SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 19, 2020

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10929 The People of the State of New York, Ind. 699/15
Respondent,

-against-

Jason Gordineer,
Defendant-Appellant.

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Janet E. Sabel, The Legal Aid Society, New York (David Crow of counsel), and White & Case LLP, New York (Jonathan Abi Rached of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (James M. Burke, J.), rendered December 17, 2015, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a term of 3½ to 7 years, unanimously affirmed.

There is no reasonable interpretation of the trial testimony and evidence by which the jury could have concluded that defendant was justified in using a hypodermic needle to stab the store manager who was attempting to eject him for shoplifting.

To the contrary, the testimony establishes that the manager, after defendant brandished the needle, merely warned him that, if defendant tried to stab him with it, he in turn would use the box cutter he was holding to defend himself. There is no evidence that the mere presence of the box cutter was sufficient to cause defendant reasonably to fear imminent harm. Considering that fact, and all of the other attendant circumstances, the court correctly declined to instruct the jury that justification would negate the intent element of the third degree criminal possession of a weapon charge.

The store manager testified that, when he first confronted defendant, who was filling a backpack with canisters of deodorant, he instructed him that if he put everything back he would be free to leave the store and that otherwise he would be arrested. When, according to the manager, defendant put back some, but not all, of the pilfered items and tried to run off, the manager grabbed him by the shoulder and started to escort him to the front of the store. A struggle ensued, during which defendant shouted, "I can't go to jail, I got AIDS. I got AIDS. I'm not going to jail." Then defendant reached into his pocket and produced the needle. The manager told defendant that if he stabbed him with the needle he would cut him with the box cutter,

which he had been using to unpack inventory before defendant entered the store. Defendant ignored the warning and proceeded to stab the manager with the needle, and did so a second time after the manager threw him on the floor and tried to grab him to eject him from the store.

The cashier who initially alerted the store manager to defendant's shoplifting testified that the manager had the box cutter in his hand when she saw him escorting defendant to the front of the store, although she equivocated on this point during cross-examination. She was not asked whether the blade was extended. She testified that defendant told the manager to let him go, and then took out a needle. After defendant produced the syringe, she stated, the manager "threaten[ed]" him with the box cutter.

Defendant takes issue with the jury charge on the criminal possession of a weapon count because, in setting forth the elements of the crime the People were required to prove, it did not clarify that defendant's use of the needle would not have been considered "unlawful" if he had been justified in using it. To be clear, defendant did not request the standard charge on the defense of justification, which allows a person to use physical force (including by use of a weapon) when and to the extent he

reasonably believes it necessary to defend himself from what he reasonably believes to be the use or imminent use of unlawful physical force by another person (Penal Law § 35.15[1]). That charge was unavailable, because the crime of criminal possession of a weapon does not involve physical force (*People v Pons*, 68 NY2d 264, 267 [1986]). However, as the People concede, and as reflected in CJI2d(NY) Penal Law art 265, "Intent to Use Unlawfully and Justification,"[1] a defendant in a weapons possession case where intent is an element of the crime may request, when appropriate, a charge clarifying for the jury that "justification [is] a *factor* bearing on the lawfulness of intent" (*People v Richardson*, 115 AD3d 617, 618 [1st Dept 2014] [emphasis added], *lv denied* 23 NY3d 1041 [2014]; *see People v Echevarria*,

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[1] The charge reads in full: "The defense of justification does not apply to this crime because that defense applies only to the use of force. You may, however, in determining whether or not the defendant had the intent required for this crime consider the following:

"The use of a [weapon] to engage in conduct that is justifiable under the law is not unlawful. Thus, an intent to use a [weapon] against another justifiably is not an intent to use it unlawfully.

"Therefore, to find the defendant guilty of this crime, you must find beyond a reasonable doubt that he/she possessed the [weapon] with the intent to use it against another unlawfully and not solely with the intent to use it justifiably."

136 AD3d 589 [1st Dept 2016], *lv denied* 27 NY3d 1131 [2016]).

Here, in arguing that the Penal Law art 265 justification charge should have been read to the jury, defendant focuses on sections in the record that he says suggest that he had returned all of the merchandise before the manager marched him to the front of the store. The implication seems to be that the manager was in a rage and had the singular goal of harming defendant. Defendant seeks to buttress this theory by pointing to the cashier's testimony that the manager was "threatening" him. However, even viewing the facts in the light most favorable to defendant, defendant's argument that the manager was the aggressor ignores the absence of any basis for finding that he ever brandished the tool in a manner indicating that he intended to use it against defendant proactively. To the contrary, the manager's "threat" confirms that he demonstrated no intention to use the box cutter until he saw defendant pull out the needle, and even then he demonstrated no intention to use it unless defendant stabbed him with the needle. Further, defendant's statement that he could not go to jail because he had AIDS strengthens the notion that he was the aggressor.

Defendant also points to the lack of clarity in the record, especially in the cashier's testimony, concerning whether the

store manager had the box cutter in his hand during the entirety of the incident, including at the time when defendant first pulled out the syringe. The manager admitted that it was possible that he did, since he had been opening boxes immediately before the incident began. However, he testified that he never extended the blade out of its case. People's Exhibit "L," a low-definition still image taken from surveillance video of the incident that shows the manager's right arm raised with the box cutter in his right hand, does not appear to show the blade of the box cutter. Further, the manager testified, without challenge, that his thumb would have been at the top of the box cutter if the blade was out, and the image shows his thumb at the bottom of the instrument. Moreover, the previous still, Exhibit "K," shows defendant's right arm raised, with his hand appearing to clutch something, and the manager does not have his right arm raised in that picture. In any event, the critical issue is

whether defendant had a reasonable belief that the manager intended to use the box cutter against him before he stabbed the manager with the syringe. As explained above, there is no evidence that such a belief would have been reasonable.

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

ENTERED: MARCH 19, 2020

CLERK

Acosta, P.J., Richter, Manzanet-Daniels, Gische, Kapnick, JJ.

11421 & M-1179 In re Bridget G. Brennan, etc., Petitioner,

-against-

Hon. Althea Drysdale, etc., et al., Respondents.

Dkt. CR-4728-20NY

Cyrus R. Vance, Jr., District Attorney, New York (Valerie Figueredo of counsel), for petitioner.

Letitia James, Attorney General, New York (James B. Cooney of counsel), for Hon. Althea Drysdale, respondent.

Cohen, Frankel & Ruggiero, LLP, New York (Mark I. Cohen of counsel), for Miguel Rodriguez, respondent.

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

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

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

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

ENTERED: MARCH 19, 2020

CLERK

Renwick, J.P., Gische, Kern, Singh, JJ.

11175 The People of the State of New York, Ind. 1146/14
Respondent,

-against-

Omar Minus,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Daniel P. Conviser, J.), rendered August 25, 2015, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of three years, unanimously affirmed.

The Court's determination not to give an adverse inference charge regarding a manila envelope, used to hold property seized from defendant at the arrest scene, which a detective later discarded at the police station before vouchering the envelope's contents and delivering them to the property clerk, does not warrant reversal (*see People v Smith*, 33 AD3d 462, 464 [1st Dept 2006], *lv denied* 8 NY3d 849 [2007]; *People v Pines*, 298 AD2d 179, 180 [1st Dept 2002], *lv denied* 99 NY2d 562 [2002]).

Even assuming that the envelope contained annotations amounting to *Rosario* material, there was no reasonable possibility any error in failing to give an adverse inference charge materially contributed to the result at trial (*People v Martinez*, 71 NY2d 937, 940 [1988]; *People v Satlin*, 142 AD3d 920 [1st Dept 2016], *lv denied* 28 NY3d 1150 [2017]).

By failing to object, to make specific objections, or to request further relief after the court sustained objections, defendant failed to preserve all but one of his challenges to the prosecutor's summation, and we decline to review the unpreserved arguments in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-120 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]). To the extent that a few isolated comments might be deemed error, there was no pattern of inflammatory remarks or anything so egregious as to deprive defendant of a fair trial (*see People v Whaley*, 70 AD3d 570 [1st Dept 2010], *lv denied* 14 NY3d 894 [2010]). Defendant's sole preserved

challenge, to the prosecutor's remark that it was "offensive" to suggest that the police officers framed defendant, does not warrant reversal, either standing alone or when viewed along with the other comments at issue.

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

ENTERED: MARCH 19, 2020

CLERK

Renwick, J.P., Gische, Mazzarelli, Webber, Singh, JJ.

11279 The People of the State of New York, Ind. 5075/16
Respondent,

-against-

Barshon Jamison, also known as
Tremaine Jamison,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Felicia A. Mennin, J.), rendered July 24, 2018, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third and fifth degrees, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to an aggregate term of six years with two years post release supervision, unanimously reversed, on the law, the plea vacated, and the matter remanded for further proceedings.

At the plea proceeding, the court advised defendant that under the plea agreement, he would plead guilty to third-degree possession, a class B felony, and fifth-degree possession, a class D felony, with the understanding that if he complied with

the terms of the plea agreement, he would be allowed to withdraw his plea to the B felony, and be sentenced, solely on the D felony, to 3½ years in prison, followed by two years of postrelease supervision. The court stated that if defendant violated the terms of the plea agreement, he could be sentenced to up to 15 years in prison on the B felony, but it neglected to state that any enhanced sentence would include a period of PRS. Defendant violated the plea agreement by, among other things, failing to appear for sentencing, and the court imposed an enhanced sentence that included two years of post release supervision concurrent on the B and D felonies.

The court was required to advise defendant that his potential sentence in the event he violated the plea conditions would include PRS, and it was also required to specify the length of the term of PRS (*see People v McAlpin*, 17 NY3d 936 [2011]). The prosecutor's brief reference to PRS immediately before sentencing was not the type of notice under *People v Murray* (15 NY3d 725 [2010]) that would require defendant to preserve the

issue (*see People v Singletary*, 118 AD3d 610, 611 [1st Dept 2014]).

In light of this determination, we find it unnecessary to reach any other issues.

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

ENTERED: MARCH 19, 2020

CLERK

Renwick, J.P., Gische, Mazzarelli, Webber, Singh, JJ.

11280 Wilmington Savings Fund Society, etc., Plaintiff-Respondent, Index 850163/15

-against-

Hyo Choong Sung, et al., Defendants.

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West Fork Capital Equities, LLC, etc., Nonparty Appellant.

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Fox Horan & Camerini LLP, New York (Anthony R. Filosa of counsel), for appellant.

Knuckles, Komosinski & Manfro, LLP, Elmsford (Max T. Saglimbeni of counsel), for respondent.

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Order, Supreme Court, New York County (Judith N. McMahon, J.), entered October 24, 2018, which denied nonparty appellant's motion to vacate an order, same court (Carol Edmead, J.), entered on or about February 8, 2017, granting plaintiff's motion for summary judgment; to vacate a judgment of foreclosure and sale, same court (McMahon, J.), entered June 14, 2018; and to dismiss the action, pursuant to CPLR 3215(c), as abandoned, unanimously affirmed, without costs.

The motion court providently exercised its discretion in denying appellant's motion to dismiss the action pursuant to CPLR 3215(c). Plaintiff provided a reasonable excuse for its delay in

seeking a default judgment against appellant, i.e., an inadvertent error by plaintiff's counsel in moving for a default judgment against the "non-appearing" defendants only (*see LaValle v Astoria Constr. & Paving Corp.*, 266 AD2d 28 [1st Dept 1999]), and the record otherwise demonstrates that plaintiff did not abandon this action (*see e.g. Street Snacks, LLC v Bridge Assoc. of Soho, Inc.*, 156 AD3d 556, 557 [1st Dept 2017]).

We have considered appellant's remaining arguments, including those in support of vacating the court's prior orders and judgment, and find them unavailing.

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

ENTERED: MARCH 19, 2020

CLERK

Renwick, J.P., Gische, Mazzarelli, Webber, Singh, JJ.

11281-
11281A In re Ravine Sean H., and Another,

Children Under the Age of Eighteen Years, etc.,

Delois C. also known as Delois H.,
Respondent-Appellant,

Catholic Guardian Society,
Petitioner-Respondent.

Dkt. B-441-2/16

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Andrew J. Baer, New York, for appellant.

Joseph T. Gatti, New York, for respondent.

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), attorney for the children.

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Appeal from orders of disposition, Family Court, Bronx County (Michael R. Milsap, J.), entered on or about May 23, 2019, which, upon a finding of permanent neglect, terminated respondent-mother's parental rights to the subject children and transferred custody of the children to petitioner agency and the Administration of Children's Services for the purpose of adoption, unanimously dismissed, without costs.

Because the children have reached the age of 18, we decline to reach the issues on appeal (*see Matter of Geovany S. [Martin R.]*, 143 AD3d 578 [1st Dept 2016]; *Matter of Alexis Alexandra G. [Brandy H.]*, 134 AD3d 547 [1st Dept 2015]).

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

ENTERED: MARCH 19, 2020

CLERK

Renwick, J.P., Gische, Mazzarelli, Webber, Singh, JJ.

11282 Yajaida Luna Rodriguez, Index 22124/14E
Plaintiff-Respondent,

-against-

Hamid Nikkhah, M.D., et al.,
Defendants-Appellants.

_____

Yoeli Gottlieb & Etra LLP, New York (Matthew E. Yoeli of counsel), for appellants.

James Newman, P.C., Bronx (Kyle Newman of counsel), for respondent.

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Order, Supreme Court, Bronx County (Lewis J. Lubell, J.), entered July 17, 2018, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing plaintiff's claim that the alleged malpractice caused her urinary incontinence, unanimously affirmed, without costs.

In this action where plaintiff alleges medical malpractice based on the theories that she underwent an unnecessary vaginal hysterectomy which caused injury, and that defendants did not obtain her informed consent, defendants made a prima facie showing that the procedure did not cause urinary incontinence. Defendants submitted the report of an expert who attributed all of plaintiff's urinary issues to a later diagnosis of chronic

interstitial cystitis (IC).

In opposition, plaintiff raised an issue of fact through her expert, who opined that plaintiff's urinary incontinence, which is a well-known complication of the procedure and which manifested for the first time shortly after the procedure was performed, resulted from fibrosis and the "weakening of ligamentous tissue supporting the bladder, bladder neck and urethra" (*see Vega v Mount Sinai-NYU Med. Ctr. & Health Sys.*, 13 AD3d 62, 63 [1st Dept 2004]). Defendants' expert did not rebut the assertion that urinary incontinence is an accepted risk of a vaginal hysterectomy that can occur in this manner, nor that plaintiff's symptoms only emerged after the hysterectomy. Plaintiff's expert further opined that IC is a separate, identifiable condition unrelated to plaintiff's complaints of urinary incontinence, thus presenting an issue of fact.

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

ENTERED: MARCH 19, 2020

CLERK

Renwick, J.P., Gische, Mazzarelli, Webber, Singh, JJ.

11284 The People of the State of New York, Ind. 4965/15
Respondent,

-against-

Okavian King,
Defendant-Appellant.

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

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered May 19, 2016, as amended May 24, 2016, unanimously affirmed.

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

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

service of a copy of this order.

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

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

ENTERED: MARCH 19, 2020

CLERK

Renwick, J.P., Gische, Mazzarelli, Webber, Singh, JJ.

11285 Osvaldo Alicea, Index 304567/15
Plaintiff-Respondent,

-against-

Gorilla Ladder Company, et al.,
Defendants-Appellants,

Luz Valentin,
Defendant.

_____

McVey & Parsky, LLC, Chicago, IL (Jonathan R. Sichtermann of the bar of the State of Illinois, admitted pro hac vice, of counsel), for appellants.

McCartney Stucky LLC, Rye (Kathryn C. Llaurado of the bar of the State of California, the State of Minnesota and the State of Wisconsin, admitted pro hac vice, of counsel), for respondent.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about June 5, 2019, which, inter alia, denied the motion of defendants Gorilla Ladder Company, Tricam Industries, Inc. and The Home Depot U.S.A., Inc. for summary judgment dismissing plaintiff's claims alleging design defect and failure to warn, unanimously affirmed, without costs.

Plaintiff has withdrawn and discontinued his strict product liability and negligent manufacturing defect claims.

As to the design defect claim, "mere compliance with minimum industry standards is, at most, some evidence to be considered

and is not a shield to liability" (*Spiconardi v Macy's E., Inc.*, 83 AD3d 472, 473 [1st Dept 2011]). Here, the averments of plaintiff's expert, based on testing of the subject ladder and exemplars of other ladders in the industry, that the subject ladder was defective and unreasonably dangerous because its design included feet that were prone to wear and tear and slip out, raised issues of fact as to whether the ladder was defectively designed and the proximate cause of plaintiff's injuries (*see Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 107 [1983]).

The denial of summary judgment on the failure to warn claim was also proper, since plaintiff's expert raised issues of fact as to whether the ladder's warnings failed to identify the foot slip-out danger or instruct the user of proper methods to mitigate such danger (*see Feiner v Calvin Klein, Ltd.*, 157 AD2d 501 [1st Dept 1990]).

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

ENTERED: MARCH 19, 2020

CLERK

Renwick, J.P., Gische, Mazzarelli, Webber, Singh, JJ.

11286 In re Baychester Retail III LLC, Index 156584/18
Petitioner-Appellant,

-against-

Margery Perlmutter, etc., et al.,
Respondents-Respondents.

_____

Akerman LLP, New York (Richard G. Leland of counsel), for appellant.

James E. Johnson, Corporation Counsel, New York (Barbara Graves-Poller of counsel), for respondents.

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Judgment, Supreme Court, New York County (Arthur F. Engoron, J.), entered March 4, 2019, denying the petition to annul a resolution of respondent Board of Standards and Appeals of the City of New York (BSA), dated February 27, 2018, which upheld the denial by the New York City Department of Buildings (DOB) of petitioner's applications for permits for a proposed signage installation at 2001 Bartow Avenue in the Bronx, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

BSA's determination that DOB properly denied petitioner's applications is rationally based in the record and not arbitrary and capricious (see *Matter of Sasso v Osgood*, 86 NY2d 374, 384 n 2 [1995]; *Matter of Baychester Retail III LLC v Perlmutter*, 161

AD3d 678, 678 [1st Dept 2018] ["*Baychester I*"], *lv denied* 32 NY3d 907 [2018]). Respondents rationally found that each 27-panel face of the installation should be treated as a single advertising sign for purposes of calculating the surface area (*see Baychester I*, 161 AD3d at 678). In so doing, respondents rationally considered the practical reality that, rather than being used to display 27 smaller advertisements, the 27 panels would be coordinated to project a single advertisement more than 9,000 square feet in area. Similarly, respondents rationally found that, although each panel would be affixed to the supporting monopole by its own armature, ultimately all of the panels were attached to a "single structure," i.e., the monopole itself. Respondents also rationally found that the resulting massive illuminated assembly would be a hazard to motorists on the nearby New England Thruway and a disruption to residents of nearby Co-op City.

Petitioner contends that, in disapproving its applications, respondents arbitrarily departed from precedent, i.e., other previously approved signage installations that used a similar multi-panel assembly and were found to constitute multiple signs. This contention is unavailing. In its resolution, BSA meaningfully distinguished petitioner's revised assembly from the

earlier approved signage installations identified by petitioner (*see Matter of Charles A. Field Delivery Serv. [Roberts]*, 66 NY2d 516 [1985]; *Matter of Take Two Outdoor Media LLC v Board of Stds. & Appeals of the City of N.Y.*, 146 AD3d 715 [1st Dept 2017]; *see Baychester I*, 161 AD3d at 679).

Similarly unavailing is petitioner's contention that, in finding its revised assembly to be a single sign, notwithstanding each panel's individual connection to the monopole, BSA arbitrarily deviated from its rationale in *Baychester I*, in which the connection of the panels to a common supporting grid, which in turn was affixed to the monopole, was a key factor in finding the original assembly to be a single sign. BSA did not apply different standards in evaluating the original and revised assemblies. In both cases, it considered whether the panels were attached to a common supporting structure. As to the original assembly, BSA found the panels' attachment to a common grid to be dispositive. While it suggested that a different outcome might obtain if an installation consisted of "multiple structures affixed to a single pole," it made clear that it "[did] not reach a determination as to any signage assembly other than" the common grid structure then before it. As to the revised assembly, BSA rationally concluded that, notwithstanding the panels'

independent armatures, given their unified configuration, all the panels comprise a single structure affixed to the monopole.

As BSA did not materially change its position, petitioner's jurisdiction, judicial estoppel, and issue and claim preclusion arguments are unavailing.

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

ENTERED: MARCH 19, 2020

CLERK

Renwick, J.P., Gische, Mazzarelli, Webber, Singh, JJ.

11287- Index 154861/14
11287A Lester Greenman,
Plaintiff-Appellant,

-against-

2451 Broadway Market, Inc., et al.,
Defendants-Respondents.

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Sullivan Papain Block McGrath & Cannavo P.C., New York (Stephen C. Glasser of counsel), for appellant.

Gladstein Keane & Partners, LLC, New York (Thomas F. Keane of counsel), for respondents.

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Judgment, Supreme Court, New York County (Alexander M. Tisch, J.), entered on or about May 29, 2019, upon a jury verdict that allocated 75% of the fault to plaintiff and 25% to defendants, awarding plaintiff the principal sum of $18,750 for past pain and suffering, unanimously reversed, on the law, without costs, the judgment vacated, and the matter remanded for a new trial on the issues of past and future pain and suffering. Appeal from order, same court and Justice, entered on or about January 7, 2019, which denied plaintiff's motion for an upward modification of the jury award of $75,000 for past pain and suffering and zero damages for future pain and suffering, or, in the alternative, a new trial on damages, unanimously dismissed,

without costs, as subsumed in the appeal from the judgment.

The trial court erred in permitting defendants to use the transcripts of plaintiff's and his nonparty wife's depositions at trial, since the transcripts had never been served upon plaintiff and his wife in accordance with CPLR 3116(a) (*Li Xian v Tat Lee Supplies Co., Inc.*, 170 AD3d 538 [1st Dept 2019]; *Ramirez v Willow Ridge Country Club*, 84 AD3d 452 [1st Dept 2011]). Defendants used the transcripts extensively, both on cross-examination and as direct evidence, and, given the centrality of the issue of credibility, the error cannot be regarded as harmless (*see Rivera v New York City Tr. Auth.*, 54 AD3d 545, 548 [1st Dept 2008]).

The trial court further erred in permitting defense counsel to argue that the actual cause of plaintiff's fall was the effect of the Valium he had been given earlier that day in connection with a medical visit, since no evidence had been offered as to the dose plaintiff was given, the length of time the Valium would have remained in his system after his medical procedure, or the effect the Valium would have had on his ability to ambulate at

the time of his accident (*see Kaminer v John Hancock Mut. Ins. Co.*, 199 AD2d 53 [1st Dept 1993]).

In view of the foregoing, we do not reach the issue of the sufficiency of the damages awards.

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

ENTERED: MARCH 19, 2020

CLERK

Renwick, J.P., Gische, Mazzarelli, Webber, Singh, JJ.

11288 The People of the State of New York, Ind. 1735/17
Respondent,

-against-

Daniel Adams,
Defendant-Appellant.

_____

John P. Buza, New York, for appellant.

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

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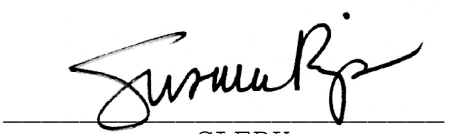
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ellen N. Biben, J.), rendered July 10, 2018,

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

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

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

ENTERED: MARCH 19, 2020



CLERK

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

Renwick, J.P., Gische, Mazzarelli, Webber, Singh, JJ.

11290 Jay Mitchell Bauman, M.D., Index 102293/08
Plaintiff-Appellant,

-against-

The Mount Sinai Hospital, et al.,
Defendants-Respondents.

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Tuckner, Sipser, Weinstock & Sipser, LLP, New York (William J. Sipser of counsel), for appellant.

Akerman LLP, New York (Rory J. McEvoy of counsel), for respondents.

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Order, Supreme Court, New York County (Debra A. James, J.), entered April 17, 2019, which granted defendants' motion for summary judgment dismissing the complaint alleging violations of the New York City Human Rights Law, unanimously affirmed, without costs.

Defendants proffered legitimate, nondiscriminatory reasons for temporarily suspending plaintiff in 2005 for allegedly administering a pill to his patients that induces labor, at his office and without his patients' knowledge, requiring him to enter into an interim agreement that partially restored his hospital privileges pending investigation, and ultimately terminating his position for violating the interim agreement (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]).

Plaintiff failed to raise an issue of fact as to whether defendants' explanations were pretextual (*see id.*) or whether discrimination was one of a number of motives for their decisions (*see Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 40-41 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]).

There is no evidence in the record supporting plaintiff's contention that defendants' employment decisions were motivated by animus toward his Orthodox Jewish faith. Nor is there evidence tending to establish a nexus between any alleged discriminatory behavior toward plaintiff's patients by nurses and another physician and the employment decisions underlying plaintiff's claim (*see Godbolt v Verizon N.Y. Inc.*, 115 AD3d 493 [1st Dept 2014], *lv denied* 24 NY3d 901 [2014]). The employment decisions followed a 10 year history of warnings, monitoring and interim suspensions regarding plaintiff's practices in caring for his patients admitted to the hospital. Some of the prior complaints concerned claims that plaintiff was admitting more patients to the hospital for labor and delivery than he could personally handle and that he did not provide for adequate cover by other physicians. After investigation, although the hospital could not determine whether plaintiff induced labor without his patients' consent, it did conclude that he was overworked and did

not have adequate support. This history well preceded his complaints of discrimination against his patients.

Plaintiff's reliance on the temporal proximity of his internal complaints and the adverse employment actions to raise an issue of fact as to retaliation is insufficient, especially since he was engaging in similar conduct that prompted numerous disciplinary measures in the 10 years preceding the 2005 allegations (*see Cadet-Legros v New York Univ. Hosp. Ctr.*, 135 AD3d 196, 206-207 [1st Dept 2015]).

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 19, 2020

CLERK

Renwick, J.P., Gische, Mazzarelli, Webber, Singh, JJ.

11291 The People of the State of New York, Ind. 3518/15
Respondent,

-against-

John Boyer,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered April 20, 2017, convicting defendant, after a nonjury trial, of burglary in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 16 years to life, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the court's verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's evaluation of expert testimony introduced by both sides.

The central element of the People's proof was evidence that

defendant was the major and only identifiable contributor to a DNA mixture found inside a football receiver glove that the perpetrator uncontestedly used and left behind in the burglarized apartment. The evidence supported reasonable inferences regarding the burglar's activities during the crime, including the inference that the burglar's efforts to climb to the apartment and enter it were strenuous. Expert testimony demonstrated that, given this level of exertion, which would cause the tight-fitting elastic glove to collect the wearer's sweat, it was extremely likely that the major DNA contributor and the burglar were the same person. In addition, aspects of defendant's interview with the police evinced a consciousness of guilt, and also showed that defendant was familiar with the particular building where the burglary occurred and had been in the area generally around the time of the crime. Furthermore, defendant's relatively small size was consistent with evidence supporting an inference that the burglar had to pass through a very narrow space to access the fire escape leading to the apartment.

The guilty verdict was further supported by evidence that defendant did not possess the glove when he was released from prison approximately 10 days before the crime, that he did not

receive it in any package while incarcerated, and that it would have been confiscated as contraband had he possessed it. The court providently exercised its discretion in admitting this evidence, which was plainly relevant in that it increased the probability that defendant's DNA was deposited in the glove some time between his release and the burglary 10 days later, and not at some earlier time. The relevance of this evidence was heightened by testimony that the glove appeared to be new. "Moreover, the court expressly stated that, as factfinder in this nonjury trial, it would [disregard defendant's prior incarceration], and the court is deemed capable of keeping that promise" (*People v Brown*, 129 AD3d 545, 545 [1st Dept 2025], *lv denied* 26 NY3d 1038 [2015]).

The court had no obligation to inquire, sua sponte, into defendant's competency, because there was no reason to believe that he was unable to understand the proceedings or to assist in his defense (*see Pate v Robinson*, 383 US 375 [1966]; *People v Tortorici*, 92 NY2d 757 [1999], *cert denied* 528 US 834 [1999]; *People v Morgan*, 87 NY2d 878 [1995]).

We have considered and rejected defendant's claims that his jury waiver was invalid and that his counsel rendered ineffective assistance.

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

ENTERED: MARCH 19, 2020

CLERK

Renwick, J.P., Gische, Mazzarelli, Webber, Singh, JJ.

11292 Quattro Parent LLC, Index 651555/17
Plaintiff-Respondent,

-against-

Zaki Rakib,
Defendant-Appellant.

_____

Gregory Zimmer, New York, for appellant.

Becker, Glynn, Muffly, Chassin and Hosinski LLP, New York (Jesse T. Conan of counsel), for respondent.

_____

Order, Supreme Court, New York County (Andrea Masley, J.), entered on or about January 23, 2019, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment as to liability, unanimously affirmed, with costs.

Plaintiff made a prima facie showing of defendant's liability for breach of a contract, based upon defendant's failure to pay $7.5 million, as required pursuant to the terms of the parties' Transaction Agreement, in exchange for a majority interest in plaintiff, after approval was received from the relevant Brazilian regulatory agency (*see Gordon v Schaeffer,* 176 AD3d 431 [2019]*; VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49, 58 [2013]).

The motion court correctly rejected defendant's misrepresentation-based defense and counterclaims, as the valuation report on which defendant allegedly relied was a nonactionable projection of future profitability (*see ESBE Holdings, Inc. v Vanquish Acquisition Partners, LLC*, 50 AD3d 397, 398 [1st Dept 2008]; *Sidamonidze v Kay*, 304 AD2d 415, 416 [1st Dept 2003]).

At a minimum, defendant's position on plaintiff's board placed him on notice of the need to investigate the discrepancy between the third-party valuation projections and the company's financials, which he failed to do (*see ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1044 [2015]; *MP Cool Invs. Ltd. v Forkosh*, 142 AD3d 286, 291-292 [1st Dept 2016], *lv denied* 28 NY3d 911 [2016]).

The motion court also correctly rejected defendant's unilateral mistake-based defense and counterclaim, because there was no showing of fraud or other wrongdoing (*see generally Angel v Bank of Tokyo-Mitsubishi, Ltd.*, 39 AD3d 368, 369-370 [1st Dept 2007]) and because defendant could not reasonably have relied on the alleged false representations (*see Dousmanis v Joe Hornstein, Inc.*, 181 AD2d 592, 593 [1st Dept 1992]). A court of equity may also rescind a contract for unilateral mistake if the failure to

do so would enrich one party at the other's expense, and the parties can be returned to the status quo without prejudice (*Gessin Electric v 95 Wall Assoc.*, 74 AD3d 516, 520 [1st Dept 2010]). Here, however, there are no specific allegations of unjust enrichment in the answer and counterclaims. Nor has defendant raised any argument that the status quo can be restored now that plaintiff has ceased doing business.

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

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

ENTERED: MARCH 19, 2020

CLERK

Renwick, J.P., Gische, Mazzarelli, Webber, Singh, JJ.

11293 The People of the State of New York, Ind. 3613N/17
Respondent,

-against-

Douglas Johnson,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Rebecca Hausner 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, New York County (Stephen M. Antignani, J.), rendered October 24, 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 19, 2020

CLERK

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

Renwick, J.P., Gische, Mazzarelli, Webber, Singh, JJ.

11294 Irving Lieblich, etc., Index 654551/17
Plaintiff-Appellant,

-against-

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

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Squitieri & Fearon, LLP, New York (Stephen J. Fearon, Jr. of counsel), for appellant.

Georgia M. Pestana, Acting Corporation Counsel, New York (John Moore of counsel), for respondent.

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Order, Supreme Court, New York County (Margaret A. Chan, J.), entered on or about January 22, 2019, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff's challenge to defendant's calculation of his pension is a challenge to an administrative determination, which should have been brought pursuant to CPLR article 78, and is barred by the applicable four-month statute of limitations (CPLR 217[1]; *see Hughey v Metropolitan Transp. Auth.*, 159 AD3d 596, 597 [1st Dept 2018]; *Clissuras v City of New York*, 131 AD2d 717, 718 [2d Dept 1987], *appeal dismissed* 70 NY2d 795 [1987], *cert denied* 484 US 1053 [1988]).

The determination - the exclusion of plaintiff's 2011 summer pay from the calculation of his pension benefits - became final and binding upon plaintiff in October 2011, when he received his benefits letter from defendant (*see Matter of Eldaghar v New York City Hous. Auth.*, 34 AD3d 326, 327 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]). Defendant's February 22, 2017 letter responding to plaintiff's inquiry and stating that "there is nothing further than can be done" did not extend the limitations period (*id.*).

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

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

ENTERED: MARCH 19, 2020

CLERK

Renwick, J.P., Gische, Mazzarelli, Webber, Singh, JJ.

10295- Index 306655/11
10295A S. A.,
Plaintiff-Respondent,

-against-

R. H.,
Defendant-Appellant.

_____

Larry S. Bachner, New York, for appellant.

Dobrish Michaels Gross LLP, New York (Robert Z. Dobrish of counsel), for respondent.

Philip Katz, New York, attorney for the child.

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Order, Supreme Court, New York County (Matthew F. Cooper, J.), entered June 22, 2018, which granted plaintiff father legal and residential custody of the child, final decision-making power for the child subject to meaningful consultation with defendant mother, and awarded supervised visitation to defendant, unanimously affirmed, without costs. Order, same court and Justice, entered July 9, 2018, which appointed a social worker to supervise visitation, and ordered defendant to refrain during visits from speaking to the child about court proceedings, making negative comments about plaintiff, his family, friends, the court, or attorneys, recording visits with the child, or disseminating information about visits on the Internet or

otherwise, unanimously affirmed, without costs.

The court's determinations have sound and substantial bases in the record and are consistent with the best interests of the child (*see Eschbach v Eschbach*, 56 NY2d 167 [1982]; *Matter of James Joseph M. v Rosana R.*, 32 AD3d 725 [1st Dept 2006], *lv denied* 7 NY3d 717 [2006]).

Defendant's argument that the court erred in awarding plaintiff temporary custody and allowing him to relocate without an evidentiary hearing is unpreserved, and in any event was rendered moot by the final custody determination, which was made after a full hearing (*see Matter of Wagner v Stevens*, 143 AD3d 903, 904 [2d Dept 2016]; *Matter of Julian S. [Patricia L.]*, 121 AD3d 796 [2d Dept 2014]).

Defendant's argument that she was deprived of a fair trial is also unpreserved and in any event without merit. Contrary to her contention, it was plaintiff's counsel, not the court, who first raised the issue of sexual abuse allegations against the psychologist. Defendant refers to plaintiff's counsel's ex parte allegations; however, she and her counsel were present when plaintiff's counsel spoke. Defendant's claims of inappropriate, ex parte contact between plaintiff's counsel and the court-appointed psychiatrist are unsupported, and she failed to rebut

counsel's claim that communications were for scheduling purposes only.

Defendant's complaints about the appointment of the psychiatrist are belied by the record; the order appointing him provides that his appointment is on the parties' consent. Defendant contends that the psychiatrist was appointed on plaintiff's counsel's "sole, handpicked recommendation." However, her counsel was offered, but failed to take, the opportunity to suggest other psychiatrists. Moreover, the court reacted positively to the suggestion of this psychiatrist, a suggestion supported by the attorney for the child, because of its familiarity with his expertise, not because of undue influence by plaintiff or his family.

Defendant suggests that there is some impropriety arising from plaintiff's payment of the psychiatrist's fees. However, the order appointing the psychiatrist states that plaintiff will pay him, and the record reveals neither an objection by defendant, nor an offer to pay the fees herself.

Contrary to defendant's argument, the court's finding that she was responsible for an Internet website on which, among other things, the child's paternal grandfather, the psychologist, the attorney for the child, the psychiatrist, and the social worker

are accused of wrongdoing is not based on the court's bias against her, but is the product of its careful deliberations as to her credibility, motives, revenge-oriented temperament, and ability to manipulate others.

Defendant waived her arguments about the psychiatrist's qualifications. The time to raise her objections was at the time of his appointment and before he commenced work on his extensive report – a report in which defendant participated by being interviewed. Defendant also failed to object to the use of the report at trial, and her counsel cross-examined the psychiatrist on it (*see* CPLR 4017; *Koplick v Lieberman*, 270 AD2d 460 [2d Dept 2000]).

Defendant's contention that the child's best interests were ignored at trial is belied by the court's repeated emphasis on that very issue throughout the proceedings and in its order entered June 22, 2018. Among other things that she claims prove she should have been awarded custody of the child, defendant points out that the visitation supervisor had no health or safety concerns about her care of the child. However, it is because her visitation was supervised that those concerns did not arise.

Contrary to defendant's contention, the court's references to settlement attempts were not improper (*see* CPLR 4547). The

court found that defendant's attitude toward settlement implicated her parental fitness and was therefore directly relevant to its analysis of the child's best interests. Defendant's First Amendment complaint that she was unfairly punished for the aforementioned website fails to acknowledge the broad harm done by the website, including harm to the child.

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

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

ENTERED: MARCH 19, 2020

CLERK

Renwick, J.P., Gische, Mazzarelli, Webber, Singh, JJ.

11296N Felicidad Sanchez, Index 300619/14
Plaintiff-Appellant,

-against-

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

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Massimo & Panetta, P.C., Mineola (Nicholas J. Massimo of counsel), for appellant.

Georgia M. Pestana, Acting Corporation Counsel, New York (Elina Druker of counsel), for respondents.

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Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about October 1, 2018, which denied plaintiff's motion for spoliation sanctions, unanimously reversed, on the law and facts, without costs, and the motion granted to the extent of imposing an adverse inference charge.

Defendants had an obligation to preserve the pre-accident audio recordings at the time they were destroyed because the Police Department (NYPD) internal report and plaintiff's notice of claim, which attached the public police accident report, put defendants on notice that they would likely assert an emergency operation defense. Therefore, pre-accident audio communication between the dispatcher and the NYPD vehicle or officers involved in the accident should have been preserved in case it was needed

for future litigation (*see Maiorano v JPMorgan Chase & Co.*, 124 AD3d 536 [1st Dept 2015]; *Malouf v Equinox Holdings, Inc.*, 113 AD3d 422 [1st Dept 2014]). Under the circumstances presented, the imposition of an adverse inference charge would be an appropriate sanction (*see Suazo v Linden Plaza Assoc., L.P.*, 102 AD3d 570, 571 [1st Dept 2013]; *Metropolitan N.Y. Coordinating Council on Jewish Poverty v FGP Bush Term.*, 1 AD3d 168 [1st Dept 2003]).

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

ENTERED: MARCH 19, 2020

CLERK

Renwick, J.P., Gische, Mazzarelli, Webber, Singh, JJ.

11297N Marilyn Model Management, Inc., Index 655776/18
Plaintiff-Respondent,

-against-

Derek Saathoff, et al.,
Defendants-Appellants.

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Heerde Blum LLP, New York (Matthew C. Heerde of counsel), for appellants.

Pillsbury Winthrop Shaw Pittman LLP, New York (Kristen J. Ferguson of counsel), for respondent.

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Order, Supreme Court, New York County (Andrea Masley, J.), entered March 12, 2019, which enjoined, during the pendency of this action, defendant Derek Saathoff from contacting or soliciting models under contract with plaintiff, using, disclosing, and/or misappropriating any of plaintiff's confidential information, unfairly competing with plaintiff, otherwise breaching his post-termination contractual obligations, unfairly competing with plaintiff through the use of its confidential information, and interfering with plaintiff's contractual relationships with its models or other employees, and enjoined defendant 1 Model Management LLC from using, disclosing and/or misappropriating any of plaintiff's confidential information, unfairly competing with plaintiff through the use of

confidential information, and interfering with plaintiff's contractual relationships with its models or other employees, unanimously modified, on the law and facts, to vacate so much of the order as enjoined Saathoff from contacting, soliciting, or assisting in the solicitation of any model under contract with plaintiff, and otherwise affirmed, without costs.

Plaintiff demonstrated its entitlement to injunctive relief by clear and convincing evidence establishing a likelihood of success on the merits of its claims that defendants engaged in improper solicitation of its employees and improper use of its confidential information (*see e.g. 1234 Broadway LLC v West Side SRO Law Project, Goddard Riverside Community Ctr.*, 86 AD3d 18, 23 [1st Dept 2011]).

However, the provision of the injunction barring Saathoff from contacting or soliciting plaintiff's employees for the duration of this action must be vacated. That provision was based on evidence that Saathoff violated a contractual restrictive covenant barring such solicitation for six months

following the termination of his employment. The covenant, pursuant to its terms, expired on March 25, 2019. Thus, there is no basis for the injunction to remain in place for the pendency of this action.

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

ENTERED: MARCH 19, 2020

CLERK