SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 10, 2020

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Kapnick, Moulton, González, JJ.

11052-
11052A

Index 152846/16

Esteban Medina,
Plaintiff,

-against-

Fischer Mills Condo Association, et al.,
Defendants,

Unity Operating Corp.,
Defendant-Respondent,

Wichcraft Operating, LLC,
Defendant-Appellant.

- - - - -

[And A Third-Party Action]

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Lewis Brisbois Bisgaard and Smith LLP, New York (Matthew P. Cueter of counsel), for appellant.

Pillinger Miller Tarallo, LLP, Elmsford (Edward J. O'Gorman of counsel), for respondent.

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Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered January 8, 2019, which, to the extent appealed from as limited by the briefs, granted defendant Unity Environmental Corp.'s motion for summary judgment dismissing the complaint as against it and on its cross claims against defendant Wichcraft Operating, LLC for conditional indemnification, unanimously

modified, on the law, to deny the part of Unity's motion seeking summary judgment on its cross claims against Wichcraft, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered June 4, 2019, which denied Wichcraft's motion for reargument, unanimously dismissed, without costs, as taken from a nonappealable order.

Plaintiff alleges that he slipped and fell on a patch of ice on the sidewalk in front of a store leased by defendant Wichcraft from defendant Unity, which owned the commercial condominium unit and was responsible for the awning overhanging the sidewalk. In discovery, plaintiff disclosed that he intended to call experts who would opine that the icy condition was caused by melting snow and ice dripping from the awning onto the sidewalk and refreezing. In support of its motion for summary judgment, Unity failed to establish prima facie that it did not cause or create the icy condition on the sidewalk through negligent maintenance of the awning (*see Lebron v Napa Realty Corp.*, 65 AD3d 436, 437 [1st Dept 2009]). Unity is therefore not entitled to summary judgment, regardless of the sufficiency of the showing in opposition (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). However, because plaintiff has not appealed from the dismissal of his claims against Unity, and Wichcraft is not

aggrieved by the dismissal, we do not reinstate those claims (*see* *Rodriguez v Heritage Hills Socy., Ltd.*, 141 AD3d 482 [1st Dept 2016]).

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

ENTERED: MARCH 10, 2020

DEPUTY CLERK

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

4557 The People of the State of New York, Respondent, SCI 598/10

-against-

Reuel Mebuin,
Defendant-Appellant.

_____

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

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

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Order, Supreme Court, New York County (Abraham L. Clott, J.), entered on or about June 25, 2019, which, upon remand, denied defendant's CPL 440.10 motion to vacate a judgment rendered February 17, 2010, unanimously affirmed.

We previously held this appeal in abeyance pending a hearing on defendant's CPL 440.10 motion (158 AD3d 121 [1st Dept 2017]). After an evidentiary hearing, Supreme Court denied the motion, finding that defendant received effective assistance of counsel.

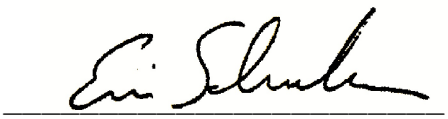
We find no basis for reversing the order. There is no basis for disturbing the court's credibility determinations, which are entitled to "great deference" (*People v Pinilla*, 164 AD3d 452, 453 [1st Dept 2018], *lv denied* 32 NY3d 1127 [2018]). The record supports the court's finding that defendant failed to show that his counsel's performance "fell below an objective standard of

reasonableness" (*see People v McDonald*, 1 NY3d 109, 113 [2003]). Contrary to defendant's argument, the testimony of defendant's plea counsel does not establish any affirmative misadvice regarding immigration matters, particularly because defendant's guilty plea did not carry mandatory deportation.

Defendant also failed to satisfy the requirement of prejudice. Given the court's credibility findings, the evidence does not support defendant's claim that but for his attorney's allegedly incorrect advice, he would not have pleaded guilty to a misdemeanor with a conditional discharge and would have instead proceeded to trial, risking a felony conviction and prison sentence that would clearly have resulted in deportation.

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

ENTERED: MARCH 10, 2020



DEPUTY CLERK

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

10884 Jose R. Leveron, Index 302203/15
Plaintiff-Respondent-Appellant,

-against-

Prana Growth Fund I, L.P., et al.,
Defendants-Appellants-Respondents,

A-Awan Construction Corp.,
Defendant-Respondent.

_____

Cascone & Kluepfel, LLP, Garden City (James K. O'Sullivan of counsel), for appellants-respondents.

Wingate, Russotti, Shapiro & Halperin, LLP, New York (David M. Schwarz of counsel), for respondent-appellant.

Weiner Millo Morgan & Bonanno, LLC, New York (Richard A. Walker of counsel), for respondent.

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Order, Supreme Court, Bronx County (Donna Mills, J.), entered on or about January 23, 2019, which, insofar as appealed from as limited by the briefs, denied defendants Prana Growth Fund I, L.P., Prana Fund Manager, LLC, and Park Avenue South Management LLC's (the Prana defendants) motion for summary judgment dismissing the complaint and all cross claims as against them and on their contractual indemnification and contribution cross claims against defendant A-Awan Construction Corp., and denied plaintiff's cross motion for partial summary judgment on the Labor Law §§ 240(1) and 241(6) claims, unanimously modified, on the law, to grant the Prana defendants' motion as to the

common-law negligence and Labor Law § 200 claims and as to the Labor Law § 241(6) claim predicated on violations of Industrial Code (12 NYCRR) §§ 23-1.7(a) and 23-3.3(g) and (k), and to grant plaintiff's cross motion as to the Labor Law § 240(1) claim, and otherwise affirmed, without costs.

Plaintiff, an employee of nonparty sidewalk shed contractor J&G Construction, Inc., was injured when three or four sections of a sidewalk shed that he was dismantling collapsed onto him. The sidewalk shed had been erected for facade repair work performed by defendant A-Awan Construction Corp.

The collapse of the sidewalk shed is prima facie evidence of a violation of Labor Law § 240(1) (*see Thompson v St. Charles Condominiums*, 303 AD2d 152, 154 [1st Dept 2003], *lv dismissed* 100 NY2d 556 [2003]). In opposition, defendants failed to raise a triable issue of fact. Plaintiff's inability to identify the specific piece of the sidewalk shed that struck him is not fatal to his claim, as he is not required to establish the exact manner in which the accident occurred (see *Ortega v City of New York*, 95 AD3d 125, 128 [1st Dept 2012]). Moreover, securing the sidewalk shed against collapse would not have been contrary to the purpose of the undertaking. The three or four sections that collapsed onto plaintiff when "everything slipped apart" were not the intended target of the demolition at the time of the accident

(*see Ragubir v Gibraltar Mgt. Co., Inc.*, 146 AD3d 563, 564 [1st Dept 2017]; *cf. Salazar v Novalex Contr. Corp.*, 18 NY3d 134, 139-140 [2011] [covering trench in floor into which plaintiff fell while spreading concrete onto floor would have been contrary to purpose of work]).

In his cross motion for summary judgment, plaintiff identified, for the first time, four Industrial Code provisions that provided the foundation for his Labor Law § 241(6) claim. On appeal, plaintiff abandoned his arguments under three of those provisions (12 NYCRR 23-1.7[a] and 23-3.3[g] and [k]). Plaintiff's belated identification of 12 NYCRR 23-3.3(c) in his cross motion for summary judgment does not require dismissal of the claim, because it entailed no new factual allegations, raised no new theories of liability, and caused no prejudice to defendants (*see Alarcon v UCAN White Plains Hous. Dev. Fund Corp.*, 100 AD3d 431, 432 [1st Dept 2012]; *Burton v CW Equities, LLC*, 97 AD3d 462, 462-463 [1st Dept 2012]). However, plaintiff failed to demonstrate his entitlement to summary judgment under this remaining provision, which requires "continuing inspections" during "hand demolition operations" to protect against hazards "resulting from weakened or deteriorated floors or walls or from loosened material." Issues of fact exist as to whether defendants violated 12 NYCRR 23-3.3(c) and if so, whether any

such violation was a proximate cause of the accident.

Plaintiff's argument that 12 NYCRR 23-3.3(b)(3) was violated, raised for the first time on appeal, is fact-based, and therefore not properly before us for consideration (*see Nadella v City of New York*, 161 AD3d 412, 413 [1st Dept 2018]).

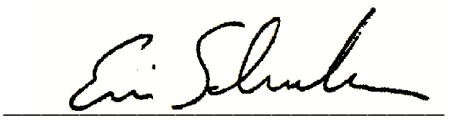
Plaintiff abandoned his common-law negligence and Labor Law § 200 claims as against the Prana defendants by failing to oppose that part of their motion seeking the dismissal of those claims (*Ng v NYU Langone Med. Ctr.*, 157 AD3d 549, 550 [1st Dept 2018]). In any event, because plaintiff's accident resulted from the means and methods of his work, which was directed and controlled solely by his employer, the Prana defendants are entitled to summary judgment dismissing the Labor Law § 200 and common-law negligence claims against them (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143 [1st Dept 2012]).

Pursuant to contract, A-Awan was required to indemnify the Prana defendants, who owned and managed the premises, against claims, damages, etc. arising out of or resulting from negligent acts or omissions by A-Awan or its subcontractors. While it is undisputed that the accident arose from J&G Construction's work, it is sharply disputed whether J&G was A-Awan's subcontractor.

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

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

ENTERED: MARCH 10, 2020



DEPUTY CLERK

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

11073- Index No. 32037/17E
11073A- U.S. Bank Trust, N.A., etc.,
11073B Plaintiff-Respondent,

-against-

Desmond Ellis,
Defendant-Appellant,

Mortgage Electronic Registration Systems, Inc., etc., et al.,
Defendants.

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Petroff Amshen LLP, Brooklyn (Christopher Villanti of counsel), for appellant.

Fein Such Kahn & Shephard, P.C., Westbury (Gregg P. Tabakin of counsel), for respondent.

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Order and judgment of foreclosure and sale (one paper), Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered July 17, 2019, in favor of plaintiff and against defendant Desmond Ellis, and order (same court and Justice), entered November 9, 2018, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment, and denied Ellis's cross motion for summary judgment seeking to dismiss the complaint as untimely, unanimously modified, on the law, the judgment vacated, plaintiff's motion for summary judgment denied, and otherwise affirmed, without costs. Appeal from the November 9, 2018 order, unanimously dismissed, without

costs, as subsumed in the appeal from the order and judgment.

In this foreclosure action, plaintiff moved and defendant Ellis cross-moved for summary judgment. Plaintiff established that it holds a note and mortgage executed by Ellis, secured by the subject property owned by Ellis. Plaintiff also established that Ellis has defaulted in payment. The heart of this appeal is whether this foreclosure action, commenced on January 18, 2017, is timely, given that there was a prior foreclosure action against defendant Ellis and others.

Plaintiff's predecessor in interest (HSBC) commenced that prior foreclosure action, in which it accelerated the mortgage, on February 11, 2010. HSBC voluntarily discontinued the action on June 28, 2013 by filing a notice of discontinuance (2013 discontinuance) with the Clerk of Supreme Court, Bronx County pursuant to CPLR 3217(a)(2). On January 6, 2016, plaintiff sent Ellis a notice purporting to de-accelerate and reinstate the loan and directing him to resume mortgage payments (2016 notice).

Ellis contends, among other things, that even if the 2013 discontinuance ended the 2010 action, it did not de-accelerate or reinstate the mortgage, making this action, commenced more than six years later, untimely (*see Wells Fargo Bank, N.A. v Liburd*, 176 AD3d 464 [1st Dept 2019]). With respect to the 2016 notice, Ellis contends that it should not be considered because Supreme

Court improvidently exercised its discretion in allowing plaintiff to untimely supplement its opposition, after the motions were briefed and that, in any event, the 2016 notice is inadmissible hearsay. Ellis further contends that the 2016 notice was filed by plaintiff solely as a pretext to avoid the approaching six-year statute of limitations deadline.

We find that neither party is entitled to summary judgment, as a matter of law, because there are material issues of fact whether this action was timely commenced (*Milone v US Bank N.A.*, 164 AD3d 145, 152-153 [2d Dept 2018], *lv dismissed* 34 NY3d 1009 [2019]; *U.S. Bank N.A., v Charles*, 173 AD3d 564, 565 [1st Dept 2019]).

By virtue of the commencement of the 2010 foreclosure action (*HSBC Mtge. Servs., Inc. v Ellis, et al.*, Sup Ct, Bronx County 2010, index No. 380293/10), the mortgage was accelerated (*see MTGLQ Invs. LP v Wozencraft*, 172 AD3d 644, 645 [1st Dept 2019], *lv dismissed* 34 NY3d 1010 [2019]). The six-year limitations period applicable to a mortgage foreclosure action began to run no later than when HSBC commenced the 2010 action (*MTGLQ*, 172 AD3d at 645). If, however, plaintiff (or HSBC), revoked its election to accelerate the loan and the loan was de-accelerated and reinstated, then the statue of limitations may not apply to later due installment payments, claims for which would not be

time barred (*Milone*, 164 AD3d at 154).

The 2013 discontinuance vacated the lis pendens and amended notice of pendency that were filed against the property before and after the 2010 action was commenced. In addition to vacating the lis pendens, the 2013 discontinuance states that it is being filed in compliance with New York's Real Property and Proceedings Law § 1304. The 2013 discontinuance did not contain any affirmative statement, let alone a clear and equivocal one, that the plaintiff was de-accelerating the mortgage, reinstating it or demanding payment on the note (*Milone* at 154). The commencement of the 2010 action accelerated the entire debt and the entire amount requiring that plaintiff bring its action to a conclusion within the applicable six-year statute of limitations (CPLR 213[4]). Since the 2013 discontinuance did not de-accelerate the payments due under the mortgage, plaintiff cannot rely on the discontinuance to establish that this 2017 foreclosure action is timely (*Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 982-983 [2d Dept 2012]).

Plaintiff, however, also relies on the 2016 notice that its mortgage servicer, Caliber Home Loans, purportedly sent to Ellis advising him that the mortgage was de-accelerated and reinstated, and demanding payments under the loan (the 2016 notice). It states:

> "Under the terms of your Loan, which includes the Note and the mortgage, your obligations were previously accelerated and brought to maturity. All sums secured by the Security instrument were declared immediately due and payable. Caliber is writing to advise you that as of the date of this letter, the maturity of the Loan is hereby de-accelerated, immediate payment of all sums owned is hereby withdrawn, and the Loan is re-instituted as an installment loan.
>
> "**PLEASE BE ADVISED THAT TO THE EXTENT ANY PREVIOUS ACCELERATION MAY BE APPLICABLE, WE HEREBY REVOKE ANY PRIOR AND CURRENTLY APPLICABLE ACCELERATION OF THE LOAN, WITHDRAWING ANY PRIOR DEMAND FOR IMMEDIATE PAYMENT OF ALL SUMS SECURED BY THE SECURITY INSTRUMENT AND RE-INSTITUTE THE LOAN AS AN INSTALLMENT LOAN** (caps and bold in original).
>
> "If you have any questions please contact the SPOC Department at [contact information provided]. . . ."

Plaintiff claims that Ellis did not make any mortgage payments after this notice. Consequently, plaintiff served Ellis with a 90-day pre-foreclosure notice dated August 8, 2016 and a notice of intent to foreclose dated October 4, 2016, and commenced this foreclosure action on January 18, 2017.

Ellis argues that the 2016 notice should not be relied upon as a basis to de-accelerate the mortgage for two reasons. First, he contends that Supreme Court improvidently granted plaintiff's separate motion pursuant to CPLR 2004 for leave to serve a late supplemental opposition to his cross motion. It was in the

supplemental opposition that the 2016 notice was first provided to the court. His second argument is that the 2016 notice should not be considered because it is not proof in admissible form. Ellis argues that not only should plaintiff's motion for summary judgment have been denied, but that he is entitled to summary judgment dismissing the complaint.

We reject Ellis's argument that the court improvidently exercised its discretion in allowing plaintiff to supplement its opposition. It was within the court's discretion to grant plaintiff's motion pursuant to CPLR 2004 upon a showing of good cause and in the absence of any prejudice to Ellis (*see e.g. N450JE LLC v Priority 1 Aviation Inc.*, 102 AD3d 631, 633 [1st Dept 2013]). Plaintiff's attorney provided a detailed affirmation explaining why he did not submit the 2016 notice sooner, attesting not only to law office failure, but also describing the jumbled record of the 2010 action (*id.*).

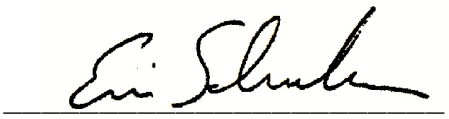
We agree, however, with defendant that the 2016 notice is not an authenticated business record and, therefore, it is not admissible as presented in the record, leading us to modify Supreme Court's order by denying plaintiff's motion for summary judgment. This hearsay document, however, is sufficient to defeat Ellis's summary judgment motion, because it is sufficiently corroborated by other evidence (*see Zupan v Price*

Chopper Operating Co., Inc., 132 AD3d 1211, 1213 [3d Dept 2015]). Accordingly, the effect of the 2016 notice on the timeliness of this action should be determined at trial (*see Lippe v Finley*, 75 AD2d 558 [1st Dept 1980]).

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: MARCH 10, 2020



DEPUTY CLERK

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

11219 The People of the State of New York, Ind. 41/16
Respondent,

-against-

Ronald Germain,
Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Dana B. Wolfe of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Stephen Joseph Kress 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 (Felicia Mennin, J.), rendered July 26, 2017,

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

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

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

ENTERED: MARCH 10, 2020

DEPUTY CLERK

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

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

11220 U Joon Sung, Index 159279/15
Plaintiff-Appellant,

-against-

Andrew I. Park, Esq., et al.,
Defendants-Respondents,

Junghyun Choi, Esq.,
Defendant.

_____

Walia & Walia, PLLC, Flushing (Bobby Walia of counsel), for appellant.

Robert Alan Saasto, Woodbury, for respondents.

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Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered January 14, 2019, which denied plaintiff's motion for summary judgment as against defendants Andrew I. Park, Sim & Park LLP and Andrew Park, P.C. on the issue of liability, unanimously affirmed, without costs.

In this legal malpractice action, plaintiff failed to establish prima facie that, but for defendants' alleged negligence in representing him in the underlying personal injury action, he would have prevailed in that action (*see Brooks v Lewin*, 21 AD3d 731, 734 [1st Dept 2005], *lv denied* 6 NY3d 713 [2006]). The personal injury action, which alleged, as pertinent here, that plaintiff sustained economic loss greater than "basic economic loss" in a motor vehicle accident (*see* CPLR 5014[a];

5012[a], [d]), was dismissed as abandoned pursuant to CPLR 3404, and plaintiff's motion to vacate the dismissal was denied (*U. Joon Sung v Feng Ue Jin*, 127 AD3d 740 [2d Dept 2015]). However, in this action, plaintiff failed to prove as a matter of law that he sustained in excess of $50,000 in economic loss as related to the accident. While plaintiff claims he left the Marine Reserves due to the injuries he sustained, plaintiff testified that there were no physical requirements to his position and that he was able to perform all of his duties. Thus, his experts' report estimating that he suffered economic loss in excess of $50,000 based on his remaining a Marine reservist for 20 or 30 years is speculative, as it relies on assumptions, rather than proven facts.

Plaintiff having failed to make his prima facie showing, we need not consider the sufficiency of defendants' opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

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

ENTERED: MARCH 10, 2020

DEPUTY CLERK

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

11222 In re Brad Allecia, Index 155704/19
Petitioner,

-against-

The New York Department of Buildings, et al.,
Respondents.

_____

Fox Rothschild LLP, New York (James M. Lemonedes of counsel), for petitioner.

Georgia M. Pestana, Acting Corporation Counsel, New York (D. Alan Rosinus, Jr. of counsel), for respondents.

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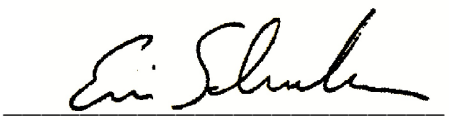
Determination of respondent Department of Buildings, dated April 19, 2019, which permanently revoked petitioner's master rigger license, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by amended order of Supreme Court, New York County [John J. Kelley, J.], entered September 27, 2019), dismissed, without costs.

Respondent's determinations with respect to the charges of misconduct against petitioner are supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176 [1978]), and are not arbitrary or capricious (*see Matter of Whitehead v McMickens*, 126 AD2d 440 [1st Dept 1987], *affd* 69 NY2d 942 [1987]).

Our role in reviewing an administrative penalty is sharply limited, and we do not overturn administrative penalties lightly (*Matter of Bolt v New York City Dept. of Educ.*, 30 NY3d 1065, 1071-1072 [2018]). Applying this standard, we confirm the penalty of permanent revocation of petitioner's master rigger license as it does not shock our sense of fairness and was an appropriate exercise of the agency's discretion.

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

ENTERED: MARCH 10, 2020



DEPUTY CLERK

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

11223 Deutsche Bank National Trust Company, as Indenture Trustee Under the Indenture Relating to IMH Asset Corps., Collateralized Asset-Backed Bonds, Series 2005-7,
Plaintiff-Respondent,

-against-

Joshua Kirschenbaum,
Defendant-Appellant,

New York City Parking Violations Bureau, et al.,
Defendants.

Index 850262/13

_____

Richland & Falkowski, PLLC, Washingtonville (Daniel Richland of counsel), for appellant.

Blank Rome LLP, New York (Timothy W. Salter of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered on or about July 9, 2019, which, insofar appealed from as limited by the briefs, granted plaintiff's motion for summary judgment against defendant Joshua Kirschenbaum, unanimously reversed, on the law, with costs, and the motion denied.

Plaintiff failed to make a prima facie case that it had physical possession of the note signed by defendant at the time it commenced the instant action in August 2013. No copy of the note was attached to the original foreclosure complaint. Plaintiff relies on an affidavit from an employee of nonparty

Ocwen Loan Servicing, LLC, which did not specify the source of the affiant's conclusion that plaintiff was "physically delivered" the original note on September 29, 2005. Ocwen did not become plaintiff's agent until September 2013. While an employee may lay a business record foundation for documents without having personal knowledge of their contents (see *Bank of Am., N.A. v Brannon*, 156 AD3d 1 [1st Dept 2017]), here no business record is attached that supports the employee's conclusion regarding when plaintiff came into possession of the note. This is insufficient (*see Residential Credit Solutions, Inc. v Gould*, 171 AD3d 638, 638-643 [1st Dept 2019]; *Deutsche Bank Natl. Trust Co. v Guevara*, 170 AD3d 603, 603-605 [1st Dept 2019]). Unlike the plaintiffs in *Bank of N.Y. Mellon v Knowles* (151 AD3d 596 [1st Dept 2017]) and *Nationstar Mtge. LLC v Islam* (168 AD3d 583 [1st Dept 2019]), plaintiff did not attach a copy of the note to its summons and complaint.

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

ENTERED: MARCH 10, 2020

DEPUTY CLERK

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

11224 The People of the State of New York, Respondent, Ind. 2263/15

-against-

Isidro Orellana, Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Christopher Michael Pederson of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Ralph Fabrizio, J.), rendered July 11, 2016, convicting defendant, upon his plea of guilty, of sexual abuse in the first degree, and sentencing him to a term of 6 months, with 10 years' probation, unanimously affirmed.

Defendant did not preserve his argument that his guilty plea was rendered invalid by the court's misstatement that sexual abuse in the first degree was not a violent felony offense. Defendant did not move to withdraw his plea before sentencing (*see People v Williams*, 27 NY3d 212, 214 [2016]), and this case does not fall within the narrow exception where, because of the sequence of events, the defendant has "no practical ability" to make a plea withdrawal motion (*id.* at 220-221). Between the plea and the sentencing, defense counsel and defendant had the

opportunity to ascertain the true status of the crime to which defendant had pleaded guilty, and to make a plea withdrawal motion if so inclined (*see id.* at 223-224).

We decline to address the issue in the interest of justice. In any event, whether the crime was classified as violent or nonviolent did not affect defendant's actual sentence in the present case, and although it would affect his predicate violent felony status in the event of a new conviction, "a defendant's eligibility for an enhanced sentence upon a hypothetical future conviction is merely a collateral consequence of a plea of guilty that the defendant need not be advised of in order for the guilty plea to be deemed fully informed" (*People v August*, 33 AD3d 1046, 1050 [3d Dept 2006][internal quotation marks omitted], *lv denied* 8 NY3d 878 [2007]). Furthermore, the surrounding circumstances do not warrant a conclusion that defendant would have opted not to plead guilty absent the court's inaccurate characterization of the crime as nonviolent.

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

ENTERED: MARCH 10, 2020

DEPUTY CLERK

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

11225 Jean Van Dyk, Index 28106/16E
Plaintiff-Appellant,

-against-

C & M 974 Route 45 LLC, et al.,
Defendants-Respondents.

_____

Hasapidis Law Offices, Scarsdale (Annette G. Hasapidis of counsel), for appellant.

Law Office of James J. Toomey, New York (Jason Meneses of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Paul L. Alpert, J.), entered December 27, 2018, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

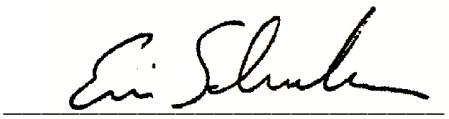
Plaintiff alleges that she was injured when a heavy door that was stored in a locked medical storage closet in the medical office where she worked tipped over onto her. Defendants established prima facie, through deposition testimony, sworn witness statements, and renewal lease provisions, that they were out-of-possession landlords who had no access to the locked closet and therefore did not possess or control the closet for liability purposes (*see Sapp v S.J.C. 308 Lenox Ave. Family L.P.*, 150 AD3d 525, 527 [1st Dept 2017]).

In opposition, plaintiff failed to raise an issue of fact.

The statement by her employer's office manager about defendants' knowledge that the door was stored in the closet is inadmissible hearsay (*see O'Halloran v City of New York*, 78 AD3d 536 [1st Dept 2010]). In any event, it does not avail plaintiff, because the door itself was not inherently dangerous, and there is no evidence that defendants were responsible for the manner in which it was stored – upright against a wall – which was the cause of the accident (*see Murray v New York City Hous. Auth.*, 269 AD2d 288 [1st Dept 2000]).

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

ENTERED: MARCH 10, 2020



DEPUTY CLERK

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

11226 Denham, Wolf Real Estate Services, Inc., Plaintiff-Appellant-Respondent, Index 656278/16

-against-

60-74 Gansevoort Street LLC, Defendant-Respondent-Appellant,

Maiyet, Inc., Defendant.

_____

Rosenberg & Estis, P.C., New York (Michael E. Feinstein of counsel), for appellant-respondent.

Pryor Cashman LLP, New York (Bryan T. Mohler of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered July 8, 2019, which, inter alia, denied plaintiff's motion for summary judgment, unanimously affirmed, without costs.

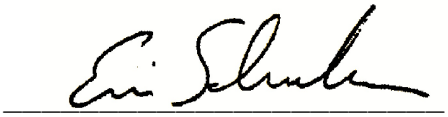
The motion court correctly found an issue of fact as to whether the lease between defendant and plaintiff's client was cancelled under section 1.F(iii) of the lease. It is undisputed that these sophisticated parties made the payment of plaintiff's brokerage commission contingent on whether or not the lease was cancelled under sections 1.F(ii) and 1.F(iii) of the lease and that plaintiff otherwise performed under the commission agreement. However, the agreement terminating the lease does not

specifically cite the section of the lease upon which it was terminated.

We decline defendant's invitation to search the record and grant it summary judgment dismissing the complaint.

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

ENTERED: MARCH 10, 2020



DEPUTY CLERK

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

11227-
11227A Diana Reyes,
Plaintiff-Appellant,

-against-

Latin American Pentecostal
Church of God Inc.,
Defendant-Respondent.

Index 157297/16

Brand Brand Nomberg & Rosenbaum LLP, New York (Brett J. Nomberg of counsel), for appellant.

Molod Spitz & DeSantis P.C., New York (Marcy Sonneborn of counsel), for respondent.

Order, Supreme Court, New York County (David Benjamin Cohen, J.), entered July 18, 2019, which granted the motion of defendant Latin American Pentecostal Church of God Inc. for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied. Order, same court and Justice, entered March 13, 2019, which denied plaintiff's motion to strike defendant's pleadings, unanimously affirmed, without costs.

Plaintiff alleges that she fell and sustained injuries as a result of a slippery condition on two steps in the bathroom of a building owned and managed by defendant. Supreme Court granted defendant's motion, finding that plaintiff failed to identify the cause of her fall.

Although plaintiff did not have personal knowledge of what caused her to fall, she was able to sufficiently identify the alleged defect through the testimony of an eyewitness who observed, after plaintiff fell, that there was water on the steps, as well as a "soaking" wet piece of cardboard at the bottom of the steps (*see McRae v Venuto,* 136 AD3d 765, 766 [2d Dept 2016]; *Izaguirre v New York City Tr. Auth.*, 106 AD3d 878, 878 [2d Dept 2013]).

Defendant submitted no evidence to show when the bathroom was last cleaned and inspected prior to plaintiff's fall, and therefore failed to establish prima facie that it did not have constructive notice of the alleged dangerous condition (*see Edwards v Wal-Mart Stores*, 243 AD2d 803 [3rd Dept 1997]; *Van Steenburg v Great Atl. & Pac. Tea Co.*, 235 AD2d 1001 [3rd Dept 1997]). Moreover, defendant's own evidence indicates that there may have been a recurring, but unaddressed, problem with flooding in the bathroom, raising a triable issue as to whether it may be charged with constructive notice of a wet, slippery condition (*see Talavera v New York City Tr. Auth.*, 41 AD3d 135 [1st Dept 2007]; *O'Connor-Miele v Barhite & Holzinger*, 234 AD2d 106 [1st Dept 1996]). The evidence submitted by defendant did not eliminate triable issues as to whether it was negligent under common-law standards for failing to install safety devices or a

warning on the stairs (*see Branch v SDC Discount Store, Inc.*, 127 AD3d 547 [1st Dept 2015]).

Supreme Court providently declined to grant plaintiff's motion to strike the answer, as the record does not demonstrate that defendant willfully and contumaciously refused to obey disclosure orders (*see Rodriguez v United Bronx Parents, Inc.*, 70 AD3d 492 [1st Dept 2010]).

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

ENTERED: MARCH 10, 2020

DEPUTY CLERK

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

11228 Jeffrey Attilio, Index 302985/14
Plaintiff-Respondent,

-against-

Gerardo Torres, et al.,
Defendants-Appellants.

_____

Lawrence Heisler, Brooklyn, (Alison Estess of counsel), for appellants.

Rodriguez & Nathan PLLC, Rockville Centre (Heather Nathan of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about February 13, 2019, which denied defendants' motion for summary judgment dismissing the complaint for lack of a causally related serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants, who do not dispute that plaintiff has significant and permanent limitations in range of motion of his cervical spine, lumbar spine, and left shoulder, established prima facie that these injuries are not causally related to the subject 2013 motor vehicle accident (*see Massillon v Regalado*, 176 AD3d 600, 600 [1st Dept 2019]; *Pouchie v Pichardo*, 173 AD3d 643, 644 [1st Dept 2019]). Defendants' radiologist opined, based on his review of the relevant MRI films and CT scans, that plaintiff's claimed cervical spine, lumbar spine, and left

shoulder injuries were degenerative in nature. In addition, defendants relied on plaintiff's own medical records showing previous treatment of his lumbar spine following a 2007 accident and degenerative conditions in each of the claimed body parts (*see Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043, 1044 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]; *Pommells v Perez*, 4 NY3d 566, 572 [2005]).

In opposition, plaintiff raised issues of fact as to causation by submitting affirmed reports by his treating orthopedic surgeon, physiatrist, and pain management specialists, who, after reviewing plaintiff's treatment and MRIs and diagnostic scans of the affected body parts, acknowledged the prior accident and the findings of degeneration in plaintiff's records, and explained their respective opinions that plaintiff's claimed injuries were the result of the subject accident, rather than of the prior motor vehicle accident or degeneration (*see Perl v Meher*, 18 NY3d 208, 218-219 [2011]; *Ortiz v Boamah*, 169 AD3d 486, 488 [1st Dept 2019]). Their opinions were based, in part, on plaintiff being asymptomatic in the years preceding the current accident (*id.*).

We did not consider the affidavits by defendants' putative expert biomechanical engineer, because they were notarized without the state and not accompanied by the requisite

certificate of conformity (*see* CPLR 2309[c]; *see generally Midfirst Bank v Agho*, 121 AD3d 343, 350 [2d Dept 2014]). Moreover, the technical defect was not corrected, despite plaintiff's timely objection in opposition to defendants' motion (*compare Sanchez v Oxcin*, 157 AD3d 561, 563 [1st Dept 2018] ["assuming" burden shifted to plaintiff based on engineer's unsworn report, "since she did not object to its form"]; *Shinn v Catanzaro*, 1 AD3d 195, 197-198 [1st Dept 2003] [defendant's argument that plaintiffs' submissions were not in admissible form was unpreserved for appellate review and therefore waived]).

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

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

ENTERED: MARCH 10, 2020

DEPUTY CLERK

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

11230 In re Daniel M. G., Dkt. F-02274-08/12B
Petitioner-Appellant,

-against-

Annette P.,
Respondent-Respondent.

_____

Port and Sava, Lynbrook (George S. Sava of counsel), for appellant.

_____

Supplemental Decision and Order of Family Court, New York County (Carol Goldstein, J.), entered on or about September 20, 2018, which, after remand by order of the same court and Judge, entered February 16, 2018 so as to issue findings of fact concerning the mother's income, denied, in part, the father's objections to Findings of Fact of the same court (Karen D. Kolomechuk, Support Magistrate), entered on or about November 8, 2017, which denied his petition for downward modification of child support obligations set forth in an order of the same court and Support Magistrate, entered on or about March 20, 2010, unanimously affirmed, without costs.

In attempting to show which party is the noncustodial parent for purposes of establishing child support in the parties' 50-50 custody arrangement (*see e.g. Rubin v Della Salla*, 107 AD3d 60, 68 [1st Dept 2013]; *Powers v Powers*, 37 AD3d 316 [1st Dept

2007]), the father failed to show the mother is the party with the larger income.

Notwithstanding his contentions to the contrary, Family Court deemed the mother's statements about her earnings and record keeping not credible, and imputed income to her of $126,000/year accordingly (*see e.g. Squiteri v Squiteri*, 90 AD3d 500 [1st Dept 2011]). The imputed amount was well in excess of even the greatest total annual deposit into her bank accounts for the relevant period, and the court imputed such income precisely because it found her testimony unreliably vague, and as due to her failure to furnish tax returns or other reliable documentation of her income.

The father offers no reason to revisit Family Court's reasonable approach to determining her income and to impute even more income to her. The court's approach was not, as he contends, "arbitrary," but based on information he himself furnished to the court from the information the mother posted on DoulaMatch.net.

Family Court reasonably declined to adopt his interpretation of the mother's testimony that the number of births she had attended as a doula could serve as a predicate for calculating her true income.

Moreover, the number of births he imputes to her would have

required an investment of time which was impossible given her child care responsibilities, and her lifestyle suggested that she had not enjoyed such financial success, as she remained living in her aunt's apartment, where she shared a bedroom with the child.

His arguments for imputing income to her based on her rent or based on inferences to be drawn from deposits into her many bank accounts are similarly unpersuasive. As to rent, he does not in any way refute the mother's testimony that she paid her aunt every month, in full, for the $1,200/month rent. Even if, as he states, her records contained only a few checks to substantiate her claim, the burden of proof, on his petition for downward modification, was his, not the mother's (*see e.g. Matter of Hermans v Hermans*, 74 NY2d 876 [1989]), and he did not refute the mother's testimony on this point. His arguments about the propriety of the apartment's Section 8 designation, whether or not relevant to the question of imputed income, cannot be resolved on this record.

As to imputing income based on the mother's deposits, he does not address Family Court's key point that he failed to differentiate between the influx of new money and transfers between her many accounts. Although the chart in his post-trial submissions included a "transfers" column, the chart does not include corresponding reductions to balances in what would have

been the transferor accounts.

His analogizing the mother's 2016 testimony to a "formal judicial admission" is not persuasive, as her testimony was not sufficiently conclusive or unequivocal to qualify (*see e.g. Matter of Columbia County Support Collection Unit v Interdonato*, 51 AD3d 1167, 1168-1169 [3d Dept 2008]).

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

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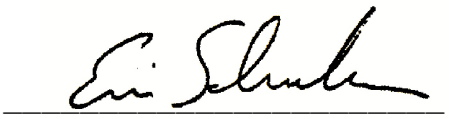

DEPUTY CLERK

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

11231-
11231A ED&F Man Sugar Inc., etc.,
Plaintiff-Respondent,

-against-

ZZY Distributors, Inc., etc., et al.,
Defendants-Appellants,

Mariana Deutsch,
Defendant.

Index 653963/12

Mark S. Friedlander, New York, for appellants.

Franzino & Scher LLC, New York (Frank J. Franzino, Jr. of counsel), for respondent.

Judgment, Supreme Court, New York County (Andrea Masley, J.), entered July 10, 2019, awarding plaintiff the principal amount of $790,792.45 against defendants ZZY Distributors, Inc., Zale Vishedsky, Zack Vishedsky and Yoseph Sternberg, unanimously modified, on the law, to vacate the judgment as against individual defendants Zale Vishedsky and Zack Vishedsky, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered on or about May 9, 2019, after a nonjury trial, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The trial court providently exercised its discretion in granting plaintiff's motion to amend the pleadings to conform to

the proof by adding a claim for goods sold and delivered (*see* CPLR 3025[c]; *Murray v City of New York*, 43 NY2d 400, 405 [1977]). Contrary to defendants' contention, plaintiff established prima facie "the total quantity of the sugar actually delivered" (i.e., 1,415 metric tons) through defendant Zack Vishedsky's affidavit admitting that 1,415 metric tons of sugar had been delivered but claiming that the sugar had been "foisted" on defendant ZZY Distributors, Inc. (ZZY). Further, defendants were not prejudiced by the amendment (*see Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 [2014]). They had notice of the motion to amend from plaintiff's prior arguments and prior attempts to reclassify the breach of contract claim as a claim for goods sold and delivered (*see E.D.&F. Man Sugar, Inc. v ZZY Distribs., Inc.*, 150 AD3d 452 [1st Dept 2017]).

Plaintiff established its claims for goods sold and delivered and breach of contract by a preponderance of the trial evidence. The sale and delivery of sugar is shown by plaintiff's Order Confirmations and ZZY's corresponding purchase orders, Zack Vishedsky's affidavit admitting delivery of 1,415 metric tons of sugar, and defendants' failure to produce the "receiving report" that admittedly contained the quantity of sugar ZZY received, from which the court properly drew an adverse inference (*see Gogos v Modell's Sporting Goods, Inc.*, 87 AD3d 248, 255 [1st Dept

2011]). ZZY's acceptance of the sugar is shown by proof of its resale of the sugar received (*see* UCC 2-606[1][c]; *Gem Source Intl. v Gem-Works N.S., L.L.C.*, 258 AD2d 373, 374 [1st Dept 1999], *lv dismissed* 93 NY2d 999 [1999]). ZZY's failure to pay the full amount due for the sugar is shown by its own QuickBooks accounting records reflecting an outstanding balance of $705,290.86. Given its credibility determinations as to defendants' testimony and submissions, which we see no reason to disturb, the court properly rejected that amount and accepted the figure submitted by plaintiff, i.e., $790,782.45, which is supported by documentary proof.

The foregoing proof of the parties' conduct also establishes the existence of a contract under UCC 2-207(3) (*see e.g. Hornell Brewing Co. v Spry*, 174 Misc 2d 451, 455-456 [Sup Ct, New York County 1997]), as well as a breach of the contract and damages.

The court properly pierced the corporate veil to hold defendant Yoseph Sternberg (Yoseph) personally liable for ZZY's debts. The trial evidence overwhelmingly demonstrates that Yoseph operated ZZY without any regard to corporate formalities, commingled and made personal use of ZZY's funds by shuttling them between ZZY and third parties, including other closely held corporations owned by him, and that these acts resulted in ZZY's undercapitalization, which rendered ZZY unable to pay its

outstanding debt to plaintiff (*see Baby Phat Holdings Co., LLC v Kellwood Co.*, 123 AD3d 405, 407-408 [1st Dept 2014]; *Shisgal v Brown*, 21 AD3d 845, 849 [1st Dept 2005]; *Austin Powder Co. v McCullough*, 216 AD2d 825, 827 [3d Dept 1995]).

However, Zale Vishedsky and Zack Vishedsky may not be held liable individually because they were not owners, directors, or shareholders of ZZY (*see Old Republic Natl. Tit. Ins. Co. v Moskowitz*, 297 AD2d 724, 726 [2d Dept 2002]), and there is no evidence that either of them exerted any dominance over ZZY (*see National Union Fire Ins. Co. of Pittsburgh, Pa. v Bodek,* 270 AD2d 139 [1st Dept 2000], *lv dismissed* 95 NY2d 887 [2000]).

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

ENTERED: MARCH 10, 2020

DEPUTY CLERK

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

11232-
11232A HSBC Bank USA, N.A., Index 35208/18E
Plaintiff-Respondent,

-against-

Kavian Donaldson,
Defendant-Appellant,

Gregory Donaldson, et al.,
Defendants.

_____

Michael Kennedy Karlson, New York, for appellant.

Shapiro DiCaro & Barak, LLC, Rochester (William Jennings of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered June 21, 2019, which granted defendant Kavian Donaldson's motion for reargument, and, upon reargument, substantially adhered to the prior order denying defendant's motion for a default judgment on his counterclaim and granting plaintiff's cross motion for leave to reply to the counterclaim, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about April 16, 2019, unanimously dismissed, without costs, as academic.

Plaintiff's excuse for its delay in replying to defendant's counterclaim, i.e., law office failure, is reasonable, in view of the shortness of the delay and the absence of evidence of

willfulness or of prejudice to defendant (*see e.g. Hertz Vehs., LLC v Mollo*, 171 AD3d 651 [1st Dept 2019]; *Newyear v Beth Abraham Nursing Home*, 157 AD3d 651 [1st Dept 2018]). Contrary to defendant's contention, since plaintiff moved pursuant to CPLR 3012(d), no showing of a meritorious defense was required. However, we note in any event that plaintiff made such a showing.

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

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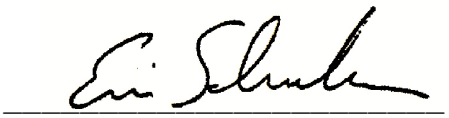

DEPUTY CLERK

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

11233 Thomas Gilbride, Individually and as Administrator of the Estate of Unsuk Gilbride,
Plaintiff-Appellant,

-against-

Dr. Dimyan Balikcioglu,
Defendant-Respondent,

Fieldston Lodge Care Center, et al.,
Defendants.

Index 20950/11

_____

Preston & Wilkins, LLC, Levittown (Gregory R. Preston of counsel), for appellant.

Rubin Paterniti Gonzalez Kaufman LLP, New York (Juan C. Gonzalez of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Robert T. Johnson, J.), entered October 9, 2018, dismissing the complaint as against defendant Dr. Dimyan Balikcioglu pursuant to an order, same court and Justice, entered on or about June 13, 2018, which granted Dr. Balikcioglu's motion for summary judgment, unanimously affirmed, without costs.

Plaintiff failed to raise a triable issue of fact in opposition to Dr. Balikcioglu's prima facie showing that he was entitled to judgment as a matter of law. The opinion of plaintiff's expert was conclusory and failed to raise an issue as to whether Dr. Balikcioglu departed from good and accepted

standards of medical practice in his treatment of decedent. Specifically, plaintiff's expert did not disagree with or address the opinions asserted by Dr. Balikcioglu's expert that Dr. Balikcioglu was not responsible for determining how decedent was monitored and that the use of physical restraints was not indicated because decedent was alert and oriented and her periods of agitation and restlessness were intermittent and irregular (*see Foster-Sturrup v Long*, 95 AD3d 726, 728-729 [1st Dept 2012]).

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: MARCH 10, 2020

DEPUTY CLERK

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

11234 The People of the State of New York, Respondent, Ind. 3432/14

-against-

Wayne Stewart, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (James M. Burke, J.), rendered March 13, 2017, as amended May 12, 2017, convicting defendant, after a jury trial, of murder in the second degree, robbery in the first degree, assault in the first and second degrees, criminal use of a firearm in the first degree, attempted robbery in the first degree (two counts), and criminal possession of a weapon in the second and third degrees, and sentencing him to an aggregate term of 35 years to life, unanimously affirmed.

The trial court providently exercised its discretion in conducting the *Mapp* and *Dunaway* portions of the suppression hearing ex parte. Initially, we note that defendant did not preserve his claims concerning the ex parte proceedings and we decline to review them in the interest of justice *(see e.g. People v Pilgrim*, 101 AD3d 435 [1st Dept 2012], *lv denied* 21 NY3d

946 [2013]). Although counsel for the codefendant objected and proposed other ways to protect the informants' identities, defendant's counsel did not (*see People v Bailey*, 32 NY3d 70, 80 [2018]).

Similarly, defendant's right to counsel claim that would be exempt from preservation requirements fails as his counsel had ample opportunity to also lodge an objection to the court's decision to conduct proceedings without counsel (*see e.g. People v Strothers*, 87 AD3d 431 [1st Dept 2011]). As an alternative holding, we reject it on the merits. The People made an extensive and particularized record that established overriding interests justifying the ex parte proceeding (*see People v Frost*, 100 NY2d 129 [2003]; *People v Castillo*, 80 NY2d 578 [1992], *cert denied* 507 US 1033 [1993]). Revealing the facts provided by two informants would have permitted defendant to ascertain their identities, and would have placed them in grave danger (*see generally People v Sweeper*, 122 Misc 2d 386 [Sup Ct, NY County 1984]). These safety concerns justified the exclusion of counsel as well as defendant (*see Frost*, 100 NY2d at 134). These safety concerns also justified the court's granting the People a protective order delaying their production of discovery material relating to the identities of the confidential informants (*see People v Santana*, 100 AD3d 479, 479 [1st Dept 2012], *lv denied* 21

NY3d 1009 [2013]).

Further, we find the court providently exercised its discretion in admitting a videotape showing defendant in close proximity to a distinctive weapon, similar to the one used in the charged homicide (*see e.g. People v Marte*, 7 AD3d 405, 407 [1st Dept 2004], *lv denied* 3 NY3d 677 [2004]). The court properly determined that the videotape's probative value outweighed any undue prejudice arising from it (*see e.g. People v Hayes*, 168 AD3d 489 [1st Dept 2019], *lv denied* 33 NY3d 977 [2019]). Defendant failed to preserve his claim that the videotape should have been redacted and his challenges to alleged hearsay and statements made during the People's summation, and we decline to review these arguments in the interest of justice. As an alternative holding, we find no basis for reversal.

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]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see*

People v Benevento, 91 NY2d 708, 713–714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

We reject defendant's challenges to the sufficiency and weight of the evidence supporting the convictions of felony murder and certain related charges (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence supports the conclusion that the incident in which the victim was killed constituted a felony murder in which defendant participated, rather than an intentional crime committed by the codefendant for his own purposes. Among other things, the jury could have reasonably found that defendant demanded the victim's property just before the codefendant fired the fatal shots.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 10, 2020

DEPUTY CLERK

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

11235 Greystone Building & Development Corp.,
Plaintiff-Appellant,

-against-

Makro General Contractors, Inc., et al.,
Defendants-Respondents,

The New York City Transit Authority,
Defendant.

Index 450271/16

Flanagan Law, PLLC, New York (Richard J. Flanagan of counsel), for appellant.

Peckar & Abramson, P.C., New York (Howard M. Rosen of counsel), for respondents.

Order, Supreme Court, New York County (David Benjamin Cohen, J.), entered on or about December 10, 2018, which denied plaintiff's motion for summary judgment, and granted defendants Makro General Contractors, Inc. and Hercules Argyriou's motion to dismiss the complaint as against them, unanimously modified, on the law, to deny defendants' motion, and otherwise affirmed, without costs.

Summary judgment in plaintiff's favor on its claim for payment for work performed is precluded by issues of fact as to the portion of the contract that was performed and the portion that was deleted (*see e.g. F. Garofalo Elec. Co. v New York Univ.*, 300 AD2d 186, 189 [1st Dept 2002]; *Sea Crest Constr. Corp.*

v City of New York, 286 AD2d 652 [1st Dept 2001]).

Defendants are not entitled to dismissal of the complaint on the ground that the action was commenced outside the one-year period of limitations contained in the subcontract between defendant Makro and plaintiff for claims arising out of the subcontract. While there is nothing inherently unreasonable about the one-year limitations period, it is unenforceable under the circumstances of this case (*see AWI Sec. & Investigations, Inc. v Whitestone Constr. Corp.*, 164 AD3d 43, 47 [1st Dept 2018]; *D&S Restoration, Inc. v Wenger Constr. Co., Inc.*, 160 AD3d 924 [2d Dept 2018]). After work commenced, a certain portion of the subcontracted work became impracticable, and deletions and change orders were made to Makro's prime contract with defendant New York City Transit Authority (NYCTA) and, by extension, the subcontract. Although, according to plaintiff's principal (additional defendant on counterclaim Theodore Melittas), plaintiff's work was substantially completed in September of 2013, negotiations among NYCTA, Makro and plaintiff over the value of the credit for the deleted work proceeded until September of 2015. However, under the subcontract, plaintiff was not entitled to final payment until NYCTA paid Makro. Thus, the one-year limitation period had run before the final negotiations were complete, i.e., before NYCTA would have paid Makro (*see*

Executive Plaza, LLC v Peerless Ins. Co., 22 NY3d 511, 518 [2014] ["A 'limitation period' that expires before suit can be brought is not really a limitation period at all, but simply a nullification of the claim"]).

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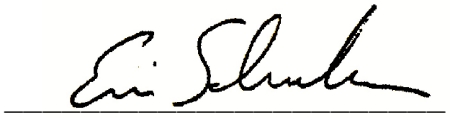


DEPUTY CLERK

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

11236N U.S. Bank National Association, etc.,
Plaintiff-Appellant,

-against-

Gloria Sherwood,
Defendant-Respondent,

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

Index 35116/15E

_____

Sandelands Eyet LLP, New York (Michael T. Madaio of counsel), for appellant.

Michael Kennedy Karlson, New York, for respondent.

_____

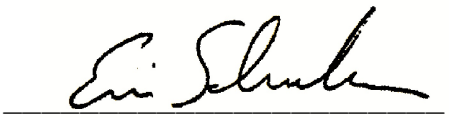
Order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered January 30, 2019, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for a default judgment against defendant Sherwood, unanimously reversed, on the law, without costs, and the motion granted.

Defendant defaulted in answering the complaint and failed either to move to vacate the default or to compel plaintiff to accept a late answer. Accordingly, she is precluded from asserting plaintiff's purported failure to comply with RPAPL 1304

as a defense to this action (*see JP Morgan Chase Bank v Dennis*, 166 AD3d 530 [1st Dept 2018]; *Deutsche Bank Natl. Trust Co. v Lopez*, 148 AD3d 475 [1st Dept 2017]; *PHH Mtge. Corp. v Celestin*, 130 AD3d 703 [2d Dept 2015]).

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

ENTERED: MARCH 10, 2020



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

11237N Michael Besen, etc., et al., Index 652691/18
Plaintiffs-Appellants,

-against-

Amit Doshi, et al.,
Defendants-Respondents,

223 West 20 LLC, et al.,
Defendants.

- - - - -

Morritt Hock & Hamroff, LLP,
Nonparty Respondent.

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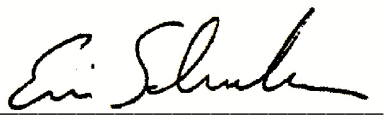
An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Andrea Masley, J.), entered on or about October 9, 2019,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated February 7, 2020,

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

ENTERED: MARCH 10, 2020



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