Rushaid v Pictet & Cie.*, 28 NY3d 316, 331 [2016] [internal quotation marks omitted]). Moreover, "[w]here the purpose of the proceeding is to protect the citizens of the State from potentially dangerous consequences, less is required than might otherwise be the case" (*Matter of La Belle Creole Intl., S. A. v Attorney-General of the State of N.Y.*, 10 NY2d 192, 198 [1961]).

Here, petitioner is investigating, inter alia, whether respondents have committed fraud (as broadly defined in the Martin Act) "within or from" New York (GBL 352) by making untrue claims about the cash reserves backing *tether* and their ability to honor customer withdrawal requests. She has sought documents and information from respondents going back to 2015, which is well within the applicable six-year statute of limitations (CPLR 213[9]).

iFinex admits that it permitted New York-based customers to trade *tether* on the Bitfinex platform until January 30, 2017. Respondent Tether Holdings did not expressly prohibit redemption of *tether* by New York-based customers until November 27, 2018. Petitioner included in her motion papers documents obtained in her investigation indicating that New York-based customers nevertheless used the Bitfinex platform to trade *tether* after both of these dates, including as recently as May 14, 2019 (*see*

Archer-Vail v LHV Precast, Inc., 168 AD3d 1257, 1261-1262 [3d Dept 2019] [showing that the defendant operated an "interactive website" that made products available to New York customers was a "sufficient start" to showing of long-arm jurisdiction on motion to dismiss]).

In addition, respondents do not deny that, until at least early 2018, they had an executive who resided in and conducted business on their behalf within New York, including with customers who appear to be New York-based (*see Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988][long-arm jurisdiction established where agent "engaged in purposeful activities in this State . . . for the benefit of and with the knowledge and consent" of foreign corporation defendants]. While respondents claim that the customer involved in certain correspondence attached to petitioner's papers was a "United Kingdom entity," they do not deny that the entity acted through a representative located in New York.

Furthermore, respondents had active accounts with New York banks until at least October 2018 (*see Licci v Lebanese Can. Bank, SAL*, 20 NY3d 327, 339 [2012] [foreign defendant's "repeated use" of New York bank accounts to effect wire transfers on behalf of foreign client sufficient to exercise long-arm jurisdiction]), and retained New York professional firms to review *tether* cash

reserves and to make public statements on respondents' behalf about the Bitfinex platform and *tether* cash reserves in 2017 and 2018 (*see Courtroom Tel. Network v Focus Media*, 264 AD2d 351, 353 [1st Dept 1999] [long-arm jurisdiction established where the defendant relied on agents "to perform commercial activities in New York for [their] benefit"]).

Accordingly, petitioner has demonstrated that respondents' activities in New York were sufficiently related to the subjects of petitioner's investigation to satisfy specific personal jurisdiction for the purposes of GBL 354. It bears noting that, in an ordinary case, the party opposing a motion to dismiss based on personal jurisdiction need not establish that there is personal jurisdiction. Rather, she need only make a "sufficient start" in demonstrating, prima facie, the existence of personal jurisdiction, since facts relevant to this determination are frequently in the exclusive control of the opposing party and will only be uncovered during discovery (*Peterson v Spartan Indus.*, 33 NY2d 463, 466-467 [1974]; *see also Universal Inv. Advisory SA v Bakrie Telecom Pte, Ltd.*, 154 AD3d 171, 179-180 [1st Dept 2017]). Here, some of the information the ex parte order requires respondents to produce to petitioner is relevant to this issue and may reveal additional bases for the court's exercise of personal jurisdiction over respondents if and when

petitioner commences an action against them, including documents concerning Bitfinex users and *tether* holders residing or doing business in New York. For that reason, courts generally permit discovery to proceed solely on the jurisdictional issue in the first instance following a dismissal motion on that basis and a prima facie showing of the existence of personal jurisdiction. However, what is at issue here is not the existence of personal jurisdiction for a lawsuit but merely for an investigation, which requires a far lighter showing. Petitioner has made a sufficient showing of personal jurisdiction in the context of this Martin Act investigation for Supreme Court to have issued the ex parte order pursuant to GBL 354. The Martin Act authorizes the Attorney General to investigate securities or commodities fraud (as those terms are defined by the Act) "within or from" New York (GBL 352). Petitioner may properly investigate a foreign entity if she "has a reasonable basis for believing that [it] has violated a New York statute" (*La Belle Creole*, 10 NY2d at 198). As the Court of Appeals found in relation to the Attorney General's issuance of a subpoena on a foreign corporation pursuant to her broad investigative powers, her request for an order pursuant to GBL 354 "is not rendered improper because it may produce the evidence required to establish that the petitioner is doing business in New York" (*id.*). Finally,

respondents argue that Supreme Court lacked personal jurisdiction over them because petitioner improperly served the ex parte order when she delivered a noncertified copy to respondents' counsel by hand, email, and overnight delivery. I disagree for two reasons.

First, this Court's decision in *Abrams v Lurie* (176 AD2d 474 [1st Dept 1991]), relied upon by respondents, is not determinative here. In *Lurie*, we found that a GBL 354 order must be served in accordance with the CPLR, and held that, where there was no showing that personal service on an individual was "impracticable" (CPLR 308[5]; *see also* CPLR 311[b]), service upon him by mail was improper. In doing so, this Court stated:

> "A General Business Law § 354 order is closely analogous to both a subpoena and a temporary restraining order, both of which, under the CPLR, must be served in the same manner as a summons (CPLR 2303, 6313[b]). In the case of a temporary restraining order, the court is expressly empowered to order service otherwise, but it is generally recognized that this power is exercised only when a temporary restraining order is issued in the context of an already pending action" (*Lurie*, 176 AD2d at 476).

There is no indication that the individual respondent in *Abrams* was aware of the Attorney General's investigation, much less that he had already been cooperating and had agreed to accept service of a subpoena, as is the case here. Where respondent is aware of the investigation and has been

cooperating, the GBL 354 order is analogous to a temporary restraining order issued in an "already pending action." Accordingly, service pursuant to CPLR 6313 is appropriate. Unlike CPLR 311(b), CPLR 6313(b) does not require a showing of impracticability, but rather provides: "*Unless the court orders otherwise*, a temporary restraining order together with the papers upon which it was based, and a notice of hearing for the preliminary injunction, shall be personally served in the same manner as a summons" (emphasis added). Here, the court did order otherwise, and specifically authorized that service "of a copy of the Order, and the papers upon which it was granted, on counsel for Respondents" would be sufficient.

Furthermore, whether a defect in service is jurisdictional or a mere technical irregularity that a court may overlook under CPLR 2001 depends upon whether it "affect[s] the likelihood that the [pleading] will reach [the] defendant and inform him that he is being sued" (*Ruffin v Lion Corp*, 15 NY3d 578, 583 [2010]). In making this determination, "courts must be guided by the principle of notice to the defendant—notice that must be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections'" (*id.* at 582 [quoting *Mullane v Central Hanover Bank & Trust Co.*, 339 US 306, 314

[1950]). The Court of Appeals noted in *Ruffin*, in dicta, that mailing, emailing, or delivering the pleading to the wrong person all "would present more than a technical infirmity, even if defendant actually receives the documents, inasmuch as these methods in general introduce greater possibility of failed delivery" (*id.* at 583). In *Ruffin*, the Court held that personal service upon the defendant bus company at its out-of-state headquarters by a person not authorized under the CPLR to make such service was a mere technical infirmity, which the motion court properly overlooked in denying the defendant's motion to vacate the default judgment against it.

Here, petitioner's service of a copy, rather than a certified copy as required by GBL 355, is unquestionably a mere technical infirmity, since it had no impact on the likelihood of failed delivery. Moreover, the order on its face required service only of a 'copy,' not a certified copy. Petitioner's service by hand, email and overnight delivery on respondents' attorney with whom she had been dealing throughout her investigation was reasonably calculated to inform respondents of the existence of the GBL 354 order. As discussed above, the ex parte order in this case is not a summons or complaint informing respondents for the first time of a lawsuit's commencement. Rather, it is simply the next step in petitioner's investigation

of respondents, who were well aware of it and were cooperating with it.

Moreover, even if service had been improper, petitioner argues that respondents waived any objection based on lack of personal jurisdiction because of inadequate service by failing to raise it in their initial motion to vacate or modify the ex parte order. I agree. Because a GBL 354 application does not result in a final order from a court after trial or summary judgment, there is nothing to "dismiss." Respondents' only remedy is to seek to vacate or modify the GBL 354 order. Accordingly, respondents' earlier motion to vacate the GBL 354 order was, procedurally speaking, their motion to dismiss. By failing to make their case as to lack of personal jurisdiction based on improper service in that motion, the determination of which respondents have not appealed, respondents have waived this argument.

Accordingly, the order of the Supreme Court, New York County (Joel M. Cohen, J.), entered August 19, 2019, which, insofar as

appealed from as limited by the briefs, denied respondents' motion to dismiss, should be affirmed, without costs.

All concur.

Order, Supreme Court, New York County (Joel M. Cohen, J.), entered August 19, 2019, affirmed, without costs.

Opinion by Gesmer, J. All concur

Gische, J.P., Gesmer, Oing, Moulton, JJ.

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

ENTERED: JULY 9, 2020

CLERK