Acosta, P.J., Friedman, Mazzarelli, Webber, JJ.

11193 Graciano Corporation, Index 652750/14
Plaintiff-Appellant-Respondent,

-against-

Lanmark Group, Inc., et al.,
Defendants-Respondents-Appellants.

- - - - -

Lanmark Group, Inc.,
Third-Party Plaintiff-Respondent-Appellant,

-against-

Liberty Mutual Insurance Company,
Third-Party Defendant-Respondent.

_____

Marco & Sitaras, PLLC, New York (George A. Marco of counsel), for Graciano Corp., appellant-respondent and Liberty Mutual Insurance Company, respondent.

Milber Makris Plousadis & Seiden, LLP, Woodbury (Joseph J. Cooke of counsel), for Lanmark Group, Inc. and Federal Insurance Company, respondents-appellants.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered December 31, 2018, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the cause of action for quantum meruit, and denied defendants' motion for partial summary judgment on its counterclaim for breach of contract, unanimously affirmed, without costs.

The court properly denied defendant Lanmark Group, Inc.'s (Lanmark) motion for summary judgment on its counterclaim for breach of contract. In this regard, the court correctly found that issues of fact exist as to whether Lanmark's issuance of

Addendum No. 3 "breach[ed] . . . a fundamental obligation of the contract," relieving plaintiff from the effect of the no damages for delay clause (*Corinno Civetta Constr. Corp. v City of New York*, 67 NY2d 297, 309 [1986]).

The court properly dismissed the cause of action for quantum meruit. A valid and enforceable written contract governed the subject matter at issue, and, therefore, recovery in quasi-contract for events arising out of the same subject matter is precluded (*see Parker Realty Group, Inc. v Petigny*, 14 NY3d 864 [2010]; *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388-389 [1987] ["a quasi-contractual obligation is one imposed by law where there has been no agreement or expression of assent, by word or act, on the part of either party involved"]).

Defendants' reliance on a "Partial Release and Waiver of Lien" executed by plaintiff is unavailing. Although the release recites receipt of some $325,000 in consideration, defendants point to no evidence that this sum was actually paid. Hence, questions of fact exist as to whether the release is supported by consideration (*see* Lien Law § 34). Nor do defendants dispute that Lanmark required plaintiff to execute monthly partial waivers in consideration for progress payments. Such monthly liens and/or releases are treated "as merely a receipt for the monies referenced in the waiver" (*West End Interiors v Aim Constr. & Contr. Corp.*, 286 AD2d 250, 252 [1st Dept 2001]; *see*

Penava Mech. Corp. v Afgo Mech. Servs., Inc., 71 AD3d 493, 495 [1st Dept 2010]).

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: JUNE 11, 2020

CLERK

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

10985 In re Aurora Associates LLC, Index 570235/17
Petitioner-Appellant-Respondent,

-against-

Raffaello Locatelli,
Respondent-Respondent-Appellant,

Cleantech Strategies LLC, et al.,
Respondents.

_____

Kossoff, PLLC, New York (Joseph S. Goldsmith of counsel), for appellant-respondent.

DeLotto & Fajardo, LLP, New York (Eduardo A. Fajardo of counsel), for respondent-appellant.

_____

Order, Appellate Term, First Department, entered on or about December 6, 2017, which, to the extent appealed from, in modifying an order of the Civil Court, New York County (Jack Stoller, J.), entered on or about November 28, 2016, granted respondent's motion for summary judgment dismissing the holdover petition, granted petitioner's motion to dismiss the overcharge counterclaim, denied respondent's motion for summary judgment on the overcharge counterclaim, and granted respondent's motion for summary judgment on the counterclaim for attorneys' fees, unanimously affirmed, without costs.

Notwithstanding the predecessor owner's purchase of a prior tenant's rights under Multiple Dwelling Law § 286(12), the loft unit at issue remained subject to rent regulation as the apartment is located in a pre- 1974 building containing six or more residential units (*Acevedo v Piano Bldg. LLC* (70 AD3d 124

[1st Dept 2009], *appeal withdrawn* 14 NY3d 884 [2010]; *Costanzo v Joseph Rosen Found., Inc.*, 178 AD3d 501, 502 [1st Dept 2019], *citing Acevedo*, 70 AD3d at 129). Therefore, petitioner was not entitled to charge a market value rent for the unit (*cf.* Multiple Dwelling Law § 26[6]), and the summary eviction proceeding was properly dismissed.

Because respondent prevailed in his defense of the summary proceeding, the Appellate Term properly concluded that he was the prevailing party on the "core" issue between the parties, and therefore attorneys' fees were properly awarded (*Board of Mgrs. of 55 Walker St. Condominium v Walker St.*, 6 AD3d 279, 280 [1st Dept 2004]).

However, Appellate Term properly dismissed the rent overcharge claim on the ground that, under applicable law, there was no basis to examine the rental history beyond the four-year look-back period (*see* Rent Stabilization Law [Administrative Code of City of NY] § 26-516[a][2]). The Court of Appeals has determined that the Housing Stability and Tenant Protection Act (HSTPA), which requires that the entire rent history be examined, cannot be retroactively applied to overcharges alleged to have occurred before the HSTPA's enactment in 2019 (*see Matter of Regina Metro. Co., LLC v New York State Div. of Hous. and Community Renewal* (__ NY3d __, 2020 NY Slip Op 02127, *9 [2020] ["We conclude that the overcharge calculation amendments (of the HSTPA) cannot be applied retroactively to overcharges that

occurred prior to their enactment"]).

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

ENTERED: JUNE 11, 2020

CLERK

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

11216 Melissa Hall, et al., Index 113201/11
Plaintiffs-Appellants,

-against-

Ernest Louis, et al.,
Defendants-Respondents.

_____

John D. Gorman, New York (Diana Jarvis of counsel), for appellants.

Richter Restrepo, PLLC, New York (Peter M. Rivera of counsel), for respondents.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered July 25, 2018, which, insofar as appealed from as limited by the briefs, sua sponte dismissed the second cause of action of the complaint, unanimously reversed, on the law, without costs, the second cause of action reinstated, and the matter restored to the trial calendar.

This appeal involves Supreme Court's sua sponte dismissal of a shareholders' derivative lawsuit against a low-income Housing Development Fund Corporation (HDFC) and its current and former members of the board of directors. Supreme Court dismissed the lawsuit at a pretrial conference after determining that all three causes of action asserted in the complaint were moot. The appeal is limited to Supreme Court's dismissal of plaintiffs' second cause of action for an equitable accounting, asserted against the individual defendants. Plaintiffs do not appeal from Supreme Court's dismissal of their first cause of action for the

inspection of the HDFC's books and records or the dismissal of their third cause of action for an injunction.

An order issued sua sponte is not appealable as of right (*see* CPLR 5701[a][2]; *Sholes v Meagher*, 100 NY2d 333, 335 [2003]). Plaintiffs' remedy is to move to vacate the court's order, and, if the motion is denied, appeal from that order (CPLR 5701[a][3]; *see Person v Einhorn*, 44 AD3d 363 [1st Dept 2007]; *Davidson v Regan Fund Mgt. Ltd.*, 15 AD3d 172 [1st Dept 2005]).

Although plaintiffs failed to move to vacate the order in Supreme Court, in the interest of justice we deem the notice of appeal a motion for leave to appeal pursuant to CPLR 5701(c) and grant the motion (*see Yuppie Puppy Pet Prods., Inc v Street Smart Realty, LLC*, 77 AD3d 197, 200 [1st Dept 2010]; *Jun-Yong Kim v A&J Produce Corp.*, 15 AD3d 251, 251 [1st Dept 2005]). Having granted leave to appeal, we turn now to the appeal.

On the merits, we find that Supreme Court erred in dismissing the complaint because the cause of action for an equitable accounting was not moot. Supreme Court conflated the first cause of action for the inspection of the HDFC's books and records with the second cause of action for an equitable accounting (*see Zyskind v FaceCake Mktg. Tech., Inc.*, 110 AD3d 444, 447 [1st Dept 2013] [the inspection of books and records is not the equivalent of an accounting]). Defendants failed to demonstrate what happened to the $90,000 from the sale of Apartment 6A, and the funds do not appear in the HDFC's

financials. Defendants' affidavits did not address this glaring deficiency.

Supreme Court also erred in concluding that plaintiffs were required to amend their complaint to assert yet another cause of action in order for this litigation to move forward. An equitable accounting involves a remedy "designed to require a person in possession of financial records to produce them, demonstrate how money was expended and return pilfered funds in his or her possession" (*Roslyn Union Free School Dist. v Barkan*, 16 NY3d 643, 653 [2011]). Available relief includes a personal judgment against the wrongdoer (*see Fur & Wool Trading Co. v Fox, Inc.*, 245 NY 215, 218 [1927]). Moreover, plaintiffs' complaint specifically demands "[j]udgment of such sums as were embezzled or improperly diverted by the Individual Defendants."

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

ENTERED: JUNE 11, 2020

CLERK

Richter, J.P., Manzanet-Daniels, Kapnick, Kern, Oing, JJ.

11625 & M-1626 — Ind. 428/14

The People of the State of New York,
Respondent,

-against-

Darnell Holmes,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (John T. Komondorea of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (James McCarty, J.), rendered June 6, 2019,

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.

M-1626 *People v Darnell Holmes*

Motion to enlarge record denied.

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

ENTERED: JUNE 11, 2020

CLERK

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

Richter, J.P., Manzanet-Daniels, Kapnick, Kern, Oing, JJ.

11626 Mid Island LP, doing business as, Madison Management of Queens, et al., Plaintiffs-Respondents, Index 650911/13

-against-

Hess Corporation, Defendant-Appellant.

_____

White & Case LLP, New York (Kimberly A. Havlin of counsel), for appellant.

Grossman LLP, New York (Judd B. Grossman of counsel), for respondents.

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Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered May 10, 2019, which granted plaintiffs' motion for class certification, unanimously reversed, on the law and the facts, without costs, the motion denied, and the class decertified, without prejudice to renewal upon evidence sufficient to establish numerosity of the proposed class.

The gravamen of plaintiffs' claim, and that for which they seek class certification, is that defendant provided them and others similarly situated "with inferior, adulterated heating oil, i.e. that the fuel oil that was delivered to them contained oils of lesser value mixed into the ordered grade of fuel oil, so that the delivered product did not meet the standards of the parties' contracts" (*BMW Group LLC v Castle Oil Corp.*, 139 AD3d 78, 80 [1st Dept 2016]). Contrary to defendant's contention, this is the predominant question of law and fact in this case, and it is common among the class. In any event, "the fact that

questions peculiar to each individual may remain after resolution of the common questions is not fatal to the class action" (*City of New York v Maul*, 14 NY3d 499, 514 [2010] [internal quotation marks omitted]; *see Maddicks v Big City Props., LLC*, 34 NY3d 116, 125 [2019]). Moreover, "CPLR article 9 affords the trial court considerable flexibility in overseeing a class action," and the court could even "decertify the class at any time before a decision on the merits if it becomes apparent that class treatment is inappropriate" (*Maul*, 14 NY3d at 513-514). Supreme Court is more than able to recognize if its class certification becomes unduly cumbersome, and, if so, how best to fashion a remedy.

Nevertheless, "[t]he proponent of class certification bears the burden of establishing the criteria promulgated by CPLR 901(a) and must do so by the tender of evidence in admissible form" (*Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 422 [1st Dept 2010] [internal citations omitted]; *see Feder v Staten Is. Hosp.*, 304 AD2d 470, 471 [1st Dept 2003]). Here, plaintiffs failed to submit admissible evidence demonstrating that the numerosity prerequisite to class certification was satisfied. However, the record suggests that such evidence is in plaintiffs' possession but simply was not submitted in connection with their

motion. Accordingly, plaintiffs are given leave to renew their motion for class certification, upon admissible evidence providing a sufficient basis for determining the size of the potential class.

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

ENTERED: JUNE 11, 2020

CLERK

Richter, J.P., Manzanet-Daniels, Kapnick, Kern, Oing, JJ.

11627 In re Dawn Monique W.W., Dkt. 0-17406-17
Petitioner-Appellant,

-against-

Melvin Alexander W., Sr.,
Respondent-Respondent.

_____

Larry S. Bachner, New York, for appellant.

_____

Order, Family Court, New York County (Adam Silvera, J.), entered on or about November 13, 2017, which, inter alia, after a hearing, dismissed the petition for an order of protection, with prejudice, unanimously affirmed, without costs.

The court dismissed the petition on the ground that petitioner's testimony lacked credibility and that she failed to establish prima facie that respondent committed family offenses warranting an order of protection. The court's credibility

determinations are supported by the record (*see Matter of Everett C. v Oneida P.*, 61 AD3d 489, 489 [1st Dept 2009]).

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

ENTERED: JUNE 11, 2020

CLERK

Richter, J.P., Manzanet-Daniels, Kapnick, Kern, Oing, JJ.

11628 PJD Corporate Realty Inc., Index 652616/17
Plaintiff-Appellant,

-against-

Henry George School of Social Science,
Defendant,

Douglas Elliman Real Estate, et al.,
Defendants-Respondents.

_____

Dilworth Paxson, LLP, New York (Patrick J. Dwyer of counsel), for appellant.

Solbakken Angelillo LLP, New York (Robert C. Angelillo of counsel), for Douglas Elliman, LLC, respondent.

Koss & Schonfeld, LLP, New York (Jacob J. Schindelheim of counsel), for Edinburgh Seven Seas LLC, respondent.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered on or about April 12, 2019, which, to the extent appealed from, granted defendants-respondents' motions to dismiss the complaint as against them, unanimously affirmed, without costs.

Because the letter agreement at issue was a unilateral contract, it did not need to be supported by a mutual promise from plaintiff to be enforceable (*Flemington Natl. Bank & Trust Co. [N.A.] v Domler Leasing Corp.*, 65 AD2d 29 [1st Dept 1978], *affd sub nom. Flemington Natl. Bank & Tr. Co. v Domler Leasing Corp.*, 48 NY2d 678 [1979]).

While the failure to identify plaintiff as buyer's broker can be actionable, it is only actionable where plaintiff has some contractual or other entitlement to be paid once it is identified

as the broker (*Lansco Corp. v NY Brauser Realty Corp.*, 63 AD3d 513, 513-514 [1st Dept 2009]). Because there was no such entitlement here, and seller did not agree to pay plaintiff any commission, there was no cause of action against seller or its broker for the commission.

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

ENTERED: JUNE 11, 2020

CLERK

Richter, J.P., Manzanet-Daniels, Kapnick, Kern, Oing, JJ.

11629-
11629A In re Jose Verdugo,
An Incapacitated Person

Index 500137/09

- - - - -

Michael Flomenhaft, Esq.,
Nonparty Appellant,

-against-

Schwartz Goldstone & Campisi, LLP,
Nonparty Respondent.

_____

Rubin Law PLLC, New York (Denise A. Rubin of counsel), for appellant.

Schwartz, Goldstone, Campisi & Kates, LLP, New York (Herbert Rodriguez, Jr. of counsel), for respondent.

Newman Ferrara LLP, New York (Ricardo M. Vera of counsel), for Roberto Lopez, guardian.

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Order, Supreme Court, New York County (Tanya R. Kennedy, J.), entered January 7, 2019, which, inter alia, denied the motion of nonparty outgoing attorney Michael Flomenhaft, Esq. (Flomenhaft) for a protective order and granted the cross motion of nonparty successor counsel Schwartz Goldstone & Campisi, LLP (SGC) to the extent of compelling certain discovery, unanimously affirmed, with costs. Order, same court and Justice, also entered January 7, 2019, which, insofar as appealed from as limited by the briefs, denied the branches of Flomenhaft's motion to set a date for an attorney's fee hearing and limit the scope thereof, unanimously affirmed, with costs.

The record shows that Flomenhaft was retained as trial counsel in a personal injury action brought on behalf of the

subject incapacitated person prior to a guardian having been appointed. SGC was later substituted as counsel in that action.

A hearing is necessary to determine whether cause existed to discharge Flomenhaft (*see Teichner v W & J Holsteins*, 64 NY2d 977, 979 [1985]; *Matter of Mason v City of New York*, 67 AD3d 475 [1st Dept 2009]), thus rendering his fee subject to forfeiture (*see People v Keeffe*, 50 NY2d 149, 156 [1980]; *Doviak v Finkelstein & Partners, LLP*, 90 AD3d 696, 699 [2d Dept 2011]). Contrary to Flomenhaft's claim, the so-ordered fee stipulation did not preclude consideration of this issue. Although it is true that, in general, once an order has been entered recognizing a charging lien, it bars any challenge to the rendering of the underlying legal services (*see Lusk v Weinstein*, 85 AD3d 445 [1st Dept 2011], *lv denied* 17 NY3d 709 [2011]; *Molinaro v Bedke*, 281 AD2d 242 [1st Dept 2001]), the stipulated order at issue here also expressly provided that SGC did not waive "any claims or defenses w[ith] respect to fees or expenses" and that a hearing would be held "regarding all fee and expense issues."

Because the subject discovery is material and necessary to

the question of Flomenhaft's entitlement to fees (*see generally Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406-407 [1968]), the motion court providently exercised its discretion in requiring Flomenhaft to provide it, or to provide an affidavit explaining why he cannot produce same.

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

ENTERED: JUNE 11, 2020

CLERK

Richter, J.P., Manzanet-Daniels, Kapnick, Kern, Oing, JJ.

11630 The People of the State of New York, Ind. 2993/14
Respondent,

-against-

Tramayer Williams,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Jose David Rodriguez Gonzalez of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Eric Del Pozo of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered May 7, 2015, convicting defendant, after a jury trial, of aggravated harassment of an employee by an inmate, and sentencing him, as a second felony offender, to a term of 2 to 4 years, unanimously affirmed.

The court providently exercised its discretion in precluding defendant from cross-examining a Department of Correction captain about a pending disciplinary investigation. The allegations underlying the pending investigation involved a violation of Department policy that had no bearing on the officer's credibility, whether in general or in this case (*see People v Smith*, 27 NY3d 652 [2016]). Defendant's contention that the pending investigation provided the officer with a motive to fabricate in order to avoid further disciplinary exposure is speculative and unsupported (*see People Howard*, 158 AD3d 455, 455 [1st Dept 2018], *lv denied* 31 NY3d 1083 [2018]).

The court also providently exercised its discretion in precluding defendant from introducing a Correction document that had no probative value under the circumstances of the case (*see People v Petty*, 7 NY3d 277, 286 [2006]). To the extent the document at issue, a card, contained anything relevant, the same relevant fact was stipulated to by the parties. Defendant asserts that the card also contained a significant handwritten notation that was allegedly added after this incident as part of a coverup regarding the officers' use of force against defendant. However, by viewing the card, the jury would have had no way of determining whether the notation was placed on the card before or after the incident. Furthermore, defendant received a full opportunity to explore the issue of the notation on the card by way of cross-examination and summation.

Neither of the rulings at issue violated defendant's constitutional rights to cross-examine witnesses and present a defense. In any event, any constitutional or nonconstitutional error was harmless in view of the overwhelming evidence of guilt,

which included the testimony of multiple officers and corroborating photographic evidence (*see People v Crimmins*, 36 NY2d 230 [1975]).

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

ENTERED: JUNE 11, 2020

CLERK

Richter, J.P., Manzanet-Daniels, Kapnick, Kern, Oing, JJ.

11631-
11631A The People of the State of New York, Respondent,

Ind. 4128/16
97/17
1631/17

-against-

Shakur Young,
Defendant-Appellant.

_____

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

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

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Judgments, Supreme Court, New York County (Patricia M. Nuñez, J. at diversion hearing; Gregory Carro, J. at plea and sentencing), rendered September 20, 2017, as amended October 13, 2017 and February 21, 2018, convicting defendant, upon his pleas of guilty under three indictments, of burglary in the third degree (seven counts) and bail jumping in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 3½ to 7 years, unanimously affirmed.

Defendant was eligible for judicial diversion based on two indictments that charged him with burglary in the third degree, a qualifying offense (*see* CPL 216.00[1], 410.91[5]; Penal Law § 140.20). A third indictment, which charged him solely with bail jumping in the second degree, did not render him ineligible, because that crime is neither a qualifying nor disqualifying offense (*see* CPL 216.00[1]; Penal Law § 215.56). The inclusion of a nonqualifying offense in an indictment "will not prevent an

otherwise eligible defendant from making an application for judicial diversion" (*People v Smith*, 139 AD3d 131, 136 [1st Dept 2016], *lv denied* 28 NY3d 1031 [2016]). For the reasons set forth in *Smith* (*id.* at 134-137), we conclude that a separate indictment that charges only a nonqualifying offense, but was part of the same disposition as one or more other indictments that contain qualifying offenses, does not render an otherwise eligible defendant ineligible for judicial diversion. Thus, the court should not have deemed defendant statutorily ineligible.

Regardless of defendant's eligibility, the record supports the court's alternative holding, in which it denied judicial diversion. The court providently exercised its discretion in determining, without first ordering an alcohol and substance abuse evaluation report, that judicial diversion was not warranted (CPL 216.05[1]). "Such an evaluation is permissive" (*People v O'Keefe*, 112 AD3d 524, 524 [1st Dept 2013], *lv denied* 23 NY3d 1023 [2014]; *see also People v Carper*, 124 AD3d 1319 [4th Dept 2015], *lv denied* 25 NY3d 949 [2015]; *Matter of Carty v Hall*, 92 AD3d 1191, 1192 [3d Dept 2012]). The court concluded that defendant's criminal record, which included numerous felonies, rendered him an unsuitable candidate for diversion, regardless of

what an evaluation might reveal, and there is no basis to disturb that determination (*see O'Keefe*, 112 AD3d at 525).

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 11, 2020

CLERK

Richter, J.P., Manzanet-Daniels, Kapnick, Kern, Oing, JJ.

11632 Alexander Astrakan, Index 306426/11
Plaintiff-Respondent,

-against-

City of New York, et al.,
Defendants-Appellants,

Northeast and Metro Marine Inc.,
Defendant.

_____

Schnader, Harrison, Segal & Lewis, LLP, New York (Theodore L. Hecht of counsel), for City of New York and New York City Department of Transportation, appellants.

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Jana Slavina Farmer of counsel), for B&H Engineering P.C., appellant.

Grey & Grey, LLP, Farmingdale (Evelyn F. Gross of counsel), for respondent.

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Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about April 16, 2019, which, to the extent appealed from as limited by the briefs, denied defendant B&H Engineering P.C.'s (B&H) motion for summary judgment dismissing the common-law negligence and Labor Law §§ 200, 240(1), and 241(6) claims as against it, and denied defendants City of New York and New York City Department of Transportation's (City) cross claims against it, and denied the City's motion for summary judgment dismissing the complaint and all cross claims against it and on its common-law and contractual indemnification cross claims against B&H, unanimously modified, on the law, to grant B&H's motion except as to the City's cross claim against it for contractual indemnification to the extent not barred by the anti-subrogation

rule, and to grant the City's motion as to the complaint and cross claims against it, and otherwise affirmed, without costs.

Supreme Court improvidently exercised its discretion in denying the City's motion for summary judgment as untimely because it was made more than 60 days after the note of issue was filed, in violation of the court's part rules. In fact, at the time of the filing of the note of issue, and for more than 60 days thereafter, the case was assigned to a different part (*see Gomez v Penmark Realty Corp.*, 50 AD3d 607 [1st Dept 2008]), and the City showed that it had complied with the rules of the part to which the case had originally been assigned.

Plaintiff, a bridge inspector, was injured while performing an inspection of a City bridge, pursuant to a contract providing for periodic bridge inspections to determine any necessary future repairs. Upon consideration of the contract and the work performed by plaintiff, it is clear that he was not engaged in an activity within the ambit of Labor Law § 240(1) or 241(6) at the time of his accident (*see Martinez v City of New York*, 93 NY2d 322, 326 [1999]; *Bosse v City of Hornell*, 197 AD2d 893, 894 [4th Dept 1993]; *Shpizel v Reo Realty & Constr. Co.*, 288 AD2d 291 [2d Dept 2001]; *Russ v State of New York*, 267 AD2d 833, 834 [3d Dept 1999]).

Neither the City nor B&H can be held liable for plaintiff's injuries under Labor Law § 200 or the common law, because plaintiff's accident arose from the means and methods by which he

gained access to his work, and neither the City nor B&H controlled those means and methods (*see Mitchell v New York Univ.*, 12 AD3d 200 [1st Dept 2004]). Plaintiff does not contest that his Longshore and Harbor Workers' Compensation Act and Jones Act claims against the City must be dismissed.

The City's cross claim against B&H for breach of contract for failure to procure insurance must be dismissed because B&H procured an insurance policy naming the City as an additional insured. To the extent of such coverage, the City and B&H's remaining cross claims against each other are barred by the anti-subrogation rule (*see Cuzzi v Brook Shopping Ctr.*, 287 AD2d 403, 403-404 [1st Dept 2001]). In any event, their cross claims against each other, as well as defendants North East Marine and Metro Marine's cross claims against the City, for common-law indemnification and contribution must be dismissed because neither the City nor B&H was negligent (*see Higgins v TST 375 Hudson, L.L.C.*, 179 AD3d 508, 511 [1st Dept 2020]). To the extent B&H asserts a contractual indemnification claim against the City, the claim must be dismissed because, as B&H acknowledges, there was no contract between them. However, neither side is entitled to summary judgment on the City's claim

for contractual indemnification against B&H based on a provision in the City's permit requirements, because the record does not establish whether, to the extent not barred by the anti-subrogation rule, B&H's permit requires it to indemnify the City.

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

ENTERED: JUNE 11, 2020

CLERK

Richter, J.P., Manzanet-Daniels, Kapnick, Kern, Oing, JJ.

11633-
11633A Dona Fischer, etc., et al.,
Plaintiffs-Appellants,

-against-

American Biltrite, Inc., et al.,
Defendants,

Burnham LLC,
Defendant-Respondent.

Index 190271/16

_____

The Gori Law Firm P.C., New York (Kyle A. Shamberg of counsel), for appellants.

Clyde & Co US LLP, New York (Thomas G. Carruthers of counsel), for respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about March 20, 2019, which granted defendant Burnham's motion for summary judgment dismissing the complaint against it, unanimously reversed, on the law, without costs, and the motion denied. Appeal from order, same court and Justice, entered on or about June 10, 2019, insofar as it denied plaintiffs' motion to renew, unanimously dismissed, without costs, as moot.

In connection with a motion for summary judgment in an action based on exposure to asbestos, defendant has the initial burden of showing "unequivocally" that its product could not have contributed to the causation of decedent's asbestos-related injury (*see Shanahan v Aerco Intl., Inc.*, 172 AD3d 534 [1st Dept 2019]; *see also Matter of New York City Asbestos Litig.*, 116 AD3d

545 [1st Dept 2014]).

Defendant Burnham failed to sustain its initial burden of demonstrating that its products could not have contributed to decedent's mesothelioma. Decedent's testimony identified defendant as the manufacturer of greenhouses in which he worked and cited three possible sources of asbestos: transite benches in the greenhouses, window glazing and the greenhouse boiler. Burnham provided no evidence demonstrating that its products could not have been the source of the asbestos that caused decedent's illness. It only pointed to gaps in plaintiffs' proof, which was insufficient to meet its burden (*see Ricci v A.O. Smith Water Prods. Co.*, 143 AD3d 516 [1st Dept 2016]). Even if the burden had shifted, plaintiffs' evidence in opposition raised an issue of fact as to whether Burnham had sold, distributed, and recommended asbestos-containing products such as those used in plaintiffs' family's gardening business. While hearsay, that evidence could be considered by the court since it was not the sole basis of the opposition (*see Long v Taida Orchids, Inc*, 117 AD3d 624, 625 [1st Dept 2014]).

Alternatively, even if the summary judgment motion had been properly granted, the court should have granted leave to renew in the interests of fairness and justice since plaintiffs presented an affidavit of decedent's estranged brother, which supplied

crucial evidence linking decedent's illness to Burnham's products.

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

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

ENTERED: JUNE 11, 2020

CLERK

Richter, J.P., Manzanet-Daniels, Kapnick, Kern, Oing, JJ.

11634 The People of the State of New York, Ind. 266/15
Respondent,

-against-

Thomas Person,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, Bronx County (Ralph Fabrizio, J. at speedy trial motion; April A. Newbauer, J., at plea and sentencing), rendered June 7, 2018, convicting defendant of attempted sexual abuse in the first degree, and sentencing him, as a second felony offender, to a term of 4 years with 15 years' postrelease supervision, unanimously affirmed.

The principal issue presented on this appeal is whether a recent amendment to the speedy trial statute, which grants a defendant who has pleaded guilty the right to raise a statutory speedy trial claim on appeal, also precludes a waiver of that right. We conclude that under this amendment, appellate review of the denial of a statutory speedy trial motion is no longer *forfeited* by a guilty plea, but such review may be voluntarily *waived*.

Initially, we find that defendant made a valid waiver of his right to appeal (*see People v Thomas*, 34 NY3d 545, 2019 NY Slip

Op [2019]; *People v Bryant*, 28 NY3d 1094, 1096 [2016]). The court's oral colloquy with defendant, when viewed as a whole, and in connection with a detailed written waiver, carefully separated the right to appeal from the rights automatically forfeited by a guilty plea, and otherwise satisfied the requirements of a valid waiver. Furthermore, the waiver was comprehensive and intended to encompass all waivable issues (*see People v Kemp*, 94 NY2d 831, 833 [1999]).

Formerly, a defendant who pleaded guilty automatically forfeited appellate review of a denial of a statutory speedy trial motion, as opposed to a constitutional claim (*People v Suarez*, 55 NY2d 940, 942 [1982]). The new version of CPL 30.30(6) provides that "an order finally denying a [30.30] motion to dismiss . . . shall be reviewable upon appeal from an ensuing judgment of conviction, notwithstanding the fact that such judgment is entered upon a plea of guilty."

Defendant relies heavily on the phrase "shall be reviewable," arguing that it renders review of a 30.30 issue mandatory and therefore nonwaivable. While this phrase clearly creates a reviewability that did not previously exist, the reviewability of an issue does not render it nonwaivable. On the contrary, the general purpose of an appeal waiver is to serve as an agreement not to raise otherwise reviewable issues on appeal. "A defendant's decision to waive appeal does not interfere with the court's jurisdiction, however; it is simply a decision not to

invoke the court's review power" (*People v Seaberg*, 74 NY2d 1, 9-10 [1989]).

We note that review by the Appellate Division of the claimed excessiveness of a sentence, even where a defendant has pleaded guilty and agreed to a particular sentence, is mandated not only by statute but also by the State Constitution (*People v Pollenz*, 67 NY2d 264, 267-268 [1986]; *People v Thompson*, 60 NY2d 513, 520 [1983]). Nevertheless, a defendant is free to voluntarily relinquish this otherwise mandatory review by validly waiving the right to appeal (*People v Lopez*, 6 NY3d 248, 255 [2006]). Similarly, the phrase "shall be reviewable" in CPL 30.30(6) unequivocally directs that appellate review of a 30.30 claim shall no longer be forfeited by a guilty plea, but neither that phrase, nor any other language in the statute, precludes a voluntary waiver.

Regardless of whether defendant made a valid waiver of his right to appeal, and whether that waiver forecloses the issues raised on this appeal, we find those issues unavailing. With regard to periods excluded because of the victim's serious illness (*see* CPL 30.30[4][g]; *People v Goodman*, 41 NY2d 888, 889 [1977]), we find that the People met their burden of providing satisfactory proof that the victim, a cancer patient, was medically unavailable despite diligent efforts. The remaining

periods at issue, even if included and added to the undisputedly includable time, would not be enough to require dismissal; in any event, the court properly excluded those periods.

Likewise, we perceive no basis for reducing the sentence.

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

ENTERED: JUNE 11, 2020

CLERK

Richter, J.P., Manzanet-Daniels, Kern, Oing, JJ.

11635 In re Wimbledon Fund, SPC (Class TT), Index 160576/17
Petitioner-Respondent,

-against-

Weston Capital Partners Master Fund II, Ltd.,
Respondent-Appellant,

Wimbledon Financing Master Fund Ltd.,
Respondent.

_____

Ballard Spahr LLP, New York (Eugene R. Licker of counsel), for appellant.

Cole Scholtz P.C., New York (Eric S. Latzer of counsel), for respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered on or about April 4, 2019, which denied the motion of respondent Weston Capital Partners Master Fund II, Ltd. (Weston) to dismiss the amended petition and granted said petition, unanimously reversed, on the law, without costs, and Weston's motion granted.

In this turnover proceeding, petitioner – a judgment creditor – seeks to recover funds from Weston, alleging that there was a fraudulent conveyance from judgment debtor Swartz IP Services Group Inc. (SIP) to Weston. Weston's contention that petitioner lacked standing because it released SIP is unavailing. While the settlement and release agreement that petitioner, SIP, and others signed in another action is not as clear as the one in *Koehler v Bank of Bermuda Ltd.* (544 F3d 78 [2d Cir 2008]), it

sufficiently shows that petitioner "intended to reserve [its] right to sue" Weston (*id.* at 84). Unlike the judgment creditor in *Allard v DeLorean* (884 F2d 464 [9th Cir 1989]), petitioner has not "executed and filed a full satisfaction of judgment" (*id.* at 466), and it is not "undisputed that the judgment has been satisfied" (*Oparaji v Madison Queens-Guy Brewer*, 302 AD2d 439, 440 [2d Dept 2003]).

Weston next argues that this proceeding is champertous because (1) David Bergstein, Graybox LLC, and/or SIP are funding the first $500,000 of this litigation and (2) petitioner and Graybox or its designee agreed to divide the first $4.8 million recovered in this action. However, *Graybox* is not bringing this lawsuit; rather, petitioner is. Furthermore, the instant action does not fall under the narrow scope of champerty (*see Trust for Certificate Holders of Merrill Lynch Mtge. Invs., Inc. Mtge. Pass-Through Certificates, Series 1999-C1 v Love Funding Corp.*, 13 NY3d 190, 199-201 [2009]).

Third, Weston contends that this proceeding should be dismissed under the doctrine of unclean hands. However, unclean hands is "equivalent" to in pari delicto, which "is not a defense to a fraudulent conveyance suit" (*Matter of Wimbledon Fin. Master Fund, Ltd. v Wimbledon Fund, SPC*, 162 AD3d 433, 434 [1st Dept 2018] [internal quotation marks omitted]). Even if unclean hands were applicable, Weston cites no precedent showing that petitioner's act of entering into a settlement agreement was

unconscionable or immoral (*Citibank, N.A. v American Banana Co., Inc.*, 50 AD3d 593, 594 [1st Dept 2008]); on the contrary, public policy favors the settlement of disputes. To be sure, Bergstein has unclean hands, but he is not bringing the instant proceeding (*cf. Levy v Braverman*, 24 AD2d 430 [1st Dept 1965]).

Nevertheless, the proceeding should have been dismissed on the ground that petitioner failed to sufficiently plead a fraudulent conveyance claim under Cayman Islands law, which applies in this case. Contrary to the motion court's finding, Weston did not concede that Cayman and New York law were the same with respect to fraudulent conveyance claims. Indeed, on appeal, it is not disputed that Cayman Islands and New York law differ.

"In the context of tort law, New York utilizes interest analysis to determine which of two competing jurisdictions has the greater interest in having its law applied in the litigation" (*Padula v Lilarn Props. Corp.*, 84 NY2d 519, 521 [1994]). "Given that fraudulent conveyance laws are 'conduct regulating,' 'the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders'" (*Atsco Ltd. v Swanson*, 29 AD3d 465, 466 [1st Dept 2006], citing *Cooney v Osgood Mach.*, 81 NY2d 66, 72 [1993][internal quotations omitted]). "'[T]he locus jurisdiction's interests in protecting the reasonable expectations of the parties who relied on it to govern their primary conduct[,] and in the admonitory effect that applying its

law will have on similar conduct in the future[,] assume critical importance . . . ." (*Atsco Ltd.*, 29 AD3d at 466, citing *Schultz v Boy Scouts of Am.*, 65 NY2d 189, 198 [1985]). Further, as "the purpose of fraudulent conveyance laws is to aid creditors who have been defrauded by the transfer of property," consideration of the residency of the parties, particularly the creditors, is also required to determine their reasonable expectations (*Atsco Ltd.*, 29 AD3d at 466; *see also Padula*, 84 NY2d at 521). Applying these principles, the law of the Cayman Islands applies to petitioner's fraudulent conveyance claim. Petitioner, who is the creditor allegedly injured by the fraudulent transfer of the funds at issue, is a Cayman Islands domiciliary. Moreover, petitioner is seeking the return of funds which were allegedly fraudulently transferred to Weston, also a Cayman Islands domiciliary. Additionally, the Cayman Islands has the greatest interest in protecting the reasonable expectations of its residents, both petitioner and respondent Weston, who relied on Cayman Islands law to govern their conduct. Although SIP, the transferor of the funds, is domiciled in Texas, and the bank account into which the funds were transferred is located in New York, it is the Cayman Islands that has the most significant contacts with the matter in dispute. Thus, Cayman Islands law should apply.

Upon application of Cayman Islands law, petitioner's fraudulent conveyance claim should have been dismissed on the

ground that it was not sufficiently alleged in the petition. Both sides agree that, to make out a cause of action under the Cayman Islands' Fraudulent Dispositions Law, petitioner must establish, inter alia, that SIP disposed of property with an intent to defraud and at an undervalue. They also agree that intent to defraud means an intention of a transferor wilfully to defeat an obligation owed to a creditor. The petition fails to allege that SIP transferred money to Weston with the requisite intent to defraud petitioner. Therefore, it should have been dismissed.

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

ENTERED: JUNE 11, 2020

CLERK

Richter, J.P., Manzanet-Daniels, Kapnick, Kern, Oing, JJ.

11636 Derek Hewitt, Index 20953/17E
Plaintiff-Appellant-Respondent,

-against-

NY 70th Street LLC,
Defendant,

Sweeney & Conroy Inc.,
Defendant-Respondent-Appellant,

Structure Tech New York, Inc.,
Defendant-Respondent.

- - - - -

Structure Tech New York, Inc.,
Third-Party Plaintiff-Respondent,

-against-

Spring Scaffolding LLC,
Third-Party Defendant-Respondent-Appellant.

_____

Greenberg Law P.C., New York (Robert J. Menna of counsel), for appellant-respondent.

Bartlett LLP, White Plains (David C. Zegarelli of counsel), for Sweeney & Conroy Inc., respondent-appellant.

Pillinger Miller Tarallo, LLP, Elmsford (Michael Neri of counsel), for Spring Scaffolding LLC, respondent-appellant.

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for respondent.

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Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered August 14, 2019, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment on the issue of liability on his Labor Law §§ 200, 240(1), and 241(6) claims, granted those branches of defendant Sweeney & Conroy Inc.'s (Sweeney) cross motion which sought

summary judgment dismissing plaintiff's Labor Law § 241(6) claim insofar as predicated on certain Industrial Code (12 NYCRR) regulations, and his Labor Law § 200 claim as against it, but denied those branches which were for summary judgment dismissing plaintiff's Labor Law § 241(6) claim insofar as predicated on certain other Industrial Code (12 NYCRR) regulations, and for unconditional summary judgment on its cross claim for contractual indemnification against defendant/third-party plaintiff Structure Tech New York, Inc. (Structure Tech), and denied third-party defendant Spring Scaffolding LLC's (Spring) cross motion for summary judgment dismissing the third-party complaint, unanimously modified, on the law, to grant those branches of plaintiff's motion which were for summary judgment on the issue of liability on his Labor Law § 240(1) claim against Sweeney, and on his Labor Law § 200 and common-law negligence claims against Structure Tech, and to deny that branch of Sweeney's cross motion which was for summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims as against it, and otherwise affirmed, without costs.

Sweeney, the general contractor, subcontracted with Structure Tech to perform exterior general construction work. Structure Tech, in turn, subcontracted with Spring, plaintiff's employer, to erect and dismantle scaffolding. Plaintiff's accident occurred when, while he was at ground level holding an I-beam that was being hoisted, a Structure Tech employee

dislodged a metal baluster from the third-floor balcony railing, which fell and struck plaintiff in the head and face.

Plaintiff should have been awarded summary judgment on the issue of liability on his Labor Law § 240(1) claim as against Sweeney because there was no overhead protection provided to plaintiff (*Hill v Acies Group, LLC et al.*, 122 AD3d 428 [1st Dept 2014]). Thus even if, as Structure Tech's superintendent testified, plaintiff was in an area of the worksite where he was not supposed to be at the time of his accident, this would at most constitute comparative negligence which is not a defense to a Labor Law § 240(1) claim (*id.; see also Gordon v Eastern Ry. Supply*, 82 NY2d 555, 563 [1993]; *Vasquez v Cohen Bros. Realty Corp.*, 105 AD3d 595, 598 [1st Dept 2013]; *Luna v Zoological Socy. of Buffalo, Inc.*, 101 AD3d 1745, 1746 [4th Dept 2012]). Accordingly, the issue of Sweeney's liability under Labor Law § 241(6) is academic (*see e.g. Saquicaray v Consolidated Edison Co. of N.Y., Inc.*, 171 AD3d 416, 417 [1st Dept 2019]; *Berisha v 209-219 Sullivan St. L.L.C.*, 156 AD3d 457, 458 [1st Dept 2017]).

Plaintiff also should have been awarded summary judgment on his Labor Law § 200 and common-law negligence claims as against Structure Tech. As a subcontractor and, therefore, the statutory agent of the general contractor, Structure Tech may be held liable pursuant to Labor Law § 200 and under common-law negligence for injuries caused by a dangerous condition that it caused or created or of which it had actual or constructive

notice (*DeMaria v RBNB 20 Owner, LLC*, 129 AD3d 623, 625 [1st Dept 2015]; *see Sledge v S.M.S. Gen. Contrs., Inc.*, 151 AD3d 782, 783 [2d Dept 2017]). Since no party disputes that a Structure Tech employee was responsible for dislodging the baluster and allowing it to fall and strike plaintiff, Structure Tech is liable to plaintiff under Labor Law § 200 and common-law negligence.

However, an issue of fact exists as to Sweeney's liability to plaintiff under these claims based on the testimony of Structure Tech's superintendent that it was, in fact, Sweeney's superintendent who instructed Structure Tech to cut the baluster that ultimately struck plaintiff. If credited, this testimony could support a finding that Sweeney actually exercised supervisory control over the worksite so as to trigger liability under these claims (*see generally Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]; *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]).

In view of the foregoing, the court properly awarded Sweeney only conditional summary judgment on its contractual indemnification claim against Structure Tech, i.e., subject to a determination as to their respective degrees of negligence (*see e.g. Gonzalez v G. Fazio Constr. Co., Inc.*, 176 AD3d 610, 611 [1st Dept 2019]).

Finally, the court properly denied Spring's motion for summary judgment dismissing Structure Tech's third-party

complaint against it. The testimony of Structure Tech's superintendent that plaintiff was in an area of the worksite where he was not supposed to be at the time of his accident, if credited, could support a finding that plaintiff's accident and injuries arose from the performance of Spring's work and were caused by its negligent acts or omissions, thus triggering Spring's duty to indemnify Structure Tech under the terms of their agreement (*see e.g. Ramirez v Almah, LLC*, 169 AD3d 508 [1st Dept 2019]).

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

ENTERED: JUNE 11, 2020

CLERK

Richter, J.P., Manzanet-Daniels, Kapnick, Kern, Oing, JJ.

11638N Leroy Richardson, et al., Index 29924/18E
Plaintiffs-Respondents,

-against-

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

Metropolitan Transportation Authority, et al.,
Defendants-Appellants.

_____

Krez & Flores, LLP, New York (N. Jeffrey Brown of counsel), for appellants.

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Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered February 11, 2019, which, to the extent appealed from, denied defendants Metropolitan Transportation Authority and Triborough Bridge and Tunnel Authority's (Transit Authorities) motion for a change of venue from Bronx County to New York County, unanimously reversed, on the law, without costs, and the motion granted.

After plaintiffs commenced this action in Bronx County, the Transit Authorities timely served a demand for a change of venue as of right to New York County, where one of them has its principal office (*see* CPLR 505[a]; 511). Plaintiffs did not respond to the demand, and the Transit Authorities timely moved to change venue (*see* CPLR 510[1]; 511[b]). In opposition to the motion, plaintiffs did not dispute that their choice of venue was improper, but requested that venue be placed in Kings County, where the accident occurred. No other defendant timely appeared

in opposition to the motion, although the City defendants submitted a belated affirmation asserting that venue should be placed in Kings County under CPLR 504(3).

By failing to respond to the Transit Authorities' demand to change venue to a proper forum, plaintiffs forfeited their right to select venue (*Lynch v Cyprus Sash & Door Co.*, 272 AD2d 260 [1st Dept 2000]). Further, no party moved to transfer venue to an alternate county (*see Kelson v Nedicks Stores*, 104 AD2d 315 [1st Dept 1984]; *Fisher v Finnegan-Curtis*, 8 AD3d 527 [2d Dept 2004]). Thus, once the Transit Authorities had followed the procedure set forth in CPLR 511 and established that the county chosen by plaintiffs was improper, their motion to change venue to New York County as of right should have been granted (*Lynch*, 272 AD2d at 261; *Simpson v Sears, Roebuck & Co.*, 212 AD2d 473 [1st Dept 1995]).

The cases relied on by the motion court, which involve the application of CPLR 502, are distinguishable. In *Alvarez v Metropolitan Transp. Co.* (89 AD3d 558 [1st Dept 2011]), the court properly exercised its discretion to retain venue in the county properly chosen by the plaintiff, and in *Carey v Empire Paratransit Corp.* (85 AD3d 520 [1st Dept 2011], *lv dismissed* 18 NY3d 900 [2012]), the moving party raised the issue of conflicting venue provisions. Here, as indicated, plaintiffs

forfeited their right to choose venue, and the City defendants did not move to change venue, and did not even timely raise the issue of conflicting venue provisions in opposition to the Transit Authorities' motion.

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

ENTERED: JUNE 11, 2020

CLERK

Friedman, J.P., Mazzarelli, Gesmer, Singh, González, JJ.

11639 The People of the State of New York, Ind. 623/12
Respondent,

-against-

Michael Crum,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered September 13, 2016, convicting defendant, after a jury trial, of murder in the second degree, attempted murder in the first and second degrees, assault in the first degree, attempted assault in the first degree (two counts), and criminal possession of a weapon in the second degree (two counts), and sentencing him, as a second violent felony offender, to an aggregate term of 35 years to life; and order, same court (Michele Rodney, J.), entered on or about March 4, 2019, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

At trial, defendant did not preserve any claim relating to cell site location information obtained without a warrant, and the motion court providently exercised its discretion under CPL 440.10(2)(b) when it rejected defendant's attempt to raise this issue by way of a postconviction motion. Defendant asserts that

it would have been futile for trial counsel to raise the issue because the Supreme Court of the United States had not yet decided *Carpenter v United States* (585 US __, 138 S Ct 2206 [2018]), a case that we assume, without deciding, applies here because defendant's direct appeal was pending at the time that case was decided. We conclude that defendant should not be permitted to avoid the consequences of the lack of preservation. Although *Carpenter* had not yet been decided, and trial counsel may have reasonably declined to challenge the cell site information, defendant had the same opportunity to advocate for a change in the law as did the litigant who ultimately succeeded in doing so (*see People v Stewart*, 67 AD3d 553, 554 [2009], *affd* 16 NY3d 839 [2011]). In the closely related context of preservation, the Court of Appeals has expressly rejected the argument that an "appellant should not be penalized for his failure to anticipate the shape of things to come" (*People v Reynolds*, 25 NY2d 489, 495 [1969]; *see also People v Hill*, 85 NY2d 256, 262 [1995]). In any event, regardless of the admissibility of the cell site data, there was overwhelming evidence, including defendant's confession, as well as videotapes that independently established his guilt.

The trial court providently exercised its discretion when it precluded defense counsel from making a summation argument that was not based on the evidence in this case, but instead referred to news media coverage of unrelated cases. Defendant did not

preserve any claim that he was constitutionally entitled to make this argument, or any of his claims of prosecutorial misconduct at various stages of the trial, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. While there were improprieties involving the prosecutor's undue emphasis on his personal participation in the case, they were not so egregious as to require reversal (*see People v D'Alessandro*, 184 AD2d 114, 118-120 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]), and any error was harmless in light of the overwhelming evidence of guilt, as discussed above (*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]; *People v Love*, 57 NY2d 998 [1982]). 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]).

A grand jury's indictment of defendant for depraved indifference murder, after a prior grand jury had indicted him for intentional murder, did not violate CPL 170.95(3). The second presentation did not require permission from the court, because the first indictment cannot be deemed a dismissal of the

depraved indifference count in the absence of any indication that the first grand jury was aware of or considered that charge (*see People v Wilkins*, 68 NY2d 269, 274 [1986]). The rule that a person may not be convicted of both intentional and depraved indifference murder (*see People v Gallagher*, 69 NY2d 525, 529-530 [1987]) applies to verdicts after trial, not indictments. These charges may be presented to a trial jury in the alternative (as occurred in this case, where defendant was acquitted of depraved murder but nevertheless claims a spillover effect). Furthermore, the People were not required to present both charges to the same grand jury (*see People v Cade*, 74 NY2d 410, 415 [1989]).

The court lawfully imposed consecutive sentences for murder and weapon possession, because the record shows that defendant's unlawful possession of a handgun outside his home or place of business was complete before he shot at the four victims (*see People v Brown*, 21 NY3d 739, 752 [2013]). We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 11, 2020

CLERK

Friedman, J.P., Mazzarelli, Gesmer, Singh, González, JJ.

11640 In re Richard Melendez, Index 100692/18
Petitioner-Appellant,

-against-

James P. O'Neill, etc., et al.,
Respondents-Respondents.

_____

Law Office of Joseph F. Kilada, Garden City (Nicole Wertz Alloway of counsel), for appellant.

James E. Johnson, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondents.

_____

Determination of respondents, dated February 1, 2018, which, after a hearing, found petitioner guilty of subjecting a fourteen-year-old girl to sexual contact and dismissed him from service within the New York City Police Department, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Carol R. Edmead, J.] entered November 20, 2018), dismissed, without costs.

Substantial evidence, including the detailed testimony of two camp counselors and two child abuse investigators, supports respondents' finding that petitioner improperly touched a child and endangered her welfare (*300 Gramatan Ave. Assocs. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]; *Matter of American Tel. & Tel. Co. v State Tax Commn.*, 61 NY2d 393, 400 [1984]). Although the child's statements were relayed to the court by the investigators' testimony, hearsay evidence is admissible in an

administrative hearing, and may constitute substantial evidence for purposes of article 78 review (*Matter of Aliberti v O'Connor*, 231 AD2d 472, 473 [1st Dept 1996]).

While petitioner provided explanations for the conduct at issue, it was the prerogative of the hearing officer, who saw and heard the witnesses, to reject his explanations as not credible (*Matter of Tighe v Kelly*, 305 AD2d 274 [1st Dept 2003], *lv denied* 100 NY2d 513 [2003]; *Matter of Cassino v Kerik*, 301 AD2d 403 [1st Dept 2003], *lv denied* 100 NY2d 502 [2003]). Based on the detailed nature of their oral statements and written accounts, the hearing officer rationally rejected any claims that the written statements provided by the child and her mother were fabricated or coerced, as well their recantation, which occurred within months of petitioner's arrest.

Petitioner's contention that he was denied due process because he was unable to cross-examine the child and her therapist is not preserved for review since it was not raised during the administrative hearing, and, in any event, is unavailing as both individuals were called, yet declined to testify.

Based on the findings, the penalty of dismissal does not shock the conscience (*see Matter of Ciollo v Bratton*, 147 AD3d 662, 663 [1st Dept 2017]; *Matter of Tighe*, 305 AD2d at 274; *Matter of Cassino*, 301 AD2d at 403).

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

ENTERED: JUNE 11, 2020

CLERK

Friedman, J.P., Mazzarelli, Gesmer, Singh, González, JJ.

11641-
11641A In re Susan A., Dkt. F-44460
10/18S & U

Petitioner-Appellant,

-against-

Christopher O.,
Respondent-Respondent.

_____

Susan A., appellant pro se.

_____

Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about September 27, 2018, which denied petitioner's objections to the findings of the Support Magistrate that Family Court lacked continuing jurisdiction over a 2011 child support order, and dismissed the petition for upward modification of the child support order, and order, same court and Judge, entered on or about December 28, 2018, which denied petitioner's objections to the Support Magistrate's order, and dismissed her petition for failure to show a change of circumstances, unanimously affirmed, without costs.

Respondent resides in Texas. It is undisputed that petitioner and the child no longer resided in New York by January 17, 2017. Petitioner failed to show that she or the child resided here when the June 5, 2018 petition was filed (*see Matter of Deazle v Miles*, 77 AD3d 660, 662-663 [2d Dept 2010]). The month-to-month lease that petitioner showed to the Support Magistrate during the August 2018 modification hearing was not entered into evidence and is not included in the record. Even if

a month to month lease commencing June 1, 2018 (as petitioner claims) were in the record, that would be insufficient to establish that she or the child were New York State residents as a matter of law when the June 5, 2018 petition was filed, since neither such a document nor any evidence admitted at the hearing demonstrates a significant connection within this state "as the result of living [here] for some length of time during the course of a year" (*Wittich v Wittich*, 210 AD2d 138, 139 [1st Dept 1994] [internal quotation marks omitted]). In fact, the evidence presented during the hearing indicated that petitioner and the child were residents of Rhode Island.

Even if respondent consented to New York's continuing jurisdiction by filing his own modification petition (*see* Family Ct Act § 580-205[a][2]), no competent evidence was adduced as to the child's financial needs, as required to establish a change of circumstances to warrant an upward modification (*see Matter of Brescia v Fitts*, 56 NY2d 132, 140-141 [1982]*; Matter of Fensterheim v Fensterheim*, 55 AD2d 516, 516-517 [1st Dept 1976]).

Contrary to petitioner's contention, the October 6, 2018 petition was properly dismissed without a hearing because she submitted no additional evidence regarding her or the child's residency, or as to how the child's needs were not being met (*see Matter of Loveless v Goldbloom*, 141 AD3d 662, 663 [2d Dept 2016]).

Petitioner failed to preserve her contention that Family

Court harbored a bias against her (*see Matter of Maureen H. v Samuel G.*, 104 AD3d 470, 471 [1st Dept 2013]). In any event, petitioner failed to sustain her burden to establish that the court's rulings were the result of a bias against her, as the record shows that the court's skepticism of her claims reflects gaps in the proof (*see Matter of Lourdes G. v Julio P.*, 115 AD3d 510, 511 [1st Dept 2014], *lv denied* 24 NY3d 1051 [2014]).

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

ENTERED: JUNE 11, 2020

CLERK

Friedman, J.P., Mazzarelli, Gesmer, Singh, González, JJ.

11642 Fresenius Kabi USA, LLC, Index 651871/18
Plaintiff-Appellant,

-against-

Hetero USA, Inc.,
Defendant-Respondent.

_____

Swanson, Martin & Bell LLP, Chicago IL (Patrick G. Cooke of the bar of the State of Illinois, admitted pro hac vice, of counsel), for appellant.

Greenberg Traurig, LLP, New York (David Jay of counsel), for respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered November 29, 2018, which granted defendant's motion for summary judgment dismissing the damages claim for lost profits, unanimously affirmed, with costs.

Plaintiff seeks damages for lost profits resulting from defendant's alleged breach of the parties' "Product Distribution Agreement." The agreement contains a limitation of liability clause that provides, in pertinent part, "Except for indemnification obligations under this agreement, no party shall be liable to the other party for indirect, incidental, special or consequential damages arising out of performance under this agreement, including without limitation, loss of . . . profits" (all caps deleted). However, plaintiff argues that the damages it seeks are recoverable because they are direct, or general, as opposed to consequential (*see Biotronik A.G. v Conor Medsystems Ireland, Ltd.*, 22 NY3d 799, 806 [2014]). We reject this

argument. Whether damages for lost profits are considered general or consequential turns on "whether the lost profits flowed directly from the contract itself or were, instead, the result of a separate agreement with a nonparty" (*id.* at 808). Plainly, recovery of the damages plaintiff seeks is barred by the parties' agreement. Plaintiff has not provided a persuasive explanation for why the parties included the "lost profits" language in the limitation of liability clause if they did not intend to preclude the recovery of lost profits.

Contrary to plaintiff's contention, the indemnification provision mentioned in the limitation of liability clause requires the parties to indemnify one another against claims by third parties arising from their losses.

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

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

ENTERED: JUNE 11, 2020

CLERK

Friedman, J.P., Mazzarelli, Gesmer, Singh, González, JJ.

11643 The People of the State of New York, Ind. 754/15
Respondent,

-against-

Pashuk Ndreka,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Derek M. Ciulla 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 (Miriam R. Best, J.), rendered July 18, 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: JUNE 11, 2020

CLERK

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

Friedman, J.P., Mazzarelli, Gesmer, Singh, González, JJ.

11644 Belkis Monahan, Index 301202/14
Plaintiff-Appellant,

-against-

Juan O. Reyes, et al.,
Defendants-Respondents.

_____

Mitchell Dranow, Sea Cliff, for appellant.

Robert D. Grace, Brooklyn, for respondents.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about April 13, 2018, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the complaint based on plaintiff's inability to demonstrate that she suffered a serious injury to her cervical spine within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants satisfied their prima facie burden to show that plaintiff did not sustain a serious injury to her cervical spine by submitting the report of their orthopaedic surgeon, who found that plaintiff's own MRI report showed preexisting degenerative changes not causally related to the accident (*see Reynoso v Tradore*, 180 AD3d 531, 531 [1st Dept 2020]; *Campbell v Drammeh*, 161 AD3d 584, 585 [1st Dept 2018]). Although the orthopaedic surgeon did not compare plaintiff's range of motion to normal values, he found no objective evidence of injury upon recent examination using diagnostic tests (*see Rodriguez v Konate*, 161

AD3d 565, 566 [1st Dept 2018]).

In opposition, plaintiff failed to raise an issue of fact. None of her experts addressed the evidence of preexisting degenerative conditions shown in her own medical records or explained why they could not have been the cause of her conditions (*see Williams v Laura Livery Corp.*, 176 AD3d 557, 558 [1st Dept 2019]; *Auquilla v Singh*, 162 AD3d 463, 464 [1st Dept 2018]). Plaintiff's experts also failed to adequately address a prior motor vehicle accident which resulted in alleged neck injuries or to negate any inference that that accident was the cause of her current conditions (*see Ogando v National Frgt., Inc.*, 166 AD3d 569, 570 [1st Dept 2018]).

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

ENTERED: JUNE 11, 2020

CLERK

Friedman, J.P., Mazzarelli, Gesmer, Singh, González, JJ.

11645 The People of the State of New York, Ind. 3711/16
Respondent,

-against-

Alfonse Lesane,
Defendant-Appellant.

_____

The Legal Aid Society, New York (David Crow of counsel), and Schulte Roth & Zabel LLP, New York (Amanda Wichot of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Anthony J. Ferrara, J. at suppression hearing; Robert M. Stolz, J. at jury trial and sentencing), rendered August 2, 2017, convicting defendant of criminal possession of a controlled substance in the third degree and unlawful possession of marijuana, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of six years, unanimously affirmed.

The court properly denied defendant's suppression motion. Defendant argues that, without the proper predicate, an officer conducted something "akin" to a strip search, as well as improperly doing so in public view. However, the record supports the hearing court's finding to the contrary. There is no basis for disturbing the court's credibility determinations. There was no strip search, or otherwise highly invasive search, when the officer pulled defendant's waistband back, without pulling his pants down, and reached into defendant's underwear to retrieve a

bag containing drugs. Defendant was not disrobed in any way, and his genitals were not exposed to the view of the officer or anyone else (*see People v Butler*, 27 AD3d 365, 369 [1st Dept 2006], *lv denied* 6 NY3d 893 [2006]). Moreover, the bag recovered from defendant was partially protruding outside of defendant's clothing. Thus, based on his observations of defendant and defendant's conduct, the officer reasonably concluded that defendant was hiding drugs in his pants.

The court's *Sandoval* ruling, which permitted only a limited inquiry into the underlying facts of defendant's extensive criminal record, balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]). In any event, any error in the court's ruling was harmless (*see People v Grant*, 7 NY3d 421, 424-425 [2006]). There was overwhelming evidence of possession with intent to sell, including the quantity of drug packages that defendant possessed, along with police observations of defendant making what reasonably appeared to be a sale to an unapprehended buyer.

The court properly exercised its discretion when it admitted expert testimony concerning circumstances that indicate an intent to sell drugs as opposed to possession for personal use (*see People v Hicks*, 2 NY3d 750 [2004]). The testimony was within the

scope permitted under *Hicks*, and it did not invade the province of the jury. In any event, any error in admitting this testimony was harmless in light of the overwhelming evidence of defendant's intent to sell, as discussed above.

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

ENTERED: JUNE 11, 2020

CLERK

Friedman, J.P., Mazzarelli, Gesmer, Singh, González, JJ.

11646 In re Dawn S.,
Petitioner-Appellant,

-against-

Michael L. Y.,
Respondent-Respondent.

- - - - -

In re Michael L. Y.,
Petitioner-Appellant,

-against-

Dawn S.
Respondent-Respondent.

Dkt. M-6645
V-510-13
V-19184-13
V32171/13
V-510-13/15A
V-510-13/16B
V-19184-13/16A
V-32171-13/16A

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Alexander M. Dudelson, Brooklyn, appellant/respondent.

Law and Mediation Office of Helene Bernstein, PLLC, Brooklyn (Helene Bernstein of counsel), for respondent/appellant.

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

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Order, Family Court, New York County (J. Machelle Sweeting, J.), entered on or about May 24, 2018, which, after a hearing, awarded sole legal and physical custody of the subject children to respondent father with visitation to petitioner mother, unanimously affirmed, without costs.

The court providently exercised its discretion in awarding the father sole legal and primary residential custody of the children, awarding the mother parenting time with the children on weekends and a mid-week overnight, and awarding the parties equal amounts of vacation and holiday time with the children. The court's determination was based upon an extensive assessment of

the parties' testimony and credibility, and has a sound and substantial basis in the record (*see Eschbach v Eschbach*, 56 NY2d 167, 173-174 [1982]). The children had spent approximately equal amounts of time with both parents from birth, and both parents were loving and provided appropriate housing for the children, but the father was actively involved with the children's schooling and had been active in their medical and daily care, adequately addressing their needs (*see Matter of Charmaine L. v. Kenneth D.*, 76 AD3d 910 [1st Dept 2010], *lv denied* 16 NY3d 702 [2011]).

While the mother has many positive parenting skills, she exhibited poor judgment when she made the unilateral decision to remove one of the children from his school and enroll him in a different school without notice to the father. The court was in the best position to assess credibility in determining that the mother had sometimes allowed her boyfriend to discipline the children in an inappropriate manner.

The court considered the appropriate factors when it granted the father sole legal and primary residential custody, and, under the circumstances of this case, determined that the forensic expert's conclusions and recommendations, issued more than two years prior to the completion of trial, were unsupported by the record (*see Matter of Hildebrandt v St. Elmo Lee*, 110 AD3d 491, 492 [1st Dept 2013]; *Matter of Castellano v England*, 275 AD2d 412 [2d Dept 2000]).

Furthermore, the court's determination with respect to the mother's visitation was in the best interests of the children (*see Matter of Ronald C. v Sherry B.*, 144 AD3d 545, 546 [1st Dept 2016], *lv dismissed* 29 NY3d 965 [2017]).

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

ENTERED: JUNE 11, 2020

CLERK

Friedman, J.P., Mazzarelli, Gesmer, Singh, González, JJ.

11647 The People of the State of New York, Ind. 1496/15
Respondent,

-against-

Allen Stanford,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes 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 (Ronald A. Zweibel, J.), rendered April 21, 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: JUNE 11, 2020

CLERK

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

Friedman, J.P., Mazzarelli, Gesmer, Singh, González, JJ.

11648 Array BioPharma, Inc., Index 657269/17
Plaintiff-Respondent-Appellant,

-against-

AstraZeneca AB,
Defendant-Appellant,

AstraZeneca PLC,
Defendant-Respondent.

_____

Williams & Connolly LLP, New York (Sarah M. Harris of the bar of the District of Columbia, admitted pro hac vice, of counsel), for AstraZeneca AB, appellant and AstraZeneca PLC, respondent.

Skadden, Arps, Slate, Meagher & Flom LLP, New York (Kurt Wm. Hemr of counsel), for Array BioPharma Inc., respondent-appellant.

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Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered September 17, 2019, dismissing the complaint against AstraZeneca PLC, and bringing up for review an order, same court and Justice, entered on or about July 31, 2019, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the amended complaint as against defendant AstraZeneca PLC, and denied defendants' motion to dismiss the complaint as against defendant AstraZeneca AB, unanimously affirmed, without costs.

Supreme Court properly refused to dismiss the claim against AstraZeneca AB (AZ AB). Under CPLR 3211[a][1], dismissal is only warranted if the documentary evidence resolves all factual issues and disposes of plaintiff's claim as a matter of law (*Foster v Kovner*, 44 AD3d 23, 28 [1st Dept 2007]). Defendants submitted

only excerpts from the agreements related to the Merck collaboration. This limited submission was not adequate to demonstrate how the agreements were intended to work together, and whether Merck received any sublicensee rights outside the selumetinib sublicense agreement.

We agree with the court's decision to dismiss the complaint against AstraZeneca PLC (AZ PLC) but not on the jurisdictional grounds stated by the motion court (*see Universal Inv. Advisory SA v Bakrie Telecom Pte., Ltd.*, 154 AD3d 171, 179 [1st Dept 2017]; *Tate & Lyle Ingredients Ams., Inc. v Whitefox Tech. USA, Inc.*, 98 AD3d 401, 402 [1st Dept 2012]). Rather, we find that the sole claim of breach of contract against AZ PLC must be dismissed for failure to plead, and based upon documentary evidence. Generally, a breach of contract claim cannot be asserted against a non-signatory to the contract (*Randall's Is. Aquatic Leisure, LLC v City of New York*, 92 AD3d 463, 463 [1st Dept 2012], *lv denied* 19 NY3d 804 [2012]), unless a plaintiff pleads liability on veil piercing or alter ego theories (*see e.g. Remora Capital S.A. v Dukan*, 175 AD3d 1219, 1221 [1st Dept 2019]). Array has not pled any facts to support veil piercing or alter ego theories sufficient to demonstrate "inequity, fraud or malfeasance" (*TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339

[1998]). Moreover, Array never pled that AZ PLC assumed AZ AB's rights and obligations under the selumetinib license agreement, and in fact, the documentary evidence directly refutes this argument.

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

ENTERED: JUNE 11, 2020

CLERK

Friedman, J.P., Mazzarelli, Gesmer, González, JJ.

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Index 153731/18
150972/14

Estate of Theodore Lipin, et al.,
Plaintiffs-Respondents,

-against-

Joan C. Lipin,
Defendant-Appellant.

- - - - -

Joan C. Lipin,
Plaintiff-Appellant,

-against-

Danske Bank, et al.,
Defendants-Respondents.

David E. Hunt, et al.,
Defendants.

_____

Joan C. Lipin, appellant pro se.

Allegaert Berger & Vogel LLP, New York (Lauren J. Pincus of counsel), for Estate of Theodore Lipin, Robert G. Lipin, Ann Susan Markatos, Ulf Bergquist, Evelyn F. Ellis, Dana A. Sawyer, Krainin Real Estate, David A. Berger, Allegaert Berger & Vogel LLP and Deborah Lovewell, respondents.

Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., New York (Francis J. Earley of counsel), for Danske Bank, respondent.

Lewis Brisbois Bisgaard & Smith LLP, New York (Sarah A. Adam of counsel), for Hon. Joseph R. Mazziotti and Mark K. Anesh, respondents.

_____

Judgment, Supreme Court, New York County (Shlomo Hagler, J.), entered October 15, 2019, in Index No. 153731/18, renewing a 2008 money judgment in favor of plaintiffs against defendant, unanimously affirmed, without costs. Appeals from orders, same

court and Justice, entered June 17, 2019 and on or about July 12, 2019, which, inter alia, denied defendant's motions to dismiss the litigation and granted plaintiffs' motion for summary judgment in lieu of complaint renewing the 2008 money judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment. Orders, Supreme Court, New York County (Shlomo Hagler, J.), entered on or about January 4, 2019, in Index No. 150972/14, which, inter alia, denied plaintiff's motions to renew a January 2018 motion to vacate prior orders, for a default judgment against defendants, for a cease and desist order, and to hold certain defendants and others in criminal and civil contempt, granted defendants' motions for sanctions and attorneys' fees, referred the issue to a special referee, and imposed a fine of $250 on plaintiff for contempt, and granted defendants' motion to confirm a special referee's report awarding them attorneys' fees, and order, same court and Justice, entered June 13, 2019, which granted defendants' motions to hear and report, and ordered plaintiff to pay reasonable attorneys' fees and expenses to certain defendants, unanimously affirmed, without costs. The Clerks of this Court and Supreme Court are directed to accept no filings from this plaintiff as to the matters herein without leave of their respective courts.

Defendant's arguments in support of dismissing the litigation and denying plaintiffs' motion for summary judgment, in Index No. 153731/18, were rejected by this Court in May 2019,

upon our finding that defendant's motions were "incomprehensible and lacking any basis in law or fact" and that her appeal, in large part, was an apparent effort to relitigate failed claims asserted in a related action (*Estate of Lipin v Lipin*, 172 AD3d 536, 536 [1st Dept 2019]). None of defendant's present arguments, including those relating to service of process and jurisdiction, are any more comprehensible than her previous arguments or properly based in law or fact. Accordingly, there is no basis for vacating any of the prior orders or granting defendant's motion.

In Index No. 150972/14, the court correctly denied plaintiff's improper efforts to reargue and relitigate her claims arising out of the probate of her father's estate and to avoid the reasonable sanctions imposed on her for her defiance of properly issued filing injunctions. Plaintiff's contention that her due process rights were violated is not supported by the record, and her contentions that defendants have newly committed misconduct and insurance fraud are without merit. Like her motions in the related action brought by her father's estate, plaintiff's claims are incomprehensible and without any basis in fact or law (*see Estate of Lipin v Lipin*, 172 AD3d 536 [1st Dept 2019]).

In light of plaintiff's long-standing and continuing abusive

conduct, which has caused defendants to incur additional attorneys' fees, defendants' request that this Court exercise its authority to impose further sanctions on plaintiff is granted, as indicated.

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

ENTERED: JUNE 11, 2020

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Troy K. Webber
Ellen Gesmer
Jeffrey K. Oing, JJ.

9965
Index 652433/18

_____x

In re Rose Castle Redevelopment II, LLC, etc.,
Petitioner-Respondent,

-against-

Franklin Realty Corp., et al.,
Respondents-Appellants.
_____x

Respondent appeals from the order of the Supreme Court, New York County (Charles E. Ramos, J.), entered October 10, 2018, which, to the extent appealed from as limited by the briefs, granted petitioner's motion to confirm the part of a final arbitration award that reduced the "Clawback Amount" set forth in the parties' contribution agreement by $8,311,040, and denied respondents' cross motion to vacate that part of the award.

Ganfer Shore Leeds & Zauderer LLP, New York (Mark C. Zauderer, Ira Brad Matetsky and Grant A. Shehigian of counsel), for appellants.

Blank Rome LLP, New York (Stephen E. Tisman, Craig M. Flanders and Gregory P. Cronin of counsel), for respondent.

OING, J.

This appeal arises out of an arbitration before the American Arbitration Association (AAA). Respondents Franklin Realty Corp., Franklin Realty Owners LLC (FRO), and I&A Rosenberg Family LLC (collectively, respondents) seek reversal of Supreme Court's order which granted the petition by petitioner Rose Castle Redevelopment II, LLC (petitioner) to confirm the underlying arbitration award, and denied respondents' cross motion to vacate the award.

In March 2014, the parties entered into several agreements creating a joint venture whereby petitioner would acquire from respondents three parcels of real property located in Brooklyn to develop for mixed residential and commercial use (the property). The parties' transaction contemplated that petitioner would invest in respondent FRO, the entity that indirectly owned the property, and that petitioner would be responsible for rezoning the property from industrial to commercial and residential use with the goal of maximizing the residential square footage on the property (rezoning). The intended ultimate outcome of the transaction was to transfer sole ownership of respondent FRO from the other two respondents (Franklin Realty Corp. and I&A Rosenberg Family LLC) to petitioner. In that regard, pursuant to their agreements, petitioner would receive a 49.5% interest and

respondents would have a 50.5% interest in respondent FRO, with petitioner ultimately obtaining a 100% interest. Also, under these agreements, petitioner would pay respondents $21 million, a guaranteed minimum contribution, and a higher amount if it successfully obtained the rezoning.

In furtherance of the transaction, the parties entered into, inter alia, a contribution agreement, dated March 6, 2014, which is the source of the instant dispute. Pursuant to that agreement, petitioner made an initial cash capital contribution to respondent FRO of approximately $10 million towards the $21 million guaranteed minimum contribution. Petitioner's second capital contribution was to be made by obtaining a mortgage loan on or before March 6, 2017, three years after executing the agreements. The parties agreed to extend this date by one month to April 6, 2017 (mortgage loan due date). The amount of petitioner's second capital contribution would be dependent on the outcome of petitioner's rezoning effort at the time of the mortgage loan due date. Sections 13.1.8 and 13.2.4 of the contribution agreement set forth four possible rezoning outcomes: positive rezoning, negative rezoning, no rezoning, or subsequent rezoning.

Meanwhile, on or about March 22, 2016, approximately two years after the parties signed their real estate agreements, the

City of New York enacted legislation requiring mandatory inclusionary housing (MIH) for certain rezoned residential housing. Simply stated, MIH essentially required a rezoning application, such as the one herein, to include senior residential or affordable residential housing. MIH applied to the instant property, and would diminish the available square footage for market rate housing.

As is relevant to this appeal, sections 13.2.4 and 13.2.5 of the contribution agreement, entitled "Post Closing Matters," set forth petitioner's additional contribution, which included an initial "Loan Proceeds Amount" (undisputed to be $11 million) and a "Clawback Amount," payable in the event a favorable rezoning decision was issued after the mortgage loan due date (a "Subsequent Rezoning") in an amount based on the square footage resulting from the rezoning decision, subject to a $6.5 million minimum.

Petitioner ultimately obtained a rezoning on May 10, 2017, approximately one month after the April 6, 2017 mortgage loan due date, which under the contribution agreement is deemed a subsequent rezoning. Although petitioner could maximize the residential use of the property at about 329,000 square feet, as a result of required compliance with MIH, only 215,092 square feet was available for market rate residential use.

In August 2017, petitioner commenced an arbitration proceeding before the AAA, and in October 2017, respondents filed counterclaims in the arbitration. The sole issue before us in this appeal is the amount of petitioner's second contribution to respondent FRO as a result of the subsequent rezoning.

In determining petitioner's contribution, the arbitrator noted that the parties unquestionably wanted to maximize their profit from the development of the project, and that section 13.1.1 of the contribution agreement supported this goal in that it provided for the development of "mixed use residential and commercial development to incorporate the maximum as of right residential square footage and commercial overlay to the extent possible" on the Property. He then devoted substantial analysis to the issue noting MIH's negative economic impact on the property. The arbitrator chose 215,092 square feet as the maximum square footage, instead of 329,000 square feet, to determine the amount of petitioner's contribution under the Clawback.

The arbitrator ruled that under the Clawback provision, petitioner would be required to pay $25,811,040, but that due to the "guaranteed minimum", petitioner had to contribute $27.5 million. The arbitrator then found the Clawback provision to be ambiguous and determined that it should be construed against

respondents, as drafter of that clause. After noting the testimony and evidence on this issue, the arbitrator found that "there was no agreement by the parties on the meaning of the claw back section" and that "[a]dopting the interpretation advocated by Respondents would result in unreasonable financial consequences that do not make economic sense." As such, he rejected respondents' interpretation.

In the partial final award, the arbitrator determined that "due to the guaranteed minimum," petitioner owed a total of $27.5 million, "less the $10 million already paid", leaving the remaining amount of $17.5 million due under the contribution agreement. The final award, dated May 10, 2018, incorporated, inter alia, the partial final award.

Petitioner sought to confirm the final award and respondents cross-moved to vacate the award. Supreme Court, noting that respondents were "taking on a very, very difficult task here to set aside an arbitration award" and after hearing oral arguments, confirmed the award finding that there was a "reasonable basis for the arbitrator to reach the award that he reached." This appeal ensued.

Respondents contend that the award is irrational because it is based on the arbitrator's incorrect finding that the Clawback provision is ambiguous. Compounding this error, according to

respondents, is the arbitrator's ruling to construe the ambiguity against them, as drafters of the contribution agreement. That said, they argue that the arbitrator committed a $10 million error, namely, deducting that amount from the $27.5 million so that petitioner's contribution would only be $17.5 million. They complain that the arbitrator shortchanged them by $8,311,040, and accuse him of issuing a totally unjustified award.

Under CPLR 7511(b)(1), "[a]n arbitration award must be upheld when the arbitrator offers even a barely colorable justification for the outcome reached" (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479 [2006] [internal quotation marks and brackets omitted]), and "an arbitrator's award will not be vacated for errors of law and fact" (*Matter of Sprinzen [Nomberg]*, 46 NY2d 623, 629 [1979]; *see also Azrielant v Azrielant*, 301 AD2d 269, 275 [1st Dept 2002], *lv denied* 99 NY2d 509 [2003] ["An arbitrator's award will be confirmed if any plausible basis exists for the award"] [internal quotation marks omitted]; *Johnston v Johnston*, 161 AD2d 125, 128 [1st Dept 1990] ["Courts will not set aside arbitration awards even where the factual findings or the legal conclusions of the arbitrator are unsound"]).

In this case, we agree with respondents that the Clawback provision is not ambiguous. Respondents' arguments, however, are

misplaced. Indeed, respondents and the arbitrator arrive at the same figure of $25,811,040, petitioner's contribution under the Clawback provision, rendering the arbitrator's MIH impact analysis immaterial.

The arbitrator's reason for inserting a $10 million deduction into the formula to be applied to the square footage figure (resulting in the application of the $6.5 million amount, and a $8,311,040 reduction in the payable amount) was clear -- he based it on the fact that petitioner had "already paid" that amount (i.e., $10 million), and not in reliance on any of the provisions set forth in the Clawback provision. Among other arguments made to the arbitrator, petitioner requested that the relevant portion of the contribution agreement be reformed on grounds of a scrivener's error or of mutual mistake. Although the arbitrator did not expressly so characterize his determination, reformation was, in substance, the permissible relief he granted (*see Matter of SCM Corp. [Fisher Park Lane Co.]*, 40 NY2d 788, 792-793 [1976] [arbitrators have the power to fashion remedies, such as reformation, appropriate to the resolution of the dispute]). While a court's grant of reformation based on this record might constitute reversible error, the arbitrator's determination here passes muster, given the extremely limited scope of our review of an arbitration award

(*see American Intl Specialty Lines Ins. Co. v Allied Capital Corp.*, __ NY3d __, 2020 NY Slip Op 02529 [2020] [arbitrators routinely use their expertise to orchestrate expeditious resolutions to complex commercial legal disputes and courts are discouraged from becoming unnecessarily entangled in arbitrations]). We acknowledge respondents' argument that the arbitrator, in determining the amount of the post-closing capital contribution that petitioner was obligated to make to the parties' joint venture, rewrote the parties' agreement in a manner that could not withstand scrutiny as a rational construction of the terms of the contract as written. The result the arbitrator reached, however, is supportable as a reformation of the parties' agreement, given the highly deferential standard of review accorded arbitration awards under CPLR article 75 (*id.*).

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

Accordingly, the order of the Supreme Court, New York County (Charles E. Ramos, J.), entered October 10, 2018, which, to the extent appealed from as limited by the briefs, granted petitioner's motion to confirm the part of a final arbitration award that reduced the "Clawback Amount" set forth in the parties' contribution agreement by $8,311,040, and denied

respondents' cross motion to vacate that part of the award, should be affirmed, without costs.

All concur.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered October 10, 2018, affirmed, without costs.

Opinion by Oing, J. All concur.

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

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

ENTERED: JUNE 11, 2020

CLERK