SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 26, 2020

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

10689N Domenick Rossi,
Plaintiff-Appellant,

Index 156072/13
590168/14

-against-

Doka USA, Ltd., et al.,
Defendants-Respondents.

- - - - -

[And a Third-Party Action]

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StolzenbergCortelli LLP, White Plains (Terrence James Cortelli of counsel), for appellant.

Biedermann Hoenig Semprevivo, Ne York (Philip C. Semprevivo of counsel), for respondents.

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Order, Supreme Court, New York County (Debra A. James, J.), entered September 26, 2018, which granted defendant Doka USA Ltd.'s motion to dismiss the complaint as against it, and denied plaintiff's cross motion for sanctions against Doka, unanimously modified, to deny defendant's motion, and otherwise affirmed, without costs.

Plaintiff, a carpenter, was injured while installing concrete walls at the building that would become 4 World Trade Center. The walls were created using a reusable form system

distributed to plaintiff's employer by defendant Doka. Doka's system employed tracks, so that a form could be filled with concrete, pushed into place along the track, and then pulled out again once the concrete had set. The form was moved back and forth on the track by use of a ratchet, approximately three feet in length, that attached to a bolt. Doka supplied the ratchets to plaintiff's employer, but denies that it manufactured or designed the ratchets. Doka provided training on how to use the system, including the ratchets, to the foremen working for plaintiff's employer. The foremen in turn trained the workers, including plaintiff. Plaintiff testified at his deposition that the ratchets frequently broke, and he remembered this happening on at least 10 occasions. In an email dated December 22, 2010, just over one month before the accident, Doka's senior account manager told two other Doka employees that he had been informed of several defective ratchets at the World Trade Center site.

Occasionally a form would not be situated evenly on the track and would become "bound," meaning difficult to move. According to plaintiff, workers had been trained to apply as much force to the ratchet as necessary when this happened. Although plaintiff testified that he had not been instructed to do so in training, it was common for workers to use their feet to add additional leverage on the ratchet, and that the foreman was

aware of the practice. On the day of the accident, plaintiff was in the process of closing up a wall. According to Doka, this was supposed to be a task completed by two people working together in order to make sure the form moved evenly on the track and did not get bound. Plaintiff was working with a partner that day, but when he was injured he was apparently moving the wall by himself. The wall became bound, and plaintiff used his right foot to apply pressure onto the shaft of the ratchet. He testified that when he did this, the gears in the ratchet broke, propelling the ratchet forward and with it plaintiff himself, causing his knee to hit a brace that was directly in front of him. Plaintiff was not certain whether the ratchet was new, or whether it had any particular markings or labels on it, but based on past experience he was certain that it was a Doka ratchet because it had come in a package that contained other Doka materials.

Immediately after the accident, plaintiff saw his partner pick up the ratchet and inspect it. Plaintiff was advised to go see a site medic who was located on a lower floor. However, the medic was not there and plaintiff went home. Plaintiff does not know what happened to the ratchet after the accident, and the ratchet has never been recovered.

Plaintiff commenced this action over two years after the accident, asserting, inter alia, a product liability cause of

action sounding in defective design. Doka served a notice of inspection demanding that plaintiff produce the ratchet that injured him, at which time he admitted he did not possess it. Plaintiff served his own demand on Doka seeking emails "pertaining to any complaints of defective and malfunctioning Doka wrench/ratchet[s]." Doka conducted a broad search, but asserts that it failed to identify any emails concerning defective wrenches or ratchets supplied by Doka to plaintiff's employer for the project. In September of 2014, over one year after the action was commenced, Doka underwent a company-wide replacement of its email system. Any emails predating the replacement became irretrievable.

Doka moved for spoliation sanctions, arguing that the absence of the ratchet that allegedly broke at the time of plaintiff's injury entitled it to dismissal of the complaint. Plaintiff filed a cross motion, seeking to strike Doka's answer for spoliation, arguing that it destroyed relevant emails. The motion court granted Doka's motion, and dismissed the complaint as against it. The court held that the loss of the ratchet warranted dismissal because it meant that Doka could not "exclude the various possibilities that the accident was caused by 'misuse, alteration, or poor maintenance' . . . rather than some design or manufacturing defect." The court denied plaintiff's

cross motion, finding that he had failed to establish spoliation based on Doka's alleged destruction of emails. The court reasoned that Doka searched its emails in April of 2014, when it was first notified that plaintiff alleged a defective ratchet, and that at that time, it could not locate any responsive emails. Hence, plaintiff had not established that the data lost during the subsequent email changeover actually resulted in the loss of relevant emails.

The issue on Doka's motion is not whether the ratchet plaintiff was using when he was injured was defectively designed. Rather, it is whether plaintiff forfeited any opportunity to establish a design defect at trial because, in the immediate aftermath of an accident that resulted in substantial trauma to his knee, he failed to secure the ratchet for purposes of a lawsuit. To answer that question, we must review the law of spoliation generally, and the law of spoliation as it applies to design defect cases specifically.

To obtain sanctions for spoliation, a party must establish that the non-moving party had an obligation to preserve the item in question, that the item was destroyed with a "culpable state of mind," and that the destroyed item was relevant to the party's claim or defense (*see VOOM HD Holdings LLC v EchoStar Satellite LLC*, 93 AD3d 33, 45 [1st Dept 2012]). A party can be deemed to

have had a "culpable state of mind" for purposes of a spoliation sanction even if it engaged in no more than ordinary negligence (*id.*). However, "striking a pleading is usually not warranted unless the evidence is crucial and the spoliator's conduct evinces some higher degree of culpability" (*Russo v BMW of North America, LLC*, 82 AD3d 643 [1st Dept 2011]). When that drastic remedy is appropriate in the case of ordinary negligence, it is because the non-spoliating party carried its burden of establishing that the missing evidence was its "sole means" of defending the claim, its defense was otherwise "fatally compromised" by the spoliation, or it had become "prejudicially bereft" of being able to defend (*Arbor Realty Funding, LLC v Herrick, Feinstein LLP*, 140 AD3d 607, 609-610 [1st Dept 2016]). Supreme Court has broad discretion to determine a sanction for spoliation of evidence (*Pegasus Aviation I, Inc. v Varig Logistics S.A.*, 26 NY3d 543, 551 [2015]). However, "the Appellate Division is vested with a corresponding power to substitute its own discretion for that of the trial court even in the absence of abuse" (*Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 745 [2000]).

In cases like this, where the claim is based on a design defect (as opposed to a manufacturing defect), the absence of the product is not necessarily fatal to the defendant. As this Court

has observed, a product's design "possibly might be evaluated and the defect proved circumstantially" (*Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 175 [1st Dept 1997]; *see Dayal v Coinmach Indus. Co.*, 284 AD2d 206, 207 [1st Dept 2001]). Circumstantial evidence could, one would imagine, be the testimony of someone involved in the design process, and plans or photographs of the product before it entered the stream of commerce. It could also, assuming that the missing product was one of multiple units manufactured using the same design, be another one of those units.

Preliminarily, it is questionable whether plaintiff should be held responsible at all for the absence of the ratchet. The accident occurred in the midst of a major construction project, which is a chaotic environment even when things are proceeding in routine fashion. Once the accident happened, plaintiff, who was suffering from his injuries and went directly to seek medical attention, unsurprisingly did not have securing the ratchet as his foremost priority. Further, there is nothing in the record to indicate that he would have found the ratchet if he had returned to the site after visiting the medic.

With respect to whether the absence of the ratchet was fatal to Doka's defense, plaintiff testified that on at least ten different occasions a ratchet broke while he was using it.

Specifically, the gears became stripped when force was exerted on the ratchet, which is what happened at the time of the accident. Plaintiff's foreman separately testified that on several separate occasions he had to order additional ratchets from Doka because the ones previously delivered had broken. Further, the December 22, 2010 email from Doka's senior account manager to two other Doka employees referred to anecdotes he had heard about several defective ratchets at the World Trade Center site.

The record indicates that, at the time of the accident, there were multiple ratchets present on the WTC site, and that new ratchets were provided on a regular basis. To the extent any ratchets still existed, an expert could have tested one or several, and investigated whether the gears tended to strip when force was exerted on the ratchet. Further, the simplicity of the tool negates the concerns identified in cases where design defect claims were dismissed based on spoliation. For example, in *Squitieri v City of New York* (248 AD2d 201 [1st Dept 1998]), a case on which Doka places heavy reliance, the product at issue was a street sweeper. The cab of the sweeper became filled with noxious carbon monoxide fumes, and the sweeper had been disposed of by the City, which owned it. This Court dismissed the City's third-party complaint against the sweeper's manufacturer alleging defective design, stating that "the absence of the sweeper would

prevent [the manufacturer] from countering the design defect claim with evidence that the City's misuse, alteration, or poor maintenance of this particular sweeper was a proximate cause of [plaintiff's] injuries" (248 AD2d at 203-204). Unlike a street sweeper, the design of the ratchet is simple, and there is no evidence that it could have been, or was, altered or maintained in such a way that could have contributed to plaintiff's accident. As for misuse, although there is no evidence that plaintiff was ever warned not to do so, plaintiff concedes that he used his foot to apply force to it. There is no other theory of misuse. Again, an expert could use one or more of the other ratchets to investigate whether the application of force by foot could cause the ratchet to break.

Notably, Doka does not, in any meaningful way, argue why its inability to inspect the exact ratchet that plaintiff was using would prevent it from defending against the products liability claim. Instead, it vociferously claims that without the actual ratchet it cannot know whether it was even the manufacturer or distributor of the ratchet. However, it is abundantly clear from the record, even from Doka's own witnesses, that Doka was responsible for the ratchets being made available to the workers installing the walls, which, whether or not it manufactured the ratchet, would make it liable for any defect in its design (*see*

Messina v New York City Trans. Auth., 84 AD3d 439, 440 [1st Dept 2011]). Moreover, Doka makes no effort to identify other entities that could have been responsible for making the ratchets available to plaintiff and the other workers. Based on the foregoing, it cannot on this record be said that Doka was prejudiced by the absence of the ratchet, and so the court should not have penalized plaintiff, much less resorted to the drastic remedy of dismissing his complaint.

We now turn to plaintiff's cross motion for spoliation sanctions based on Doka's failure to preserve emails when it switched its email service provider in September 2014. Plaintiff complains that Doka should have placed a litigation hold on its emails system when he commenced the action. However, plaintiff resorts to nothing more than speculation when he surmises that there were emails on those servers that could have assisted him in establishing his design defect claim. Indeed, Doka represented that it conducted a search of the old server before it was replaced, and found nothing responsive. The email dated December 22, 2010, in which Doka's senior account manager told two other Doka employees that he had been informed of several defective ratchets at the World Trade Center site, was generated one month before the accident happened and 2½ years before plaintiff commenced this action. There is no way of knowing

whether that email, and any emails responding to it, were deleted outside the ordinary course of Doka's business operations. Accordingly, plaintiff has not carried his burden of establishing that there were emails still on the server, at the time Doka switched its email provider, that were relevant to his claim (*see VOOM HD Holdings LLC v EchoStar Satellite LLC*, *supra*, 93 AD3d at 45).

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

ENTERED: MARCH 26, 2020

CLERK

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

11221 In re Shaun C.S., Dkt. V-18421-18
Petitioner-Respondent, V-28135-18

-against-

Kim N.M.,
Respondent-Appellant.

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In re Kim N.M.,
Petitioner-Appellant,

-against-

Shaun C.S.,
Respondent-Respondent.

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The Mandel Law Firm, New York (Howard A. Gardner of counsel), for appellant.

Carrion Law Group P.C., Brooklyn (Christopher A. Carrion of counsel), for respondent.

Janet Neustaetter, The Children's Law Center, Brooklyn (Laura Solecki of counsel), attorney for the child.

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Order, Family Court, Bronx County (Tamara Schwarzman, Court Attorney - Referee), entered on or about August 2, 2019, which, to the extent appealed from as limited by the briefs, granted physical custody to the mother on the condition that she return to live in New York prior to the start of the 2019-2020 school year, and live in specified geographic proximity to the father's residence, unanimously reversed, on the law, without costs, and the matter remanded for further proceedings, consistent herewith,

before a Family Court judge.

In April 2018 and May 2018, the father and the mother filed separate custody petitions for their son. The petitions were subsequently withdrawn and dismissed, without prejudice. In those proceedings, the father, mother, and mother's counsel executed an order of reference and stipulation agreeing that a Family Court Referee would "hear and determine the . . . matter and any cross petitions and any supplemental petitions filed prior to its conclusion, as well as any future petitions and supplemental petitions with respect thereto." When new petitions were filed, the mother made an application to have the case transferred from the Referee to a Family Court judge. That request was improperly denied.

"[A]n order of reference to a Judicial Hearing Officer (JHO) to hear and determine is permissible only with the consent of the parties, and [] such consent is an 'essential jurisdictional predicate'" (*Batista v Delbaum, Inc.*, 234 AD2d 45, 46 [4th Dept 1996][internal citations omitted]; *Matter of David S.S. v Mia B.M.*, 48 AD3d 1246, 1246 [1st Dept 2008]).

We do not agree that the parties' consent to have the Referee hear and determine the parties' disputes in the prior proceedings remained effective after those proceedings were terminated. We also disagree with the father's contention that

the reference to "future" petitions in the stipulation means that the parties forever forfeited any right to have a Family Court judge review their custody disputes until their child reaches age 18. Rather, once the prior proceedings were terminated, and the parties filed completely new petitions, which did not seek any enforcement or modification of extant orders issue in the prior proceedings, the stipulation regarding the Referee's jurisdiction had no effect. Use of the word "future" in this stipulation did not bind the parties for all times and in all subsequent proceedings concerning this child.

Notwithstanding that the Referee lacked jurisdiction to determine the matters before her, a Family Court judge has the right to refer the parties' dispute to a referee for a hearing and report (*see* CPLR 4001, 4201; *see Matter of Rose v Simon*, 162 AD3d 1048 [2d Dept 2018]; *see Matter of Stewart v Mosley*, 85 AD3d 931, 932 [2d Dept 2011]). A Family Court judge may make such a reference, even in the absence of the parties' consent (*see* CPLR 4001; 4212). In those circumstances, where it is a hear and report, the parties have the right to seek review of the Referee's findings by a Family Court judge by bringing a motion to confirm or reject (CPLR 4320; 4403; *see e.g. Matter of McDuffie v Reddick*, 154 AD3d 1308, 1309 [4th Dept 2017]; *Capili v Ilagan*, 26 AD3d 354 [2d Dept 2006]).

Here, however, the Referee exceeded her authority by determining the issues, instead of making findings of fact and reporting them to the court (*see Karpov v Shiryaev*, 116 AD3d 613, 613 [1st Dept 2014]). Although the mother requests a new trial, it is unclear whether that relief is necessary. Instead, we remand this matter to a Family Court judge so that a judicial determination can be made as to whether any further hearings are necessary, and to allow the parties an opportunity to seek confirmation or rejection of the Referee's findings of fact and legal conclusions.

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

ENTERED: MARCH 26, 2020

CLERK

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

11259 & M-430 The People of the State of New York, Respondent,

-against-

Pedro Hernandez,
Defendant-Appellant.

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Chief Defenders Association of New York and The Innocence Project Inc.,
Amici Curiae.

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

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

The Legal Aid Bureau of Buffalo, Inc., Buffalo (Erin A. Kulesus of counsel), for Chief Defenders Association of New York amicus curiae.

Simpson Thacher & Bartlett LLP, New York (Mark Stein of counsel), for The Innocence Project Inc., amicus curiae.

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Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered April 18, 2017, convicting defendant, after a jury trial, of murder in the second degree and kidnapping in the first degree, and sentencing him to concurrent terms of 25 years to life, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the hearing court's factual determinations. The hearing record establishes that, under the

totality of circumstances, defendant's statements made before he received *Miranda* warnings were not the product of custodial interrogation, because a reasonable innocent person in defendant's position would not have thought he was in custody (*see People v Yukl*, 25 NY2d 585 [1969], *cert denied* 400 US 851 [1970]). Defendant voluntarily accompanied the detectives to a New Jersey police station, where he was not locked into the facility, handcuffed or restrained, and he was permitted to move around in a manner that was inconsistent with a custodial setting. The detectives repeatedly told defendant he was free to leave. In the context of all the surrounding circumstances, those explicit assurances were not undermined when, on several occasions, the detectives expressed their preference that defendant complete the interview before he left or spoke to his wife, and defendant voluntarily opted to continue. Furthermore, the interview was never hostile or accusatory.

The court also correctly determined that defendant made a knowing and intelligent waiver of his *Miranda* rights. The evidence, including the videotape of defendant's ultimate interview by an Assistant District Attorney as well as expert testimony presented by both sides, supports the conclusion that defendant was not so mentally ill, lacking in intelligence, or impaired by medication that he was incapable of intelligently

waiving his rights (*see People v Williams*, 62 NY2d 285 [1984]). An interchange between defendant and the interviewing Assistant, in which defendant asked intelligent questions about his right to counsel and received appropriate answers, demonstrates defendant's ability, rather than inability, to understand his rights.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Initially, we find that defendant's confession was corroborated to the limited extent required by CPL 60.50. That statute is satisfied by the production of "some proof, of whatever weight, that a crime was committed by someone" (*People v Chico*, 90 NY2d 585, 589 [1997]). Here, the unexplained disappearance in 1979 of six-year-old Etan Patz, who has not been located or heard from since, presented strong circumstantial evidence that he was kidnaped and murdered (*see People v Lipsky* 57 NY2d 560, 571-572 [1982]).

Next, we find that defendant's confession to law enforcement was reliable and truthful. Defendant offered certain details without any prompting, such as offering Etan a soda, that were consistent with other evidence. Defendant also led detectives to the place where he thought he had left the body, but expressed uncertainty because of the presence of a door; detectives later

learned that the owner had installed the door after 1979. Defendant made generally similar admissions to civilians over a period ranging from shortly after Etan's disappearance to immediately after he confessed to the authorities. Defendant's account was consistent with his admissions at a religious retreat, where he told fellow participants that he had strangled a boy while working at a store, and placed his body in a bag, which he put with the trash. After his confession to law enforcement, defendant also admitted to his wife and daughter that he had killed a boy, and told a nurse that he had choked a person 33 years earlier. Any inconsistencies within defendant's confession, or between that confession and his admissions to civilians, or between his various statements and other evidence in the case, were sufficiently explained. The evidence does not support defendant's claim that he gave a false confession due to a susceptibility resulting from mental impairment. Aside from the fact that defendant volunteered essentially the same admission to civilians, the evidence showed that defendant lived as a well-functioning, employed family man for many years, and the jury could have reasonably rejected the expert testimony introduced by defendant regarding his mental condition. Furthermore, there is no evidence that the facts stated in defendant's confession were contaminated by police suggestion or

otherwise.

We also find that evidence regarding the possible culpability of an alternative suspect was too weak to affect the weight of the evidence establishing defendant's guilt. Although the other suspect was a convicted child molester, his admission that on the day Etan disappeared, he had sexually molested a boy named "Jimmy," whom he brought to his apartment and then put on a subway to his aunt's home, had little connection with the facts of this case.

The evidentiary rulings challenged on appeal were provident exercises of discretion that did not impair defendant's right to present a defense or any other constitutional right (*see Crane v Kentucky*, 476 US 683, 689-690 [1986]). Defendant had an ample opportunity to introduce evidence about the above-discussed alternative suspect, and the evidence offered by defendant relating to yet another possible suspect was so remote as to be irrelevant (*see People v DiPippo*, 27 NY3d 127, 135-136 [2016]). With regard to hearsay evidence offered by both sides, the court properly concluded that the evidence offered by the People was admissible, not for its truth, but for legitimate nonhearsay explanatory purposes (*see People v Tosca*, 98 NY2d 660 [2002]), while the evidence offered by defendant was not admissible on that, or any other basis (*see People v Burns*, 6 NY3d 793, 795

[2006]). The court also providently exercised its discretion in precluding expert testimony on the effect on memory of a lengthy passage of time, because the proposed testimony was within the jurors' ordinary experience and knowledge. We reach similar conclusions as to the other evidentiary issues raised on appeal, including defendant's constitutional claims.

The court provided a meaningful response to a jury note on the subject of the voluntariness of confessions (*see generally People v Almodovar*, 62 NY2d 126, 131 [1984]; *People v Malloy*, 55 NY2d 296, 302 [1982], *cert denied* 459 US 847 [1982]). Given the precise wording of the note, the court's brief response was correct. Even assuming, without deciding, that the court should have added instructions on the circumstances whereby a statement may or may not be attenuated from a prior statement found to be involuntary, there is no reasonable possibility that the verdict would have been different had those instructions been given (*see People v Petty*, 7 NY3d 277, 286 [2006]; *People v Jones*, 3 NY3d 491, 497 [2004]), in light of the strong evidence that defendant's confession to the Assistant District Attorney was fully attenuated from all of his confessions to the police, as well as being corroborated by defendant's various confessions to civilians.

The court providently exercised its discretion in denying,

without an evidentiary hearing, defendant's CPL 330.30(2) motion to set aside the verdict on the ground that the jury had been improperly influenced by extraneous information (*see People v Samandarov*, 13 NY3d 433, 436-438 [2009]). Defendant did not provide affidavits from anyone with first-hand knowledge of the material facts. While affidavits in support of such a motion may be based on information and belief, here the "information" in a defense investigator's affidavits was limited to news media accounts, along with statements by a juror and an alternate that failed to support, or contradicted, defendant's theory of improper influence. None of this information was sufficient to require a hearing (*see id.*). Defendant acknowledged his inability to provide more information, and he was not "entitled to a hearing based on expressions of hope that a hearing might reveal the essential facts" (*People v Brooks*, 134 AD3d 574, 576 [1st Dept [2015], *affd* 31 NY3d 939 [2018]). Furthermore, defendant did not demonstrate that the extraneous information

allegedly made known to the jury had any effect on its deliberations, or that it was inherently prejudicial.

We perceive no basis for reducing the sentence.

We have considered and rejected defendant's remaining claims.

M-430 - *People v Hernandez*

Motion to file amicus curiae brief granted, and the brief deemed filed.

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

ENTERED: MARCH 26, 2020

CLERK

Friedman, J.P., Kapnick, Oing, González, JJ.

11263 In re Reliance Ambulette, Inc., Index 160717/16
Petitioner,

-against-

Dennis Rosen, etc., et al.,
Respondents.

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Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Alan M. Sclar of counsel), for petitioner.

Letitia James, Attorney General, New York (Amit R. Vora of counsel), for respondents.

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Determination of respondent New York State Department of Health, dated August 23, 2016, which affirmed a determination of the New York State Office of the Medicaid Inspector General (OMIG), after a hearing, that petitioner received overpayments of Medicaid reimbursements totaling $2,659,293.15, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Lynn R. Kotler, J.], entered August 14, 2017), unanimously dismissed, without costs.

Substantial evidence supports OMIG's determination that petitioner received overpayments of Medicaid reimbursements for claims where petitioner's drivers were either not licensed by the New York City Taxi and Limousine Commission (TLC), or had missing or inaccurate information in their claims (*see generally 300*

Gramatan Ave. Assoc. v State Div. of Human Rights, 45 NY2d 176, 180-181 [1978]). OMIG correctly determined that 18 NYCRR 505.10 requires both ambulette owners and drivers who provide services in the City of New York to be licensed by the TLC in order to receive reimbursement (*see* Department of Social Services Regulations [18 NYCRR] § 505.10[e][6][ii]).

The parties' communications and the conduct described in the final OMIG report provided petitioner with sufficient notice of the charges, and petitioner thus had an adequate opportunity to prepare its defense (*see generally Matter of Franklin St. Realty Corp. v NYC Envtl. Control Bd.*, 164 AD3d 19, 24-25 [1st Dept 2018], *affd* __ NY3d __, 2019 NY Slip Op 08976 [2019]). Moreover, petitioner did not preserve its claim that respondent's audit was unduly burdensome, and, in any event, it did not demonstrate that it was precluded thereby from complying with the audit or that the administrative delay required annulment of OMIG's determination (*see Matter of Clearview Ctr., Inc. v New York*

State Off. of the Medicaid Inspector Gen., 172 AD3d 1582, 1586-1588 [3d Dept 2019]).

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

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

ENTERED: MARCH 26, 2020

CLERK

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

11298 The People of the State of New York, Respondent, Ind. 4440/16

-against-

Edgar Tapia-Hernandez.
Defendant-Appellant.

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Janet E. Sabel, The Legal Aid Society, New York (Ellen Dille 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 (Neil Ross, J.), rendered January 2, 2018, convicting defendant, after a jury trial, of petit larceny and criminal mischief in the fourth degree, and sentencing him to a term of 45 days and three years' probation, unanimously modified, as a matter of discretion in the interest of justice, to the extent of eliminating the term of imprisonment, and otherwise affirmed.

We find the sentence excessive to the extent indicated.

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

ENTERED: MARCH 26, 2020

CLERK

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

11299-
11299A Harriet Mehler,
Plaintiff-Appellant,

-against-

Cheryl D. Jones also known as
Cannon J. Tanner,
Defendant,

Nader Paksima, D.O., et al.,
Defendants-Respondents.

Index 805469/13

Joseph R. Bongiorno & Associates, P.C., Mineola (Joseph R. Bongiorno of counsel), for appellant.

Bartlett LLP, White Plains (David C. Zegarelli of counsel), for Nader Paksima, D.O., respondent.

McAloon & Friedman, PC, New York (Gina Bernard DiFolco of counsel), for NYU Hospitals Center for Joint Diseases and NYU Langone Medical Center, respondents.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about April 25, 2018, which granted defendant Nader Paksima, D.O.'s and defendants NYU Hospital for Joint Diseases and NYU Langone Medical Center's motions to dismiss the complaint unless plaintiff appeared for a deposition on or before May 8, 2018, and order, same court and Justice, entered on or about August 16, 2018, which denied plaintiff's motion to renew defendants' motions, unanimously affirmed, without costs.

The motion court providently exercised its discretion in

issuing a conditional order of dismissal, in light of plaintiff's history of noncompliance with court orders requiring her to appear for a further deposition (*see* CPLR 3126[3]; *Fish & Richardson, P.C. v Schindler*, 75 AD3d 219, 220 [1st Dept 2010]).

Plaintiff contends that her behavior was neither willful nor contumacious. However, by issuing a conditional order, the court "relieve[d] [itself] of the unrewarding inquiry into whether [plaintiff's] resistance was willful" (*Board of Mgrs. of the 129 Lafayette St. Condominium v 129 Lafayette St., LLC*, 103 AD3d 511, 511 [1st Dept 2013] [internal quotation marks omitted]).

On her motion to renew, plaintiff failed to submit new facts (CPLR 2221[e][2]), i.e., facts that existed but were unknown to her at the time defendants made their motions (*see Matter of Naomi S. v Steven E.*, 147 AD3d 568 [1st Dept 2017]). Instead, she submitted facts that developed after the conditional order that decided the prior motions was issued.

Plaintiff's proper recourse was to seek to vacate the order on the ground of excusable default, pursuant to CPLR 5015(a)(1) (*see Hutchinson Burger, Inc. v Bradshaw*, 149 AD3d 545, 545 [1st Dept 2017]; *Country Wide Home Loans, Inc. v Dunia*, 138 AD3d 533 [1st Dept 2016]). Even if we treat the motion as a motion to vacate (*see* CPLR 2001), we must deny it. Although plaintiff

demonstrated a reasonable excuse for her failure to comply with the conditional order, she failed to demonstrate a meritorious medical malpractice claim (*see Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 80 [2010]).

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

ENTERED: MARCH 26, 2020

CLERK

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

11300 In re Dean E.H., Dkt. V-05239-01/17C
Petitioner-Appellant,

-against-

Deborah R.,
Respondent-Respondent.

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Dean E.H., appellant pro se.

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

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Order, Family Court, New York County (Carol Goldstein, J.), entered on or about August 3, 2018, which awarded respondent mother $60,000 in attorneys' fees, unanimously affirmed, with costs.

The attorneys' fees award was a provident exercise of discretion, which expressly took into consideration the financial circumstances of the parties and the underlying facts of the case (Domestic Relations Law § 237[b]). Any alleged mistake in the redaction of the billing statements was properly accounted for in the $60,000 award, which was less than the $85,000 total fees requested. Contrary to the father's argument, the fact that the mother was able to pay her own attorneys' fees was not a bar to

an award of legal fees in her favor (see *Matter of Balber v Zealand*, 169 AD3d 500, 501 [1st Dept 2019]).

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

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

ENTERED: MARCH 26, 2020

CLERK

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

11301 In re Charles Thomas Michelsen, Petitioner-Appellant, Index 100112/18 1045/19

-against-

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

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Charles T. Michelsen, appellant pro se.

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

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Judgment, Supreme Court, New York County (Carmen Victoria St. George, J.), entered October 5, 2018, denying the petition to annul the determination of respondent City University of New York (CUNY), dated September 25, 2017, which dismissed petitioner from the Hunter College School of Education, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondents' decision to dismiss petitioner from their masters in education program was not irrational, arbitrary and capricious, or contrary to law (*see Matter of Madison County Indus. Dev. Agency v State of N.Y. Auths. Budget Off.*, 33 NY3d 131, 135 [2019]; *see also Tedeschi v Wagner Coll.*, 49 NY2d 652, 658 [1980]). Respondents rationally dismissed petitioner from the program on account of his longstanding unprofessional

behavior in connection with his fieldwork placements, arguably the most important aspect of his training in becoming a teacher.

We reject petitioner's contention that his dismissal should have been governed by CUNY's procedures for "disciplinary offenses," which call for formal charges and a disciplinary hearing. The conduct giving rise to petitioner's termination raised academic issues, which do not require that respondent issue formal charges or afford petitioner an administrative hearing. Petitioner's argument that the Hunter School of Education lacked sufficient authority to enact the new fieldwork policy, as opposed to relying on the existing academic policy, which did not apply to him, is without merit. Petitioner cites no authority to support his contention that an educational division must be an independent legal entity to create policies that govern its programs.

Petitioner's argument that his dismissal infringed on his First Amendment rights is also without merit. Petitioner maintains that respondents improperly and unlawfully dismissed him solely because he was their "loudest, most articulate, and least politically-correct critic." However, he made no showing that it was his expression of conservative political views, as opposed to his continued unprofessional and insubordinate conduct

in his student teaching positions in violation of respondents' fieldwork policy, that was the basis for his dismissal.

We have considered petitioner's remaining contentions and find them without merit.

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

ENTERED: MARCH 26, 2020

CLERK

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

11303 Joseph Rodriguez, et al., Index 151770/17
Plaintiffs-Respondents,

-against-

BSREP UA Heritage LLC,
Defendant-Appellant.

_____

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Louise M. Cherkis of counsel), for appellant.

Sacks & Sacks, LLP, New York (Scott N. Singer of counsel), for respondents.

_____

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered September 9, 2019, which, insofar as appealed from, denied defendant's cross motion for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) claims, granted plaintiffs' motion for partial summary judgment on the Labor Law § 240(1) claim, and upon a search of the record, granted plaintiff partial summary judgment on so much of the Labor Law § 241(6) claim as was based on alleged violations of Industrial Code (12 NYCRR) § 23-1.21, unanimously affirmed, without costs.

Plaintiff made a prima facie showing that his injuries were proximately caused by a violation of Labor Law § 240(1). Plaintiff submitted his testimony, corroborated by a coworker who witnessed the accident, that plaintiff was working on a 10-foot ladder (a segment of a larger extension ladder) that suddenly

slipped and tipped over, causing plaintiff to fall to the ground (*see Rom v Eurostruct, Inc.*, 158 AD3d 570 [1st Dept 2018]; *Fanning v Rockefeller Univ.*, 106 AD3d 484, 485 [1st Dept 2013]). Plaintiff was not otherwise required to show that the ladder was defective (*see Pierrakeas v 137 E. 38th St. LLC*, 177 AD3d 574, 574-575 [1st Dept 2019]).

In opposition, defendant failed to raise an issue of fact as to whether plaintiff's conduct was the sole proximate cause of his injuries. Earlier on the day of the accident, plaintiff had seen other workers using the same ladder, which had been set up by another worker, and plaintiff's failure to secure the ladder was at most comparative negligence (*see Concepcion v 333 Seventh LLC*, 162 AD3d 493, 494 [1st Dept 2018]; *Nacewicz v Roman Catholic Church of the Holy Cross*, 105 AD3d 402, 403 [1st Dept 2013]). "Plaintiff's failure to ask his coworkers to hold the ladder while he worked also did not constitute the sole proximate cause of the accident, since a coworker is not a safety device contemplated by the statute" (*Noor v City of New York*, 130 AD3d 536, 541 [1st Dept 2015], *lv dismissed* 27 NY3d 975 [2016] [internal quotation marks omitted]). Furthermore, defendant's argument that plaintiff should have used a metal ladder available on the site, rather than the fiberglass ladder, is unsupported by the record (*see Jarzabek v Schafer Mews Hous. Dev. Fund Corp.*,

160 AD3d 412 [1st Dept 2018]; *Fanning*, 106 AD3d at 485).

Since the court properly granted plaintiffs' motion for partial summary judgment on the Labor Law § 240(1) claim, we need not reach the remaining issues raised on appeal (*see Fanning*, 106 AD3d at 485).

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

ENTERED: MARCH 26, 2020

CLERK

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

11304 The People of the State of New York, Respondent, Ind. 2795/17

-against-

Jason Reid,
Defendant-Appellant.

_____

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

_____

Judgment, Supreme Court, Bronx County (Efrain Alvarado, J.), rendered May 9, 2018, 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 26, 2020

CLERK

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

11305 Patricia Agard, Index 303451/12
Plaintiff,

-against-

Green Tree, LLC,
Defendant-Appellant-Respondent,

Knit-A-Way,
Defendant-Respondent-Appellant,

392 Atlantic Avenue, LLC, et al.,
Defendants-Appellants,

Diamond Point Excavating Corp., et al.,
Defendants,

Triumph Construction Corp.,
Defendant-Respondent.

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Hannum, Feretic, Prendergast & Merlino, LLC, New York (Napatr Thanesnant of counsel), for appellants.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Jeremy M. Buchalski of counsel), for appellant-respondent.

Law Office of Tromello & Fishman, Tarrytown (D. Bradford Sessa of counsel), for respondent-appellant.

Litchfield Cavo LLP, New York (Anthony Broccolo of counsel), for respondent.

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Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about July 6, 2018, which denied defendant Knit-A-Way's and defendants 392 Atlantic Avenue, LLC (Atlantic) and Mandarin Enterprises II, Inc.'s (Mandarin) motions for summary judgment dismissing the complaint and all cross claims against

them, and denied defendant Green Tree, LLC's (Green Tree) motion for summary judgment dismissing the complaint and all cross claims against it or, alternatively, on its cross claims against Knit-A-Way for common-law and contractual indemnification, unanimously reversed, on the law, to grant Green Tree's, Knit-A-Way's, Atlantic's, and Mandarin's motions dismissing the complaint and all cross claims against them, without costs. The Clerk is directed to enter judgment dismissing the complaint and all cross claims against Green Tree, Knit-A-Way, Atlantic, and Mandarin.

Plaintiff alleges that she was injured after slipping and falling on wet cement on a public sidewalk between 392 and 398 Atlantic Avenue in Brooklyn. At her deposition, plaintiff adequately authenticated photographs depicting the area of the sidewalk in which she allegedly fell (*see Singh v New York City Hous. Auth.*, 177 AD3d 475, 475-476 [1st Dept 2019]; *Cuevas v City of New York*, 32 AD3d 372, 373 [1st Dept 2006]). Based on these photographs, defendants Atlantic and Mandarin, the owner of and general contractor working at 392 Atlantic Avenue, established prima facie that plaintiff's alleged accident did not occur in front of their premises (*see Cuenca v City of New York*, 178 AD3d 602 [1st Dept 2019]). In opposition, defendant Triumph Construction Corp. (Triumph), which was performing work in the

immediate area of the sidewalk around the time and place of the alleged accident, failed to raise an issue of fact.

Defendants Knit-A-Way and Green Tree also established their entitlement to judgment as a matter of law. These defendants submitted evidence that plaintiff, who was injured after slipping on wet cement related to an active construction site, did not see any cement on the ground prior to her accident (*see Richardson v S.I.K. Assoc., L.P.*, 102 AD3d 554 [1st Dept 2013]). They also point to Triumph's superintendent's testimony, in which he stated that Triumph's work included the use of cement, and that its employees were responsible for cleaning up the job site. In light of the foregoing, Knit-A-Way and Green Tree established prima facie that they neither caused or created the alleged dangerous condition, nor had sufficient notice of its existence to remedy it (*see Ceron v Yeshiva Univ.*, 126 AD3d 630, 632 [1st Dept 2015]). In opposition, neither plaintiff nor Triumph submitted evidence sufficient to create an issue of fact. Although Knit-A-Way and/or Green Tree were required to keep the sidewalk in a reasonably safe condition, plaintiff was injured on an active construction cite, which was Triumph's responsibility to maintain.

Knit-A-Way also established that Green Tree's cross claims for contractual and common law indemnification should be

dismissed as against it, in light of Green Tree's principal's testimony that the condition that allegedly caused plaintiff's accident was not something that Knit-A-Way would have been expected to clean (*see Morchik v Trinity School*, 257 AD2d 534, 536 [1st Dept 1999]).

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

ENTERED: MARCH 26, 2020

CLERK

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

11306 In re Ramon Cabrera, Index 151196/18
Petitioner-Appellant,

-against-

City of New York Civil Service Commission,
Respondent-Respondent.

_____

Cronin & Byczek, LLP, White Plains (Linda M. Cronin of counsel), for appellant.

James E. Johnson, Corporation Counsel, New York (Zachary S. Shapiro of counsel), for respondent.

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Judgment (denominated an order), Supreme Court, New York County (Andrea Masley, J.), entered January 2, 2019, denying the petition to annul a determination of respondent, dated October 5, 2017, which affirmed a determination by New York City Department of Correction (DOC), after a hearing, to terminate petitioner from his position as a correction officer, and granting respondent's cross motion to dismiss the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner, in his brief, does not address the court's dismissal of the petition for failing to join necessary parties and has thus abandoned any challenge to the court's dismissal on that basis (*see Matter of Eilenberg v City of New York*, 162 AD3d 457 [1st Dept 2018]). In any event, the court properly determined that DOC was a necessary party to this proceeding, as

petitioner sought relief against the DOC, and the DOC might have been inequitably affected by a judgment in the proceeding (*see* CPLR 1001[a]; *Matter of Centeno v City of New York*, 115 AD3d 537 [1st Dept 2014]*); Matter of Watkins v New York City Dept. of Educ.*, 48 AD3d 339, 340 [1st Dept 2008], *lv denied* 10 NY3d 713 [2008]).

The court also properly concluded that petitioner failed to establish that respondent "acted illegally, unconstitutionally or in excess of its jurisdiction" (*Matter of Almanzar v City of N.Y. City Civ. Serv. Commn.*, 166 AD3d 522, 524 [1st Dept 2018] [internal quotation marks omitted]). Petitioner was provided with sufficient notice of the charges, an explanation of the evidence, and an opportunity to be heard (*see generally Matter of Beck-Nichols v Bianco*, 20 NY3d 540, 559 [2013]). Following a hearing on the disciplinary charges against petitioner and others, DOC determined that the serious nature of petitioner's misconduct warranted termination, and that petitioner's employment history did not mitigate the sanction. Although respondent initially affirmed DOC's determination based on a legal error, the matter was subsequently remanded and, following a review of the record, a supplementary determination was issued which addressed the process petitioner received and the basis for his termination which did not rely on the legal error. Since

petitioner elected to appeal to the Civil Service Commission, challenges to the weight of the evidence and the penalty imposed are outside of the narrow scope of review (*see Matter of Dhar v Commissioner, N.Y. City [NYC] Dept. of Transp.*, 146 AD3d 573 [1st Dept 2017] *lv denied* 29 NY3d 916 [2017]).

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

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

ENTERED: MARCH 26, 2020

CLERK

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

11307 The People of the State of New York, Ind. 4948/16
Respondent,

-against-

Martin Francisco,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Amanda Katherine Regan 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 (Michael Obus, J. at plea; Laura Ward, J. at sentencing), rendered May 18, 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 26, 2020

CLERK

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

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

11308 The Lisa Goldberg Qualified Personal Residence Trust under agreement dated December 12, 2012, etc., Plaintiff-Appellant, Index 161672/14

-against-

The Board of Managers of the Madison Square Condominium, et al., Defendants-Respondents,

Jerome Berard, et al., Defendants.

_____

Kishner Miller Himes, P.C., New York (Elizabeth Tobio of counsel), for appellant.

Gallo Vitucci Klar LLP, New York (Jessica Clark of counsel), for The Board of Managers of the Madison Square Condominium and New Bedford Management Corp., respondents.

Quirk & Bakalor, P.C., Garden City (Loretta A. Redmond of counsel), for George Higgins and Ali Reza Momtaz, respondents.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered on or about January 17, 2019, which, to the extent appealed from as limited by the briefs, granted defendant Board's motion for summary judgment dismissing the trespass and breach of fiduciary duty claims as against it and granted defendants Higgins and Momtaz's motion for summary judgment dismissing the negligence and trespass claims as against them and the breach of fiduciary duty claim as against Higgins, unanimously modified, on the law, to deny both motions as to the breach of fiduciary duty

claims and deny Higgins and Momtaz's motion as to the negligence claim, and otherwise affirmed, with costs.

This case arises from a recurring leak in plaintiff's condominium apartment that was found to emanate from the apartment above, which was owned by board member defendant Higgins and defendant Ali Reza Momtaz. The parties' respective experts determined in 2015 that the leak was caused by an improperly pitched pipe connected to Higgins and Momtaz's toilet, a defective toilet flange connecting the building's pipes to the toilet, and a defective seal around the base of the toilet at the floor. The improperly pitched pipe was repaired and the toilet replaced in 2015, and after the seal around the base of the toilet was repaired in 2017, the leak did not recur.

Higgins's expert's determination that all three defective conditions constituted "common elements" is arguably incorrect under the condominium declaration and bylaws (*see also* Real Property Law § 339-e[3]). The description of the defective conditions both inside the walls and within Higgins and Momtaz's apartment raises an issue of fact as to whether it is defendant Board or Higgins and Momtaz who are ultimately responsible for the cause of the leak. In light of that, and in view of the evidence that they obstructed the Board's investigation, Higgins and Momtaz are not entitled to summary judgment dismissing the

negligence claim as against them.

Nor is Higgins or the Board entitled to the dismissal of the breach of fiduciary duty claim. Although the motion court acknowledged the evidence that Higgins refused access to his apartment while the board on which he sat was tasked with investigating the leaks in plaintiff's apartment, it ruled that Higgins engaged in this conduct only in his individual capacity (*see Avramides v Moussa*, 158 AD3d 499 [1st Dept 2018]). However, this distinction would extinguish any potential claim against a board member for breach of fiduciary duty based on self-interest or on tortious acts that were outside the scope of his or her duty as a board member but that impeded the Board's performance of its fiduciary obligations (*see Birnbaum v Birnbaum*, 73 NY2d 461, 466 [1989]). Given Higgins's admitted refusal to recuse himself from decisions that would affect the investigation, the record presents issues of fact whether Higgins placed his own personal interest in keeping the investigation out of his apartment over plaintiff's interest in a timely investigation and repair of the leaks and whether the Board took appropriate steps to insulate the investigation from Higgins's self-interested involvement and intentional delays (*see Barbour v Knecht*, 296 AD2d 218, 224-225 [1st Dept 2002]).

The court correctly dismissed the trespass claims for failure to show that defendants performed "an affirmative act constituting or resulting in an intentional intrusion upon plaintiff's property" (*Congregation B'Nai Jehuda v Hiyee Realty Corp.*, 35 AD3d 311, 312 [1st Dept 2006]).

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

ENTERED: MARCH 26, 2020

CLERK

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

11309 Eileen Henry, Index 24000/14E
Plaintiff-Respondent,

-against-

Storage Post,
Defendant-Appellant.

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Molod Spitz & DeSantis, P.C., New York (Alice Spitz of counsel), for appellant.

DeColator Cohen & DiPrisco LLP, Garden City (Carolyn M. Canzoneri of counsel), for respondent.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered June 19, 2019, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff, a New York City police officer, was injured while attempting to handcuff a tenant at defendant's storage facility who refused to leave the facility at closing time. She alleges that defendant was negligent in failing to evict the tenant before the incident occurred and, pursuant to General Municipal Law § 205-e, that defendant violated Administrative Code of City of NY § 28-301.1 by maintaining a locked door in the basement of the facility.

Defendant established prima facie that it had no duty to

plaintiff to evict the tenant by submitting evidence that there was no history of prior violence on the tenant's part (*see Maheshwari v City of New York*, 2 NY3d 288, 297 [2004]). In opposition, plaintiff failed to raise an issue of fact whether defendant knew or had reason to know from past experience that the tenant was likely to commit misconduct (*see Ortiz v Wiis Realty Corp.*, 66 AD3d 429 [1st Dept 2009]; *Piazza v Regeis Care Ctr., L.L.C.*, 47 AD3d 551, 552 [1st Dept 2008]). Plaintiff testified that defendant's employee told her that he had problems with the tenant, who harassed other tenants, and had called the police twice about him, and that some tenants and staff were fearful of him. However, even if this hearsay testimony is accepted, it is insufficient to raise an issue of fact. There is no evidence that the tenant had ever attempted to assault anyone or engaged in violent behavior. Even if, as some testimony suggests, the tenant may have suffered from mental illness, this also fails to raise an issue of fact. Defendant cannot be held responsible for assessing and determining the dangerous propensities of mentally ill tenants or for exercising control over them (*see Gill v New York City Hous. Auth.*, 130 AD2d 256, 262 [1st Dept 1987]).

Defendant established prima facie that it is not liable to plaintiff under General Municipal Law § 205-e by submitting

evidence that it did not violate Administrative Code § 28-301.1 (*see Gammons v City of New York*, 24 NY3d 562, 570 [2014]). Defendant demonstrated that the door to the basement was in good working order and did not violate any applicable laws, rules or regulations. Even if plaintiff's hearsay testimony that the door was locked from the inside is accepted, it is insufficient to raise an issue of fact, since plaintiff cited no applicable law, rule or regulation mandating that the basement door be unlocked. Plaintiff's contention that issues of fact exist whether the locked door delayed the back-up officers in reaching her is unavailing for the same reason.

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 26, 2020

CLERK

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

11310 James Jonke, Index 111794/99
Plaintiff-Respondent,

-against-

The Foot Locker Inc., et al.,
Defendants.
- - - - -
Foot Locker, Inc.,
Nonparty Appellant.

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Kelley Drye & Warren LLP, New York (Melissa E. Byroade of counsel), for appellant.

Bernadette Panzella, P.C., New York (Bernadette Panzella of counsel), for respondent.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered on or about March 18, 2019, which, to the extent appealed from as limited by the briefs, set the case down for a jury trial, unanimously reversed, on the law, with costs, the order vacated, and the matter remanded for a determination of plaintiff's motion pursuant to CPLR 3025(c) and 1003 for leave to amend the caption to add or substitute nonparty appellant as successor in interest to defendant The Foot Locker, Inc.

Plaintiff's motion for leave to amend has yet to be decided. In light of the liberal standard for granting leave to amend (*see Obstfeld v Thermo Niton Analyzers, LLC*, 168 AD3d 1080, 1084 [2d Dept 2019], the court must determine whether the proposed

addition or substitution is "plainly lacking in merit" (*id.* [internal quotation marks omitted]).

Plaintiff is not entitled to a jury trial in any event, since he seeks to enforce a judgment against a party other than the judgment debtor, which is an equitable claim (*see Matter of Colonial Sur. Co. v Lakeview Advisors, LLC*, 125 AD3d 1292, 1295 [4th Dept 2015], *lv denied* 26 NY3d 901 [2015]).

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

ENTERED: MARCH 26, 2020

CLERK

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

11311 The People of the State of New York, Respondent, Ind. 503/15

-against-

Timothy Daugherty, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Abraham L. Clott, J.), rendered September 28, 2016, convicting defendant, after a jury trial, of robbery in the third degree and grand larceny in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of 2½ to 5 years, unanimously affirmed.

By making a generalized objection (*see People v Tevaha*, 84 NY2d 879, 881 [1994]), or no objection at all, defendant failed to preserve his arguments as to evidence allegedly relating to uncharged crimes and allegedly improper cross-examination, and we decline to review them in the interest of justice. As an alternative holding, we find them unavailing.

Evidence of defendant's threatening conduct toward store security personnel while he was being detained was not evidence

of an uncharged crime, but was part of the evidence of the charged crime (*see People v Frumusa*, 29 NY3d 364, 370 [2017]), and was relevant to the element of force. Likewise, the portion of the prosecutor's cross-examination challenged on appeal did not involve a "bad act" offered to impeach defendant's general credibility, but instead was proper cross-examination about the facts of the underlying incident, and it was responsive to defendant's direct testimony.

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

ENTERED: MARCH 26, 2020

CLERK

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

11312 XL Specialty Insurance Company, Index 650017/19
Plaintiff-Respondent,

-against-

AR Capital, LLC, et al.,
Defendants-Appellants,

Vereit, Inc., formerly known as
American Realty Capital Properties, Inc.,
Defendant.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Joel M. Cohen, J.), entered on or about August 12, 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 11, 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 26, 2020

CLERK

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

11313 XL Specialty Insurance Company, Index 650018/19
Plaintiff,

Continental Casualty Company,
et al.,
Plaintiffs-Respondents,

-against-

AR Capital, et al.,
Defendants-Appellants.

_____

McKool Smith, P.C., New York (Robin L. Cohen of counsel), for appellants.

Vigorito, Barker, Patterson, Nichols & Porter, LLP, Garden City (David Cutter of the bar of the State of Illinois, admitted pro hac vice, of counsel), for Continental Casualty Company, respondent.

Ropers Majeski Kohn Bentley LLP, New York (Geoffrey Heineman of counsel), for Argonaut Insurance Company, respondent.

Skarzynski Marick Black LLP, New York (Alexis J. Rogoski of counsel), for Freedom Insurance Company, respondent.

Peabody & Arnold LLP, New York (Jane A. Horne of counsel), for QBE Insurance Corporation, respondent.

_____

Order, Supreme Court, New York County (Joel M. Cohen, J.), entered August 12, 2019, which denied defendants AR Capital, LLC, Bellevue Capital Partners, LLC, Nicholas Schorsch, Edward Weil, William Kahane, and Peter Budko's motion to dismiss the complaint pursuant to CPLR 3211(a)(4) or CPLR 327, or alternatively, to stay the action, unanimously affirmed, with costs.

Supreme Court providently exercised its discretion in denying defendants' motions to dismiss pursuant to CPLR 3211(a)(4) based on another action pending, or pursuant to CPLR 327 for forum non conveniens, or alternatively, to stay this action, which was filed a day before defendants-appellants commenced an action against plaintiffs in Delaware, seeking to litigate most, but not all, of the same issues. New York courts generally follow the first-in-time-rule, which instructs that "the court which has first taken jurisdiction is the one in which the matter should be determined and it is a violation of the rules of comity to interfere" (*City Trade & Indus., Ltd. v New Cent. Jute Mills Co.*, 25 NY2d 49 [1969]; *White Light Prods. v On The Scene Prods.*, 231 AD2d 90, 94 [1st Dept 1997]). However, "chronology is not dispositive," especially, where, as here, this action at the early stages of litigation or filed in close proximity (*IRX Therapeutics, Inc. v Landry*, 150 AD3d 446, 447 [1st Dept 2017]). Nevertheless, here New York has a more substantial nexus to the parties and the dispute, and this action is more comprehensive than the Delaware action.

Moreover, the fact that "New York is the logical and proper place . . . to go forward," negates any inference that this constitute preemptive litigation intended to deprive defendants of their chosen forum (*Seneca Ins. Co. v Lincolnshire Mgt.*, 269

AD2d 274, 275 [1st Dept 2000]), and defendants-appellants offer no compelling reason why they should be entitled to their choice of forum. Defendants also bear some responsibility for the duplicative litigation, given that they commenced the Delaware action after learning that plaintiffs had commenced this action.

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

ENTERED: MARCH 26, 2020

CLERK

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

11314 Rafael Pabon, Index 301794/13
Plaintiff-Respondent,

-against-

940 Southern Blvd., LLC, et al.,
Defendants-Appellants,

Knickerbocker Management, LLC, et al.,
Defendants.

_____

Hannum Feretic Prendergast & Merlino, LLC, New York (Steven R. Dyki of counsel), for appellants.

Silbowitz Garafola Silbowitz Schatz & Frederick, LLP, New York (Jill B. Savedoff of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about November 14, 2018, which granted plaintiff's motion for partial summary judgment on the issue of liability on his negligence claim as against defendants 940 Southern Blvd., LLC and FT Meat Corporation, unanimously reversed, on the law, without costs, and the motion denied.

Partial summary judgment on the issue of liability was improperly granted in this action where plaintiff alleges that he was injured when he tripped and fell on the sidewalk abutting property owned by 940 Southern Blvd., LLC and operated as a supermarket by defendant FT Meat Corporation. Plaintiff's account of his accident was uncorroborated by any witnesses,

reports to others, or his medical files, and he did not seek treatment for his injury to his wrist until several weeks after his fall. Since the manner in which plaintiff's alleged accident occurred is within his exclusive knowledge, and the only evidence submitted in support of defendants' liability is plaintiff's account, defendants should have the opportunity to subject plaintiff's testimony to cross-examination to have his credibility determined by a trier of fact (*see Grant v Steve Mark, Inc.*, 96 AD3d 614 [1st Dept 2012]; *Jones v West 56th St. Assoc.*, 33 AD3d 551 [1st Dept 2006]).

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

ENTERED: MARCH 26, 2020

CLERK

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

11315 Branch Banking and Trust Company, Index 651295/12
Plaintiff-Respondent,

-against-

Leonard A. Farber, et al.,
Defendants-Appellants.

_____

Arkin Solbakken LLP, New York (Robert C. Angelillo of counsel), for appellants.

Lacy Katzen LLP, Rochester (Michael J. Wegman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shlomo Hagler, J.), entered February 13, 2019, which denied defendants' motion to vacate, pursuant to CPLR 5015(a)(3) and the court's inherent power, a judgment, same court and Justice, entered May 14, 2015, against them and in plaintiff's favor, unanimously affirmed, with costs.

The court providently exercised its discretion in finding that defendants' December 2018 motion, which was based on plaintiff's alleged fraud in its December 2013 brief, was not made within a reasonable time (*see Mark v Lenfest*, 80 AD3d 426 [1st Dept 2011]). It also providently exercised its discretion in denying the motion on the merits (*see Nash v Port Auth. of N.Y. & N.J.*, 22 NY3d 220, 225 [2013]). Plaintiff did not commit "fraud, misrepresentation, or other misconduct" (CPLR 5015[a][3])

by citing New York rather than North Carolina law in its reply brief (*see generally Shomron v Fuks*, 147 AD3d 685, 686 [1st Dept 2017]). While it made misstatements about whether defendant Tanya Tohill-Farber signed the extension agreement, those misstatements were not material (*see Torres v Torres*, 171 AD3d 613 [1st Dept 2019]; *Ryan v Zherka*, 140 AD3d 500 [1st Dept 2016]), since the court relied on payments, not just ratification of the extension.

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

ENTERED: MARCH 26, 2020

CLERK

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

11316N 135 West Broadway LLC, et al., Index 152353/19
Plaintiffs-Appellants,

-against-

137 West Broadway Owners Corp.,
Defendant-Respondent.

_____

Law Office of Allison M. Furman, P.C., New York (Allison M. Furman of counsel), for appellants.

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

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Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered July 27, 2019, which denied plaintiffs' motion for a preliminary injunction enjoining defendant from interfering with their use of a shaftway on its property, and granted defendant's cross motion for a preliminary injunction requiring plaintiffs to immediately vacate and remove all their equipment, materials, and other property from defendant's property, unanimously reversed, on the law and the facts, without costs, the motion granted, and the cross motion denied.

Plaintiffs made a prima facie showing that their use of the shaftway between the exterior of their building and defendant's adjacent building may satisfy the requirements for establishing adverse possession (*see Walling v Przybylo*, 7 NY3d 228, 232 [2006]) and/or a prescriptive easement (*see Amalgamated*

Dwellings, Inc. v Hillman Hous. Corp., 33 AD3d 364 [1st Dept 2006]). Issues of fact exist, inter alia, as to the open and notorious element (*see Weinstein Enters. v Pesso*, 231 AD2d 516, 517 [2d Dept 1996]).

In our view, the court should not have granted a preliminary injunction in defendant's favor, awarding defendant the ultimate relief it seeks without a trial on the merits of plaintiffs' adverse possession claim (*see e.g. Spectrum Stamford, LLC v 400 Atl. Tit., LLC*, 162 AD3d 615, 617 [1st Dept 2018]). It is apparent that an expedited trial is warranted.

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

ENTERED: MARCH 26, 2020

CLERK